

ORDINANCE No. 180376

Grant a franchise to NewPath Networks, LLC a New Jersey Limited Liability Company for five years for Telecommunications Services, and establish terms and conditions (Ordinance)

The City of Portland ordains:

Section A. The Council finds:

- a. NewPath Networks, LLC (“NewPath”) has informed the City that it designs, installs, and operates fiber optic-fed distributed antenna systems that extend existing wireless networks to improve wireless signal quality and coverage.
- b. NewPath has informed the City that it’s intended customers are the domestic wireless service providers, both PCS and Cellular. NewPath was founded to address the increasing demand from wireless service providers for a solution to long-standing coverage problems as well as network enhancements that add capacity to accommodate high speed data applications.
- c. NewPath has informed the City that it provides a broadband transport system utilizing existing utility and telecommunication assets in the public streets. Newpath’s network objective is to provide on-street coverage in west hills and portions of W. Burnside Street, specifically:
 - North on NW Skyline Blvd.
 - East on West Cornell Rd. into Macleay Park
 - Junction of W. Burnside Rd. and SW Barnes Rd.

The facilities will be a combination of fiber optic strand and cable, antennae and radio frequency repeater units on existing utility poles in the Streets.

- d. NewPath has informed the City that it’s technology is flexible enough to allow multiple wireless service providers to use one antenna or antenna array. It therefore supports the City’s policy of co-location, whereby all alternatives are explored before new cell towers are built.

NOW, THEREFORE, the Council directs:

Section 1. NATURE AND TERM OF GRANT

A. Grant of Authority

1. The City grants to NewPath Networks, LLC (“Grantee”), a New Jersey Limited Liability Company qualified to do business in the State of Oregon, and Grantee’s successors and assigns, as approved by the City under Section 12 of this Franchise, the privilege and authority to access Structures located in the City Streets to construct, repair, replace, maintain and operate Facilities for a Telecommunications System in, under and over the surface of City Streets. Access to Structures is subject to receipt of authorization from the owner of the Structures.
2. Grantee intends to use its Telecommunications System to provide Telecommunications Services. Grantee represents that it has applied for and received

all necessary regulatory authority to provide Telecommunication Services. Grantee has a certificate of authority from the Oregon Public Utilities Commission (OPUC). OPUC Order No. 05-143. The service allowed by the PUC may be provided to the extent they are for the provision of Telecommunications Services.

3. This Franchise does not authorize Grantee to operate a cable system as defined by 47 USC §522(7) (04/01/2006), or provide video programming, as defined by 47 U.S.C.A §522 (20) (04/01/2006).
 4. To the extent that Grantee's use of its Telecommunications System changes, the City of Portland may reopen this Franchise pursuant to the provisions of Section 16(I).
- B. Duration. The term of this Franchise, and all rights and obligations pertaining thereto, shall be five (5) years, as measured from its effective date, unless terminated sooner as provided in this Franchise or renewed in accordance with Section 15.
- C. Effective Date. The effective date of this Franchise shall be 60 days after passage of the Franchise by the City Council, unless NewPath fails to file an unconditional written acceptance of this Franchise in accordance with Section 17, in which event this Franchise shall thereupon be null and void. The passage date of this Franchise is set forth on the last page of the original franchise ordinance, as stamped by the Council Clerk.
- D. Franchise Not Exclusive. This Franchise is not exclusive. The City expressly reserves the right to grant rights to other Persons, as well as the right in its own name as a municipality, to use the Streets for similar or different purposes allowed Grantee hereunder, by lease, franchise, permit or otherwise.
- E. Charter and General Ordinances To Apply. To the extent authorized by law, this Franchise is subject to the Charter of the City of Portland and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of Grantee, now in effect or hereafter made effective. Section 10-201 through 10-218, inclusive, of the Charter of the City of Portland, (1942 compilation, as revised in part by subsequent amendments), are hereby incorporated by reference and made a part of this Franchise, to the extent authorized by law. Nothing in this Franchise shall be deemed to waive the requirements of the various codes and ordinances of the City regarding permits, fees to be paid or the manner of construction.

Section 2. DEFINITIONS

- A. Captions. Throughout this Franchise, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Franchise. The captions shall not affect the meaning and interpretation of this Franchise.

NewPath RoW Franchise
O://UtilityProgram/Franchises/NewPath/RoWAgmt.doc

- B. Definitions. For the purpose of this Franchise, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.
1. "Attached Facilities" are any Facilities affixed to a Structure except optical fiber, wires, coaxial cable and the mounting hardware used to attach optical fiber, wires, coaxial cable. Examples of "Attached Facilities" include but are not limited to antennas, telephone boxes, power boxes, and other equipment boxes and cabinets on Structures;
 2. "City" means the City of Portland, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.
 3. "City Council" means the Council of the City of Portland.
 4. "Facility" means Grantee's equipment and property, including but not limited to the optical fiber, wires, pipes, mains, conduits, ducts, pedestals, antennas, cabinets and electronic equipment located in the Streets used for transmitting, receiving, distributing, providing or offering Telecommunication Services over the spectrum of radio frequencies licensed by the Federal Communications Commission.
 5. "Franchise" means this Franchise, as approved by the City Council and accepted by Grantee, according to the terms of Section 17 of this Franchise.
 6. "Grantee" and "NewPath" mean NewPath Networks, LLC.
 7. "Gross Revenues" shall mean any and all gross revenues derived by Grantee from the provision of any and all products, services or charges, originating or terminating in Portland, Oregon or billed to a circuit, switch or address in Portland, Oregon, including revenues from dedicated private networks. Gross revenues shall include any and all revenue from leases and IRUs for the Portland portion of Grantee's system.
 8. "Guy Pole" means a pole that is used primarily to structurally support an electrical or telephone distribution or transmission pole, but has no energized conductors or telephone wires or Facilities attached.
 9. "Indefeasible Right of User Interest" or "IRU" means a form of acquired capital in a telecommunications system, in which the holder of the interest possesses a right to use the telecommunications system, but not the right to control, maintain, construct or revise the telecommunications system.
 10. "Minimum Annual Franchise Fee" shall mean \$10,000.

