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9 NEWPATH NETWORKS, LLC

10 **BEFORE THE PUBLIC UTILITIES COMMISSION**
11 **OF THE STATE OF CALIFORNIA**

12 CITY OF DAVIS, CALIFORNIA

13 Complainant,

14 v.

15 NEWPATH NETWORKS, LLC, a New
16 Jersey Limited Liability Company
17 (U-6928-C)

18 Defendant

Case No. C. 10-03-011

(Filed March 23, 2010)

**ANSWER OF DEFENDANT
NEWPATH NETWORKS, LLC
(U-6928-C)**

19 Defendant NewPath Networks, LLC (U-6928-C) (“NewPath”), for its answer to the
20 complaint of Complainant City of Davis, California (“City”), alleges as follows:

PARTIES TO THIS PROCEEDING AND JURISDICTION

- 21 1. Answering paragraph 1, NewPath is without knowledge or information
22 sufficient to form a belief as to the truth of the allegations therein, and on that
23 basis denies the allegations of the paragraph.
- 24 2. Answering paragraph 2, NewPath admits the allegations of the paragraph.
- 25 3. Answering paragraph 3, NewPath admits that it is a “public utility” and a
26 “telephone corporation” that provides service over “telephone lines,” as those
27 terms are defined in the California Public Utilities Code.
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- 1 4. Answering paragraph 4, NewPath finds the allegations therein quoted but
2 unsourced, vague and ambiguous. NewPath is therefore without knowledge or
3 information sufficient to form a belief as to the truth of the allegations therein,
4 and on that basis denies the allegations of the paragraph.
- 5 5. Answering paragraph 5, NewPath admits the allegations of the paragraph.
- 6 6. Answering paragraph 6, NewPath admits that the Commission has jurisdiction
7 over this proceeding under Public Utilities Code section 1702.
- 8 7. Answering paragraph 7, NewPath agrees that this proceeding should be
9 categorized as adjudicatory and that hearings will be necessary.
- 10 8. Answering paragraph 8, NewPath admits that Commission Decisions D.08-08-
11 010 and D.02-02-049 speak for themselves. NewPath is without knowledge or
12 information sufficient to form a belief as to the truth of the remaining allegations
13 in paragraph 8, and on that basis denies the remaining allegations of the
14 paragraph.

15 **FACTUAL ALLEGATIONS**

- 16 9. Answering paragraph 9, NewPath finds the allegations therein quoted but
17 unsourced, vague and ambiguous. NewPath is therefore without knowledge or
18 information sufficient to form a belief as to the truth of the allegations therein,
19 and on that basis denies the allegations of the paragraph.
- 20 10. Answering paragraph 10, NewPath admits that the information therein generally
21 describes NewPath's DAS network plans in Davis. NewPath finds the specific
22 allegations in paragraph 10 quoted but unsourced, vague and ambiguous.
23 NewPath is therefore without knowledge or information sufficient to form a
24 belief as to the truth of the allegations therein, and on that basis denies the
25 allegations of the paragraph.
- 26 11. Answering paragraph 11, NewPath finds the allegations therein quoted but
27 unsourced, vague and ambiguous. NewPath is therefore without knowledge or
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information sufficient to form a belief as to the truth of the allegations therein, and on that basis denies the allegations of the paragraph.

12. Answering paragraph 12, NewPath admits that it has requested duct space in the City’s duct overcrossing across Interstate 80, and that the City has not yet acted on NewPath’s request. NewPath denies the remaining allegations of the paragraph.

13. Answering paragraph 13, NewPath admits the allegations in the first two sentences. NewPath admits it provided City staff with a copy of D.06-04-030 (NewPath’s full facilities-based CPCN), but otherwise denies the allegations in the third sentence of the paragraph.

14. Answering paragraph 14, NewPath admits that the City’s Wireless Ordinance speaks for itself. NewPath denies the remaining allegations of the paragraph.

15. Answering paragraph 15, NewPath admits the allegations of the paragraph.

16. Answering paragraph 16, NewPath denies the allegations of the paragraph.

17. Answering paragraph 17, NewPath is without knowledge or information sufficient to form a belief as to the truth of the allegations therein, and on that basis denies the allegations of the paragraph.

