

**AMENDED WIRELESS BROADBAND INTERNET ACCESS
NETWORK AGREEMENT
BETWEEN THE CITY AND COUNTY OF SAN FRANCISCO AND EARTHLINK, INC.**

This Agreement is made this 5th day of January, 2007, as amended on April 19, 2007, in the City and County of San Francisco, State of California, by and between EarthLink, Inc., a Delaware corporation (hereinafter referred to as "EarthLink") and the City and County of San Francisco, a municipal corporation, (hereinafter referred to as "City").

WHEREAS, the City solicited competitive proposals to install, manage, and operate a City-wide wireless broadband Internet access network for the purpose of increasing broadband availability, spurring economic development, and enhancing local neighborhoods; and

WHEREAS, the City selected EarthLink's proposal as the best proposal in that competitive solicitation process and desires EarthLink to provide a City-wide wireless broadband Internet access network as provided herein; and

WHEREAS, EarthLink installs, manages, and operates wireless broadband Internet access networks in municipalities throughout the United States in order to provide wireless broadband products and services to governments, businesses and consumers; and

WHEREAS, EarthLink desires to offer products and services enabled by a City-wide wireless broadband Internet network in the City to all residents, businesses, institutions, and visitors in and around the geographic boundaries of the City and County of San Francisco;

Now, THEREFORE, the parties agree as follows:

SECTION 1. DEFINITIONS.

Except as otherwise defined herein, the following terms, phrases, words, abbreviations and their derivations, when capitalized, shall have the meanings given below. 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 number include the plural number.

- 1.1 "Access Service" means any service that permits users to obtain access to the Internet through the Network, and includes without limitation the Minimum List of Initial Products and any other products that allow access to the Internet.
- 1.2 "Agreement" means this Wireless Broadband Internet Access Network Agreement.
- 1.3 "Aggregated Location Information" means Location Information that: (a) is not associated with an individual user's Protected Personal Information; or (b) is aggregated beyond the level of the individual account.
- 1.4 "Applicable Laws" means all applicable federal, state, and City laws, ordinances, codes, rules, regulations and orders, as the same may be amended or adopted from time to time.

- 1.5 “Assignee” means any entity to which the rights and obligations of this Agreement have been lawfully assigned in accordance with the Agreement.
- 1.6 “Assignment Open Access Requirements” means the following: In addition to the Open Access provisions in Section 9.1 of this Agreement, the Assignee agrees as follows with respect to any Premium Service that the Assignee offers to the public: (a) Assignee shall make such services available on a wholesale basis to other service providers on nondiscriminatory terms and conditions; (b) Assignee shall enter into contracts with at least three (3) Service Providers for the provision by Service Providers of one or more services over the Network, and, at any given time, at least three (3) Service Providers shall be offering to the public one or more services over the Network; and (c) Failure by Assignee to meet these requirements shall constitute a Termination Default, as specified in Section 14.5 of this Agreement.
- 1.7 “Backhaul Equipment” means radios, antennae, masts, cabinets and other related equipment of EarthLink’s broadband wireless system that EarthLink proposes for mounting on buildings or other structures in the City, approved by the City Planning Department or Commission for mounting on buildings or other structures in the City for the purpose of transmitting wireless data traffic to and from the mesh layer of the Communications Equipment of the Network that is installed on Street Light Poles.
- 1.8 “Backhaul Site” is defined in Section 6.5.3.
- 1.9 “Basic Service” means Access Service with a minimum average symmetric throughput of three hundred (300) kbps that is available without the user of such service paying any access fees.
- 1.10 “Basic Service Privacy Policy” is defined in Section 10.4.
- 1.11 “Basic Service Privacy Policy Standard” is defined in Section 10.4.
- 1.12 “Basic Service Protected Personal Information” is defined in Section 10.4.1.
- 1.13 “Best Selling Wireless Broadband Product” means the Access Service having the largest number of combined wholesale and retail Subscribers for the six (6) month period for which data are available immediately preceding the date on which the calculation is made, using the same data EarthLink uses to determine the number of Subscribers for its products.
- 1.14 “Board Approval” is defined in Section 6.2.1.
- 1.15 “Capture Portal” means the Web pages, authentication, and order management system to which browser requests are redirected when a wireless device first attaches to the Network.
- 1.16 “City” means the City and County of San Francisco, California.
- 1.17 “City Default” is defined in Section 14.8.

