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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

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13 NEWPATH NETWORKS, LLC, A NEW )  
14 JERSEY LIMITED LIABILITY )  
15 COMPANY, )

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

15 Plaintiff,

**REPLY TO DEFENDANT'S  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

16 vs.

17 THE CITY OF DAVIS, )  
18 CALIFORNIA, )

Date: March 8, 2010

Time: 9:00 a.m.

19 Defendant.

Courtroom: 10

Judge: Hon. Garland E. Burrell, Jr.

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1 Plaintiff NewPath Networks, LLC (“NewPath”) hereby submits the following Reply to  
 2 Defendant’s Opposition to Plaintiff’s Motion for Preliminary Injunction (“Opposition” or “Def.  
 3 Opp”).

4 Nothing in the Opposition or its supporting documentation warrants denial of NewPath’s  
 5 request for a preliminary injunction. Moreover, because NewPath has no objection to posting an  
 6 appropriate bond covering removal and restoration, there is no measurable harm to the City  
 7 resulting from the issuance of a preliminary injunction. The basis for an injunction under Ninth  
 8 Circuit case law is cited by both parties in their respective briefs. In addition, California Code of  
 9 Civil Procedure § 526 details the circumstances in which a preliminary injunction is warranted  
 10 pending the outcome of a lawsuit. Cal. Code Civ. P. § 526; *West Coast Constr. Co. v. Oceano*  
 11 *Sanitary Dist.*, 17 Cal. App. 3d 693, 700 (Cal. App. 1971) (“Section 526...provides when an  
 12 injunction can be granted, specifically, when it appears by complaint or affidavit that the  
 13 commission of some act during the continuance of the action would produce great or irreparable  
 14 injury to a party to the action (subd. 2) or when it appears that a party to the action is doing, or  
 15 threatening to do, some act in violation of the rights of another respecting the subject of the  
 16 action and tending to render the judgment ineffectual (subd. 3)"); *Continental Baking Co. v.*  
 17 *Katz*, 68 Cal. 2d 512, 528 (1968) (“The granting or denial of a preliminary injunction does not  
 18 amount to an adjudication of the ultimate rights in controversy. It merely determines that the  
 19 court, balancing the respective equities of the parties, concludes that, pending a trial on the  
 20 merits, the [party] should or that he should not be restrained from exercising the right claimed by  
 21 him...”).

22 **I. NewPath Has Been Injured as a Result of the City’s Actions and the Balance**  
 23 **of Harms Tips Decidedly in NewPath’s Favor**

24 Defendant City of Davis’s (“City”) order to halt active construction of the Davis  
 25 distributed antenna system (“DAS”) and its decision to rescind all of NewPath’s permits did and  
 26 continues to do irreparable harm to NewPath’s goodwill and reputation. Declaration of Michael  
 27 J. Kavanagh (“Kav. Decl.”) at ¶¶ 18-21. Damages will not adequately compensate NewPath for  
 28 the lost business and impact to its reputation caused by the City’s action and the delay associated

1 with this litigation. *Id.*; *University of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1108  
 2 (9th Cir 1999). The irreparable harm caused by the City's decision to rescind NewPath's permits  
 3 is ongoing and is now magnified by the City's false and unsupported accusation that NewPath  
 4 "misled" the City into granting the permits. Def. Opp. at pp. 19, 26, 27 n.5. The full scope of the  
 5 injury that the City alleges would result if the injunction were granted is that residents would be  
 6 injured by "residing near" the proposed DAS and by the "impaired views" resulting from the  
 7 proposed DAS. Def. Opp. at p. 27. Furthermore, unlike the irreparable harm to NewPath, those  
 8 alleged harms would be temporary and would be easily reversed by removal of the facilities in  
 9 the event the Court rules in the City's favor on the merits. Thus the balance of hardships tips  
 10 decidedly in favor of NewPath, and NewPath should be allowed to proceed with its DAS project  
 11 subject to the risk that the Court may disagree with NewPath in its determination on the merits.  
 12 "In the last analysis the trial court must determine which party is the more likely to be injured by  
 13 the exercise of its discretion [ ] and it must then be exercised in favor of that party." *Continental*  
 14 *Baking*, 68 Cal. 2d at 528 (citations omitted); *Cayetano*, 183 F.3d at 1108.