11. "Penalty" means any and all monetary penalties provided for in this Franchise.
12. "Person" means any individual, sole proprietorship, partnership, association, corporation or other form of organization authorized to do business in the State of Oregon, and includes any natural person.
13. "Streets" means the surface of, and the space above and below, any public street, road, alley or highway, within the City, used or intended to be used by the general public for travel, to the extent the City has the right to allow Grantee to use them.
14. "Structure" means any utility pole, Guy Pole, utility pole extension, light standard or other similar pole in the Streets that is suitable for the installation of Facilities. An "Original Structure" is a Structure that has not been replaced to accommodate Facilities.
15. "Telecommunications Service" means all products and services related to the transport of radio frequency signals for providers of commercial mobile radio service, as defined in Section 20.3 of title 47 of the Code of Federal Regulations as in effect on October 1, 2005, together with any services currently authorized by the Oregon Public Utility Commission.
16. "Telecommunications System" means all necessary Facilities owned or used by Grantee for the purpose of providing Telecommunications Services and located in, under and above City Streets, excluding ducts, conduits and vaults leased from another City franchisee, licensee, lessee or permittee.
17. "Year", "Annual", or "Annually" means the period consisting of a full calendar year, beginning January 1 and ending December 31, unless otherwise provided in this Franchise.

Section 3. COMPENSATION AND AUDITING

A. Amount of compensation.

As compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City, the Grantee shall pay as a franchise fee to the City, through the duration of this Franchise, the greater of either:

- a. The Minimum Annual Franchise Fee; or

- b. An amount equal to five percent (5%) of the Grantee's Gross Revenues. However, revenues derived from the sale of facilities and subject to Section 3(A)(2), shall be excluded from the Gross Revenues calculation of franchise fees under this Section 3(A)(1).
2. As additional compensation to the amounts set forth in Section 3(A)(1):
- a. In the event Grantee sells any portion of its Telecommunications System, Grantee shall pay a one-time franchise fee to the City of one percent (1%) of the sales price.
 - b. The calculation of the one percent (1%) franchise fee on sales shall be based on the sale price of the Portland, Oregon portion of the Telecommunications System or the minimum annual fee of \$10,000, whichever is greater. The calculations of the one percent franchise fee on sales revenues shall be calculated under the following formula:

Franchise fee = (.01) x Ts x (Fp÷Ft), where:

Ts = Total sales price for the facility(ies);

Fp = the number of Structures with Attached Facilities sold located within the City; and,

Ft = the total number of Structures with Attached Facilities.

B. Franchise Fee Payments.

- 1. In the first year of this Franchise, Grantee's Minimum Annual Franchise Fee shall be payable forty five (45) days after the Effective Date of this Franchise. Thereafter, Grantee's Minimum Annual Franchise Fee payable under Section 3(A)(1) shall be paid to the City annually following the effective date of this Franchise. Each annual payment shall be made for the immediately preceding calendar year ending December 31, and each annual payment shall be paid on or before the forty-fifth (45th) day following December 31st.

2. Gross Revenue based franchise fees payable under Section 3(A)(1), together with franchise fees based upon revenues from sales under Section 3(A)(2), shall be computed and paid on or before the forty-fifth (45th) day following each calendar year quarter period (January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31) during the term of this Franchise.
3. Franchise fee payments not received by the City on or before the due date shall be assessed interest based on the prime interest rate set by the City's bank on December 31st of the previous year, plus 300 basis points (3%). At no time shall the annual interest rate be reduced to less than 12%. Interest shall be compounded daily.
4. Any payment not paid when due shall be subject to a delinquency penalty charge of five percent (5%) of the unpaid amount. Failure to make full payment and penalty charges within sixty (60) days of the applicable payment date shall constitute a violation of this Franchise.

C.. Reports.

Each payment under Section 3(C) shall be accompanied by a written report to the City, verified by an officer or other authorized representative of Grantee, containing an accurate statement in summarized form, as well as in detail, of Grantee's Gross Revenues, together with franchise fees based upon revenues from sales, IRUs and leases under Section 3(A) and the computation basis and method. Such reports shall be in a form satisfactory to the City.

D. Cost of Pre-franchising and Publication. Grantee has paid the City Five thousand Dollars (\$5,000) for its pre-franchising costs, including publication of this Franchise, as such publication is required by the City Charter.

E. Acceptance of Payment and Recomputation.

1. No acceptance of any payment by Grantee shall be construed as an accord by the City that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments by the City be construed as a release of any claim the City may have for further or additional sums payable.
2. All amounts paid under Section 3 shall be subject to confirmation and recomputation by the City, provided that such audit and computation is completed within five (5) years of the date any audited and recomputed payment is due. If no such audit or financial review is conducted within the five (5) year period, then any claim that the

City might have had for additional compensation shall be forever waived and relinquished. The Grantee agrees to reimburse the City for:

- a. The reasonable costs of such confirmation if the City's recomputation discloses that the Grantee has paid 95% or less of the franchise fees owing for the period at issue upon receipt of an invoice from the City showing such costs were actually incurred and directly related to the audit.
- b. One-half of the reasonable costs of such confirmation if the City's recomputation discloses that the Grantee had paid more than 95% but less than 98% of the franchise fees owing for the period at issue.
- c. The City's costs which may be reimbursed under this Section 3(E) shall not exceed \$5,000.00 per audit or financial review.
- d. If the City determines that Grantee made any underpayment, and that the underpayment exceeded 5% of the amount due, Grantee shall pay interest pursuant to Section 3(B)(3) above. Interest shall be due on the entire underpayment from the date on which payment was due until the date on which full payment is received.