- 1.18 “Communications Equipment” means the equipment, including without limitation radios, antennae, gateways, wires, cables, fibers, filters, amplifiers, and other equipment, and switching, processing, monitoring, transmission and distribution components of EarthLink’s broadband wireless system, approved by the City Planning Department or Commission and City Public Utilities Commission from time to time, for mounting on poles in the Public Rights-of-Way.
- 1.19 “Customer Premises Equipment” or “CPE” mean communications equipment used at the end user’s location to enable or improve the reception of a wireless radio signal.
- 1.20 “DBE Goal” is defined in Section 19.1
- 1.21 “Design Criteria” means any criteria developed by and mutually agreed upon by the City and EarthLink in association with the City Planning Department for the installation of the Communications Equipment and Network in a manner that is consistent with the City’s General Plan.
- 1.22 “Digital Inclusion Product” means Access Service with a minimum average symmetric throughput of one (1) Mbps that is discounted for the purpose of expanding the number of users accessing the Network.
- 1.23 “Dispute” is defined in Section 14.1.1.
- 1.24 “EarthLink Privacy Policy” is defined in Section 10.2.
- 1.25 “Effective Date” is defined in Section 7.1.
- 1.26 “Exempt Information” means information that has been marked “Trade Secret”, “Proprietary” or “Confidential” and that either: (a) meets the definition of a trade secret as that term is defined in federal or California law; or (b) is otherwise exempt by law from the disclosure requirements of the San Francisco Sunshine Ordinance and California Public Records Act.
- 1.27 “Exempted Transfers” is defined in Section 12.2.
- 1.28 “Fee Service” means services of the Network that are provided to Subscribers of EarthLink. Basic Service and other Network services provided to other Service Providers or Subscribers of other Service Providers are not included in this definition.
- 1.29 “Final Network Acceptance” is defined in Section 5.1.12.
- 1.30 “Final Acceptance Test Criteria” is defined in Section 5.1.8.
- 1.31 “Final Network Design Documents” is defined in Section 5.1.7.
- 1.32 “Final Network Design Documents Approval” is defined in Section 5.1.9.
- 1.33 “Force Majeure Events” is defined in Section 14.3.

- 1.34 "Full Execution of this Agreement" is defined in Section 6.1.
- 1.35 "General Plan" means the San Francisco General Plan.
- 1.36 "Good Faith" means that a Party acts without the ulterior motive to terminate this Agreement or the Pole Use Agreement.
- 1.37 "Graffiti" is defined in Section 20.16.2.
- 1.38 "Gross Access Revenue" means the total revenues received by EarthLink from the following, minus any applicable taxes or government fees that are included in such revenues:
- (a) The Minimum List of Initial Products and any other products that allow access to the Internet, excluding Basic Service.
 - (b) All Access Services provided to Service Providers, excluding Basic Service.
 - (c) To the extent future products, excluding Basic Service, are developed that combine Internet access with a non-access application (such as Voice over Internet Protocol or VoIP), Gross Access Revenue shall also include the revenue attributable to the access portion of such combinations offered by EarthLink over the Network. The revenue attributable to the access portion of the combination shall be the lower of: (i) the retail bundled price of the combination; or (ii) the retail price of the retail product that is most similar to the Access Service included in the combined product. For example, if EarthLink offered a combined access and VoIP product to end users which included Network access with throughput of one (1) Mbps at a price of thirty dollars (\$30), and EarthLink's then current retail price for one (1) Mbps Premium Service was twenty dollars (\$20), then the revenue attributable to the access portion of the combination would be twenty dollars (\$20), which is the lower of: (i) the retail bundled price of the combination (\$30); or (ii) the retail price of the retail product that is most similar to the Access Service included in the combined product (\$20).
- 1.39 "Historic District" or "Historic Districts" is defined in Section 2.8.2.
- 1.40 "Initial Network Design Documents" is defined in Section 5.1.2.
- 1.41 "Initial Network Design Document Approval" is defined in Section 5.1.4.
- 1.42 "Initial Term" is defined in Section 7.2.
- 1.43 "Installed Street Light Pole Use Fee" means the fee paid by EarthLink to the PUC as compensation for installing Communications Equipment on Street Light Poles, in the amount specified in the Pole Use Agreement.
- 1.44 "Internal Resolution" is defined in Section 14.1.1.
- 1.45 "JAMS" means Judicial Arbitration and Mediation Services.