18. Answering paragraph 18, NewPath admits the allegations of the paragraph.

19. Answering paragraph 19, NewPath is without knowledge or information sufficient to form a belief as to the truth of the allegations therein, and on that basis denies the allegations of the paragraph.

20. Answering paragraph 20, NewPath admits the allegations of the paragraph.

21. Answering paragraph 21, NewPath is without knowledge or information sufficient to form a belief as to the truth of the allegations therein, and on that basis denies the allegations of the paragraph.

22. Answering paragraph 22, NewPath finds the allegations therein vague and ambiguous. NewPath is therefore without knowledge or information sufficient

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to form a belief as to the truth of the allegations therein, and on that basis denies the allegations of the paragraph.

23. Answering paragraph 23, NewPath admits receiving a letter dated December 5, 2009, from the City Manager, purporting to rescind the encroachment permits the City had issued. NewPath finds that the balance of the allegations in paragraph 23 do not quote the rescission letter accurately, and on that basis denies the allegations of the paragraph.

24. Answering paragraph 24, NewPath admits the allegations of the paragraph.

25. Answering paragraph 25, NewPath admits that the City Council met on January 19, 2010, on NewPath’s appeal of the City Manager’s decision. NewPath further admits that the Resolution issued by the City speaks for itself, and otherwise denies the allegations of the paragraph.

26. Answering paragraph 26, NewPath admits the allegations of the paragraph.

ANSWER TO FIRST CLAIM FOR RELIEF

27. Answering paragraph 27, in which the City incorporates previous paragraphs of the Complaint by reference, NewPath incorporates by reference the responses herein to the allegations made in the specified paragraphs of the Complaint.

28. Answering paragraph 28, NewPath admits that the CEQA Guidelines and the cases cited in paragraph 28 speak for themselves, and otherwise denies the allegations of the paragraph.

29. Answering paragraph 29, NewPath admits that the CEQA Guidelines speak for themselves, and otherwise denies the allegations of the paragraph.

30. Answering paragraph 30, NewPath admits that it claims several categorical exemptions apply to its Davis DAS network, and denies that none of these exemptions applies.

31. Answering paragraph 31, NewPath admits that it claims that its Davis DAS network is exempt under Section 15301 of the CEQA Guidelines (Class 1

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Exemption), and states that Section 15301 speaks for itself. NewPath otherwise denies the allegations of the paragraph.

32. Answering paragraph 32, NewPath admits that it claims that its Davis DAS network is exempt under Section 15302(c) of the CEQA Guidelines (Class 2 Exemption), and states that Section 15302(c) speaks for itself. NewPath otherwise denies the allegations of the paragraph.

33. Answering paragraph 33, NewPath admits that it claims that its Davis DAS network is exempt under Section 15303(d) of the CEQA Guidelines (Class 3 Exemption), and states that Section 15303(d) speaks for itself. NewPath otherwise denies the allegations of the paragraph.

34. Answering paragraph 34, NewPath admits that it claims that its Davis DAS network is exempt under Section 15304(f) of the CEQA Guidelines (Class 4 Exemption), and states that Section 15304(f) speaks for itself. NewPath otherwise denies the allegations of the paragraph.

35. Answering paragraph 35, NewPath admits that it claims that its Davis DAS network is exempt under Section 15332 of the CEQA Guidelines (Class 32 Exemption), and states that Section 15332 speaks for itself. NewPath otherwise denies the allegations of the paragraph.

36. Answering paragraph 36, NewPath denies the allegations of the paragraph.

37. Answering paragraph 37, NewPath admits that the Commission Decision cited therein speaks for itself, and otherwise denies the allegations of the paragraph.

38. Answering paragraph 38, NewPath denies the allegations of the paragraph.

ANSWER TO SECOND CLAIM FOR RELIEF

39. Answering paragraph 39, in which the City incorporates previous paragraphs of the Complaint by reference, NewPath incorporates by reference the responses herein to the allegations made in the specified paragraphs of the Complaint.