F. If the Grantee disputes any of the franchise fees to be paid to the City under Section 3, the Grantee shall place the entire disputed amounts in an escrow account until final resolution of the dispute.

G. The City and its agents and representatives shall have authority to arrange for and conduct reviews of the relevant financial obligations payable hereunder. The City may determine the scope of review in each instance. All amounts paid by Grantee shall be subject to review by the City, provided that such review be completed within five (5) years from the date payment was due. City requests for reviews shall be in writing. If Grantee has not provided copies of all information reasonably within the scope of the review to the City within 30 days from the date of the written request, Grantee shall provide access within the Portland metropolitan region, during normal business hours, upon 48 hours prior written notice. If the City requests in writing that the Grantee provide, or cause to be provided, copies of any information reasonably within the scope of the review, and the Grantee fails within 30 days of receipt of the request to provide, or cause to be provided, such information, then the five (5) year period shall be extended by one day for each day or part thereof beyond 30 days that Grantee fails to provide, or fails to cause to be provided, such requested information.

Section 4. GENERAL INSURANCE AND BONDING PROVISIONS

A. Insurance.

1. Grantee shall maintain commercial general liability insurance that protects Grantee and the City, as well as the City's officers, agents, and employees, from the claims referred to in Section 6. The insurance shall provide coverage at all times of not less than \$200,000 for personal injury to each person, \$500,000 for each occurrence, and \$50,000 for each occurrence involving property damages, plus costs of defense; or a single limit policy of not less than \$500,000 covering all claims per occurrence, plus costs of defense. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon during the term of this Franchise. The insurance shall be without prejudice to coverage otherwise existing and shall name as additional insureds the City and its officers, agents, and employees. Notwithstanding the naming of additional insureds, the insurance shall protect each insured in the same manner as though a separate policy had been issued to each, but nothing in this Section 4(A)(1) shall operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured. The coverage must apply as to claims between insureds on the policy. The insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days prior written notice first being given to the City Auditor. If the insurance is canceled or materially altered within the term of this Franchise, Grantee shall provide a replacement policy with the same terms. Grantee shall maintain continuous uninterrupted coverage, in the terms and amounts required, upon and after the effective date of this Franchise.
2. Grantee shall maintain on file with the City Auditor a certificate of insurance certifying the coverage required above. The certificate of insurance shall be subject to the approval as to form by the City Attorney.
3. In the alternative to providing a certificate of insurance to the City certifying liability insurance coverage as required in this Section, Grantee may provide the City with a statement regarding its self-insurance. Grantee's self-insurance shall provide at least the same amount and scope of coverage for Grantee and the City, its officers, agents and employees, as otherwise required under this Section. The adequacy of such self-insurance shall be subject to the approval as to form by the City Attorney. Upon Grantee's election to provide self-insurance coverage under this Section 4(A)(3), any failure by Grantee to maintain adequate self-insurance shall be a material violation of this Franchise.

B. Faithful Performance Bond.

NewPath RoW Franchise
O://UtilityProgram/Franchises/NewPath/RoWAgmt.doc

1. Upon the effective date of this Franchise, Grantee shall furnish proof of the posting of a faithful performance bond running to the City, with good and sufficient surety approved by the City, in the penal sum of ten thousand dollars (\$10,000), conditioned that Grantee shall well and truly observe, fulfill, and perform each term and condition of this Franchise. Grantee shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of this Franchise, including, if necessary, the time required for removal of all of Grantee's Facilities installed in the City's Streets. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without thirty (30) days prior written notice first being given to the City Auditor. The bond shall be subject to the approval as to form by the City Attorney.
 2. During the term of this Franchise, Grantee shall file with the City Auditor a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall the City exercise its rights against the performance bond under Section 4(B) if a bona fide, good faith dispute exists between the City and Grantee.
- C. Construction Bond. During all times when Grantee is performing any construction work in or under the Streets requiring a street opening permit, Grantee shall post a faithful performance bond or irrevocable letter of credit, as is required for street opening permits, running to the City, with good and sufficient surety approved by the City, in the sum of ten thousand dollars (\$10,000). The bond or letter of credit shall be conditioned that Grantee shall well and truly observe, fulfill and perform each term and condition under Section 6. Grantee shall pay all premiums or other costs associated with maintaining the bond or letter of credit, and shall keep the same in full force and effect at all times during the construction work. The bond or letter of credit shall provide that it may be terminated upon final approval of Grantee's construction work in or under the Streets by the City Engineer which shall not be unreasonably withheld or delayed. Upon such approval, the City agrees to sign all documents necessary to release the bond in accordance with the terms of this Section. During the duration of the construction work, Grantee shall file with the City Auditor a copy of the bond or letter of credit, along with written evidence of the required premiums. The bond or letter of credit shall be subject to the approval as to form by the City Attorney.

Section 5. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS

- A. General Indemnification. Grantee hereby agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any claim for injury, damage, loss, liability, cost or expense, including court and appeal costs and reasonable attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any other act done under this Franchise, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Facilities in a safe condition, but not if arising out of or by reason of any negligence or

willful misconduct by the City, its officers, agents or employees. The City shall provide Grantee with prompt notice of any such claim, which Grantee shall defend with counsel of its own choosing and no settlement or compromise of any such claim will be done by the City without the prior written approval of Grantee. Grantee and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.