15 The City's claim that NewPath "misled" staff by outlining its rights under state law is  
 16 especially disturbing.<sup>1</sup> As the facts demonstrate, the City took several months to consider  
 17 NewPath's assertion that, as a state certified competitive local exchange carrier ("CLEC"), it was  
 18 exempt from the City's Wireless Telecommunications Facilities Ordinance (codified at Davis  
 19 Mun. Code §§ 40.29.0 *et seq.*) ("WTFO"). Several senior level City officials, including, at a  
 20 minimum, the City Engineer, the Chief Building Official, the Chief Information Officer, the

21 \_\_\_\_\_  
 22 <sup>1</sup> The City relies almost exclusively on *Sprint PCS Assets v. City of Palos Verdes Estates*, 583  
 23 F.3d 716 (2009), to show that NewPath could not have been correct in its representation to the City  
 24 that it was exempt from a discretionary zoning determination. That position is problematic on  
 25 several fronts. First, the City does not offer any other published decision to demonstrate that  
 26 NewPath was wrong on the law when it first claimed exemption and *Palos Verdes Estates* was  
 27 not released until October 14, 2009. In fact, prior to *Palos Verdes Estates*, the question of  
 28 whether or not § 7901.1 preserved local agencies' discretionary zoning authority over wireless  
 facilities was hotly disputed and the only published decision on the question prior to *Palos*  
*Verdes Estates* was *Sprint PCS Assets v. City of La Canada-Flintridge*, 448 F.3d 1067 (9<sup>th</sup> Cir. 2006),  
 which ruled in Sprint's favor and, arguably, would have supported NewPath's claim. Second, the City  
 not only began issuing permits prior to the release of *Palos Verdes Estates* but also continued to  
 issue permits to NewPath for almost a full month after that release. Marshall Decl. at ¶ 2.

1 Assistant Director of Public Works and the Director of Community Development met with  
 2 NewPath and were involved at some point in reviewing and/or making that determination. Sears  
 3 Decl. at ¶ 4-17. NewPath, moreover, was led to believe that these officials would consult in  
 4 advance with the City Manager before deciding whether or not NewPath qualified as exempt.<sup>2</sup>  
 5 *Id.* at ¶ 16. The Opposition offers no evidence of any false statements made by NewPath to these  
 6 or any other City officials and relies solely on the strikingly odd and unsupported claim that  
 7 NewPath did not mention Cal. Pub. Util. Code § 7901.1 when it described its status as a CLEC.  
 8 *See, e.g.,* Def. Opp. at 26. The Davis Municipal Code demonstrates that the City was fully  
 9 cognizant of state law restrictions on its authority long before NewPath approached the City.  
 10 D.M.C. § 40.29.020 (“Telecommunication facilities are regulated at the federal, *state*, and local  
 11 level”) (emphasis added). Moreover, pursuant to the express terms of the WTFO, NewPath’s  
 12 failure to mention § 7901.1, even if such an obligation could be imposed on NewPath, would not  
 13 have ended the discussion. To the contrary, upper and lower level staff had numerous  
 14 discussions about NewPath’s status and the City’s authority under state law and only after several  
 15 months of discussion agreed that, so long as NewPath worked with staff on the location and  
 16 design of the network, NewPath would be treated as exempt and a CUP would not be required.  
 17 Sears Decl., ¶¶ 5, 6, 16 and 17. *See* MPI, Exh. 23, p. 384 (“...NewPath asserted, *and staff made a*  
 18 *decision*, based on NewPath’s assertions, that NewPath’s facilities were in the right-of-way and  
 19 were exempt from discretionary City review” (emphasis added).

20 It is undisputed that the City decided to treat NewPath as exempt from the WTFO and  
 21 from any discretionary permitting requirement and that it issued roughly three dozen permits to  
 22 NewPath authorizing the construction of the DAS. *Id.* Those permits authorized NewPath to use  
 23 the public rights-of-way (“PROW”), public utility easements (“PUE”), and, in two instances,  
 24 planting strips directly adjacent to PROW for the placement of conduit, fiber and antenna nodes.

25 \_\_\_\_\_  
 26 <sup>2</sup> It is difficult to imagine that a City-wide project that involved multiple heads of City  
 27 departments, a novel interpretation of a recently adopted ordinance, and several months of  
 28 deliberation was never presented to the City Manager, or, for that matter, to the City Attorney.  
 NewPath, of course, had neither any duty nor any ability to insure that the appropriate officials  
 had consulted with the City Attorney’s office.

