

## FOR BOARD ACTION

Agenda Item # 5

Meeting Date:

6/29/04

**SUBJECT:** Mutual Confidentiality Agreement with Amperion, Inc

**PREPARED BY:** Walt Lorber, Director of Core Services


ITEM DESCRIPTION:

Hiawatha Broadband Communications received acceptable BPL equipment proposals from two prospective providers. HBC, in consultation with RPU, has determined that it would be optimal to test both types of equipment. One provider, Amperion, has requested that HBC (and RPU as a party to the test) sign a confidentiality agreement. HBC has done so. The proposed agreement was reviewed by the Rochester City Attorney and found acceptable for RPU execution except for its lack of specificity in acknowledging that Minnesota's statutes regarding data practices will apply. We have asked Amperion to provide clarification to that effect.

At the time of submittal of this FBA, the revised language had not been agreed to. The attached version of the agreement does not reflect the requested language.

UTILITY BOARD ACTION REQUESTED:

It is requested that the Utility Board approve a Mutual Confidentiality Agreement with Amperion, Inc. and authorize the City Clerk and Mayo to execute the agreement, contingent on the City Attorney approving the addition of appropriate language to address the applicability of Minnesota data practices law.

  
Act. General Manager

6-18-04  
Date

**ROCHESTER PUBLIC UTILITIES**

## **AMPERION**

### **Mutual Confidentiality Agreement**

The undersigned business entity or individual contemplates entering into a business relationship with Amperion, Inc., a Delaware corporation ("Amperion").

In order for the undersigned business entity or individual and Amperion to evaluate or enter into the contemplated business relationship, each party (hereinafter, a "Discloser") may disclose to the other party (hereinafter, a "Recipient") certain Confidential Information (as defined below).

Therefore, in consideration of its receipt of such Confidential Information from the other party, and of the prospective business relationship, each party agrees as follows, effective as of the date of the last signature below (the "Effective Date"):

1. "Confidential Information" means any proprietary, confidential and/or trade secret information of Discloser and/or others possessed by Discloser relating to, among other things, Discloser's products, services, technology, methodologies, specifications, manufacturing or operating methods, know-how, business or marketing plans, business relationships, or any information which, given the totality of the circumstances, the Recipient has reason to believe is proprietary, confidential, or competitively sensitive. Confidential Information may be disclosed either in documentary form (including without limitation traditional tangible media such as written documents, photographs and drawings, and intangible media such as diskettes and other magnetic or electronic data), or orally or visually or in other non-documentary form (including without limitation presentations, displays or inspections of writings, designs, drawings, photographs, models, prototypes, samples, or facilities). Tangible objects, materials or media in which Confidential Information is embodied are referred to in this Agreement as "Confidential Materials".
2. Recipient (a) will not disclose Confidential Information except to its employees, or to potential suppliers or subcontractors which Discloser has approved in advance, in each case only to the extent necessary to achieve the purposes contemplated by this Agreement and only to persons legally bound by written agreement or otherwise to comply with Recipient's obligations under this Agreement, (b) will not use Confidential Information except for the purposes contemplated by this Agreement, (c) will use at least the same degree of care to safeguard Confidential Information that it uses to protect its own confidential and proprietary information, and in any event not less than a reasonable degree of care under the circumstances, and (d) will make copies of Confidential Materials only as needed for such purpose, all of which shall include any existing markings indicating that they are Confidential Information of Discloser, or shall have markings supplied by Recipient.
3. The term of this Agreement shall be one year from the Effective Date. The obligations of this Agreement will remain in effect for five years after the date of the last disclosure of Confidential Information hereunder, at which time the obligations of this Agreement will terminate; provided, however, that the obligations of this agreement shall remain in effect with respect to trade secrets until such time that such information is no longer a trade secret. Upon termination of discussions concerning the possible business relationship or upon Discloser's request, Recipient will return or, upon requesting and receiving the written authorization of Discloser, destroy all Confidential Materials.

4. Confidential Information shall not include information that: (a) was in the public domain when disclosed; (b) becomes public domain after disclosure, other than as a result of Recipient's violation of this Agreement; (c) was in Recipient's possession when disclosed and was not acquired directly or indirectly from Discloser; (d) is shown by written evidence to have been developed by Recipient independently after disclosure without benefit of the Confidential Information; or (e) was received after disclosure from a third party who did not require it to be held in confidence and who did not acquire it directly or indirectly from Discloser.