- B. Relocation Indemnification. Grantee also hereby agrees to indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust or relocate any of its Facilities in the City Streets in a timely manner in accordance with a relocation schedule furnished to Grantee by the City Engineer under this Franchise, unless Grantee's failure arises directly from the City's negligence or willful misconduct.

Section 6. CONSTRUCTION, REPLACEMENT, REPAIRS AND MAINTENANCE

- A. Permits. Grantee shall apply for and obtain all permits necessary for the construction, installation and operation of its Facilities in the Streets. Grantee shall pay all applicable fees due for City construction permits. All construction and maintenance of any and all Grantee's Facilities within the Streets shall, regardless of who performs installation and/or construction, be and remain the responsibility of Grantee.
- B. Installation of Equipment. Grantee's Facilities shall be installed and maintained in accordance with the laws of the State of Oregon and the ordinances and standards of the City regulating such construction.
- C. Common Users. Grantee's Facilities shall be attached to Structures located within the Streets. Grantee shall also allow and encourage other wireless carriers to co-locate facilities on Structures with Grantee's Facilities, provided such co-location does not interfere with Grantee's Facilities or jeopardize the physical integrity of the Structure and provided the owner of the Structure consents to such co-locations.
- D. Scale of Facilities. This Section establishes standards for attaching Facilities to Structures in the Streets in a manner that minimizes the Facilities' potential incompatibility with adjacent uses. Nothing in this Section modifies or supercedes other City requirements for these Facilities, such as Title 33 of the Portland City Code, also known as the Zoning Code.
 - 1. Original Structures. Facilities may be attached to Original Structures in the Streets, provided:
 - a. Facilities do not jeopardize the physical integrity of the Structure;
 - b. Three sector arrays, also known as triangular "top hat" style antenna mounts, are prohibited;

- c. The device used to mount the Facilities does not project more than ten (10) feet above the Structure;
 - d. Antennas will be mounted flush with the device referenced in Section 6(D)(1)(c) or the existing structure, within a unicell-style top cylinder, or on davit arms that are no greater than five (5) feet in length as measured from the center of the Structure;
 - e. The visual impacts of any Facilities located in the Streets must be minimized by utilizing the smallest antennas, equipment and equipment cabinets available that will satisfy engineering requirements and the service objectives of the site. Whenever possible, Facilities shall be painted or otherwise treated architecturally so as to minimize visual impacts;
 - f. All antennas, cabling, mounting hardware and associated microcell/equipment cabinets mounted on an Original Structure must be painted to match the color of the Structure. If cabinets require a special heat-reducing paint finish, they must be a neutral color such as beige, off-white, or light gray; and
 - g. The Original Structure is not replaced with a taller Structure, except as authorized in Sections 6(D)(2).
2. Replacement Structures. For purposes of this Section "Replacement Structure" shall mean a Structure that a) replaces an existing Structure or Original Structure to accommodate Facilities; and b) does not result in an increase in the total number of utility, guy or support poles in the Streets. Facilities may be attached to Replacement Structures in the Streets, provided:
- a. The Replacement Structure is of sufficient integrity to support the Facilities;
 - b. The requirements of Section 6(D)(1)(b, e and f) are met;
 - c. The device used to mount the Facilities does not project more than ten (10) feet above the top of the Replacement Structure;
 - d. Antennas will be mounted flush with the Replacement structure, within a unicell-style top cylinder, or on davit arms that are no greater than five (5) feet in length as measured from the center of the Structure;
 - e. In Streets designated by current Official Zoning Maps of Title 33, Portland City Code, with a base zone of either R (residential) or OS (open space), any Replacement Structure, and any subsequent Replacement Structures, may never be more than ten (10) feet taller than the Original Structure. In general, street centerlines are also the established boundaries for base zones, but Grantee must consult the current zoning map to determine the base zone in which a Replacement Structure will be installed;

E. Relocation.

1. The City shall have the right to require Grantee to change the location of its Facilities in the Streets when the public convenience requires such change, and the expense thereof shall be paid solely by Grantee. The City shall provide Grantee with the standard notice given under the circumstances to other leasees, franchisees, licensees, or permittees. Should Grantee fail to remove or relocate any such Facilities by the date established by the City, the City may cause and/or effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all expenses incurred by the City due to Grantee's delay. If the City requires Grantee to relocate its facilities located within the City's Streets, the City will make a reasonable effort to provide Grantee with an alternate location for its facilities within the City's Streets.
2. The provisions of this Section 6(E) shall in no manner require or preclude Grantee from making any arrangements with third parties it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity, other than the City where the Facilities to be constructed by said person or entity are not or will not become City owned, operated or maintained Facilities.

F. Record of Installations.

1. On the date Grantee files its acceptance in accordance with Section 17, and annually thereafter, in the event any new Facilities are constructed or any existing Facilities are relocated, Grantee shall provide to the City's Office of Cable Communications and Franchise Management, or its successor, a list that identifies the location of Grantee's Facilities in the Streets. In addition, Grantee shall file a Radio Frequency Transmission Facility Registration Form, made available by the City, for each existing and new Facility that is installed on Structures in the Streets. For existing Facilities, the form shall be filed on the date Grantee files its acceptance in accordance with Section 17, and every two years thereafter. For new Facilities, the form shall be filed within ten (10) days of the date the Facility is attached to the Structure in the City Streets, and every two years thereafter.
2. Within thirty (30) days following Grantee's acquisition of any Facilities in the Streets, or upon any addition or annexation to the City of any area in which Grantee owns any such Facilities in the Streets, Grantee shall submit to the City a written statement describing all Facilities involved, whether authorized by franchise, license, permit or any other form of prior right, and specifying the location of all such Facilities. Facilities acquired by Grantee shall immediately be subject to the terms of this Franchise, within a reasonable period of time to bring such acquired Facilities into compliance with this Franchise.
3. Radio frequency emission levels. All existing and proposed Radio Frequency Transmission Facilities are prohibited from exceeding or causing other facilities to

NewPath RoW Franchise

O:\UtilityProgram\Franchises\NewPath\RoW Agrmt.doc

exceed the radio frequency emission standards specified in Section 1.1310 of Title 47 of the Code of Federal Regulations as in effect on October 1, 2005.