- 1 40. Answering paragraph 40, NewPath admits that the CEQA Guidelines and the
2 case cited in paragraph 40 speak for themselves, and otherwise denies the
3 allegations of the paragraph.
- 4 41. Answering paragraph 41, NewPath denies the allegations of the paragraph.
- 5 42. Answering paragraph 42, NewPath admits that the Commission Decision cited
6 therein speaks for itself, and otherwise denies the allegations of the paragraph.
- 7 43. Answering paragraph 43, NewPath admits that the CEQA Guidelines cited in
8 paragraph 43 speak for themselves, and otherwise denies the allegations of the
9 paragraph.
- 10 44. Answering paragraph 44, NewPath is without knowledge or information
11 sufficient to form a belief as to the truth of the allegations therein, and on that
12 basis denies the allegations of the paragraph.
- 13 45. Answering paragraph 45, NewPath finds the allegations therein vague and
14 ambiguous. NewPath is therefore without knowledge or information sufficient
15 to form a belief as to the truth of the allegations therein, and on that basis denies
16 the allegations of the paragraph.
- 17 46. Answering paragraph 46, NewPath admits that the Commission Decisions cited
18 therein speak for themselves, and otherwise denies the allegations of the
19 paragraph.
- 20 47. Answering paragraph 47, NewPath admits that the City Code, Public Utilities
21 Code and case cited therein speak for themselves, and otherwise denies the
22 allegations of the paragraph.
- 23 48. Answering paragraph 48, NewPath admits that the Commission Decision and
24 case cited therein speak for themselves, and otherwise denies the allegations of
25 the paragraph.
- 26 49. Answering paragraph 49, NewPath admits that the Commission General order
27 159-A speaks for itself, and otherwise denies the allegations of the paragraph.
- 28 50. Answering paragraph 50, NewPath denies the allegations of the paragraph.

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ANSWER TO THIRD CLAIM FOR RELIEF

- 51. Answering paragraph 51, in which the City incorporates previous paragraphs of the Complaint by reference, NewPath incorporates by reference the responses herein to the allegations made in the specified paragraphs of the Complaint.
- 52. Answering paragraph 52, NewPath admits that the Commission Decision cited therein speaks for itself, and otherwise denies the allegations of the paragraph.
- 53. Answering paragraph 53, NewPath finds the specific allegations vague and ambiguous. NewPath is therefore without knowledge or information sufficient to form a belief as to the truth of the allegations therein, and on that basis denies the allegations of the paragraph.

RESPONSE TO THE PRAYER FOR RELIEF

Answering the allegations contained in the entirety of the City’s prayer for relief, NewPath denies that the City is entitled to the relief sought or to any relief.

FIRST AFFIRMATIVE DEFENSE

As a separate and affirmative defense to the complaint, and to each and every allegation contained therein, NewPath alleges that the complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

As a separate and affirmative defense to the complaint, and to each and every allegation contained therein, NewPath alleges that the City’s actions and inactions, including but not limited to rescinding already-issued encroachment permits, failing to allow NewPath to occupy City-controlled duct crossing Interstate 80, attempting to require NewPath to remove telecommunications facilities already installed or partially installed, requiring NewPath to comply with the City’s Wireless Ordinance, and failing to allow NewPath to complete its DAS network in Davis, exceed the scope of the City’s rightful authority under Cal. Const. art. XII, § 8, as applied to NewPath and NewPath’s deployment of its DAS facilities in the City’s public rights-of-way and public utility easements; conflict and interfere with the Commission’s authority under Public Utilities Code §§ 762, 762.5 and 1001 to determine the erection and siting of structures by

1 public utilities, including the determination of the public necessity thereof and the consideration,
2 *inter alia*, of community and aesthetic values and environmental impacts in determining the
3 location of any such structures; and therefore the aforementioned City actions and inactions are to
4 that extent preempted by the state Constitution, and are void, invalid, and unenforceable.