- 1.46 “Location Information” means information that enables a Service Provider or third party to identify the physical location of a device connected to the Network.
- 1.47 “Losses” is defined in Section 17.1.
- 1.48 “Milestone” and “Milestones” are defined in Section 6.
- 1.49 “Minimum List of Initial Products” is defined in Section 11.1.
- 1.50 “Municipal Facilities” means Street Light Poles or other poles or structures owned or controlled by the City.
- 1.51 “Municipal Services” shall mean Access Services for municipal use provided to the City by EarthLink.
- 1.52 “Network” means a wireless broadband Internet access network in the City.
- 1.53 “Network Implementation Authorizations” is defined in Section 6.5.
- 1.54 “Occasional Use Service” means service to temporary users who subscribe to Access Service for a finite time period of less than a month, such as an hour, a day or a week. Occasional Use Service shall have a minimum average symmetric throughput of one (1) Mbps.
- 1.55 “Party” means the City or EarthLink individually and “Parties” means the City and EarthLink collectively.
- 1.56 “Payment 1” is defined in Section 4.1.2.
- 1.57 “Payment 2” is defined in Section 4.1.2.
- 1.58 “Payment 3” is defined in Section 4.1.2.
- 1.59 “Permit” is defined in Section 6.5.3.
- 1.60 “Person” means a natural person, corporation, partnership or any other form of legal entity.
- 1.61 “PG&E” means Pacific Gas and Electric Company.
- 1.62 “PG&E Agreement Execution” is defined in Section 6.5.2.
- 1.63 “POC Acceptance” is defined in Section 5.1.6.
- 1.64 “POC Acceptance Test Criteria” means the test criteria for the Proof of Concept contained in the Initial Network Design Documents as approved in accordance with Section 5.1.4.

- 1.65 “Pole Use Agreement” means that certain Agreement For Non-Exclusive Use of the Street Light Poles Within the City and County of San Francisco Between the City and County of San Francisco Public Utilities Commission and EarthLink, Inc.
- 1.66 “Premium Service” means any Access Service available to users for a fee.
- 1.67 “Privacy Policy Standard” means the minimum requirements for privacy commitments and disclaimers described in Section 10.3.1 that apply to EarthLink’s Subscribers of the Network, provided this definition does not apply to the Service Providers or to the Subscribers of Service Providers.
- 1.68 “Process” means a requirement to disclose information issued by a court or other governmental entity, other than a requirement pursuant to the San Francisco Sunshine Ordinance or the California Public Records Act.
- 1.69 “Proof of Concept” is defined in Section 5.1.1.
- 1.70 “Proof of Concept Commencement Authorization” is defined in Section 6.3.
- 1.71 “Proposed Renewal Change Window” means the period that is not more than twelve (12) months and not less than seven (7) months before the end of the then current four (4) year term.
- 1.72 “Proposed Renewal Changes” means a modification to the current Agreement that a Party offers in Good Faith, provided that if such a modification is not offered in Good Faith, the modification shall not constitute a valid Proposed Renewal Change.
- 1.73 “Proposed Renewal Changes Notice” means a notice given as required herein that contains one or more Proposed Renewal Changes and states that the Term of the Agreement will not automatically renew unless the Parties agree to those Proposed Renewal Changes or some mutually agreed upon modifications to the current Agreement.
- 1.74 “Protected Personal Information” means any information which personally identifies the person to whom such information pertains. Protected Personal Information includes, but is not limited to: name, address, phone number, fax number, financial profiles, medical profiles, social security number, and credit card information. To the extent that unique information (which by itself is not Protected Personal Information) such as, but not necessarily limited to, a unique identifier, email address, biometric information, Location Information, IP address or MAC address, (“Unique Information”) is associated with Protected Personal Information, then such Unique Information will also be considered Protected Personal Information. But if such Unique Information is not combined with Protected Personal Information, then it is not Protected Personal Information. Protected Personal Information does not include information that is collected or stored in a manner that no longer reflects or references an individually identifiable user. Location Information not connected to an identified individual in its then currently stored form, or other information not connected to an

identified individual in its then currently stored form is not considered Protected Personal Information.

