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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NEWPATH NETWORKS, LLC, A NEW)	
JERSEY LIMITED LIABILITY COMPANY,)	
)	
Plaintiff,)	2:10-cv-00236-GEB-KJM
)	
v.)	<u>ORDER DENYING PLAINTIFF'S</u>
)	<u>MOTION FOR A PRELIMINARY</u>
THE CITY OF DAVIS, CALIFORNIA, A)	<u>INJUNCTION</u>
GENERAL LAW MUNICIPALITY,)	
)	
Defendant.)	
)	

This case concerns whether NewPath Networks, LLC ("NewPath") must first comply with the city of Davis' (the "City") Wireless Telecommunications Facilities Ordinance ("WTF Ordinance") before constructing a proposed distributed antenna system ("DAS") within the City. NewPath now seeks a preliminary injunction that would require the City to reinstate thirty-six revoked encroachment and building permits which authorize NewPath to construct its DAS, declare the City's "Stop Work Notice" "null and void" and enjoin the City, "its officers, agents, servants, employees and attorneys . . . from acting in any manner contrary [to the Court's order]." (Proposed Order 3:17-22.) NewPath argues this preliminary injunction should issue since "[t]he City's actions are contrary to[,] and preempted by state and federal law and immediate and irreparable injury will result to NewPath unless the [City's] activities . . . are enjoined pending

1 trial of this action." (Not. of Mot. for Prelim. Inj. 2:16-18.) The
2 City opposes NewPath's motion. Oral argument on NewPath's motion was
3 held on March 8, 2010. For the reasons stated below, NewPath's motion
4 for a preliminary injunction is DENIED.

5 I. LEGAL STANDARD

6 A plaintiff seeking a preliminary injunction must establish
7 that he is (1) "likely to succeed on the merits"; (2) "likely to
8 suffer irreparable harm in the absence of preliminary relief"; (3)
9 "the balance of equities tips in his favor"; and (4) "a preliminary
10 injunction is in the public interest." Sierra Forest Legacy v. Rey,
11 577 F.3d 1015, 1021 (9th Cir. 2009) (citing Winter v. Natural Res.
12 Def. Council, Inc., --- U.S. ----, ----, 129 S. Ct. 365, 374, 172 L.Ed
13 2.d 249 (2008)); see also Am. Trucking Ass'ns, Inc. v. City of Los
14 Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (adopting the preliminary
15 injunction standard articulated in Winter). A preliminary injunction
16 is "an extraordinary remedy that may only be awarded upon a clear
17 showing that the plaintiff is entitled to such relief." Winter, 129
18 S. Ct. at 376. "If a plaintiff fails to meet its burden on any of the
19 four requirements for injunctive relief, its request must be denied."
20 Sierra Forest Legacy v. Rey, --- F. Supp. 2d ----, 2010 WL 715846, at
21 *1 (E.D. Cal. 2010) (citing Winter, 129 S. Ct. at 376). "In each
22 case, courts must balance the competing claims of injury and must
23 consider the effect on each party of the granting or withholding of
24 the requested relief." Indep. Living Ctr. of S. Cal. Inc. v. Maxwell-
25 Jolly, 572 F.3d 644, 651 (9th Cir. 2009) (quoting Winter 129 S. Ct. at
26 376).

27 The purpose of a preliminary injunction is to preserve the
28 relative positions of the parties - the status quo - until a trial on

1 the merits can be conducted. LGS Architects, Inc. v. Concordia Homes
2 of Nev., 434 F.3d 1150, 1158 (9th Cir. 2006) (quoting Univ. of Tex. v.
3 Camenisch, 451 U.S. 390, 395 (1981)). "Injunctions are classified as
4 'prohibitory' or 'mandatory,' depending on their effect on the party
5 enjoined. A prohibitory injunction preserves the status quo, while a
6 mandatory injunction goes beyond simply maintaining [the] status quo
7 and compels the performance of an affirmative act." Bailey v. Clovis
8 Unified Sch. Dist., No. 08-CV-0146-AWI-GSA, 2008 WL 410613, at *3
9 (E.D. Cal. Feb. 12, 2008) (citing Stanley v. Univ. of S. Cal., 13 F.3d
10 1313, 1320 (9th Cir. 1994)). "A party enjoined by a mandatory
11 injunction must undo the wrong or injury with which he or she is
12 charged." Id. Therefore, "[a] mandatory injunction goes well beyond
13 simply maintaining the status quo pendente lite and is particularly
14 disfavored. When a mandatory preliminary injunction is requested, the
15 district court should deny such relief unless the facts and law
16 clearly favor the moving party." Stanley, 1313 F.3d at 1320
17 (quotations and citations omitted).

18 The City argues NewPath seeks a "mandatory" injunction and
19 that the facts and law do not clearly favor granting NewPath the
20 relief it seeks. NewPath rejoins, arguing it is requesting an order
21 prohibiting the City from interfering with the construction of its
22 DAS. However, NewPath's proposed preliminary injunction order seeks
23 to have the Court compel the City to reinstate the encroachment and
24 building permits the City has revoked. The effect of such an order
25 would require the City to take affirmative action. Cf. Bailey, 2008
26 WL 410613, at *3 (characterizing an injunction that would have
27 compelled a school district to remove a ban and reinstate a student on
28 a school's basketball team, as a request for mandatory relief).

1 Further, granting NewPath's request for injunctive relief would allow
2 NewPath to construct its DAS prior to the resolution of its claims at
3 trial, altering the current status quo. Therefore, NewPath seeks
4 mandatory relief which is governed by the heightened standard
5 articulated in Stanley.

6 The City's opposition to NewPath's motion includes a request
7 that judicial notice be taken of four documents: 1) an "Order Denying
8 Plaintiff's Motion for Summary Judgment" filed on December 23, 2009,
9 in NewPath Networks, LLC, v. City of Irvine, Case No. SACV 06-550-JVS
10 (Anx), in the United States District Court for the Central District of
11 California; 2) City of Davis Resolution No. 10-010, Series 2010,
12 Resolution Adopting Findings and Determinations re: NewPath Networks,
13 LLC's Appeal of Permit Rescission; 3) Exhibit 5 to NewPath's
14 supplemental appeal letter to the City Council, dated January 14,
15 2009; and 4) the Petition to the City of Davis City Council to
16 Disallow the Cell Tower Installation in Village Homes submitted to the
17 City Clerk for the January 19, 2010 City Council meeting. (Request
18 for Judicial Notice ("RJN") Exs. 1-4.) NewPath does not oppose the
19 City's request for judicial notice of these documents.

20 Under Federal Rule of Evidence 201, a district court may
21 take judicial notice of a fact "not subject to reasonable dispute"
22 because "it is either (1) generally known within the territorial
23 jurisdiction of the trial court or (2) capable of accurate and ready
24 determination by resort to sources whose accuracy cannot reasonably be
25 questioned." Fed. R. Evid. 201(b). A court "may take judicial notice
26 of a record of a state agency not subject to reasonable dispute."
27 City of Sausalito v. O'Neil, 386 F.3d 1186, 1223 n.2 (9th Cir. 2004)
28 (citations omitted); see also Mack v. S. Bay Beer Distribs., Inc., 789

1 F.2d 1279, 1282 (9th Cir. 1986) (stating that a court may take
2 judicial notice of "matters of public record"), overruled on other
3 grounds by, Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104,
4 111 (1991). Further, a district court may take judicial notice of "a
5 doctrine or rule of law" from an unpublished district court opinion.
6 M/V Am. Queen v. San Diego Marine. Constr. Corp., 708 F.2d 1483, 1491
7 (9th Cir. 1983) (finding judicial notice of unpublished district court
8 order proper).

9 The City of Davis Resolution No. 10-010, NewPath's
10 supplemental appeal letter to the City Council and the Petition to the
11 City Council are matters of "public record" and are appropriate for
12 judicial notice. Further, judicial notice may be taken of the
13 existence of litigation in NewPath Networks, LLC v. City of Irvine, as
14 well as the "doctrine[s] or rule[s] of law" discussed therein. See
15 M/V Am. Queen, 708 F.2d at 1491; see also BP West Coast Prods. LLC v.
16 Greene, 318 F. Supp. 2d 987, 994 (E.D. Cal. 2004) (taking judicial
17 notice of "opinions, complaints, briefs and evidence filed in other
18 actions . . . not for the truth of the facts asserted" but rather to
19 "show that various contentions and arguments have been raised in other
20 actions and review how other courts have addressed [those] issues").
21 Therefore, the City's request for judicial notice of these four
22 documents is granted.

