



SOUTH FEATHER WATER & POWER AGENCY

TO: Board of Directors

FROM: Kathy Petersen, Power Division Manager

DATE: June 15, 2009

RE: Sunset Hill Telecommunication Lease with DigitalPath Inc.
Agenda Item for 6/23/09 Board of Directors Meeting

In September 2007 the Board approved a lease agreement with DigitalPath, Inc. for use of the tower and public room at Sunset Hill. Since that time they have expanded their service area and have added additional antennae and equipment. They plan to have a total of 20 antennae, dishes or panels at full build-out at the site. The original lease agreement needs to be amended to reflect the equipment that is now installed at the site.

The proposed amendment is attached for review and the recommended form of action is:

"I move approval of the Sunset Hill Communication Lease Agreement between South Feather Water and Power Agency and DigitalPath, Inc., as amended, and authorization for the General Manager to execute said agreement."

SUNSET HILL COMMUNICATION LEASE
between
SOUTH FEATHER WATER AND POWER AGENCY
and
DIGITALPATH, INC.

WHEREAS, South Feather Water and Power Agency, hereinafter called "Landlord," has under its possession and control a public communication room and antenna tower for various communication facilities located upon that certain mountain top known as Sunset Hill, in the county of Butte, State of California; and

WHEREAS, possession and control by Landlord is based upon, and subject to, the terms of Landlord's "Communications Use Lease" with the United States Department of Agriculture, Forest Service (USFS), dated May 9th, 1997 (hereafter "the Master Lease.")

WHEREAS, DigitalPath, Inc. requested on July 25, 2007 to occupy space in the public communication room, hereinafter called the "Tenant's Room", and on the antenna tower structure; and

NOW THEREFORE, Landlord and DigitalPath, Inc. agree to a Sunset Hill Communication Lease under the following terms and conditions:

1. LEASE: Landlord leases to DigitalPath, Inc. wall space in said Tenant's Room, and space upon said antenna tower for the installation, operation and maintenance of radio frequency (RF) communication equipment in the location and manner described in article 7 and article 11 herein.

2. TERM AND TERMINATION: The term of this lease shall be five (5) years, commencing on September 1, 2007, and terminating on August 31, 2012, providing that either party may terminate this lease at an earlier date without cause by giving notice in writing to the other of not less than 90 days. Upon termination or expiration of this lease, DigitalPath, Inc. shall remove all facilities installed on the leased premises by DigitalPath, Inc. and surrender the leased premises in as good condition as when DigitalPath, Inc. first took possession hereunder, reasonable use, wear and tear excepted, and Landlord will refund the unearned portion of any rent DigitalPath, Inc. has paid in advance.

This lease may be terminated by DigitalPath, Inc., with no further liability, if DigitalPath, Inc. is unable to secure the necessary licenses, permits or other required authorization from the federal Communications Commission or any other body having authority over DigitalPath, Inc.'s operation at the premises. This lease may also be terminated by DigitalPath, Inc. with no further liability within sixty (60) days of start of lease if:

- (a) Interference/Noise from other equipment at the site does not allow a reliable connection to be established, or;
- (b) Microwave link is unable to be obtained from the proposed location.

3. RENT: Subject to the provisions of Paragraph 20, DigitalPath, Inc. agrees to pay annual rent in advance to Landlord, as follows:

a. Vault space @\$450.00 /space	\$ 450.00
b. Space on tower @\$220.00 /antenna or panel	\$ 4,400.00
c. Road maintenance(see article 9)	\$ 450.00
TOTAL	\$ 5,300.00

4. RENEWAL OPTIONS: DigitalPath, Inc., at its option, may extend the term of this lease for one (1) additional period of five (5) years, by written notice to Landlord at least thirty (30) days prior to the expiration of the initial term.

5. ELECTRICAL SERVICE: DigitalPath, Inc. understands that utility 120/240 volt AC power is supplied to Tenant's Room, and said utility power is metered by a separate power meter owned and maintained by PG&E. No standby power, AC or DC, continuous or otherwise, is available to any equipment presently installed in Tenant's Room, or any future installation(s) of equipment in Tenant's Room. DigitalPath, Inc. agrees to supply any and all necessary standby power; AC or DC, to any DigitalPath, Inc. installed and maintained equipment now in use, and any and all future DigitalPath, Inc. equipment installation(s).