1 Declaration of Jason Sears (“Sears Decl.”) at ¶ 20; Declaration of Jamie T. Hall (“Hall Decl.”) at  
 2 Exh. 1, p. 9 and Exh. 2 (noting that neither of the two planting strips is identified as City property  
 3 on the City’s official City-Owned Properties Map). In reliance on those permits, NewPath  
 4 expended substantial sums acquiring the conduit, fiber, antennas, base stations and other  
 5 ancillary equipment, machinery and contractors necessary to commence and complete  
 6 construction. Kav. Decl. at ¶ 20; Declaration of William H. Marshall (“Marshall Decl.”) at ¶ 5;  
 7 Declaration of Jonathan Kramer (“Kramer Decl.”) at ¶ 24. NewPath at no time acted in bad faith  
 8 either in applying for those permits or in commencing construction pursuant to those permits.  
 9 Declaration of Stephen Garcia (“Garcia Decl.”) at ¶¶ 3-4; Sears Decl. at ¶¶ 4-20; Hall Decl. at ¶  
 10 3. NewPath also acted properly by terminating construction in accordance with the City  
 11 Manager’s Stop Work Notice, and the City makes no allegation to the contrary. NewPath  
 12 immediately met with the City Manager in response to the Stop Work Notice and laid out its  
 13 legal arguments in support of the City’s decision to grant the permits. Garcia Decl. at ¶ 4;  
 14 Declaration of Julian Quattlebaum (“Quattlebaum Decl.”) at ¶ 3. The City Manager not only  
 15 rejected those arguments, but elected to rescind all permits without distinction, including permits  
 16 authorizing NewPath to install fiber in the PROW and PUEs. MPI, Exh. 5, p. 123 (noting that  
 17 NewPath could reapply for any encroachment permits for “conduit and/or wired facilities that are  
 18 not tied to the location of a wireless facility”). NewPath properly appealed the decision. MPI,  
 19 Exh. 10, pp. 171*ff.* Contrary to the City’s representations, NewPath does not have unclean hands  
 20 in this dispute and, as a result of the City’s politically driven flip-flop on NewPath’s permits,  
 21 NewPath has been and continues to be irreparably harmed in a manner that far exceeds any harm  
 22 suffered by the City. Kav. Decl., *passim*.

23  
 24 **II. The City Has No Compelling Public Interest in Preventing NewPath from**  
 25 **Providing Its Services Throughout the City; Rather, the Public Interest in**  
 26 **the Rapid Deployment of Advanced Wireless Telecommunications Services Is**  
 27 **Firmly Established at the Federal and State Levels.**

27 The City notes the importance of a “public interest” analysis in its Opposition, but it fails  
 28 to outline what public interest is served by preventing NewPath from providing its services

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1 throughout the City. The U.S. Supreme Court’s language referred to by the City bears repeating:  
2 “...in exercising their sound discretion, courts of equity should pay particular regard for the  
3 public consequences in employing the extraordinary remedy of injunction.” Def. Opp. at p. 29  
4 citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). In this case, the public  
5 consequences of the City’s refusal to permit access of wireless services to its residents are  
6 enormous. At the federal level, the FCC has recently noted:

7 “Wireless services are central to the economic, civic, and social lives of over 270 million.  
8 Americans are now in the transition toward increasing reliance on their mobile devices  
9 for broadband services, in addition to voice services. Without access to mobile wireless  
10 networks, however, consumers cannot receive voice and broadband services from  
11 providers. Providers continue to build out their networks to provide such services, and a  
12 crucial requirement for providing those services is obtaining State and local governmental  
13 approvals for constructing towers or attaching transmitting equipment to pre-existing  
14 structures.”

15 *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely*  
16 *Siting Review*, FCC Docket No. 09-99, 24 FCC Rcd. 13994 at ¶ 3. (released November 18,  
17 2009). California’s state telecommunications policies are set forth in Public Utilities Code §  
18 709:

19 “(a) To continue our universal service commitment by assuring the continued  
20 affordability and widespread availability of high-quality telecommunications services to  
21 all Californians....; (c) To encourage the development and deployment of new  
22 technologies and the equitable provision of services in a way that efficiently meets  
23 consumer need and encourages the ubiquitous availability of a wide choice of state-of-  
24 the-art services; (d) To assist in bridging the ‘digital divide’ by encouraging expanded  
25 access to state-of-the-art technologies for . . . disabled Californians; (e) To promote  
26 economic growth, job creation, and the substantial social benefits that will result from the  
27 rapid implementation of advanced information and communications technologies by  
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1 adequate long-term investment in the necessary infrastructure; (f) To promote lower  
2 prices, broader consumer choice, and avoidance of anticompetitive conduct; (g) To  
3 remove the barriers to open and competitive markets and promote fair product and price  
4 competition in a way that encourages greater efficiency, lower prices, and more consumer  
5 choice....”

