



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

FILED
05-17-10
04:59 PM

CITY OF DAVIS, CALIFORNIA

Complainant,

v.

NEUPATH NETWORKS, LLC, a New
Jersey Limited Liability Company
(U-6928-C)

Defendant

Case No. C. 10-03-011
(Filed March 23, 2010)

JOINT CASE MANAGEMENT STATEMENT

Pursuant to the *Administrative Law Judge's Ruling Setting A Prehearing Conference, Ordering The Parties To Meet And Confer, Commence Discovery, And To File Prehearing Conference Statements*, issued on April 12, 2010, Complainant City of Davis, California ("City") and Defendant NewPath Networks, LLC (U-6928-C) ("NewPath") (together, "the Parties") hereby file their Joint Case Management Statement.

1. FACTUAL, POLICY AND LEGAL ISSUES REQUIRING COMMISSION DECISION

- Whether NewPath's proposed DAS network in Davis falls within the specified CEQA exemptions.
- If the proposed DAS network is exempt, whether it falls within the exceptions to the CEQA exemptions.
- Whether a CEQA-based challenge can be timely raised at this time.
- Whether the Commission provided adequate notice to the City and other concerned people regarding (1) the proposed expansion of NewPath's Certificate of Public Convenience and Necessity in A.05-05-021, and (2) the proposed approval of the Notice to Proceed and the Commission's review of the proposed project under CEQA.

- Whether the Commission CEQA staff's review of NewPath's Notice of Proposed Construction and its issuance of a Notice To Proceed is a discretionary act under CEQA.
- Details of NewPath's Notice of Proposed Construction CEQA submission to the Commission.
- Whether NewPath violated its CPCN by commencing construction of its DAS network in Davis before obtaining its Notice to Proceed.
- Whether NewPath provided adequate information to City staff to permit the staff to evaluate NewPath's proposed DAS network.
- Whether NewPath's proposed DAS network in Davis is required to comply with the City's Wireless Telecommunications Ordinance, and if so, whether it does so comply.
- Whether Cal. Const. art. XIII, § 8, and Public Utilities Code sections 762, 762.5 and 1001, or any of these sections, apply to NewPath's request to construct its proposed DAS network in Davis and whether these sections constrain the City's authority to regulate in the public rights of way or constrain the Commission's or the City's review of this system under CEQA.

NewPath believes the following additional issues require Commission decision in this proceeding. The City disputes each and every one of these issues or the characterization of these issues:

- Whether the City's actions and inactions 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 public utilities, including the determination of the public necessity thereof and the consideration, *inter alia*, of community and aesthetic values and environmental impacts in determining the location of any such structures; and therefore the aforementioned City actions and inactions are to that extent preempted by the state Constitution.
- Whether the City's actions and inactions impair NewPath's state franchise rights and constitute effective prohibition of NewPath's services and, therefore, are preempted under Cal. Pub. Util. Code §§ 7901 and 7901.1.
- Whether the City's actions and inactions preclude the achievement of the telecommunications policy objectives of the State Legislature and the Commission to deploy throughout California robust telecommunications infrastructures and technologies, and thus are preempted and are void, invalid, and unenforceable.

- Whether the City's actions and inactions prohibit or have the effect of prohibiting the ability NewPath to provide its interstate and intrastate telecommunications services, and therefore violate Section 253 of the Telecommunications Act (47 U.S.C. § 253).
- Whether the City's actions and inactions constitute effective prohibition of wireless services and thereby violate Section 332(c)(7)(B)(i)(II) of the Telecommunications Act (47 U.S.C. § 332(c)(7)(B)(i)(II)), and are void, invalid, and unenforceable.
- Whether the City's actions and inactions, including but not limited to the City Council's validating of the City Manager's rescission of already-issued encroachment permits, and requiring NewPath to comply with the City's Wireless Ordinance, constitutes a rescission without substantial evidence in violation of Section 332 (c)(7)(B)(iii) of the Telecommunications Act (47 U.S.C. § 332 (c)(7)(B)(iii)).