6. OPERATION: DigitalPath, Inc. shall install, operate, and maintain its radio communication equipment in accordance with the highest engineering standards now or hereinafter employed in the industry and in accordance with all applicable laws and regulations of the Federal Communications Commission or any other governmental agency having control or regulation over such operations. In the event that DigitalPath, Inc.'s installation, operation, or maintenance of its equipment shall create any interference with the operations of Landlord's equipment, DigitalPath, Inc. shall, at its own expense, take such reasonable steps as may be recommended by Landlord to eliminate such interference. In case of DigitalPath, Inc.'s inability or refusal to eliminate such interference, Landlord may terminate this lease and DigitalPath, Inc. shall promptly remove its equipment and antennas from the leased premises.

7. FREQUENCIES and ANTENNAS: DigitalPath, Inc. shall

a. Transmit and receive only on the following frequencies and shall not change or add to these frequencies without the written consent of Landlord.

Frequency Range: 5.3 GHz (5.26 – 5.325 GHz) and 5.8 GHz (5.725 – 5.815 GHz); and 11 GHz licensed frequency.

b. Maintain its antennas and panels upon said tower at the elevations (above ground level) shown below:

<u>ANTENNA TYPE</u>	<u>ELEVATION</u>	<u>LEG</u>
2 -2 ft. 5.8 GHz 29 DB Dish	90 feet AGL	West
2 -14.5" x 7" x 2.5" Sector Panel	90 feet AGL	West
2 -14.5" x 7" x 2.5" Sector Panel	90 feet AGL	South
2 - 8" x 8" x 3" panel pointing NW	90 feet AGL	West
2 - 8" x 8" x 3" panel pointing SW	90 feet AGL	South
2 - 2' parabolic antennas	140 feet AGL	East
1 – 12" x 12" panel	140 feet AGL	East
7 – Additional antennae or panels to be determined in the future.		

8. MAINTENANCE: DigitalPath, Inc. shall maintain in good order, condition and repair, except for reasonable use and wear, that part of the premises used solely by DigitalPath, Inc. If Landlord deems, and repairs or maintenance or cleanup is necessary, it may demand that DigitalPath, Inc. make them immediately, in writing; if DigitalPath, Inc. refuses or neglects to commence such repairs within thirty (30) days, and complete them, Landlord may cause such repairs to be made and DigitalPath, Inc. shall immediately, on demand, pay Landlord the cost of the repairs. Landlord shall be responsible for the maintenance of the roof and building structure of the Tenant's Room.

9. ACCESS ROAD: Inasmuch as DigitalPath, Inc. proposes to use Sunset Hill Road in order to obtain access to the premises leased hereunder, Landlord is obliged to maintain and keep said road in good condition. DigitalPath, Inc. agrees to pay Landlord \$450.00 as an estimated pro rata share of the annual expense of such maintenance during the term of this lease.

10. SITE SECURITY: Landlord shall issue DigitalPath, Inc. the keys necessary to access Tenant's Room. Upon termination of this lease, DigitalPath shall return all keys to Landlord. Upon execution of this Agreement, and at any time during the life of this Agreement as needed, DigitalPath, Inc. shall deliver to Landlord all keys and/or combinations necessary to allow Landlord access to DigitalPath, Inc.'s equipment for the purpose of inspecting DigitalPath, Inc.'s equipment.

11. MAINTENANCE AND OPERATION: DigitalPath, Inc. shall install and maintain one (1) wall mounted control panel for its proprietary wireless radio equipment in the Tenant's Room. The DigitalPath, Inc. installed coaxial transmission lines shall be attached to the east waveguide ladder on the tower. The DigitalPath, Inc. installed and maintained 5.8 GHz 29DB Dishes shall occupy the ninety (90) foot level of the west tower leg, and the DigitalPath, Inc. installed and maintained Sector Panels and Panels pointing North West shall occupy the ninety (90) foot level of the West tower leg, and the DigitalPath, Inc. installed and maintained Sector Panels and Panels pointing South West shall occupy the ninety (90) foot level of the South tower leg. The parabolic antennas

shall occupy the ninety (90) foot level of the East tower leg. Plans and specifications for improvements to be installed by DigitalPath shall be provided to Landlord for its reasonable review and approval prior to installation. No additional facilities will be installed by DigitalPath without the written agreement of Landlord.