5. Recipient will notify Discloser immediately of any breach of this Agreement of which it becomes aware, and will assist and cooperate with Discloser in minimizing the consequences of such breach.

6. Either party will sustain irreparable harm by a breach of this Agreement for which money damages would not be an adequate remedy. Each party therefore agrees that, in the event of a threatened or continuing breach of this Agreement, Discloser shall be entitled, without prejudice to all other available remedies, to immediate injunctive or other equitable relief. Recipient shall indemnify and hold Discloser harmless from any damages, losses, costs, and expenses, including reasonable attorney fees, arising from any breach of this Agreement.

7. Nothing in this Agreement is intended to grant any rights to either party under any patent, copyright, trade secret or other intellectual property right nor shall this Agreement grant either party any rights in or to the other party's Confidential Information, except the limited right to review such Confidential Information solely for the purposes of determining whether to enter into the proposed business relationship between the parties. Neither party makes any representation or warranty, express or implied, as to the accuracy, completeness, or noninfringement of the Confidential Information that it provides to the other party. Both parties agree that the disclosing party will not have any liability to the receiving party relating to or resulting from the use of the Confidential Information or any errors therein or omissions therefrom.

8. This Agreement is the complete and exclusive agreement of the parties with respect to this subject matter, supersedes all prior and contemporaneous written or oral understandings relating thereto, and shall survive the expiration or termination of any other agreement. This Agreement shall be subject to and be interpreted in accordance with the laws of the Commonwealth of Massachusetts. The federal and state courts presiding in Boston, Massachusetts shall have exclusive jurisdiction to adjudicate any dispute arising out of this Agreement, and both parties irrevocably consent to the personal jurisdiction of such courts.

9. All notices and other communications given under this Agreement shall be in writing in the English language, addressed to the undersigned representatives of the parties at the addresses below, and shall be deemed to have been given on the date delivered when hand delivered, one business day after mailing if sent via reputable overnight courier, or four business days after mailing if sent by first-class registered or certified mail, postage prepaid.

10. Neither party hereto shall (by operation of law or otherwise) assign, transfer or subcontract its rights or delegate its performance under this Agreement without the prior written consent of the other party hereto and any such assignment, transfer or delegation without such consent shall be void and of no force or effect; provided, however, that either party hereto may assign all of its rights and obligations hereunder to a successor to all or substantially all of its business and assets (by acquisition, merger, sale of assets or otherwise) who accepts its terms.

11. In the event that either party or their respective directors, officers, or employees are requested or required by legal process, by order of any court of competent jurisdiction, by any governmental agency, by any applicable law, rule or regulation, to disclose any of the Confidential Information of the other party, the party required to make such disclosure shall give prompt notice so that the other party may seek a protective order or other appropriate relief. In the event that such protective order is not obtained, the party required to make such disclosure shall disclose only that portion of the Confidential Information that its counsel advises that it is legally required to disclose, and shall work with the owner of such Confidential Information to minimize the extent and effects of such disclosure.

12. Nothing herein shall obligate either party to proceed with any transaction with the other, and each party reserves the right, in its sole discretion, to terminate the discussions contemplated by this Agreement concerning a mutually agreeable business opportunity. Neither this Agreement nor the disclosure or receipt of Confidential Information constitutes or implies any promise or intention by either party to enter into a partnership, agency, employment, or joint venture relationship with the other party hereto.

**Amperion, Inc.**

Two Tech Drive  
Andover, MA 01810

By: \_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Name (Print or Type)

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

**[Name of Other Entity]**

Address: \_\_\_\_\_  
\_\_\_\_\_

By: \_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Name (Print or Type)

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date



## RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, that the Board approves, contingent upon acceptance by the Rochester City Attorney of language clarifying the applicability of Minnesota law on data practices, a contract agreement with Amperion, Inc. and that the Mayor and the City Clerk are authorized to execute the agreement for

Mutual Confidentiality Agreement

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 29<sup>th</sup> day of June 2004.

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President

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Secretary