23 II. BACKGROUND

24 NewPath is a competitive local exchange carrier, authorized
25 by the California Public Utilities Commission ("CPUC"), under a
26 Certificate of Public Convenience and Necessity ("CPCN"), to provide
27 "full facilities-based competitive local exchange and access services
28 . . . for the entire state of California." In re Application of

1 NewPath Networks, LLC (U-6928-C) for a Modification to its Certificate
2 of Public Convenience and Necessity, 2006 Cal. PUC LEXIS 118 (Apr. 13,
3 2006). NewPath provides wireless carriers ("Customer Carriers") with
4 access to its distributed antenna systems ("DAS"). (Kavanagh Decl. ¶¶
5 3-4.) A DAS is a network typically comprised of "small, low-power
6 antennas," referred to as "nodes," connected to a "central hub" by
7 "fiber optic cable." (Id. ¶¶ 13-15.) Each node is located on or in
8 light standards, traffic signals or other vertical structures. (Id. ¶
9 15.) NewPath's DAS receives and transmits the wireless telephone and
10 data communication signals of its Customer Carriers. (Id. ¶¶ 5-6.)
11 NewPath describes its DAS as a "dumb pipe," which its Customer
12 Carriers can use to provide wireless communications to their
13 subscribers; Newpath thus characterizes itself as a "carrier's
14 carrier." (Id. ¶¶ 1, 16.)

15 Between January 2009 and October 2009, NewPath engaged in
16 discussions with City officials concerning NewPath's proposal to build
17 a DAS within the City, which included discussions with the City's
18 Chief Information Officer, Principal Planner, Assistant Director of
19 Public Works, Electrician and Engineer. (Sears Decl. ¶¶ 4-14.)
20 NewPath's proposed DAS calls for the installation of twenty-four
21 wireless antenna facilities ("nodes") within the City. (Marshall
22 Decl. ¶ 4.) NewPath would construct seventeen wooden or metal poles,
23 approximately forty-two feet high, to host nodes, while the other
24 nodes would be placed on existing telephone or electric poles. (Id.)
25 Each node would be connected to the other nodes and a central hub by
26 fiber optic cable. (Kavanagh Decl. ¶ 10.) NewPath explained to City
27 officials that "under the CPUC's rules . . . [NewPath only] need[ed]
28 [to] obtain . . . encroachment permits from the City" and did not need

1 to comply with the City's WTF Ordinance. (Sears Decl. ¶¶ 5, 16, 17;
2 Garcia Decl. ¶ 3.) NewPath also spoke with City officials about the
3 best location and configuration for each node, in order to minimize
4 the impact on local residents. (Sears Decl. ¶ 17.)

5 Following these discussions, the City issued NewPath thirty-
6 six encroachment and related building permits between September 2,
7 2009 and November 13, 2009, for the construction of the proposed DAS.
8 (Marshall Decl. ¶ 2.) NewPath obtained a "Notice to Proceed" ("NTP"),
9 from the Energy Division of the CPUC on November 25, 2009, which
10 granted NewPath "authority to proceed with the construction" of the
11 Davis DAS project. (Mot. for Prelim. Inj. Ex. 7.) The NTP states:
12 "[t]he Energy Division has reviewed NewPath's proposal to construct
13 the Davis DAS project in the City of Davis, California and has
14 determined that the proposed construction activities are consistent
15 with the activities found by the Commission to be categorically exempt
16 from the requirements of [the California Environmental Qualify Act
17 ('CEQA')]."
18 (Id.)

19 The City Manager issued a "Stop Work Notice," on November
20 30, 2009, ordering NewPath to "cease and desist all work" authorized
21 by the thirty-six permits, "to allow for investigation of potential
22 conflicts with the City's [WTF Ordinance] and to determine whether
23 [the] permits were issued properly." (Mot. for Prelim. Inj. Ex. 3.)
24 Shortly thereafter, the City Manager rescinded all thirty-six of
25 NewPath's permits in a letter dated December 5, 2009 (the "Rescission
26 Letter"), stating the permits were improperly issued because:

26 (1) NewPath did not, and has not, complied with the
27 City's [WTF] Ordinance; (2) Certain of the permits for
28 ground based fiber and conduit rely on the location of
the wireless facilities, which . . . have not been
approved and which may not meet the local requirements

1 for wireless facilities in the City's ordinances; (3)
2 other permits rely on access to public property that is
3 not within the public rights of way for which no
4 agreements have been reached to permit access and use by
5 NewPath, and (4) certain poles and other above ground
6 facilities (including proposed monopoles) are proposed
7 for locations that do not permit above ground facilities.
8 Further, there has been no showing that the proposed
9 locations of the wireless facilities are each necessary
10 given the impacts of these facilities on the public,
11 including both public safety and aesthetic impacts.

12 (Mot. for Prelim. Inj. Ex. 5.) The Rescission Letter also states that
13 "NewPath [may] file an appeal of [the permit revocations] to the City
14 Council within 10 calendar days," or alternatively, may "apply for
15 permits" in compliance with the City's WTF Ordinance. (Id.)

16 NewPath filed a timely appeal of the City Manager's permit
17 revocation with the City Council, raising the following four
18 arguments:

- 19 1. NewPath has worked with the City for eleven months
20 on all aspects of the project ensuring that the
21 design of NewPath's distributed antenna system
22 ("DAS") was acceptable to the City and that NewPath
23 has complied with all City requirements for
24 obtaining the permits.
- 25 2. NewPath relied in good faith on the permits and, to
26 date, has expended over \$1 million in material and
27 construction costs and incurred contractual
28 obligations in that good faith reliance.
3. NewPath has obtained a vested property right to
proceed with the proposed DAS project.
4. The City's Telecommunications Ordinance . . . does
not apply to NewPath . . . and, even if it did, its
500-foot setback provisions for residential and
mixed use areas constitutes both actual and
effective prohibition of telecommunications
services under federal law.

(Mot. for Prelim. Inj. Ex. 10.) In support of its appeal, NewPath
submitted to the City Council numerous reports, surveys and other
documentation, allegedly demonstrating the existence of significant

1 gaps in coverage and the alternative locations for its nodes that
2 NewPath had considered prior to the City's issuance of the Stop Work
3 Notice. (Hall Decl. Exs. 1-5.)

4 The City Council held a public meeting on NewPath's appeal
5 on January 19, 2010, following which the City Council issued and
6 adopted Resolution No. 10-010, Series 2010, which denies NewPath's
7 appeal of the City Manager's decision to rescind NewPath's
8 encroachment and building permits. (Mot. for Prelim. Inj. Ex. 6.)
9 The Resolution includes the following pertinent findings of fact in
10 support of the City Council's decision:

11 11. The City has a Wireless Telecommunications
12 Facilities Ordinance, DMC 40.29.0 ("Wireless
13 Ordinance") that was, and continues to be, in
effect at the time NewPath submitted its
application

14 13. The permits issued to NewPath violated the City's
15 Wireless Ordinance The Wireless Ordinance
16 prohibits telecommunication projects in
17 residential, school, and public park and/or
greenbelt zones. The Wireless Ordinance also
requires an additional 500 foot setback requirement
from residential and school zones, with specified
exceptions.

18 a. All of the proposed antennas are located in or
19 within 500 feet of residential, park,
20 greenbelt, or corresponding planned
development zones.

21 b. In addition, Permit #09-777700192 . . . is
22 located on City-owned property outside the
23 right of way and public utility easements.
But NewPath does not have an approved lease to
utilize that site

24 c. One site . . . is located in Planned
25 Development for Neighborhood Commercial uses,
26 but within 500 feet of a residential zone.
However, the Wireless Ordinance has an
27 exception from the 500 foot setback
28 requirement, but any telecommunication
facility at this site would be required to go
through the [conditional use permit] process,
including notice to the public and a public

1 hearing, and be fully stealthed This
2 exemption process was not followed.