DigitalPath, Inc. shall install all components of the proprietary wireless radio equipment in a workmanlike manner under the supervision of Landlord.

On May 13, 2008, DigitalPath, Inc. installed three (3) additional two (2)-foot parabolic antennas, one on the West leg and two on the East leg at 150 feet above ground level.

In May, 2009, DigitalPath installed another five (5) panels and dishes for a total of thirteen (13) antennas, dishes and panels. Digital Path, Inc. plans to eventually install an additional seven (7) antennae or panels for a total build out of 20 devices on the tower.

12. USE: DigitalPath, Inc. will comply with all laws, ordinances, and regulations respecting DigitalPath, Inc.'s occupancy of the premises or their use, specifically including rules and regulations of the Federal Communications Commission, the State of California and Butte County and shall not use or permit use of the premises for any purpose other than the operation of its radio communications equipment. DigitalPath, Inc. shall be responsible for obtaining necessary permits and/or licenses for operation of its radio from the federal Communications Commission.

DigitalPath, Inc. agrees that the installation of any radio equipment, licensed or unlicensed, will not cause harmful interference to existing radio users at the site. If any interference is reported to Landlord or to an existing site user, the interference shall be corrected within five (5) days or transmission will cease until the interference is corrected.

13. HAZARDOUS MATERIALS: Landlord agrees to indemnify and hold harmless DigitalPath, Inc., its successors and assigns, from any and all liability, loss or expense (including attorney's fees), whether now existing or arising, in connection with any federal or state statute, law, ordinance, regulation or judgment related to the storage, disposal or release of contaminants or pollutants on said premises by Landlord.

Landlord warrants and represents that to its knowledge, no hazardous materials, including asbestos, have been disposed of or placed on the property.

Save and except for Landlord's indemnity for Landlord's storage, disposal, or release of contaminants or pollutants on said premises by Landlord, DigitalPath, Inc. will indemnify and hold harmless Landlord from and against any and all other liability, loss or expense (including attorney's fees), in connections with any federal or state statute, law, ordinance, regulation or judgment related to the existence, disposal or release of contaminants or pollutants on said premises by DigitalPath, Inc. These covenants shall survive the termination of this lease.

14. NOTICES: All notices or demands are deemed to have been given or made when delivered in person or delivered by certified or registered mail, return receipt requested, postage prepaid United States mail, or by reliable overnight carrier, and addressed to the prospective parties as follows:

Landlord: South Feather Water and Power
2310 Oro-Quincy Highway
Oroville, CA 95966
Attention: Power Division Manager

DigitalPath, Inc.: 275 Airpark Boulevard, Suite 500
Chico CA 95973
Attention: Mr. Andrew Cardin, Vice President – Wireless
Infrastructure

15. GENERAL PROVISIONS:

- (a) DigitalPath, Inc. agrees to notify Landlord prior to vault entry for maintenance due to door alarms that will be generated. In case DigitalPath, Inc. requires access to the vault during non-working hours or in an emergency, DigitalPath, Inc. will make every reasonable attempt to notify the Landlord prior to entering.
- (b) DigitalPath, Inc. will be solely responsible for all maintenance and repair of the proprietary wireless radio equipment in Tenant's Room. Further, DigitalPath, Inc. will be solely responsible for all maintenance and repair of the aforementioned equipment's associated devices such as coaxial lines, antennas, panels, batteries, mounts, or other devices.
- (c) DigitalPath, Inc. agrees to supply, install and maintain any and all equipment or devices, other than those mentioned herein, necessary to implement operation of the proprietary wireless radio equipment at Sunset Hill.