Further, with respect to all of these issues, NewPath believes the following subject areas require discovery and may require Commission decision:

- Details of NewPath's meetings with City personnel
- Details of NewPath's planned DAS network
- Details of the City's Village Homes neighborhood, public parks, public greenbelts, and underground utility districts
- Communications and documents among City personnel concerning NewPath's planned DAS network
- Basis for City's granting of encroachment permits and decisions concerning placement of NewPath's facilities
- Communications and documents among City personnel concerning Stop Work Order and rescission of NewPath's encroachment permits
- Communications and documents between City personnel and others concerning NewPath's planned DAS network
- Basis for City Manager's Stop Work Order and rescission of NewPath's encroachment permits
- Basis for City Council's validation of City manager's rescission of NewPath's encroachment permits
- Details of NewPath's DAS network construction prior to Stop Work Order
- Communications and documents among City personnel and others concerning applicability of Davis Wireless Ordinance to NewPath DAS network

2. DISPUTED FACTUAL ISSUES

At this point in the proceeding, all the factual issues identified above in Section 1 are in dispute. Prior to filing testimony and holding hearings, the Parties will endeavor to reach stipulations on as many factual issues as possible.

3. POSSIBILITY OF SETTLEMENT AND USE OF MEDIATION

At this point in the proceeding, the Parties do not believe settlement is likely, nor that Commission-assisted mediation would result in the resolution of any of the issues in dispute.

4. NEED FOR DISCOVERY

The parties dispute whether all of the issues identified in Section 1 will require discovery. The City contends that, as to the CEQA causes of action, whether NewPath's proposed DAS network project is exempt from CEQA will be determined based on the record. Discovery is not generally allowed in CEQA cases. *See, e.g., Western States Petroleum Association v. Superior Court*, 9 Cal. 4th 559 (1995). The City also contends that resolution of the legal issues regarding application of the City's local regulations and NewPath's related affirmative defenses also will not require discovery into all of the issues related to the City's rescission of the permits and whether the Commission's Notice to Proceed violated CEQA.

5. NEED FOR HEARING

The Parties believe that hearings will be required on the factual and policy issues identified above in Section 1. The legal issues will be addressed in the Parties' briefs.

6. HEARING DAYS AND WITNESSES

The Parties estimate that five days of hearings will be required. At this point in the proceeding, the City plans to present 3 witnesses, and NewPath plans to present 4 witnesses.

The number of hearing days and witnesses may change as discovery and stipulation discussions proceed.

7. PROPOSED SCHEDULE

The Parties propose the following schedule:

Prehearing Conference	May 20, 2010
Discovery	Ongoing
Opening Testimony	July 15 (+8 weeks)
Reply Testimony	August 12 (+4 weeks)
Evidentiary Hearings	September 13-17
Opening Briefs	October 8 (+3 weeks)
Reply Briefs	October 29 (+3 weeks)
Presiding Officer's Decision	December 3 (+5 weeks)
Commission Decision	January 13, 2011

Dated: May 17, 2010

Respectfully submitted,

/s/ Harriet A. Steiner
HARRIET A. STEINER
McDonough Holland & Allen PC
500 Capitol Mall, 18th Floor
Sacramento, CA 95814
Telephone: (916) 444-3900
Facsimile: (916) 444-8334
Email: hsteiner@mhalaw.com;
khood@mhalaw.com

Attorneys for Complainant
City of Davis

/s/ Stephen P. Bowen
STEPHEN P. BOWEN
Bowen Law Group
235 Montgomery Street, Suite 742
San Francisco, CA 94104
Telephone: (415) 394-7500
Facsimile: (415) 394-7505
Email: steve.bowen@bowenlawgroup.com

Attorney for Defendant
NewPath Networks, LLC

CERTIFICATE OF SERVICE

I certify that I have by regular mail and/or electronic mail this day served a true copy of the original document entitled:

**Case No. C. 10-03-011
JOINT CASE MANAGEMENT STATEMENT**

on all parties of record in this proceeding or their attorneys of record, per the attached service list.

Dated May 17, 2010, at San Francisco, California.

/s/ Stephen P. Bowen

Case No. C. 10-03-011

SERVICE LIST

HARRIET A. STEINER
MCDONOUGH HOLLAND & ALLEN PC
500 CAPITOL MAILL, 18TH FLOOR
SACRAMENTO, CA 95814
FOR: CITY OF DAVIS

Information Only

MARTIN HOMEC
PO BOX 4471
DAVIS, CA 95617

State Service

MYRA J. PRESTIDGE
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5041
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214