

FOR BOARD ACTION

Agenda Item # 10

Meeting Date:

7/31/07

SUBJECT: Nondisclosure Agreement (NDA) with Current Communications

PREPARED BY: Dan Sturm, Supervisor of Technical Services

ITEM DESCRIPTION:

RPU wishes to begin the process of exploring the possibility of entering into a communications project that would include Broadband over Power Line (BPL) and wireless. This type of project was looked into approximately two years ago, but at that time the technology had not matured enough to warrant further investigation and a full project.

However, with the advent of newer technology and the maturing nature of BPL, RPU wishes to enter into discussions and research of such a project once again. To begin this new process a Nondisclosure Agreement (NDA) is required.

UTILITY BOARD ACTION REQUESTED:

Staff recommends the Utility Board approve the Nondisclosure Agreement (NDA) with Current Communications, a BPL vendor, as prepared and authorize the Mayor and City Clerk to execute the agreement.

Reviewed 7-26-07 WNP


General Manager

7/26/07
Date

ROCHESTER PUBLIC UTILITIES

CURRENT TECHNOLOGIES & CURRENT COMMUNICATIONS SERVICES
CONFIDENTIALITY AGREEMENT

THIS CONFIDENTIALITY AGREEMENT (the "Agreement") is made and entered into as of this 19th day of July, 2007, between (i) CURRENT TECHNOLOGIES, LLC and CURRENT COMMUNICATIONS SERVICES, LLC (d/b/a CURRENT Communications) both having a place of business at 20420 Century Boulevard, Germantown, MD 20874, Telephone: 301-944-2700 and Facsimile: 301-944-2701 (collectively, "CURRENT"); and (ii) City of Rochester, a Minnesota municipal corporation, acting through its Public Utility Board having a place of business at 4000 East River Road, Rochester, MN, 55906, Telephone: 507-280-1500 and Facsimile: 507-280-1542 (the "COMPANY").

WITNESSETH:

WHEREAS, CURRENT and COMPANY are about to enter into discussions and to exchange information regarding a potential business relationship between the Parties;

WHEREAS, in the course of such discussions, each Party expects to disclose certain confidential, proprietary and trade secret information to the other Party; and

WHEREAS, CURRENT and COMPANY seek to safeguard and protect their respective confidential, proprietary and trade secret information.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto hereby agree as follows:

1. Definitions.

1.1 As used herein, the term "Disclosing Party" shall mean: (a) CURRENT, with respect to all Proprietary Information disclosed by CURRENT to COMPANY hereunder; or (b) COMPANY, with respect to all Proprietary Information disclosed by COMPANY to CURRENT hereunder.

1.2 As used herein, the term "Receiving Party" shall mean: (a) COMPANY with respect to all Proprietary Information disclosed by CURRENT hereunder; or (b) CURRENT with respect to all Proprietary Information disclosed by COMPANY hereunder.

1.3 As used herein, the term "Party" shall mean CURRENT or COMPANY as the case may be. The term "Parties" shall mean CURRENT and COMPANY.

1.4 The term "Affiliate" shall mean any company, corporation, or other entity, which controls, is controlled by, or is under common control with a party now and shall be considered an Affiliate only so long as the ownership or control, directly or indirectly, meets the conditions set forth herein. For purposes of this definition, "control" shall mean ownership or control,

directly or indirectly, of more than fifty (50%) percent of the shares having voting rights, or other equivalent rights of the subject entity entitled to vote.