G. Restoration After Construction. Grantee shall, after construction, maintenance or repair of Facilities, leave the Streets in as good or better condition in all respects as it was before the commencement of such construction, maintenance or repairs, excepting normal wear and tear. Grantee agrees to promptly complete restoration work and to promptly repair any damage caused by such work at its sole cost and expense. When any opening is made by Grantee in a hard surface pavement in any Street, Grantee shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer, in accordance with standards developed and adopted by the City Engineer. All excavations made by Grantee in the Streets shall be properly safeguarded for the prevention of accidents. All of Grantee's work under Section 6 shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

H. Tree Pruning.

1. After obtaining a written permit from the City Forester, Grantee may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Streets which interferes with Grantee's Facilities. Permit requirements for pruning are located in Portland City Code Chapter 20.40.080(E), or by contacting the City Forester's Office. Except in emergencies, Grantee may not prune trees at a point below 30 feet above sidewalk grade until one week after written notice has been given to the owner or occupant of the premises abutting the Street in or over which the tree is growing. For the purposes of this Section 6(H), an emergency exists when it is necessary to prune to protect the public from imminent danger. The owner or occupant of the premises abutting the Street shall have seven days from receipt of Grantee's notice to prune such tree at his or her own expense. If the owner or occupant fails to do so, Grantee may prune such tree at its own expense.
2. The City Forester may, at his or her own discretion, waive the notification and permit process in the case of single trees, if Grantee adequately demonstrates to the City Forester's satisfaction the ability to consistently apply proper arboricultural practices to the pruning of trees. Before any tree trimming permit may be issued, any contractor to be used by Grantee shall be subject to the approval of the City Forester. The City Forester shall have the discretion to cancel the permit if, at any time, Grantee or its agents, fails to use proper arboricultural practices.

Section 7. RESERVATION OF CITY STREET RIGHTS

Nothing in this Franchise shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any Street or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work

NewPath RoW Franchise

O://UtilityProgram/Franchises/NewPath/RoWAgmt.doc

shall be done, insofar as practicable, so as to not obstruct, injure or prevent the unrestricted use and operation of Grantee's Facilities in the Streets. However, if any of Grantee's Facilities interfere with the construction or repair of any Street or public improvement, including construction, repair or removal of a sewer or water main, Grantee's Facilities shall be removed or replaced in the manner the City shall direct in accordance with Section 6.E.; provided, however, the City will cooperate with Grantee to identify alternate locations within the Streets. Any and all such removal or replacement shall be at the expense of Grantee. Should Grantee fail to remove, adjust or relocate its Facilities by the date established by the City Engineer's written notice to Grantee, the City may cause and/or effect such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay.

Section 8. STREET VACATION

If any Street or portion thereof used by Grantee is vacated by the City during the term of this Franchise, unless the City Council specifically reserves to Grantee the right to continue its installation in the vacated Street, Grantee shall, without expense to the City, forthwith remove its Facilities from such Street, and restore, repair or reconstruct the Street where such removal has occurred, and place the Street in such condition as may be required by the City Council which shall be no better than the condition of such Street immediately prior to removal. In the event of any failure, neglect or refusal of Grantee, after thirty (30) days prior notice by the City, to repair, improve or maintain such Street, the City may do such work or cause it to be done, and the direct cost thereof, as found and declared by the City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket. The City shall cooperate with Grantee to identify alternative locations within the Streets.

Section 9. MAINTENANCE OF FACILITIES

Grantee shall provide and put in use all Facilities necessary to control and carry Grantee's Telecommunications Services so as to prevent injury to the City's property or property belonging to any Person within the City. Grantee, solely at its own expense, shall repair, renew, change and improve said Facilities from time to time as may be necessary to accomplish this purpose. Grantee shall not construct its Telecommunications System in a manner that requires any customer, except the City, or any entity permitted by the City to install cables, ducts, conduits, or other facilities, in, under or over the City's Streets.

Section 10. DISCONTINUED USE OF FACILITIES

- A. Whenever Grantee intends to discontinue use of its Facilities within all or part of a particular portion of the Streets and does not intend to use said Facilities again for six months, Grantee shall submit to the City Engineer for the City Engineer's approval a completed application describing the Facility and the date on which Grantee intends to discontinue using the

Facility. Grantee may remove the Facility or request that the City permit it to remain in place. If Grantee is permitted to abandon its Facilities in place, upon consent of the City, the ownership of Facilities in the Streets shall transfer to the City and Grantee shall have no further obligation or liability therefor. Notwithstanding Grantee's request that any such Facility remain in place, the City Engineer may require Grantee to remove the Facility from the Streets or modify the Facility in order to protect the public health and safety or otherwise serve the public interest. The City Engineer may require Grantee to perform a combination of modification and removal of the Facility; provided, however, that Grantee may elect to remove its Facility entirely in the event the City requests any modification. Grantee shall complete such removal or modification in accordance with a reasonable schedule set by the City Engineer. Until such time as Grantee removes or modifies the Facility as directed by the City Engineer, or until the rights to and responsibility for the Facility are accepted by another person having authority to construct and maintain such Facility, Grantee shall be responsible for all necessary repairs and relocations of the Facility, as well as maintenance and restoration of the Streets, in the same manner and degree as if the Facility were in active use, and Grantee shall retain all liability for such Facility.