6 Cal. Pub. Util. Code § 709. Section 7901 also evidences a clear decision by the State that  
7 communication services are of such paramount importance to the welfare of the state that it is  
8 willing to forego the usual rights of local jurisdictions to exact franchise fees and conditions in  
9 order to encourage the development of this vital infrastructure. “When there is a doubt as to  
10 whether an attempted regulation relates to a municipal or to a state matter, or if it be the mixed  
11 concern of both, the doubt must be resolved in favor of the legislative authority of the state.”  
12 *Abbott v. Los Angeles*, 53 Cal. 2d 674, 681 (1960); *Los Angeles v. Gurdane*, 59 F.2d 161, 165  
13 (9th Cir. 1932) (noting that the “Supreme Court of California has repeatedly held that any doubt  
14 as to the powers of a municipal corporation must be resolved against the corporation.”).

15 The City attempts to make much of the public interest they claim to be at stake and the  
16 deference they claim is due a legislative enactment. However, neither of these arguments is  
17 relevant when a supervening determination of public interest, a conflicting state legislative  
18 enactment and a constitutional mandate are involved. The people of the State of California have  
19 already made the determination, found in the Constitution, that it is essential that the CPUC’s  
20 authority to regulate the provision of utility services, certified to be not only convenient but  
21 necessary to the public, not be interfered with in the name of purely local concerns. Similarly,  
22 the state long ago recognized that communication services were of such paramount importance to  
23 the welfare of the state that it was willing to forego the usual rights of local jurisdictions to exact  
24 franchise fees and conditions in order to encourage the development of this vital infrastructure.  
25 Cal. Pub. Util. Code § 7901 was originally enacted for the benefit of telegraph companies as  
26 Civil Code § 536 in 1872. Here, the granting of the preliminary injunction promotes the public  
27 interest, as determined by Congress, the people of the State of California in its constitution, the  
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1 state legislature and the CPUC, in rapid deployment of facilities necessary for ubiquitous and  
2 affordable telephone service.

3 NewPath does not disagree with the notion that the public interest is relevant to a decision  
4 on a request for a preliminary injunction. However, in this situation, where a municipality's  
5 regulatory apparatus is being challenged as contrary to and preempted by state law, the standard  
6 of review is tipped in the favor of the state, notwithstanding any "public interest" asserted by a  
7 municipality. The seminal case on the subject, *Ex Parte Daniels*, 183 Cal. 636, 639 (1920), said  
8 it best: "While it is true that the regulation of traffic upon a public street is of special interest to  
9 the people of a municipality, it does not follow that such regulation is a municipal affair, and if  
10 there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be  
11 resolved in favor of the legislative authority of the state." *See also Abbott v. Los Angeles*, 53 Cal.  
12 2d 674, 681 (1960) ("When there is a doubt as to whether an attempted regulation relates to a  
13 municipal or to a state matter, or if it be the mixed concern of both, the doubt must be resolved in  
14 favor of the legislative authority of the state"); *Pacific Tel. & Tel. Co. v. San Francisco*, 51 Cal.  
15 2d 766, 774 (1959) (holding that "because of the interest of the *people throughout the state* in the  
16 existence of telephone lines in the streets in the city, the right and obligation to construct and  
17 maintain telephone lines has become a matter of state concern. For this reason the city cannot  
18 today exclude telephone lines from the streets upon the theory that 'it is a municipal affair.'"  
19 [Emphasis added.]

20 **III. NewPath Is a State Certified Telephone Utility with a Right To Deploy Its**  
21 **Facilities in Davis Regardless of the Coverage Needs of Its Carrier Clients**  
22 **and Therefore Is Likely To Succeed in This Case**

23 Given that the balance of harm tips decidedly in NewPath's favor, an injunction is  
24 warranted whether or not NewPath can demonstrate that its case is compelling. *NextG Networks*  
25 *of Cal. v. County of Los Angeles*, 522 F. Supp. 2d 1240, 1247 (C. D. Cal. 2007) ("Thus, the greater  
26 the relative hardship to [a plaintiff], the less probability of success must be shown"). Given that  
27 NewPath's case is compelling on several fronts, including, but not limited to, its claims of  
28 effective prohibition, the grant of an injunction is warranted. NewPath's single most convincing