1.5 As used herein, the term "Proprietary Information" shall mean all confidential or proprietary information including, without limitation, trade secrets, names and expertise of employees and consultants, know-how, formulae, processes, ideas, inventions (whether or not patentable), schematics, and other technical, business, financial, company and product development information and data (whether or not reduced to writing), which is disclosed or made available by the Disclosing Party to the Receiving Party and (a) is clearly marked as confidential or proprietary at the time of disclosure, (b) if disclosed orally, is orally identified at the time of disclosure or promptly thereafter in writing or electronically as confidential or proprietary, or (c) that, regardless of the form of disclosure, should reasonably have been understood by the Receiving Party because of legends or other markings, the circumstances of disclosure, or the nature of the information itself to be proprietary or confidential to the Disclosing Party, an Affiliate of the Disclosing Party or to a third party. Notwithstanding the foregoing, Proprietary Information shall not include information that: (i) is in the public domain on the date hereof or comes into the public domain other than through the fault or negligence of the Receiving Party; (ii) is lawfully obtained by the Receiving Party from a third party without breach of this Agreement and otherwise not in violation of the Disclosing Party's rights; (iii) is known to the Receiving Party at the time of disclosure as shown by its written records in existence at the time of disclosure; (iv) is independently developed by the Receiving Party, provided the Receiving Party can demonstrate that it did so without making any use of any Proprietary Information or other information that the Disclosing Party disclosed in confidence to any third party, or (v) is required to be disclosed by the Minnesota Government Data Practices Act. If the Receiving Party is required to disclose Proprietary Information pursuant to the order of any court or governmental agency, the Receiving Party shall first notify the Disclosing Party of any such order and, if practicable, afford such Party the opportunity to seek a protective order relating to any such disclosure and, provided further, that the Receiving Party will furnish only that portion of the Proprietary Information that it is legally required to disclose and will exercise all reasonable efforts to obtain reliable assurances that confidential treatment will be accorded the remaining Proprietary Information.

2. Nondisclosure. In consideration of the Disclosing Party's disclosure of Proprietary Information to the Receiving Party, the Receiving Party agrees that it: (i) shall treat all Proprietary Information as strictly confidential; (ii) shall not disclose or use any Proprietary Information except for the purpose (a) of evaluating the information disclosed by the Disclosing Party with respect to a possible transaction between the Parties or (b) performing its duties or exercising its rights under an agreement entered into by the Parties (collectively the "Purpose"); (iii) shall protect all Proprietary Information, whether in storage or in use, with the same degree of care as the Receiving Party uses to protect its own Proprietary Information against public disclosure, but in no case with less than reasonable care; (iv) shall disclose Proprietary Information only to such officers, directors, employees, agents, and attorneys (collectively "Representatives") of the Receiving Party who need to know such Proprietary Information for the Purpose, provided such Representatives are informed of the confidential nature of such Proprietary Information and the terms of this Agreement prior to disclosure and provided further that the Receiving Party shall be responsible in the event of such Representative's breach of this

Agreement; (v) shall be permitted to disclose Proprietary Information to its Affiliates (and its Affiliates may receive Proprietary Information from the Disclosing Party), provided that, Receiving Party shall require such Affiliates to be bound by the terms hereof, and provided further that the Receiving Party shall be responsible in the event of such Affiliates' breach of this Agreement and (vi) shall not copy or reverse engineer any such Proprietary Information.

3. Return. Upon the completion or termination of the discussions regarding a potential business relationship between the Parties, or at any time upon the Disclosing Party's written request, the Receiving Party shall immediately (i) return to the Disclosing Party all items of Proprietary Information (including all copies thereof) of the Disclosing Party and (ii) destroy any notes or personal memoranda which include such Proprietary Information. Notwithstanding the return or destruction of Proprietary Information, the Receiving Party will continue to be bound by the terms and obligations of this Agreement.

4. Ownership. All right, title and interest in and to the Proprietary Information disclosed by the Disclosing Party shall remain the exclusive property of the Disclosing Party. The Parties acknowledge and agree that this Agreement shall not be construed as a transfer or sale by the Disclosing Party of any right whatsoever, by license or otherwise, in or to any of its Proprietary Information, and no licenses or rights under any patent, copyright, trademark, or trade secret are granted or implied or are to be implied by this Agreement.