- B. If Grantee discontinues use of Facilities on a Replacement Structure, and that Replacement Structure is taller than the Original Structure, the Company will return the Replacement Structure to its original height. In the alternative, after proper notice pursuant to this Franchise, the Company may request, and the City may grant at its discretion, a waiver from this requirement. If the City requests that the Structure be replaced with a Structure of the original height, the City shall give Grantee at least ninety (90) days to replace the Structure.

Section 11. HAZARDOUS SUBSTANCES:

- A. Compliance. Grantee shall comply with all applicable state and federal laws, statutes, regulations and orders concerning Hazardous Substances relating to Grantee's Telecommunications System in the Streets. For purposes of this Section, "Hazardous Substances" shall have the meaning given by ORS 465.200(16) (2005).
- B. Maintenance and Inspection.
1. Grantee shall maintain and inspect its Facilities located in the Streets. If Grantee discovers any leaks, spills, releases or other contamination associated with, arising from or due to its Telecommunications System or other Facilities in the Streets, Grantee shall report the discovery to the City within 48 hours. Grantee shall immediately proceed to repair, contain, extract, detoxify and remediate any Hazardous Substances in the Streets associated with, resulting from or due to any leaks, spills, releases or other contamination from its Telecommunications System or other Facilities.
 2. Upon reasonable notice to Grantee and in the presence of an authorized representative of Grantee, the City may inspect Grantee's Facilities in the Streets to determine if any release of

Hazardous Substances has occurred, or may occur, from or related to Grantee's Telecommunications System.

- C. Remediation. In doing any construction, modification or removal of any of its Telecommunication System or other Facilities in the Streets, Grantee shall inspect and test for any Hazardous Substances contamination or residue. Grantee shall remove all contamination or residue of Hazardous Substances in compliance with applicable environmental cleanup standards. If Grantee fails to remove all such contamination or residue, in compliance with standards set by federal, state and local laws, statutes, regulations and orders, the City may arrange for the cleanup, extraction, detoxification, removal or remediation of the Hazardous Substances and the costs of such clean up, extraction, detoxification or neutralization shall be charged to the Grantee and the Grantee shall promptly pay such charges. Upon request, the City shall provide Grantee with information within the City's possession which identifies potentially responsible parties for the purposes of recovering such removal costs.
- D. Indemnification. Grantee agrees to forever indemnify the City against any claims, costs, and expenses, of any kind, whether direct or indirect, incurred by the City arising out of the release or threat of release of Hazardous Substances caused by Grantee's ownership or operation of its Telecommunication System or Facilities in the Streets. Nothing in this Agreement transfers or is intended to transfer any liability to the City for remediation of any such Hazardous Substances in the Streets.

Section 12. CITY'S WRITTEN CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE

- A. Consent. Except as otherwise permitted by Section 12.B. and except to entities that control, are controlled by, or are under common control with Grantee, neither this Franchise nor any of Grantee's Facilities located in the Streets by authority of this Franchise shall be sold, leased, mortgaged, assigned, merged or otherwise transferred without the prior written consent of the City as expressed by ordinance, which consent shall not be unreasonably withheld, Grantee shall give written notice to the City of any transfers to entities under common control within ten (10) days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. Nothing contained in this Section 12.A. shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's Telecommunications System for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Telecommunications System, within or outside the City, without the City's consent, but any such mortgage, pledge or assignment shall be subject to the City's other rights contained in this Franchise.
1. In determining whether the City will consent to any sale, lease, mortgage, assignment, merger or transfer, the City may inquire into the technical, legal, and financial

qualifications of the prospective party. Grantee shall assist the City in any such inquiry. The City may condition any sale, lease, mortgage, assignment, merger or transfer upon such conditions related to the technical, legal, and financial qualifications of the prospective party to perform according to the terms of this Franchise, as it deems appropriate. The City shall not unreasonably delay or withhold its consent to any such sale, lease, mortgage, assignment, transfer or merger.

2. No sale, lease, mortgage, assignment, transfer or merger for which the City's consent by ordinance is required may occur until the successor, assignee or lessee has complied with the requirements of Section 4, including, but not limited to, providing certificates of insurance, unless the City Council waives such compliance by ordinance. Within ten (10) days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the Auditor an executed counterpart or certified copy thereof.

B. Transfers Without Consent in Ordinary Course of Business. Grantee shall not lease any of its Facilities without the City's prior consent as expressed by ordinance. However, and notwithstanding Section 12(A), Grantee may lease any portion of its Facilities in the ordinary course of its business without otherwise obtaining the City's consent by ordinance, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing such Facilities. A lessee of Grantee's Facilities shall not obtain any rights under this Franchise. For the purposes of this Section, a capital lease shall be treated as a lease under this Section until the conclusion of the lease, when transfer of ownership occurs. At that point in time, the capital lease shall be treated as a sale under Section 12(B)(1).

1. Notwithstanding Section 12(A)(1), Grantee may sell portions of its Facilities in the ordinary course of its business, without otherwise obtaining the City's consent by ordinance, so long as Grantee complies with the following conditions:
 - a. The sale is to the holder of a current existing, valid telecommunications or mobile telecommunications agreement, franchise, permit or lease with the City.
 - b. Within fourteen days of the sale being executed and becoming final, Grantee shall provide written notice to the City, describing the Facilities sold by Grantee, identifying the purchaser of the Facilities, the location of the Facilities (in accordance with the requirements of Section 6(F)(1)), and providing an executed counterpart or certified copy of the sales documents.
 - c. Grantee shall remain solely responsible for locating, servicing, repairing, relocating or removing its remaining Facilities.
 - d. Within fourteen days of the sale being executed and becoming final, the purchaser of such Facilities shall file written notice to the City that it has assumed sole responsibility for locating, servicing, repairing, relocating or removing the purchased

Facilities under the purchaser's current, existing valid franchise. The purchaser shall not obtain any of Grantee's rights under this Franchise.