1 argument is the City’s failure to understand the significance of the CPUC’s authorization to  
 2 NewPath to provide public utility telephone services. MPI, at p. 1. This authorization is not  
 3 dependent upon NewPath’s ability to obtain customers and it is not dependent upon specific  
 4 customers’ needs such as, *e.g.*, radio frequency coverage. It is an independent authorization for  
 5 NewPath to construct its unique form of new, competitive telecommunications facilities  
 6 throughout the state and, moreover, it includes a specific and carefully analyzed authorization to  
 7 construct its facilities in the City of Davis.<sup>3</sup> MPI, at p. 4 and Exh. 7; Hall Decl. at pp. 103-326.  
 8 The state has determined that the construction of these facilities is a matter of statewide concern.  
 9 *Pac. Tel. & Tel. Co. v. City & County of San Francisco, supra.* Accordingly, even though the  
 10 City retains “*reasonable time, place and manner*” authority under § 7901.1, the City cannot use that  
 11 authority to frustrate, impede or impair NewPath’s attempt to provide its CPUC authorized services  
 12 in the City. MPI, at pp. 16-20. The City can point to no statement from the CPUC that indicates to  
 13 NewPath or to the City that a prerequisite to the provision of its telecommunications services is the  
 14 City’s separate authorization to provide those services. As NewPath has shown, only the contrary is  
 15 true, that is, the CPUC has articulated on multiple occasions that local agencies cannot use their  
 16 police powers to impede the provision of services that the CPUC has authorized. *Id.* citing, *inter*  
 17 *alia, In re Cagal Cellular Communications Corporation*, D. 90-01-020, 35 CPUC 2d 164, at \*3  
 18 (1990) (“...denial...is an idle act since local regulation must give way to the Commission’s authority  
 19 once a CPC&N for a site is authorized”). The California Supreme Court also has repeatedly made it  
 20 clear that the provision of CPUC-authorized telephone services does not require a subordinate  
 21 authorization from the City. *Pacific Tel. & Tel. Co. v. San Francisco*, 197 Cal. App. 2d 133, 143  
 22 (1961) citing *County of Inyo v. Hess*, 53 Cal. App. 415, 425, 200 P. 373 (1921) (“It is now settled  
 23 that [Section 7901] constitutes a continuing offer extended to telephone and telegraph companies . .  
 24 . which offer when accepted by the construction and maintenance of lines gives a franchise from the  
 25 state to use the public highways for the prescribed purposes **without the necessity for any grant**

26 <sup>3</sup> NewPath’s CPCN authorizes NewPath to use PROW and PUEs in Davis for its network  
 27 facilities and it does not distinguish between residential and nonresidential zones. Any City-  
 28 based prohibition on access to PROW and PUEs in residential zones necessarily conflicts with  
 that authorization.

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1 **by a subordinate legislative body**”) (internal quotes and citations omitted) (emphasis added).

2       The City relies almost exclusively on the Ninth Circuit’s holding in *Palos Verdes Estates*,  
3 cited *supra* note 1, in order to dispute NewPath’s preemption claim on the limited ground that,  
4 through § 7901.1, the Legislature preserved the City’s time, place and manner authority even as  
5 to NewPath and, moreover, that under § 7901.1 the City can use the WTFO to prevent NewPath  
6 from providing services expressly authorized by the CPUC. Def. Opp. at p. 7. *Palos Verdes*  
7 *Estates*, however, addresses only the question of whether or not a conflict exists between the  
8 City’s consideration of aesthetics in its determination to deny a permit for a wireless facility and  
9 a state statute and its corollary §§ 7901 and 7901.1. *Palos Verdes Estates*, 583 F.3d at 722-23  
10 (2009). The relevant holding in *Palos Verdes Estates* was that cities could consider aesthetics,  
11 nothing broader. *Palos Verdes Estates* did not involve a conflict between the exercise of the  
12 City’s authority over the construction of telephone utility facilities, described in § 7901.1, and the  
13 CPUC’s exercise of its authority over the construction of the same facilities because in that case  
14 Sprint had not been granted a CPCN and, furthermore, the CPUC, in General Order 159-A, had  
15 authorized local jurisdictions to act as its agent for purposes of review of facility construction, an  
16 authorization which is not applicable in NewPath’s case. . D. 96-05-035, *Order Instituting*  
17 *Rulemaking on the Commission's own motion to develop revisions to General Orders and Rules*  
18 *applicable to siting and environmental review of cellular mobile radiotelephone utility facilities*, 1996  
19 Cal. PUC LEXIS 288, at \*38 (adopted May 8, 1996) (“no cellular service provider, now subject, or  
20 which hereafter may become subject, to the jurisdiction of this Commission, shall begin construction in  
21 this state of any cell site or Mobile Telephone Switching Office [ ] without first having obtained all  
22 requisite land use approvals required by the relevant local government agency”). General Order 159-A  
23 applies to Sprint, the carrier plaintiff in *Palos Verdes Estates*, because Sprint is a “cellular service  
24 provider.” *Id.* General Order 159-A does not apply to NewPath because NewPath is not a “cellular  
25 service provider.” NewPath is a CLEC and, unlike Sprint, the CPUC has not delegated its authority over  
26 the construction of NewPath’s facilities to any local governments. The CPUC has noted that CLECs are  
27 not subject to GO 159-A. In a 1997 rulemaking order, the CPUC declined to subject CLECs to GO 159-