5. Injunctive Relief. CURRENT and COMPANY acknowledge that the extent of damages in the event of the breach of any provision of this Agreement would be difficult or impossible to ascertain, and that there will be available no adequate remedy at law in the event of any such breach. Each Party therefore agrees that in the event it breaches any provision of this Agreement, the other Party will be entitled to specific performance and injunctive or other equitable relief, in addition to any other relief to which it may be entitled at law or in equity. Any such relief shall be in addition to and not in lieu of any appropriate relief in the way of monetary damages. Notwithstanding anything to the contrary contained herein, neither Party shall be liable to the other for any indirect, incidental, special or consequential damages.

6. General.

6.1 The term of this Agreement shall continue for a period of 3 years from the date hereof, provided that the non-disclosure and use restriction obligations under this Agreement shall survive with respect to the Proprietary Information for such longer period during which such Proprietary Information retains its status as a trade secret or qualifies as confidential under applicable law.

6.2 This Agreement shall be governed by and construed in accordance with the laws of the State of Maryland, without regard to its principles of conflicts of laws.

6.3 In the event any provision of this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, the remaining provisions of this Agreement shall remain in full force and effect to the maximum extent possible.

6.4 This Agreement constitutes the entire agreement between the Parties hereto relating to the subject matter hereof and may not be amended or in any manner modified except by a written instrument signed by authorized representatives of both Parties. All prior or contemporaneous agreements or understandings between CURRENT and COMPANY relating to the subject matter hereof, whether oral or written, are superseded by and merged into this Agreement. This Agreement may be executed in any number of counterparts and by facsimile, each of which will be deemed an original, but all of which together will constitute one and the same instrument.

6.5 The waiver, express or implied, by any Party of any of its rights arising under this Agreement shall not constitute or be deemed a waiver of any other right hereunder, whether of a similar or dissimilar nature.

6.6 This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns. This Agreement shall not be assigned, nor shall any Proprietary Information be transferred to any successor or assignee, without the prior written consent of the Disclosing Party, which consent shall not be unreasonably withheld.

6.7 Except upon mutual written agreement, or as may be required by law, neither Party to this Agreement shall in any way or in any form disclose the discussions that gave rise to this Agreement or the fact that there have been, or will be, discussions or negotiations covered by this Agreement.

6.8 The Receiving Party acknowledges that the Disclosing Party has neither made any representations nor given any warranties as to the accuracy or completeness of the Proprietary Information for the Receiving Party's purposes. The Receiving Party agrees that the Disclosing Party shall have no liability or responsibility for errors or omissions in, or any decisions made by the Receiving Party in reliance on, any Proprietary Information disclosed under this Agreement.

6.9 The Receiving Party will notify the Disclosing Party in writing promptly upon the occurrence of any unauthorized release of Proprietary Information or breach of this Agreement of which it is aware.

6.10 This Agreement is neither intended to create, nor shall it be construed as creating, (i) a joint venture, partnership or other form of business association between the Parties, (ii) an obligation to buy or sell products using or incorporating the Proprietary Information, (iii) an implied or express license grant from either Party to the other, (iv) any obligation to continue discussions or negotiations with respect to any potential agreement between the Parties or (v) an agreement to enter into any agreement.

IN WITNESS THEREOF, the Parties hereto, by their duly authorized representatives, have executed this Agreement as of the date first set forth above.

ROCHESTER PUBLIC UTILITIES

By: _____
Name: Larry Koshire
Title: General Manager

CITY OF ROCHESTER

By: _____
Name: Ardell Brede
Title: Mayor

Attest:

By: _____
Name: Judy Scherr
Title: City Clerk

Reviewed By:

By: _____
Name: Terry Adkins
Title: City Attorney

CURRENT TECHNOLOGIES, LLC
a Delaware limited liability company

By: _____
Name:
Title:

CURRENT COMMUNICATIONS SERVICES, LLC
a Delaware limited liability company

By: _____
Name:
Title:



RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve a Nondisclosure Agreement (NDA) with Current Communications, a Broadband over Power Lines (BPL) vendor, and to request the Mayor and the City Clerk to execute the agreement for research and exploration purposes of a BPL communications project.

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 31st day of July, 2007.

President

Secretary