3 14. Neither NewPath's CPCN nor NTP fall within the
4 exemption in DMC § 40.29.060(j) or the Wireless
5 Ordinance; nor do they preempt application of the
6 Wireless Ordinance to NewPath's proposed DAS
7 project. Neither the CPCN nor the NTP contain any
8 express preemption of local authority. The NewPath
9 CPCN is not site-specific; rather, it applies
10 state-wide. The NTP is site-specific; however, by
11 its terms, it is limited to the issue of whether
12 the DAS project comes under a CEQA categorical
13 exemption and does not address the applicability of
14 local regulations. The City's Wireless Ordinance
15 does not conflict with the CPCN or NTP, but is
16 instead a local time, place and manner regulation
17 expressly authorized by the Public Utilities Code.
18 Pub. Util. Code § 7901.1 Accordingly, the
19 City Manager did not err in rescinding NewPath's
20 permits for the DAS project

21 17. Rescission of the improperly issued encroachment
22 and related building permits at issue does not mean
23 NewPath is effectively prohibited from utilizing
24 its CPCN to access the public rights of way.
25 Rescission of the permits simply means NewPath must
26 apply for permits pursuant to the City's Wireless
27 Ordinance. If NewPath shows that particular
28 proposed 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.

(Mot. for Prelim. Inj. Ex. 6.) After the hearing, the City sent
NewPath a letter dated January 21, 2010, enclosing a certified copy of
the Davis City Council Resolution, and stating "[t]h[e] Resolution
reflects the final action taken January 19, 2010." (*Id.*)

On January 28, 2010, NewPath filed a complaint in this
federal court, alleging that the City's revocation of the thirty-six
encroachment and building permits violates both state and federal law.

1 Shortly thereafter, NewPath filed its preliminary injunction motion
2 sub judice.

3 //

4 **III. DISCUSSION**

5 **A. Likelihood of Success on the Merits**

6 **1. Preemption of The City's WTF Ordinance by State Law**

7 NewPath argues that the City's application of the WTF
8 Ordinance to NewPath exceeds the City's authority under the California
9 Constitution and the California Public Utilities Code. Specifically,
10 NewPath argues, "[u]nder the California Constitution, state law, and
11 related rulings of the CPUC, the City does not retain the authority to
12 require that NewPath submit to the discretionary permitting process
13 outlined in the WTF Ordinance as a precondition of construction of
14 telecommunication facilities or, in the alternative, require that
15 NewPath submit to an unspecified exemption process that is neither
16 codified nor contemplated in the City's WTF Ordinance." (Mot. for
17 Prelim. Inj. 2:10-14) (emphasis omitted).

18 "The California Constitution authorizes local governments to
19 make and enforce within their limits all local, police, sanitary, and
20 other ordinances and regulations not in conflict with general laws."
21 Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates, 583 F.3d
22 716, 722 (9th Cir. 2009) (quoting Cal. Const. art. XI, § 7). These
23 "police powers" of local government, however, are limited by article
24 XII of the California Constitution which vests the California
25 legislature with "broad authority to regulate public utilities." Cal.
26 Apartment Ass'n v. City of Stockton, 80 Cal. App. 4th 699, 708 (2000).
27 Section 8 of Article XII provides that "[a] city, county, or other
28 public body may not regulate matters over which the Legislature grants

1 regulatory power to the [California Public Utilities] Commission.”
2 Cal. Const. art. XII, § 8. Section 5 of Article XII vests the
3 legislature with “plenary power, unlimited by other provisions of [the
4 California] constitution . . . to confer additional authority and
5 jurisdiction upon the [Public Utilities Commission].” Cal. Const.
6 art. XII, § 5. “Article XII, section 5 and 8 expressly authorize the
7 Legislature to confer authority upon the [CPUC] which is unlimited by
8 other provisions of the constitution and which is superior to the
9 charter powers of a city or county over municipal affairs”
10 Cal. Apartment Ass’n, 80 Cal. App. 4th at 709. However, sections 5
11 and 8 merely give the California legislature the authority to preempt
12 a municipality’s police powers over a public utility. See People v.
13 City & County of San Francisco, 92 Cal. App. 3d 913, 925 (1979)
14 (stating that “absent an assertion by the state of its authority to
15 regulate . . . , the city has the power to do so”). Therefore,
16 application of the City’s WTF Ordinance to NewPath is only invalid and
17 preempted if it conflicts with a specific grant of authority given to
18 the CPUC by the Legislature.

19 The applicable principles of preemption are well-settled
20 under California law:

21 If otherwise valid local legislation conflicts with
22 state law, it is preempted by such law and is void.
23 A conflict exists if the local legislation
24 duplicates, contradicts, or enters an area fully
25 occupied by general law, either expressly or by
26 legislative implication. Local legislation is
27 ‘duplicative’ of general law when it is coextensive
28 therewith. Similarly, local legislation is
‘contradictory’ to general law when it is inimical
thereto. Finally, local legislation enters an area
that is ‘fully occupied’ by general law when the
Legislature has expressly manifested its intent to
‘fully occupy’ the area . . . or when it has
impliedly done so in light of one of the following
indicia of intent: (1) the subject matter has been so

1 fully and completely covered by general law as to
2 clearly indicate that it has become exclusively a
3 matter of state concern; (2) the subject matter has
4 been partially covered by general law couched in
5 such terms as to indicate clearly that a paramount
6 state concern will not tolerate further or
7 additional local action; or (3) the subject matter
8 has been partially covered by general law, and the
9 subject is of such a nature that the adverse effect
10 of a local ordinance on the transient citizens of
11 the state outweighs the possible benefit to the
12 locality.

13 Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 897-98
14 (1993).

15 The City's WTF Ordinance seeks to "provide uniform standards
16 for the community desired design, placement, permitting, and
17 monitoring of telecommunication facilities consistent with applicable
18 federal requirements." Davis, California Municipal Code ("DMC") §
19 40.29.010(a). "The standards are intended to address adverse visual
20 impacts and operational effects of [telecommunications] facilities
21 through appropriate design, siting, screening techniques and
22 locational standards while providing for the communication needs of
23 residents, local businesses and government agencies." Id. A
24 "telecommunications facility" is defined in the WTF Ordinance as "[a]
25 stand-alone facility . . . that transmits and/or receives
26 electromagnetic or electro-optic signals" DMC § 40.29.030(j).

27 The WTF Ordinance classifies telecommunications facilities
28 into three categories "based upon their level of impact": 1)
"prohibited projects," 2) "exempt facilities," and 3) "facilities
allowed if authorized pursuant to conditional use permit procedures."
DMC §§ 40.29.050, 40.29.060, 40.29.070.

Specified telecommunications facilities are "exempt" from
"discretionary review" under the WTF Ordinance, so long as they

1 satisfy certain "location and design requirements." For example, a
2 wireless communication facility is exempt "if and only to the extent
3 that a permit issued by the California Public Utilities Commission
4 (CPUC) or the rules and regulations of the Federal Communications
5 Commission (FCC) specifically provide that the antenna is exempt from
6 local regulation." DMC § 40.29.060(j).

7 Other "telecommunications projects" are "prohibited,"
8 including telecommunications projects "within areas zoned or
9 designated on the General Plan Land Use map for residential uses . . .
10 or within 500 feet of said areas so designated or zoned" or "on
11 existing or planned public parks and/or greenbelts." DMC § 40.29.050.

12 Proposed "telecommunication facilities" that are neither
13 "prohibited" nor "exempt," are to be "reviewed in accordance with
14 Article 40.30 [and the requirements therein for a conditional use
15 permit], . . . provided the facilities meet [certain] location and
16 design standards" DMC § 40.29.070; § 40.29.040(b). "[A]ll
17 applications for telecommunication projects that require a Conditional
18 Use Permit . . . shall be submitted to the Community Development
19 Department" DMC § 40.29.080(a).

20 NewPath argues state laws preempt and preclude the
21 application of the WTF Ordinance to NewPath's DAS project in the City.
22 First, NewPath contends that California Public Utilities Code section
23 1001 ("section 1001"), combined with Newpath's CPCN, preempts
24 application of the WTF Ordinance. Second, NewPath argues that
25 California Public Utilities Code sections 7901 and 7901.1 ("section
26 7901" and "section 7901.1," respectively) also preempt application of
27 the WTF Ordinance.

28

1 **a. Preemption of the WTF Ordinance Under California Public**
2 **Utilities Code Section 1001**

3 Section 1001 provides that “[n]o . . . telephone corporation
4 . . . shall begin the construction of . . . a line, plant or system,
5 or of any extension thereof, without first having obtained from the
6 [CPUC] a certificate that the present or future public convenience and
7 necessity require or will require such construction.” Cal. Pub. Util.
8 Code § 1001.