16. HOLD HARMLESS/INDEMNIFICATION/INSURANCE: Sunset Hill has been leased and operated by Landlord for purposes of operating its public system, and rights to the use thereof have been heretofore granted to public agencies and PG&E for their own, public service, non proprietary purposes, and it has not been used for commercial, proprietary purposes such as DigitalPath. Therefore, DigitalPath assumes all risk of loss to its facilities installed within Sunset Hill. It is understood and agreed that Landlord shall not be liable for any damage or injury to any person or persons or property, including property of DigitalPath, occurring or arising upon the premises from any cause whatsoever, except when caused by the willful or gross negligence of Landlord. Notwithstanding the foregoing, in no event shall Landlord be responsible for, and DigitalPath shall hold Landlord harmless from, claims for loss of, or damage to, DigitalPath's property, including loss of business resulting therefrom, in excess of one year's rent paid by DigitalPath to Landlord for said premises. DigitalPath, Inc. hereby agrees to defend, and to keep safe and harmless said Landlord from any suit or claim for damage to persons or property, or injury sustained upon the premises arising from DigitalPath, Inc.'s use and occupancy. DigitalPath, Inc. covenants and agrees that it will, at its sole cost and expense, maintain and pay for its own casualty, business interruption, and general liability insurance to protect itself from such claims or liability.

17. ASSIGNMENT: DigitalPath, Inc. may assign its rights and obligations hereunder to a successor that assumes ownership and operation of its proprietary wireless radio equipment and system, and accepts the terms and conditions hereof, including a successor assuming ownership as a result of a plan of reorganization approved by the Bankruptcy Court. Landlord shall be notified, in writing, within thirty (20) days of such assignment. Notification shall include the proposed successor's undertaking, reasonably satisfactory to Landlord, to be bound by each of the terms and conditions hereof. Prior to the effectiveness of any such assignment, DigitalPath, Inc. shall obtain the written consent of Landlord to such assignment, which consent shall not be unreasonably withheld. DigitalPath, Inc. shall provide Landlord information reasonably needed by Landlord to evaluate the capability of the successor to operate DigitalPath, Inc.'s facilities in accordance with DigitalPath, Inc.'s operating requirements and standards. This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the Parties hereto.

18. DESTRUCTION: In the event the Tenant's Room and/or Tower is substantially or completely destroyed, with or without fault on the part of Landlord, DigitalPath's sole remedy against Landlord shall be one of the following: (1) to exercise the right to locate to another facility owned by Landlord, if available, until Landlord reconstructs the Tenant's Room and/or Tower; or, to terminate this Lease without obligation for future rent. No payment of the rental fee shall be due to Landlord during any period of time when DigitalPath is relocated, until Sunset Hill is reconstructed.

19. SUBORDINATION TO MASTER LEASE: Notwithstanding any other provision hereof, this Lease shall be subject to, and subordinate to, the terms and conditions of the Master Lease as they exist or as they may be modified by action of the USFS. Any change, modification, limitation, or termination of modification of the Master Lease shall govern and limit this Agreement, and Landlord shall not be liable for, nor responsible for, restrictions or limitations of DigitalPath's benefits hereunder arising from changes to, or termination of, the Master Lease. DigitalPath's sole remedy in the event such changes limit or restrict its rights hereunder shall be to terminate its occupancy under this Lease.

20. RE-OPENER ON RENT: Notwithstanding the provisions of Paragraph 3 hereof, rent payable by DigitalPath hereunder is subject to renegotiation under any of the following conditions:

- a. The rent charged to Landlord under the Master Lease is changed.
- b. Upon termination of the initial term hereof.
- c. Upon DigitalPath's exercise of the right to renewal or extension.

In the event of such re-opener, the Parties shall negotiate in good faith to agree upon a rent that reflects the fair market value of comparable facilities. If the Parties are unable to reach agreement on the modified rent, this Lease shall be subject to termination by either Party upon thirty (30) days notice, without further obligation or liability.

IN WITNESS WHEREOF, the parties have executed this amended lease agreement this 23 day of June 2009.

SOUTH FEATHER WATER AND POWER AGENCY

By: _____ Date _____
General Manager

DIGITALPATH, INC.

By: _____ Date _____
Andrew Cardin, Vice President – Wireless Infrastructure