Section 13. FORFEITURE AND REMEDIES

- A. Forfeiture. In addition to any other rights set out elsewhere in this Franchise, the City reserves the right to declare a forfeiture of the Franchise, and all of Grantee's rights arising thereunder, in the event that:
1. Grantee violates any material provision of the Franchise.
 - a. For purposes of this Section, the following are material provisions of this Franchise, allowing the City, without limitation, to exercise its rights under this Section or as set forth elsewhere in this Franchise:
 - (1) The invalidation, failure to pay or any suspension of Grantee's payments of franchise fees to the City for use of the Streets under this Franchise;
 - (2) Any failure by Grantee to submit timely reports regarding the calculation of its franchise fees to the City;
 - (3) Any failure by Grantee to maintain the liability insurance required under this Franchise;
 - (4) Any failure by Grantee to maintain the performance bond required under this Franchise;
 - (5) Any failure by Grantee to otherwise fully comply with the requirements of Sections 3 through and including Section 17 of this Franchise.
 2. Grantee is found by a court of competent jurisdiction to have practiced any fraud or deceit upon the City.
 3. There is a final determination that Grantee has failed, refused, neglected or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding Grantee's operation of its Telecommunications System or Services within the City.
- B. Additional Remedies. In addition to any rights set out elsewhere in this Franchise, as well as its rights under the City Code, the City reserves the right at its sole option to apply any of the following remedies, alone or in combination:

1. Impose a financial penalty of up to \$1,000.00 per violation;
2. Suspend Grantee's rights under this Franchise, until Grantee corrects or otherwise remedies the violation;
3. Revocation. The City Council or Grantee may revoke this Franchise in the event that any provision becomes invalid or unenforceable and the City Council or Grantee expressly finds that such provision constituted a consideration material to the Franchise. The City or Grantee shall exercise its revocation rights under this Section by providing 30 days written notice prior to the effective date of the revocation, and an opportunity to renegotiate acceptable provisions in accordance with Section 14.

C. Determination of Remedy. In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further such violations, and any other matters the City deems appropriate.

D. Notice and Opportunity to Cure. The City shall give Grantee thirty (30) day's prior written notice of its intent to exercise its rights under this Section, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) day notice period, or if Grantee initiates efforts satisfactory to the City to remedy the stated reason and the efforts continue in good faith, the City shall not exercise its remedy rights. If Grantee fails to cure the stated reason within the thirty (30) day notice period, or if Grantee does not undertake and/or maintain efforts satisfactory to the City to remedy the stated reason, then the City Council may impose any or all of the remedies available under this Section. However, in no event shall the City exercise its rights under this Section if a bona fide, good faith dispute exists between the City and Grantee.

Section 14. RENEGOTIATION

In the event that any provision of this Franchise becomes invalid or unenforceable and the City Council or Grantee expressly finds that such provision constituted a material consideration to entering into this Franchise, the City and Grantee may mutually agree to renegotiate the terms of this Franchise. The party seeking renegotiation shall serve on the other party written notice of an offer to renegotiate. In the event the other party accepts the offer to renegotiate, the parties shall have 90 days to conduct and complete the renegotiation. If both parties agree to renegotiations under this Section, the parties shall proceed in good faith and in a manner that is reasonable under the circumstances.

Section 15. EXPIRATION AND RENEWAL

A. Renewal. Upon the expiration of the initial five year term of this Franchise, on application made by Grantee for Franchise renewal or additional authority to exercise the privileges, or any

of them, hereby granted, Grantee shall have the first and preferential right to take and receive such authority upon terms and conditions approved by the City. If Grantee does not promptly apply for such renewal or additional authority, or if Grantee rejects the terms and conditions of such authority offered by the City, the City may, within one year from the expiration of the prior Franchise, grant a permit or franchise to any other Person. In the event of such a grant, such other Person taking such new or additional authority, shall in addition to any compensation to be paid to the City for such new or additional authority, pay to Grantee, at or before the time such new or additional authority takes effect, and before Grantee shall be deprived of the right to possess, maintain and operate its Telecommunications System located within the Streets, the fair and equitable valuation of Grantee's Telecommunications System located within the Streets. If the third party and Grantee cannot agree on the fair and equitable value of said Telecommunications System, the dispute shall be submitted for a declaratory determination by the courts of the State of Oregon. Until such time as the City exercises its rights as set forth in this Section, Grantee's rights and responsibilities within the City shall continue to be controlled by the terms and conditions of this Franchise.

Section 16. MISCELLANEOUS

A. Compliance with Laws.

1. Both Grantee and the City shall comply with all applicable federal and state laws.
2. Grantee shall comply with all applicable City ordinances, resolutions, rules and regulations adopted or established pursuant to the City's lawful authority.

B. Severability. Except as provided in Section 14, if any section, provision or clause of this Franchise is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or regulations, the remainder of this Franchise shall not be affected.

C. Regulation and Nonenforcement by the City. The City Council shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this Franchise in the public interest. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Franchise by reason of any failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Franchise by reason of such failure or neglect.