9 NewPath argues that the California legislature has
10 “established a regulatory scheme involving issuance of CPCNs under
11 which the CPUC is specifically vested with authority over construction
12 of public utility facilities” (Mem. for Prelim. Inj. 13:12-
13 14.) NewPath further asserts that the City’s WTF Ordinance
14 “duplicates . . . and contradicts” authority vested with the CPUC and
15 “[a]llowing local authorities to block construction projects as to
16 which the CPUC has made a determination of necessity . . . would . . .
17 conflict with the general law of the state.” (Id. 13:27-14:1, 13:17-
18 20.) The City rejoins that neither the legislature nor the CPUC have
19 preempted local regulation in this context. The City relies in part
20 on NewPath Networks, LLC v. City of Irvine, No. SACV 06-550-JVS (Anx)
21 (C.D. Cal. Dec. 23, 2009) (unpublished slip copy), as support for its
22 argument that NewPath’s CPCN does not preempt application of local
23 zoning regulations. NewPath relies on the same CPCN in this action,
24 whose preemptive effect was analyzed by the court in City of Irvine.

25 In City of Irvine, NewPath filed suit challenging the city
26 of Irvine’s refusal to issue NewPath a conditional use permit under
27 its wireless communications ordinance. Id. at *1. NewPath moved for
28 summary judgment, arguing in pertinent part, that Irvine’s wireless

1 communications ordinance, as applied to NewPath, was preempted under
2 the California Constitution. Id. at *1. NewPath argued that the
3 "CPUC's grant of a CPCN and a NTP to NewPath gave it a right to
4 construct the DAS facility free from any limitations imposed by
5 Irvine." Id. at *6. The district court in City of Irvine rejected
6 NewPath's preemption argument, reasoning as follows, which is
7 persuasive and adopted:

8 On the face of Section 1001, there appears to be no
9 conflict with local permitting authority. The statute
10 merely requires a utility to get permission from the
11 CPUC before proceeding with any construction. It does
12 not preclude a utility from having to get permission
13 from a local government. At best, the statute is
14 ambiguous as to whether a CPCN is merely the first
15 hurdle for a utility, as opposed to the only hurdle. It
16 is not necessarily duplicative of local permitting—the
17 CPUC and local governments often have different criteria
18 for approval, as the CPUC recognizes. GO 159A, 1996
19 Cal. PUC LEXIS 288, at *39-40. Neither is local
20 permitting authority contradictory—that a utility might
21 have to obtain approval from two separate agencies is
22 not inherently contradictory. And lastly, no express
23 preemption nor implicit intent to preempt is evident on
24 the face of Section 1001. The statute does not
25 necessarily occupy the entire field of utility
26 regulation and local interests will often weigh
27 substantially in construction decisions.

28 The few cases touching on the issue suggest that
the CPCN is not the final hurdle, contrary to NewPath's
argument. The California Court of Appeal laid out the
statutory framework as follows:

A telephone company must obtain a
certificate of public convenience and
necessity from the California Public
Utilities Commission in order to
construct new facilities. (§ 1001.) It
may use the public highways to install
its facilities. (§ 7901.) The local
government may "exercise reasonable
control as to the time, place, and manner
in which roads, highways, and waterways
are accessed." (§ 7901.1, subd. (a).)

Williams Commc'ns., LLC v. City of Riverside, 114 Cal.
App. 4th 642, 648 (Ct. App. 2003). Williams makes clear
that, even after a telephone company has received a
CPCN, it is subject to the authority of local
governments to control the time, place and manner of

1 facilities. See also Pac. Tel., 197 Cal. App. 2d at 150-
2 51 (holding that telephone companies have a statutory
right to use rights of way under Section 7901, but must
get CPCN).

3 The authorities which NewPath cites are not to the
4 contrary. In San Diego Gas & Elec. Co. v. City of
5 Carlsbad, 64 Cal. App. 4th 785 (Ct. App. 1998), which
6 dealt with the regulation of power companies, the CPUC
7 had exercised exclusive authority over the regulated
8 entity. Id. at 796, 801-02. The CPUC has not exercised
9 exclusive authority over telephone companies. See
10 generally GO 1591, 1996 Cal. PUC LEXIS 288
11 NewPath has identified no similar provision affecting
12 the litigation here.

13 However, decisions by the CPUC have indicated that
14 the CPUC may preempt local authority with a CPCN when it
15 chooses to do so. For example, in In re the
16 Application of Frontier Local Servs. Inc., Dec. No. 96-
17 09-072, 1996 Cal. PUC LEXIS 947 (Cal. P.U.C. Sept. 20,
18 1996), [upon which NewPath relies,] the CPUC granted a
19 CPCN to a petitioner, subject to the condition that
20 "[t]he local land use or planning agency shall be
21 consulted by petitioner so that any site-specific
22 aesthetic impacts are assessed and properly mitigated."
23 Id. at *49. However, the CPUC specifically noted that
24 this duty to consult did not give local governments free
25 reign to regulate:

26 "[L]ocal jurisdictions cannot impose standards
27 or permit requirements which would prevent
28 petitioners from developing their service
territories, or otherwise interfere with the
statewide interest in competitive
telecommunication service. There, the
petitioners' required compliance with local
permit requirements is subject to this
limitation."

29 Id. at *48-49. Indeed, in a response to a comment on
the Negative Declaration, the CPUC asserted exclusive
jurisdiction over the specific project at issue:

30 "[T]he Commission's statutory authority (State
31 Constitution and Public Utilities Code Section
32 1001) preempts local use or discretionary
33 permits for utility projects, unless the
34 Commission specifically delegates such
35 authority to local governments (e.g. General
36 Order 159A). The Certificate of Public
37 Convenience and Necessity (CPCN) being sought
38 by the [CLEC's] covered in this Negative
Declaration is the Commission's 'use' permit
for [CLEC] projects. The Commission
specifically recognizes the importance of
local input on specific environmental impacts
that may arise, but the authority for a

1 discretionary permit by a local agency is
2 preempted by the CPCN.

3 Id. at *83.

4 Similarly, in In re the Application of GTE Mobilnet
5 of San Jose Ltd. P'ship, Dec. No. 86-09-011, 1986 Cal.
6 PUC LEXIS 568 (Cal. P.U.C. Sept. 4, 1986), the CPUC
7 considered the application for a specific site of a WCF.
8 The CPUC noted that:

9 after this Commission has determined, after
10 opportunity for objection and public hearing,
11 that the public convenience and necessity
12 requires construction or extension of a public
13 utility system, and the Commission has adopted
14 a Negative Declaration which became final,
15 which determinations fix locations and
16 necessary facilities and structures but left
17 to local discretion appropriate landscaping,
18 exterior building treatment, and similar
19 ancillary visual mitigation measures, the
20 governing body of a local jurisdiction is
21 precluded to go further and attempt to
22 determine whether the service authorized is
23 locally desired or would be beneficial to the
24 jurisdiction, or whether the location or type
25 fixtures are those preferred locally. . . .
26 [T]his legal principal has particular
27 applicability to a situation . . . where the
28 facility involves erection of a pole to
support an antenna . . . at a specific site
determined to be especially suitable and
necessary.

18 Id. at *18 (emphasis added). Thus, where the CPUC has
19 had a hearing on a site-specific CPCN, then the CPCN is
20 more likely to preempt local permitting authority.

21 Accordingly, the Court finds that CPCNs in the
22 context of a telephone utility can be preemptive but are
23 not necessarily so. Where the CPUC is explicit that the
24 CPCN preempts local authority, as in the case of a site-
25 specific CPCN, then the local government cannot
26 contradict that action. However, where the CPCN is more
27 general and does not expressly preempt local power, then
28 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

25 The NewPath CPCN and subsequent NTP was issued to
26 allow NewPath to provide "full competitive local
27 exchange, access and non-dominant interexchange services
28 for the entire state of California." NewPath CPCN, 2006
Cal. PUC LEXIS 118, at *1. NewPath was "authorized to
construct equipment to be installed in existing
buildings or structures." Id. at *14. Any other
construction had to be approved by the CPUC Energy

1 Division pursuant to an expedited California
2 Environmental Quality Act ("CEQA") review process. Id.
3 Before NewPath could start construction, it had to be
4 issued a separate NTP from the Energy Division. Id. at
5 *15.