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1 A, stating that it “[did] not believe that making [CLECs] subject to the provisions of GO 159-A would  
 2 offer any material advantage over the procedure adopted in [the order issuing CPCNs to several  
 3 CLECs].” D. 97-02-051, *Order Instituting Rulemaking on Commissions Own Motion into Competition*  
 4 *for Local Exchange Service*, 1997 WL 140180, at \*11 (Cal. P.U.C. Feb. 19, 1997) (noting further that  
 5 “local jurisdictions cannot impose standards or permit requirements that would prevent [CLECs] from  
 6 developing their service territories or otherwise interfere with the statewide interest in competitive  
 7 telecommunications”). Where, as here, the conflict between local and statewide interests does  
 8 exist, it is, according to the CPUC, easily addressed because “...local regulation must give way...”  
 9 *Cagal*, cited *supra*, at \*3.

10 To be clear, NewPath is not arguing that the WTFO is facially invalid under all  
 11 circumstances or that the City has no “time, place and manner” authority over NewPath’s  
 12 installations. NewPath is arguing that the City may not exercise it’s authority in a manner which  
 13 renders infeasible the construction of a project found to be necessary by the CPUC. The WTFO  
 14 directly conflicts with NewPath’s CPCN and NTP. First, the WTFO expressly prohibits the use  
 15 of PROW in most areas of the City including residential areas. It should be noted that the  
 16 prohibition areas cover almost the entire City. Hall Decl., Exh. 2, p. 352. Thus, the WTFO  
 17 serves to block NewPath’s access to these residential areas, and therefore, block NewPath’s  
 18 access to most of the City. As indicated above, the CPUC has authorized NewPath to construct  
 19 its facilities in the residential rights of way in the City of Davis.<sup>4</sup> That authorization directly  
 20 conflicts with the WTFO restrictions on the use of the residential rights-of-way. D.M.C. §  
 21 40.29.010(c). The City cannot sustain an argument that the WTFO and the NTP are, in any  
 22 sense, consistent and, on those grounds alone, the City should have held that NewPath was  
 23 exempt from the WTFO.

24  
 25 <sup>4</sup> Even though it is true that the NTP itself does not expressly reference “residential” rights-of-  
 26 way, it is expressly based on the CPUC’s analysis of the Notice of Proposed Construction  
 27 (“NPC”) that NewPath submitted in order to obtain the NTP. Hall Decl. at pp. 103-326. The  
 28 CPUC reviewed the specific route that NewPath proposed and its authorization to proceed with  
 construction is based specifically on the description of NewPath’s route in that NPC. *See, e.g.,*  
*id.* at 116.

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1           However, a closer look at the exemption provision in the WTFO reveals why the City  
2 was unable to conclude that NewPath’s project was exempt under the terms of the WTFO.  
3 Listed among the exempted entities are “[a]ny wireless communication facility if and only to the  
4 extent that a permit issued by the [CPUC]...**specifically provide[s] that the antenna is exempt**  
5 **from local regulation.**” D.M.C. § 40.29.060(j). The City thus requires that the CPUC include  
6 in a “permit” an express provision that the network facilities that it has already authorized are  
7 exempt from local regulation. *Id.* The CPUC is under no obligation to tailor the terms of its  
8 orders to meet this requirement and, to the extent that the City requires this specific language  
9 before it recognizes the CPUC’s authority, it would constitute an *ultra vires* exercise of local  
10 authority. MPI at p. 11 citing Cal. Const. art. XII, § 8.

11           In fact, the City appeared not to take the language of the exemption provision of the WTFO  
12 seriously in that the denial resolution preserved the following option for NewPath:

13           “Rescission of the improperly issued encroachment and related building permits at issue does not  
14 mean that NewPath is effectively prohibited from utilizing its CPCN to access public rights of  
15 way. Rescission of the permits simply means NewPath must apply for permits pursuant to the  
16 City’s Wireless Ordinance. If NewPath shows that particular proposed sites are necessary to  
17 eliminate significant gaps in coverage, *i.e.*, there are no reasonable alternative locations  
18 permissible under the Wireless Ordinance, then NewPath may seek an exemption from the  
19 Wireless Ordinance...”