D. Force Majeure.

NewPath RoW Franchise

O://UtilityProgram/Franchises/NewPath/RoWAgmt.doc

1. For purposes of Section 16(D), the term Force Majeure shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts of terrorism or of the public enemy, partial or entire failure of utilities, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots, or other similar events which are not reasonably within the control of the parties hereto.
 2. If Grantee is wholly or partially unable to carry out its obligations under this Franchise as a result of Force Majeure, Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee's obligations under this Franchise, other than for the payment of franchise fees or other monies due, shall not be deemed in violation or default for the duration of the Force Majeure. Grantee agrees to use its best efforts to remedy as soon as possible, under the circumstances, Grantee's inability by reason of Force Majeure to carry out its responsibility and duties under this Franchise.
- E. Choice of Forum. Any litigation between the City and Grantee arising under or regarding this Franchise shall occur, if in the state courts, in Multnomah County Circuit Court, and if in the federal courts in the United States District Court for the District of Oregon, Portland Division.
- F. Notice. Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the following addressee, (2) deposited in the United States mail, postage prepaid, certified mail, return receipt requested, (3) sent by overnight or commercial air courier (such as Federal Express), or (4) sent by facsimile transmission addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:
1. If to the City: Office of Cable Communications and Franchise Management
City of Portland, Oregon
1120 SW 5th Avenue, Room 1305
Portland, Oregon 97204
FAX (503) 823-5370
- With a copy to: City Attorney's Office
City of Portland
Room 430, City Hall
1221 SW 4th Avenue
Portland, Oregon 97204
FAX (503) 823-3089
2. If to Grantee: Michael J. Kavanagh
NewPath Network, LLC

1300 N. Northlake Way
Seattle, WA 98103
FAX 1 (206) 633-2768

With a copy to: Barry Ziker
Salter, Joyce & Ziker
1601 5th Avenue, Suite 2040
Seattle, WA 98101
FAX 1 (206) 957-5961

3. Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail as aforesaid, one (1) business day after shipment by commercial air courier as aforesaid or the same day as facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

G. Confidential Records. Grantee may identify information submitted to the City as confidential. Prior to submitting such information to the City, Grantee shall prominently mark in conspicuous letters any information with the word "Confidential." The City shall treat any information so marked as confidential and not subject to public disclosure until the City receives any public records request for disclosure of such information. Within ten (10) working days of receiving any such request, the City shall provide Grantee with written notice of the request, including a copy of the request. Grantee shall have ten (10) working days within which to provide a written response to the City, before the City may disclose any of the requested confidential information. Whether Grantee submits any written response to the City, the City shall retain the final discretion to determine whether to release the requested confidential information, provided the City shall give Grantee at least ten (10) working days written notice after receipt of any response from Grantee prior to releasing such information. Grantee does not waive any of its rights to seek a protective order from a court of competent jurisdiction restraining the City from disclosing such information.

H. Public Records.

1. Some information submitted by the Grantee to the City may be relevant to Grantee's obligation to pay franchise fees or compensation. Requiring such information to be submitted to the City in order to determine fees or compensation payable or paid to the City may qualify such information as being exempt from public disclosure under ORS 192.501(5) (2005) of the Oregon Public Records Law.
2. Some information submitted by Grantee to the City may otherwise be used to conduct its business and known to certain individuals within the organization, with actual or

NewPath RoW Franchise
O://UtilityProgram/Franchises/NewPath/RoWAgmt.doc

potential commercial value, and giving Grantee a business advantage over its competitors. Such information may constitute trade secrets and be exempt from public disclosure under ORS 192.501(2) (2005) of the Oregon Public Record Law.

3. Identification of these exemptions under the Oregon Public Records Law, which may apply to information submitted by Grantee to the City, is not an exclusive list of those possibly applicable to such information.
- I. Amendment. The City has negotiated this Franchise in good faith, in reliance upon the information provided by Grantee regarding the scope of its authority to offer the Telecommunications Services described in Section 2(B)(15) above. In the event that Grantee actually receives authority to offer telecommunications services outside the scope of this Franchise, or otherwise begins offering telecommunications services outside the scope of those identified in Section 2(B)(15), Grantee shall immediately notify the City. Within 90 days of receiving such notice, the City may either enter into negotiations with Grantee to revise or amend this Franchise to reflect such changed circumstances, or may proceed with early termination of this Franchise. The parties will negotiate in good faith to revise the Franchise to authorize the expanded scope of services.
- J. Interference. Grantee shall, at its expense, comply with all Federal Communications Commission Radio Frequency requirements in connection with the use, operation, maintenance, construction and/or installation of its Facilities. If at any time during the Grantee's occupancy of the transmission location, it is determined by the City that the Grantee's transmission facilities are negatively impacting the City's communication facilities, Grantee agrees to cooperate with the City in addressing the negative impact. Grantee agrees to temporarily shut off power and transmission to and from the transmission facility that is causing a problem until the problem is resolved, provided that the City agrees to cooperate with and assist the Grantee in installing a temporary replacement facility so as to avoid disruption of Grantee's service.

Section 17. WRITTEN ACCEPTANCE

On or before the thirtieth (30th) day after this ordinance becomes effective, NewPath Networks, LLC shall file in the Office of the Auditor of the City of Portland a written acceptance of this ordinance, executed by a duly authorized representative of NewPath Networks, LLC, subject to the approval as to form by the City Attorney. Any failure on the part of NewPath Networks, LLC to file such written acceptance within such time shall be deemed an abandonment and rejection of the rights and privileges conferred hereby and this ordinance shall thereupon be null and void. Such acceptance shall be unqualified and shall be construed to be an acceptance of all the terms, conditions and restrictions contained in this ordinance.

NewPath RoW Franchise
O://UtilityProgram/Franchises/NewPath/RoWAgmt.doc

Section 18. OTHER AUTHORITY SUPERSEDED:

Upon effectiveness of this Franchise, any and all authority to operate Facilities or Attached Facilities in the Streets previously granted to Grantee by the City shall be superseded by this Franchise.

Passed by the Council: Aug 16 2006

Commissioner Dan Saltzman
Soloos/Walters
June 19, 2006

Gary Blackmer
Auditor of the City of Portland
By
Susan Parsons /s/
Deputy