6 The NTP for the [Davis] DAS project was issued,
7 without hearing, by the Energy Division. . . . The
8 Energy Division simply determined that the proposed
9 project was within a categorical exemption to CEQA, and
10 then "[g]rant[ed] NewPath with the authority to proceed
11 with the construction of the project as described in the
12 [Davis DAS application]." . . .

13 The Court also finds that the CPCN and NTP are not
14 the sort of Section 1001 actions that would preempt
15 local permitting authority. Neither contains any
16 express preemption of local authority. The NewPath CPCN
17 is not site-specific; rather, it applies state-wide.
18 The NTP is site-specific; however, by its terms, it is
19 limited to the issue of whether the DAS project comes
20 under a CEQA categorical exemption [The City's
21 WTF Ordinance] is not coextensive with nor inimical to
22 the CPUC Energy Division's expedited CEQA review.

23 Moreover, both orders were issued without public
24 hearing. The Court is hesitant to find preemptive
25 effect in a CPUC order that was issued without public
26 hearing, especially in light of the CPUC's repeated
27 statements on the importance of local input on WCF
28 siting. GO 159A, 1996 Cal. PUC LEXIS 288, at *39-41; In
re Frontier, 1996 Cal. PUC LEXIS 947, at *47-49. Thus,
the Court finds that the NewPath CPCN and NTP were not
intended to preempt [the City's WTF Ordinance and]
authority over the time, place and manner of NewPath's
construction of the DAS project.

City of Irvine, at *16-33.

Accordingly, neither section 1001 nor NewPath's CPCN preempt
application of the City's WTF Ordinance, and NewPath's NTP does not
transform NewPath's general CPCN into a "site specific" CPCN. See id.
at *20. Therefore, NewPath has not demonstrated that it is likely to
succeed on the merits of this preemption claim.

**b. Preemption Under California Public Utilities Code
Sections 7901 and 7901.1**

NewPath also argues the City's WTF Ordinance is preempted by
NewPath's statutory entitlement to access public rights of way for the
construction of telephone facilities under section 7901. (Mot. for

1 Prelim. Inj. 23:22-26.) NewPath further contends that the City's
2 revocation of its encroachment and building permits violates
3 California Public Utilities Code section 7901.1 ("section 7901.1")
4 because the City's actions are not reasonable. (Id. 27:19-28:8.) The
5 City rejoins that "[t]he issuance of a CPCN does not grant NewPath
6 blanket authority to construct wireless facilities wherever and
7 whenever it may choose [and] NewPath is still subject to Section
8 7901.1's grant of authority to municipalities to reasonably regulate
9 the time, place and manner on which the public rights-of-way are
10 accessed." (Opp'n 14:20-24.)

11 Section 7901 provides that "telephone corporations may
12 construct lines of telegraph or telephone lines along and upon any
13 public road or highway, . . . and may erect poles, posts, piers or
14 abutments for supporting the insulators, wires, and other necessary
15 fixtures of their lines, in such manner and at such points as not to
16 incommode the public use of the road or highway" However,
17 section 7901's grant of authority to telephone corporations is limited
18 by the provision in section 7901.1, which states: "municipalities
19 shall have the right to exercise *reasonable control* as to the *time,*
20 *place and manner* in which roads, highways, and waterways are
21 accessed." Cal. Pub. Util. Code § 7901.1(a) (emphasis added). "That
22 provision was added to the [Public Utilities Code] in 1995 to bolster
23 . . . cities' abilities with regard to construction management and to
24 send a message to telephone corporations that cities have authority to
25 manage their construction, without jeopardizing the telephone
26 corporations' statewide franchise." Palos Verdes Estates, 583 F.3d at
27 724 (quotations and citations omitted). In Palos Verdes Estates, the
28 Ninth Circuit concluded that "[t]he California Constitution gives [a

1 city] the authority to regulate local aesthetics [of proposed wireless
2 telecommunications facilities], and neither PUC § 7901 nor PUC §
3 7901.1 divests it of that authority." Id. at 721-22.

4 NewPath argues that Palos Verdes Estates is distinguishable
5 since the plaintiff there was a "cellular service provider" without a
6 CPCN, whereas NewPath is a competitive local exchange carrier with a
7 CPCN which authorizes NewPath's proposed construction activities.
8 (Reply 9:11-16.) However, since NewPath has not shown its CPCN
9 preempts application of the City's WTF Ordinance, its attempt to
10 distinguish Palos Verdes Estates on this ground is unavailing.
11 Therefore, NewPath has not demonstrated that the City's WTF Ordinance
12 is an impermissible "time, place and manner" regulation.

13 NewPath further argues that the City's revocation of its
14 permits is "unreasonable," and constitutes an "effective prohibition"
15 under section 7901.1. (Reply 12:19-22.) Specifically, NewPath argues
16 "[t]he City's rescission of NewPath's permits on the grounds that
17 NewPath must comply with the [City's WTF Ordinance] has the effect of
18 prohibiting Newpath from providing its services in violation of both
19 §§ 7901 and 7901.1." (Id. 12:19-21.) NewPath, however, has not shown
20 that the City Council's decision upholding the City manager's
21 revocation of NewPath's encroachment and building permits, was an
22 exercise of the City's "time, place and manner" authority to which
23 section 7901.1's "reasonableness" requirement applies. Therefore,
24 NewPath has not demonstrated that it is likely to succeed on the
25 merits of its preemption claims under sections 7901 and 7901.1.

26 **2. Violations of The Telecommunications Act**

27 NewPath makes three arguments under the federal
28 Telecommunications Act of 1996 ("TCA"), Pub. L. No. 104-014, 110 Stat.

1 56 (codified as amended in various sections of U.S.C. titles 15, 18
2 and 47). Specifically, NewPath alleges the City's decision to revoke
3 its permits constitutes an "effective prohibition" of the provision of
4 personal wireless services under 47 U.S.C. § 332(c)(7)(B)(i)(II) and
5 telecommunication services under 47 U.S.C. § 253(a) and also violates
6 47 U.S.C. § 332(c)(7)(B)(iii).

7 **a. NewPath's Claims Under Section 332(c)(7)(B)**

8 NewPath argues the City's permit revocation decision
9 violates 47 U.S.C. § 332(c)(7)(B)(i)(II) since it effectively
10 prohibits the provision of personal wireless services. Further,
11 NewPath argues that the City's decision to affirm the revocation of
12 its encroachment and building permits was not supported by
13 "substantial evidence" and therefore violates section
14 332(c)(7)(B)(iii). The City rejoins that NewPath's claim of
15 "effective prohibition" is not yet ripe for judicial review since
16 NewPath has not applied for, and been denied, permits under the City's
17 WTF Ordinance. NewPath counters that "[t]he City has made a final
18 decision on the question of exemption" under the WTF Ordinance, and
19 therefore its claims are ripe. (Reply 12:5-11.)

20 Section 332(c)(7) of the TCA provides in pertinent
21 part:

22 (7) Preservation of local zoning authority

23 (A) General Authority

24 Except as provided in this paragraph, nothing
25 in this chapter shall limit or affect the
26 authority of a State or local government . .
27 . over decisions regarding the placement,
28 construction, and modification of personal
wireless service facilities.

(B) Limitations

1 (I) The regulation of the placement,
2 construction, and modification of personal
3 wireless service facilities by any State or
4 local government . . .

5 (II) shall not prohibit or have the
6 effective of prohibiting the provision
7 of personal wireless services

8 (iii) Any decision by a State or local
9 government or instrumentality thereof to deny
10 a request to place, construct or modify
11 personal wireless service facilities shall be
12 in writing and supported by substantial
13 evidence contained in a written record . . .

14 (v) Any person adversely affected by any
15 final action or failure to act by a State or
16 local government . . . that is inconsistent
17 with this subparagraph may, within 30 days
18 after such action or failure to act, commence
19 an action in any court of competent
20 jurisdiction

21 47 U.S.C. § 332(c) (7).

22 Congress has limited who may bring suit under section
23 332(c) (7) (B) to those persons "adversely affected by any *final action*
24 or failure to act by a State or local government" 47 U.S.C. §
25 332(c) (7) (B) (v) (emphasis added). However, "[t]he TCA does not define
26 'final action,'" Omnipoint Holdings, Inc. v. City of Cranston, 586
27 F.3d 38, 46 (1st Cir. 2009), and the Ninth Circuit has not yet
28 considered the statutory language. The interpretations provided by
the First and Seventh Circuits, however, are persuasive and
instructive.