20 Def. Opp. at p. 18. The WTFO includes no language that would lead it to believe exemption from the  
21 WTFO would be possible on these grounds and there is no correlation between a CPUC permit  
22 containing express preemption language and a significant coverage gap. Moreover, it should be apparent  
23 that this “exemption option” is a legal sleight of hand. NewPath appealed the City Manager’s rescission  
24 decision on the grounds that NewPath was exempt from the WTFO. The City denied the appeal on the  
25 grounds that NewPath was not exempt from the WTFO. MPI, Exh. 6, p. 132. NewPath presented  
26 evidence of significant coverage gaps and described that evidence during the appeal hearing. MPI, Exhs.  
27 12, 13, and 16; see also Hall Decl., Exhs 1 and 2. The City’s expert attended the appeal hearing. Kramer  
28

1 Decl., at ¶ 25. If the City needed additional time to review this evidence, it could have continued the  
 2 hearing. In fact that possibility was considered and rejected by the City. MPI, Exh. 14. This option for  
 3 another exemption was no more than an attempt to game NewPath’s judicial appeal and, as could be  
 4 expected, it now forms the basis for the City’s claim that NewPath’s effective prohibition claim is not  
 5 ripe.<sup>5</sup> Def. Opp. at p. 18. The City has made a final decision on the question of exemption and yet now  
 6 argues that the proper forum for that determination is the review process under the WTFO despite the  
 7 fact that the WTFO itself says, “*Unless listed below... as exempt ...*, no wireless telecommunication  
 8 facility shall be constructed without first undergoing the specific review process ....” D.M.C. §  
 9 40.29.040 (emphasis added). The specific review process does not apply to exempt facilities, a  
 10 determination which must be made prior to and outside of the specific review process outlined in the  
 11 WTFO.

12 The City’s denial of NewPath’s appeal does constitute effective prohibition, but for more reasons  
 13 than the City seems to recognize. Under §7901, the City does not have the authority to impair  
 14 NewPath’s state franchise. MPI at p. 20., citing, *inter alia*, 40 Ops.Cal.Atty.Gen. 15, at pp. \*8-9. (“a  
 15 permit to excavate the streets . . . [may] not impair the franchise right of a company to use the streets”).  
 16 In addition, § 7901.1 includes a reasonable limitation on the City’s time, place and manner authority.  
 17 Cal. Pub. Util. Code § 7901.1 (“municipalities shall have the right to exercise *reasonable* control as to  
 18 the time, place, and manner in which roads, highways, and waterways are accessed”); MPI at pp. 26ff.  
 19 The City’s rescission of NewPath’s permits on the grounds that NewPath must comply with the WTFO  
 20 has the effect of prohibiting NewPath from providing its services in violation of both §§ 7901 and  
 21 7901.1. While it is the case that NewPath did not apply for a CUP under the WTFO, NewPath is under  
 22 no obligation to apply for permits if such an effort would be futile. *See Desert Outdoor Advertising v.*  
 23 *City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996) (“Applying for a permit would have been futile  
 24 because...the ordinance flatly prohibited appellants' off-site signs located outside the three permitted  
 25 zones”). As described above, the grant of authority to NewPath is not dependent upon NewPath’s

26 \_\_\_\_\_  
 27 <sup>5</sup> By the City’s own admission, this dispute is fully ripe. MPI, Exh. 6, p. 126 (“This Resolution  
 28 reflects the *final action* taken on January 19, 2010...notice is hereby given that the time within  
 which judicial review must be sought is...”) (emphasis added).

1 ability to obtain customers and it is not dependent upon specific customers' needs such as, *e.g.*,  
2 radio frequency coverage. NewPath was authorized to construct its DAS network using the  
3 City's residential rights-of-way whether or not it had existing customers. The City's exemption  
4 process is not a defense to the City's refusal to permit NewPath's DAS and constitutes effective  
5 prohibition in violation of 7901 and 7901.1.

6 NewPath also has an effective prohibition claim under § 332(c)(7)(B)(i)(II). MPI, at p.  
7 28*ff.* NewPath created a record for this claim based on evidence prepared for NewPath by  
8 existing and future customers and the City elected to ignore the record. At the hearing, the City's  
9 expert, Jonathan Kramer testified:

10 "…we need to talk to those carriers to find out what that information is [regarding  
11 whether there are alleged gaps in the coverage provided by each wireless carrier]. With  
12 that information, then we can make an independent determination as we're allowed to do  
13 under the state and federal law as to what the compliance issues are. But we're not at that  
14 point. Similarly, the issue of significant gap is a fact specific question. We don't have the  
15 people who appear to be claiming this significant gap here at our table to ask them the  
16 questions."