5 **THIRD AFFIRMATIVE DEFENSE**

6 As a separate and affirmative defense to the complaint, and to each and every allegation
7 contained therein, NewPath alleges that the City's actions and inactions, including but not
8 limited to rescinding already-issued encroachment permits, failing to allow NewPath to occupy
9 City-controlled duct crossing Interstate 80, attempting to require NewPath to remove
10 telecommunications facilities already installed or partially installed, requiring NewPath to
11 comply with the City's Wireless Ordinance, and failing to allow NewPath to complete its DAS
12 network in Davis, impair NewPath's state franchise rights and constitute effective prohibition of
13 NewPath's services and, therefore, are preempted under Cal. Pub. Util. Code §§ 7901 and 7901.1,
14 and are void, invalid, and unenforceable.

15 **FOURTH AFFIRMATIVE DEFENSE**

16 As a separate and affirmative defense to the complaint, and to each and every allegation
17 contained therein, NewPath alleges that the City's actions and inactions, including but not
18 limited to rescinding already-issued encroachment permits, failing to allow NewPath to occupy
19 City-controlled duct crossing Interstate 80, attempting to require NewPath to remove
20 telecommunications facilities already installed or partially installed, requiring NewPath to
21 comply with the City's Wireless Ordinance, and failing to allow NewPath to complete its DAS
22 network in Davis, constitute effective prohibition of wireless services and thereby violate
23 Section 332(c)(7)(B)(i)(II) of the Telecommunications Act (47 U.S.C. § 332(c)(7)(B)(i)(II)),
24 and are void, invalid, and unenforceable.

25 **FIFTH AFFIRMATIVE DEFENSE**

26 As a separate and affirmative defense to the complaint, and to each and every allegation
27 contained therein, NewPath alleges that the City's actions and inactions, including but not
28 limited to the City Council's validating of the City Manager's rescission of already-issued

1 encroachment permits, and requiring NewPath to comply with the City's Wireless Ordinance
2 while ignoring the massive amount of evidence submitted by NewPath regarding the existence of
3 significant coverage gaps in Davis, constitutes a rescission without substantial evidence in violation
4 of Section 332 (c)(7)(B)(iii) of the Telecommunications Act (47 U.S.C. § 332 (c)(7)(B)(iii)), and
5 are therefore void, invalid, and unenforceable.

6 **SIXTH AFFIRMATIVE DEFENSE**

7 As a separate and affirmative defense to the complaint, and to each and every allegation
8 contained therein, NewPath alleges that the City's actions and inactions, including but not
9 limited to rescinding already-issued encroachment permits, failing to allow NewPath to occupy
10 City-controlled duct crossing Interstate 80, attempting to require NewPath to remove
11 telecommunications facilities already installed or partially installed, requiring NewPath to
12 comply with the City's Wireless Ordinance, and failing to allow NewPath to complete its DAS
13 network in Davis, prohibit or have the effect of prohibiting the ability NewPath to provide its
14 interstate and intrastate telecommunications services, and therefore violate Section 253 of the
15 Telecommunications Act (47 U.S.C. § 253), and are void, invalid, and unenforceable.

16 **SEVENTH AFFIRMATIVE DEFENSE**

17 As a separate and affirmative defense to the complaint, and to each and every allegation
18 contained therein, NewPath alleges that the City's actions and inactions, including but not
19 limited to rescinding already-issued encroachment permits, failing to allow NewPath to occupy
20 City-controlled duct crossing Interstate 80, attempting to require NewPath to remove
21 telecommunications facilities already installed or partially installed, requiring NewPath to
22 comply with the City's Wireless Ordinance, and failing to allow NewPath to complete its DAS
23 network in Davis, preclude the achievement of the telecommunications policy objectives of the
24 State Legislature and the Commission to deploy throughout California robust
25 telecommunications infrastructures and technologies, and thus are preempted and are void,
26 invalid, and unenforceable.

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VERIFICATION

I am the attorney for the Defendant herein; said Defendant is absent from the County of San Francisco, California, where I have my office, and I make this verification for said Defendant for that reason; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 12, 2010 at San Francisco, California.

/s/ Stephen P. Bowen

Stephen P. Bowen