In Omnipoint Holdings, the First Circuit assumed that in
enacting the TCA, Congress was aware that "[t]he terms 'final' and
'final action' have special meaning in the law." Id. The Omnipoint
Holdings court held that "[a] final action by a local government or

1 any instrumentality thereof must be one that marks the consummation of
2 the instrumentality's decisionmaking process." Id. (holding that
3 zoning board's decision denying special use permit was a final action
4 within the meaning of section 332(c)(7)(B) of the TCA).

5 The Seventh Circuit, in Sprint Spectrum, L.P. v. City of
6 Carmel, 361 F.3d 998 (7th. Cir. 2004), also addressed the definition
7 of a "final action" under section 332(c)(7)(B)(v). In Sprint
8 Spectrum, Sprint, a cellular telephone service provider, brought a
9 claim under section 332(c)(7)(B) of the TCA, challenging a zoning
10 board's decision upholding revocation of "an improvement location
11 permit" Sprint had received to install a low-profile antenna. Id. at
12 1000-01. Sprint had entered into a lease with a resident of the city
13 to place an antenna on a pre-existing radio tower. Id. at 1000.
14 "Sprint applied to [the city's] Department of Community Services for
15 an improvement location permit, which the city issued. The permit
16 allowed Sprint to install special low-profile antennas on the sides of
17 [an] existing tower [However], a neighboring property owner,
18 took exception to the plan and appealed the issuance of the permit to
19 the [city's] Board of Zoning Appeals (BZA). [The neighbor] alleged
20 that the proposed Sprint antenna was not a permitted use for
21 residential districts under the existing zoning ordinance and that a
22 special use permit, or variance, was required before the plans for the
23 tower could proceed." Id. The City then issued, a stop work order,
24 and revoked Sprint's permit. Id. On Sprint's appeal, the BZA upheld
25 the revocation of Sprint's improvement location permit, finding that
26 "the use for which the improvement location permit was granted . . .
27 is not a Permitted Use under the . . . Zoning Ordinance. As a result,
28

1 Sprint was required to seek a special use permit." Id. Instead of
2 applying for a special use permit, Sprint brought suit under section
3 332(c)(7)(B) of the TCA, "arguing that the BZA's decisions were not
4 supported by substantial evidence and unreasonably discriminated
5 against Sprint." Id. at 1001.

6 The Seventh Circuit held that the "traditional analysis,
7 enunciated in Williamson County Reg'l Planning Comm'n v. Hamilton
8 Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), for
9 determining when a complaint challenging a local land use decision is
10 ripe for adjudication" governs the determination of a "final action"
11 under section 332(c)(7)(B). Id. at 1000, 1004. Under Williamson
12 County, "zoning authorities must be given an opportunity to arrive at
13 a final, definitive position regarding how [they] will apply the
14 regulations at issue" before there is a "ripe challenge." Id. at 1002
15 (quoting Williamson County, 473 U.S. at 191). Applying Williamson
16 County, the Seventh Circuit concluded that "Sprint's complaint [was]
17 not yet ripe for judicial review" since the BZA's decision was not a
18 "final action" under section 332(c)(7)(B)(v). Id. at 1004. The Court
19 reasoned that "[t]he BZA's decisions do not completely foreclose
20 Sprint from establishing wireless telecommunications facilities . . .
21 . In fact, those decisions merely map a procedural route that Sprint
22 must take in order to proceed with its project Indeed, until
23 Sprint is told definitely whether or not it is permitted to install an
24 antenna and equipment shelter, it is mere speculation whether it even
25 has an injury to complain of." Id. Further, the Court rejected
26 Sprint's argument that "it would be futile to go back to the zoning
27 board because it is not eligible for a special use permit" because
28

1 "[t]hese are precisely the types of issues that should be presented
2 first to the local land use authority." Id.

3 Under Omnipoint Holdings, Williamson County, and Sprint
4 Spectrum, the City Council's decision upholding the revocation of
5 NewPath's encroachment permits is not a "final action" within the
6 meaning of section 332(c)(7)(B)(v). Contrary to NewPath's assertion
7 that the City made a final decision that NewPath is not exempt from
8 the WTF Ordinance, the City Council only addressed and decided whether
9 the City Manager had properly revoked NewPath's thirty-six permits.
10 While implicit in that decision is the conclusion that the WTF
11 Ordinance applies to NewPath, whether NewPath is entitled to an
12 exemption was not squarely before, nor decided by, the City Council.
13 Therefore, the City Council's decision does not constitute the
14 "consummation" of the City's "decisionmaking process" on NewPath's
15 ability to construct its DAS. Rather, it "merely maps[s] a procedural
16 route that [NewPath] must take in order to proceed with its project."
17 Sprint Spectrum, 361 F.3d at 1004. NewPath also argues, as did
18 Sprint, "it would be futile" to seek an exemption because it is "not
19 eligible"; however, "[t]hese are precisely the types of issues that
20 should be presented first to the local land use authority, which has a
21 better understanding of the local ordinances." Id. Further, the
22 "impracticalities, time delays, expense and other inefficiencies" of
23 "returning to the zoning board prior to seeking litigation" do not
24 sufficiently outweigh concerns of ripeness. Id. at 1004-05.
25 "Although [NewPath] at some point might have a mature claim, for now
26 it must allow the local authorities to act with finality before
27 pursuing a claim in federal court." Id. at 1004.

28

1 Since the City Council's decision is not a "final action"
2 within the meaning of the TCA, NewPath's two claims under section
3 332(c)(7)(B) are not yet ripe for judicial review. A "lack of a final
4 action is not simply a failure of an element of the claim but divests
5 the court of jurisdiction over the matter." Sprint Spectrum, L.P. v.
6 City of Carmel, 2003 WL 21254443, at *5 (S.D. Ind. Mar. 28, 2003),
7 aff'd by, 361 F.3d 998 (7th Cir. 2004); see also S. Pacific Transp.
8 Co. v. City of Los Angeles, 922 F.2d 498, 502 (9th Cir. 1990) (stating
9 that ripeness "is determinative of jurisdiction. If a claim is
10 unripe, federal courts lack subject matter jurisdiction"); Cox
11 Commc'ns PCS, L.P. v. City of San Marcos, 204 F. Supp. 2d 1272, 1277
12 (S.D. Cal. 2002) (dismissing plaintiffs claims under section
13 332(c)(7)(B) because there was no final action). Therefore, NewPath
14 has not demonstrated that it is likely to succeed on the merits of its
15 claims under section 332(c)(7)(B) of the TCA.

16 **b. Section 253(a)**

17 NewPath also argues the City's actions effectively prohibit
18 the provision of telecommunications services in violation of 47 U.S.C.
19 § 253(a) of the TCA ("section 253(a)"). Specifically, NewPath argues
20 "the City['s] requirement that NewPath prove it is exempt from an
21 ordinance that otherwise prohibits NewPath's services" violates
22 section 253(a). (Mot. for Prelim. Inj. 33:10-13.) The City rejoins
23 that NewPath has not, and cannot, demonstrate "effective prohibition"
24 under section 253(a).

25 Congress enacted section 253 of the TCA to "preempt[] state
26 and local regulations that maintain the monopoly status of a
27 telecommunications service provider." Sprint Telephony PCS, L.P. v.
28 County of San Diego ("Sprint II"), 543 F.3d 571, 576 (9th Cir. 2008)

1 (en banc), cert. denied, 129 S. Ct. 2860 (2009). Section 253(a)
2 provides that “[n]o State or local statute or regulation . . . may
3 prohibit or have the effect of prohibiting the ability of any entity
4 to provide any interstate or intrastate telecommunications service.”
5 47 U.S.C § 253(a). “Although a final action or decision is necessary
6 to file a claim under sections 332(c)(7)(B)(i)(I) and
7 332(c)(7)(B)(i)(II), neither is required under section 253.” Cox
8 Commc’ns, 204 F. Supp. 2d at 1278.