17 Def. Opp. at p. 21. The City's unwillingness to accept NewPath's representations is  
18 disingenuous. The City, and Mr. Kramer, review coverage information submitted by carrier  
19 agents in applications and at public meetings on a regular basis, and they do not reject that  
20 information on the grounds that the carrier is not "present" to validate the data. NewPath  
21 submitted the information under declaration and penalty of perjury. It should have been  
22 sufficient for the expert to analyze. Nevertheless, MetroPCS has confirmed that the data  
23 submitted by NewPath was accurate. Declaration of Perry Newman ("Newman Decl."), at ¶ 16.  
24 The Newman Declaration and NewPath's radio frequency engineer both rebut Mr. Kramer's  
25 conclusions in his declaration. Newman Decl., at ¶ 17; Declaration of Carolyn Devolder, *passim*.

26 The WTFO does not provide a process whereby NewPath can claim exemption on the  
27 grounds of effective prohibition. The City has no basis for requiring that NewPath resubmit its  
28

1 permit applications and give the City another chance to consider this evidence in order to bring a  
 2 claim of effective prohibition. *Moreno Valley*, 103 F.3d at 818. The claim is ripe because the City  
 3 issued a final decision on NewPath's permits and NewPath can support its claim of effective  
 4 prohibition with extrinsic evidence. *Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158,  
 5 1167 (S.D. Cal. 2000) ("...on a § 332(c)(7)(B) (i)(II) claim, extrinsic evidence may be  
 6 admitted").

7 NewPath's § 253 claim is similar. MPI, at pp. 32-33. NewPath can show effective  
 8 prohibition under § 253 without evidence of a significant coverage gap because part of the  
 9 services provided by NewPath are non-wireless telecommunications services, and the City's  
 10 decision to rescind NewPath's permits actually prohibits NewPath from providing those services.  
 11 The fact that the City has invited NewPath to make a second and ultimately futile attempt at  
 12 succeeding on an exemption claim is not a defense to the City's initial decision.

13 NewPath reserves its right to reply to the City's opposition to its remaining claims. As it  
 14 stands, NewPath can show a likelihood of success on the merits warranting issuance of the  
 15 injunction.

16  
 17 **IV. NewPath Is Not Seeking a Mandatory Injunction; It is Seeking an Order**  
 18 **Prohibiting the City from Interfering with the Construction of NewPath's**  
 19 **DAS**

20 NewPath is not asking the Court to order the City to take any action that it has not already  
 21 taken, *e.g.*, issuing new permits or revising its WTFO. NewPath is seeking only to resume  
 22 construction that was commenced under validly issued permits. Under the terms of the  
 23 injunction, the City would be prohibited from interfering with that construction. No action is  
 24 required. Accordingly, the injunction is a prohibitory injunction and not a mandatory injunction,  
 25 and NewPath is not subject to a heightened standard of review. Moreover, even if the  
 26 resumption of construction is not status quo in a strict sense, that fact is not definitive. "It must  
 27 not be thought . . . that there is any particular magic in the phrase 'status quo.' The purpose of a  
 28 preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability  
 to render a meaningful decision on the merits. It often happens that this purpose is furthered by

1 preservation of the status quo, but not always. If the currently existing status quo itself is causing  
2 one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury  
3 . . . . The focus always must be on prevention of injury by a proper order, not merely on  
4 preservation of the status quo.” *Golden Gate Rest. Ass’n v. City of San Francisco*, 512 F.3d 1112  
5 1116 (9th Cir. 2008) (internal quotation marks and citations omitted). The City’s argument that  
6 NewPath is seeking all relief is also to no avail. If the City succeeds, NewPath will be obligated  
7 to remove its facilities. Accordingly, the relief can be “undone.” *Brewer v. West Irondequoit*  
8 *Cent. School District*, 212 F.3d 738, 744 (2d Cir. 2000).

9  
10 **V. NewPath Is Willing to Post an Appropriate Bond in Order to Secure a Preliminary Injunction**

11 As indicated above, NewPath has no objection to posting an appropriate bond. However,  
12 the amount proposed by the City in the Opposition is grossly excessive. Declaration of Steven  
13 Weingardt, at ¶ 10. NewPath has ordered an estimate for the removal costs of NewPath’s DAS  
14 Facilities. As part of the analysis, NewPath is assessing removal of both NewPath’s structures in  
15 the public right-of-way and public utility easements, including poles, antennas, coaxial cable, and  
16 node equipment, as well as the excavation and removal of foundation and fiber. NewPath will  
17 produce evidence in support of an appropriate bond amount at the Court’s request.

18 **VI. Conclusion**

19 Because NewPath is able to show that it has suffered and will continue to suffer  
20 irreparable harm and that there is a likelihood of success on the merits, NewPath respectfully  
21 requests that the Court grant NewPath’s Motion for Preliminary Injunction.  
22

23 Date: March 1, 2010

Respectfully submitted,

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