9 At oral argument, NewPath clarified that it is raising only
10 an as-applied challenge to the City’s WTF Ordinance under section
11 253(a). However, section 253(a) is generally interpreted as providing
12 a vehicle for a facial challenge to a local ordinance. See Sprint
13 Telephony PCS, L.P. v. County of San Diego, 490 F.3d 700, 709-715 (9th
14 Cir. 2007) (“Sprint I”) (discussing the differences between sections
15 332(c)(7) and 253(a) of the TCA and finding that section 253(a) allows
16 for facial challenges), reversed on other grounds by, Sprint II, 543
17 F.3d at 571; see also USCOC of Greater Mo., L.L.C. v. Village of
18 Marlborough, 618 F. Supp. 2d 1055, 1065 (E.D. Mo. 2009) (stating that
19 “Section 253 may be used to challenge zoning regulations on their
20 face, but is not the proper section to challenge application of a
21 zoning regulation”); GTE Mobilnet of Cal. Ltd. P’ship v. City and
22 County of San Francisco, No. C 05-04056 SI, 2007 WL 420089, at *3-7
23 (N.D. Cal. Feb. 6, 2007) (granting plaintiff’s motion for summary
24 judgment on facial challenge to city’s wireless ordinance under
25 section 253); Cox Commc’ns, 204 F. Supp. 2d at 1277 (stating that
26 “[w]here 47 U.S.C. § 253 provides a cause of action against *local*
27 *regulations*, section 332 gives a cause of action against *local*
28 *decisions*” (emphasis in original)). Further, even if NewPath may

1 maintain an as-applied challenge to the City's WTF Ordinance under
2 section 253(a), NewPath has not shown that this challenge is ripe for
3 judicial review since NewPath has not yet sought permits under the WTF
4 Ordinance. Therefore, NewPath has not shown it is likely to succeed on
5 the merits of its section 253(a) claim.

6 **3. "Vested Property Rights" Doctrine**

7 NewPath also argues it is likely to succeed on the merits
8 since the City's actions violate NewPath's "vested property rights" in
9 the thirty-six encroachment and building permits. (Motion for Prelim.
10 Inj. 33:26-27.) Specifically, NewPath argues it obtained a "vested
11 property right to proceed with its DAS project in Davis . . . when the
12 City issued valid construction permits and NewPath performed
13 substantial work and incurred substantial liabilities - roughly \$1.5
14 million - in good faith reliance on the [p]ermits." (Id. 34:20-23.)
15 The City counters that "[t]here is no vested right to [an] invalidly
16 issued permit[]." (Opp'n. 24:3.) At oral argument, NewPath conceded
17 that if the thirty-six permits were impermissibly issued, their
18 rescission was proper.

19 "[I]t has long been the rule in [California] . . . that if a
20 property owner has performed substantial work and incurred substantial
21 liabilities in good faith reliance upon a permit issued by the
22 government, he acquires a vested right to complete construction in
23 accordance with the terms of the permit. Once a landowner has secured
24 a vested right the government may not, but virtue of a change in the
25 zoning laws, prohibit construction authorized by the permit upon which
26 he relied." Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n, 17
27 Cal. 3d 785, 791 (1976). However, under California law, "permits must
28 be revoked" when an applicant has not complied with all applicable

1 ordinances. Horwitz v. City of Los Angeles, 124 Cal. App. 4th 1344,
2 1356 (2004) (stating that "the City has no discretion to issue a
3 permit in the absence of compliance [with all applicable
4 ordinances]").

5 NewPath contends that the thirty-six encroachment and
6 building permits were properly issued to it because it is exempt from
7 the City's WTF Ordinance, or alternatively, application of the City's
8 WTF Ordinance is invalid under state and federal law. (Mot. for
9 Prelim. Inj. 13-20.) However, NewPath has not demonstrated that the
10 permits were properly issued or that their revocation was erroneous.
11 Therefore, NewPath has not demonstrated it is likely to succeed on the
12 merits of this claim.

13 **4. Estoppel**

14 Lastly, NewPath argues that the City is estopped from
15 revoking the thirty-six permits. The City responds that equitable
16 estoppel is inapplicable where a permit violates a city ordinance.

17 In general, "four elements must be present in order to apply
18 the doctrine of equitable estoppel: (1) the party to be estopped must
19 be apprised of the facts; (2) he must intend that his conduct shall be
20 acted upon, or must so act that the party asserting the estoppel had a
21 right to believe it was so intended; (3) the other party must be
22 ignorant of the true state of facts; and (4) he must rely upon the
23 conduct to his injury." Golden Gate Water Ski Club v. County of
24 Contra Costa, 165 Cal. App. 4th 249, 257 (2008) (quotation and
25 citation omitted). Further, "a party faces daunting odds in
26 establishing estoppel against a government entity in a land use case.
27 Courts have severely limited the application of estoppel in this
28 context by expressly balancing the injustice done to the private

1 person with the public policy that would be supervened by invoking
2 estoppel to grant development rights outside of the normal planning
3 and review process Accordingly, estoppel can be invoked in
4 the land use context in only the most extraordinary case where the
5 injustice is great and the precedent set by the estoppel is narrow.”
6 Id. at 259.

7 NewPath has not satisfied the elements of an estoppel claim.
8 Further, NewPath has not shown that this is an “extraordinary case
9 where the injustice is great and the precedent set by the estoppel is
10 narrow.” NewPath, therefore, has not shown it is likely to succeed on
11 the merits of this claim.

12 **B. Irreparable Harm**

13 NewPath argues the City’s revocation of its thirty-six
14 building and encroachment permits and its inability to immediately
15 construct the Davis DAS has caused it to lose revenue, damaged its
16 reputation and goodwill, and impaired its ability to compete in its
17 industry. NewPath specifically contends that it “is a new entrant to
18 the telecommunications industry and, as such, must constantly work to
19 establish and maintain its reputation and goodwill” with its
20 customers. (Mot. for Prelim. Inj. 9:13-15.) Further, NewPath argues
21 that “[a]s a result of the City’s actions, and the consequent work
22 stoppage on construction of NewPath’s DAS in Davis, NewPath’s ability
23 to negotiate and enter into contracts to provide DAS services to
24 potential [customers] . . . has been severely curtailed.” (Id. 9:19-
25 24.) The City rejoins that “NewPath’s only asserted injury is lost
26 business revenues and goodwill” which are injuries that do “not rise
27 to the level of irreparable injury.” (Opp’n 12-13.) NewPath counters
28 “[d]amages will not adequately compensate [it] for the lost business

1 and impact to its reputation caused by the City's action and the delay
2 associated with this litigation." (Reply 1:26-27.)

3 A plaintiff "seeking preliminary relief . . . [must]
4 demonstrate that irreparable injury is likely in the absence of an
5 injunction"; the mere "possibility" of irreparable harm is
6 insufficient. Winter, 129 S. Ct. at 375 (emphasis in original).
7 "Mere financial injury will not constitute irreparable harm if
8 adequate compensatory relief will be available in the course of
9 litigation." California v. Tahoe Reg'l Planning Agency, 766 F.2d
10 1316, 1319 (9th Cir. 1985) (citation omitted). However, "[i]njury to
11 a business's goodwill and reputation is not easily measurable, and
12 thus supports a finding of irreparable harm." Qwest Commc'ns Corp. v.
13 City of Berkeley, 146 F. Supp. 2d. 1081, 1103 (N.D. Cal. 2001)
14 (finding irreparable harm based upon injury to goodwill and reputation
15 where application of wireless ordinance and inability to build
16 "conduit link" would have caused plaintiff to lose a contract, the
17 procurement of which had enhanced plaintiff's reputation) (citing
18 Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944
19 F.2d 597, 603 (9th Cir. 1991)) ("[I]ntangible injuries, such as damage
20 to ongoing recruitment efforts and goodwill, qualify as irreparable
21 harm."); see also NextG Networks of Cal., Inc. v. County of Los
22 Angeles, 522 F. Supp. 2d 1240, 1256 (C.D. Cal. 2007) (finding
23 irreparable harm where application of wireless ordinance to plaintiff
24 would cause plaintiff to breach contracts with customers), overruled
25 on other grounds by, Sprint II, 543 F.3d at 571; Cox Commc'ns, 204 F.
26 Supp. 2d at 1263-64 (finding irreparable harm where plaintiff's
27 inability to install wireless facilities would impair its ability to
28 provide adequate coverage to its customers). Further, "[a] sufficient

1 showing of injury to competition could support a finding of
2 irreparable harm." Am. Passage Media Corp. v. Cass Commc'ns., Inc.,
3 750 F.2d 1470, 1473 (9th Cir. 1985). Nonetheless, a federal court
4 should refrain "from interfering with non-federal government
5 operations in the absence of facts showing an immediate threat of
6 substantial injury." Midgett v. Tri-County Metro. Transp. Dist. of
7 Or., 254 F.3d 846, 850 (9th Cir. 2001).

8 NewPath's Chief Executive Officer declares as follows in
9 support of NewPath's argument that it will suffer irreparable harm:

10 18. If the City is allowed to continue to unlawfully
11 delay the construction of NewPath's DAS Facilities,
12 NewPath's customers will pursue other alternative
13 means of providing telecommunications service in
14 the City resulting in a direct loss of revenue to
15 NewPath in the hundreds of thousands of dollars.
16 In addition, NewPath and its Customer Carriers will
17 be prevented from providing adequate wireless
18 services in the City. Finally, NewPath and its
19 Customer Carriers are being deprived of the full
20 utilization of their existing licenses and business
21 investments.

16 19. Because the wireless telecommunications provider
17 market is limited to a few dominant companies, any
18 such lost customers will be irreplaceable, which
19 will jeopardize the foundation for NewPath's
20 growing but still nascent business.

19 20. In addition, NewPath to date has expended
20 approximately \$1.5 million to secure the necessary
21 equipment, personnel, and contractors in an effort
22 to construct its DAS in the City.

22 21. The actions of the city have also caused NewPath
23 irreparable harm to its goodwill and reputation
24 especially in California. New projects have been
25 and will be awarded to NewPath's competition.
26 Thus, in addition to the irreparable harm done to
27 NewPath's reputation, NewPath has irretrievably
28 lost and will continue to lose revenue that would
have been generated by other projects.

27 (Kavanagh Decl. ¶¶ 18-22.) This is the only evidence NewPath provides
28 in support of its assertion of irreparable harm.

1 "In order to support a preliminary injunction, . . .
2 irreparable harm to goodwill and reputation must be *demonstrated*, not
3 merely alleged." Bell Atlantic Business Systems, Inc. v. Storage
4 Technology Corp., No. C-94-0235 MHP, 1994 WL 125173, at *2 (N.D. Cal.
5 Mar. 31, 1994) (concluding that "evidence demonstrating that
6 [plaintiff] *might* lose customers as a result of [defendants' conduct]"
7 was insufficient to support a finding of irreparable harm) (emphasis
8 in original). The moving party's allegations of irreparable harm
9 "must be shown by probative evidence, and conclusory affidavits are
10 insufficient." Mesde v. Am. Brokers Conduit, No. C-09-02418 JF, 2009
11 WL 1883706, at *2 (N.D. Cal. June 30, 2009) (citations omitted).
12 Here, NewPath's evidence of injury to its goodwill and reputation
13 consists of the averment of its Chief Executive Officer that "[t]he
14 actions of the city have . . . caused NewPath irreparable harm to its
15 goodwill and reputation especially in California. New projects have
16 been and will be awarded to NewPath's competition." (Kavanagh Decl. ¶
17 21.) These averments, however, are "conclusory and without sufficient
18 support." Am. Passage Media Corp., 750 F.2d at 1473 (finding
19 affidavits from plaintiff's executives too conclusory and unsupported
20 to establish irreparable harm); see also Dotster, Inc. v. Internet
21 Corp. for Assigned Names and Numbers, 296 F. Supp. 2d 1159, 1163 n.2
22 (C.D. Cal. 2003) (finding moving party's support for injury to
23 goodwill and reputation conclusory and insufficient to demonstrate
24 irreparable harm). "Further, a finding of irreparable harm must be
25 based on more than speculative assertions that the moving party will
26 have greater difficulty obtaining contracts in the future." Bell
27 Atlantic, 1994 WL 125173, at *3.

28

1 "As with harm to reputation or goodwill, a showing of
2 irreparable harm to competition requires the production of probative
3 evidence. Although a loss of customers and a resulting loss of
4 revenue surely make it more difficult to compete, they do not amount
5 to irreparable harm because such injuries are measurable and thus have
6 an adequate remedy at law. Bell Atlantic, 1994 WL 125173, at *3
7 (citations omitted). Injury to a party's ability to compete is
8 sufficient to support a preliminary injunction only if the moving
9 party demonstrates that there is a "threat of being driven out of
10 business." Am. Passage Media Corp., 750 F.3d at 1474. NewPath,
11 however, only avers that any loss of customers will "jeopardize the
12 foundation for NewPath's growing but still nascent business" since the
13 "wireless telecommunications provider market is limited to a few
14 dominant companies." (Kavanagh Decl. ¶ 19.) NewPath, therefore, has
15 not shown that any injury to its ability to compete rises to the level
16 of irreparable harm.

17 NewPath has not provided sufficient evidence to conclude
18 that its alleged injuries to its reputation, goodwill, and ability to
19 compete, constitute irreparable harm. See Bell Atlantic, 1994 WL
20 125173, at *3 (stating "[w]ithout a stronger showing of nonpecuniary
21 damage, there can be no finding of irreparable harm"). Further,
22 NewPath has not shown that any loss of revenue could not be
23 compensated through an award of damages, should it prevail at trial.
24 NewPath, therefore, has not clearly shown that it will suffer
25 irreparable harm absent an award of injunctive relief.

26 **C. The Balance of Equities**

27 NewPath argues it "has been and continues to be irreparably
28 harmed in a manner that far exceeds any harm suffered by the City."

1 (Reply 6:26-7:2.) The City rejoins, the balance of equities tips in
2 its favor since the "damage to the physical environment and
3 restoration of landscaping could not be easily, inexpensively or
4 quickly undone."

5 "To qualify for injunctive relief, the plaintiff[] must
6 establish that the balance of equities tips in [its] favor. In
7 assessing whether the plaintiff[] ha[s] met [its] burden, the district
8 court has a duty to balance the interests of all parties and weigh the
9 damage to each." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138 (9th
10 Cir. 2009) (quotations and citations omitted).

11 NewPath argues denial of the injunction will cause it
12 financial injury and irreparable harm to its reputation and goodwill.
13 However, compelling the City to reinstate the thirty-six encroachment
14 and building permits would allow for the construction of seventeen
15 new, wooden or metal poles within the City. Both parties argue the
16 equities tip in their favor. However, since NewPath has not shown
17 that it will suffer irreparable harm, it has not made a "clear
18 showing" that the equities tip in its favor as is required to obtain
19 mandatory preliminary injunctive relief.

20 **D. The Public Interest**

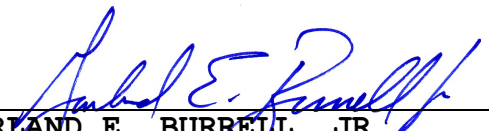
21 NewPath argues "granting . . . the preliminary injunction
22 promotes the public interest, as determined by Congress, the people of
23 the State of California in its constitution, the state legislature and
24 the CPUC, in [the] rapid deployment of facilities for ubiquitous and
25 affordable telephone service." (Reply 6:26-7:2.) The City counters,
26 arguing in conclusory fashion that the "public interest clearly
27 weigh[s] heavily against the grant of a mandatory preliminary
28 injunction." (Opp'n 29:3-4.)

1 "The public interest inquiry primarily addresses the impact
2 [of the preliminary injunction] on non-parties rather than parties."
3 Sammartano v. First Judicial District Court, 303 F.3d 959, 974 (9th
4 Cir. 2002). The City advances the local public interest of
5 "address[ing] adverse visual impacts and operational effects of
6 [telecommunications] facilities through appropriate design, siting,
7 screening techniques and locational standards" DMC §
8 40.29.010(a). In contrast, NewPath advances the state and federal
9 public interests of facilitating the provision of wireless
10 telecommunication services. However, NewPath has not shown that the
11 state and federal interests applicable to its proposed DAS override
12 the City's local regulation over the siting of the telecommunication
13 facilities NewPath seeks to construct. Nor has NewPath shown that
14 federal and state interests are incompatible with the local interests
15 sought to be fostered by the City's WTF Ordinance. Therefore, NewPath
16 has not shown that the public interest favors a preliminary
17 injunction.

18 **IV. CONCLUSION**

19 Since NewPath has not made a "clear showing" that it is
20 entitled to the preliminary injunctive relief it seeks, NewPath's
21 motion for a preliminary injunction is DENIED.

22 **Dated: March 18, 2010**

23
24 
25 **GARLAND E. BURRELL, JR.**
26 **United States District Judge**
27
28