- 1.75 “Public Rights-of-Way” means the area in, on, upon, above, beneath, within, along, across, under, and over the public streets, sidewalks, roads, lanes, courts, ways, alleys, spaces, and boulevards within the geographic area of the City in which the City now or hereafter holds any property interest, which is dedicated to public use.
- 1.76 “PUC” means the City's Public Utilities Commission.
- 1.77 “PUC/Board Approval” is defined in Section 6.2.2.
- 1.78 “Quarter”, “calendar quarter” and “quarter” shall mean the three (3) month periods that commence on January 1, April 1, July 1 and October 1 of each calendar year during the Term.
- 1.79 “Renewal Terms” is defined in Section 7.2.
- 1.80 “Request for Internal Resolution” is defined in Section 14.1.1.
- 1.81 “Roaming Service” means an Access Service with a minimum average symmetric throughput of one (1) Mbps, which is temporarily extended to Subscribers of a Service Provider.
- 1.82 “ROW Fee” is defined in Section 4.1.1.
- 1.83 “ROW Prepayment” is defined in Section 4.1.2.
- 1.84 “Service Level Agreement” and “SLA” are defined in Section 8.
- 1.85 “Service Provider” means a third party with which EarthLink enters into a written Agreement authorizing such third party to offer commercial services over the Network.
- 1.86 “Street Light Poles” means street light poles, street lights and street light arms attached to the street light poles, owned or controlled by the City and that are located in the Public Rights-of-Way of the City and County of San Francisco.
- 1.87 “Subcontractor” means third parties that enter into contracts with EarthLink for the purpose of performing EarthLink’s obligations or services under this Agreement, but shall not mean Service Providers or the provider of the Basic Service.
- 1.88 “Subscribers” means users who subscribe to services provided over the Network through EarthLink or a Service Provider, but does not include users of the Basic Service.
- 1.89 “Term” is defined in Section 7.2.
- 1.90 “Termination Default” is defined in Section 14.5.

- 1.91 “Third Party Suppliers” means vendors or partners that provide products or services to EarthLink or the Subscribers of Fee Services on behalf of EarthLink.
- 1.92 “Tier 1” means customer service to respond to, diagnose, and attempt to resolve issues raised by end users through one-to-one interaction between the end users and help desk or support representatives via all of the following at the customer’s option: telephone, email, and on-line chat.
- 1.93 “Tier 2” means customer service provided to an end user customer if a complaint cannot be addressed to the customer’s satisfaction through the Tier 1 customer service and the issue must be escalated to a supervisor.
- 1.94 “Tier 3” means customer service and network monitoring provided to EarthLink and Service Providers by a Network Operations Center, provided this does not include any contact with Subscribers.
- 1.95 “Transition Period” is defined in Section 7.2.
- 1.96 “Unique Information” is defined in Section 1.70.
- 1.97 “Unsuitable Backhaul Equipment Locations” is defined in Section 3.2.
- 1.98 “Unsuitable Poles” is defined in Section 3.2.

SECTION 2. RIGHT OF WAY AUTHORIZATION.

- 2.1 Authorization. The City hereby authorizes EarthLink to occupy and use the Public Rights-of-Way to construct, install, repair, maintain, and operate its Network and Communication Equipment as specified herein during the Term. This Agreement does not confer any rights other than those expressly provided herein and does not authorize EarthLink to occupy and use the Public Rights-of-Way for any purposes other than to construct, install, repair, maintain, and operate its Network.
- 2.2 No Real Property Interest. Nothing in this Agreement shall be deemed to grant, convey, create, or vest in EarthLink a real property interest in land, including any fee, leasehold interest, or easement.
- 2.3 EarthLink’s Authority is Subordinate to City’s Occupancy Rights. Any and all rights expressly granted to EarthLink under this Agreement shall be subject to the prior and continuing right of the City under Applicable Law to use any and all parts of the Public Rights-of-Way exclusively or concurrently with any other person or entity and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect the Public Rights-of-Way. EarthLink may only place its Communications Equipment or Network in the Public Rights-of-Way in a manner that is consistent with this Agreement and Applicable Laws.
- 2.4 Attachment to Municipal Facilities. The City hereby authorizes and permits EarthLink to enter upon the Public Rights-of-Way and to attach, install, operate, maintain,

remove, reattach, reinstall, relocate, and replace its Communications Equipment in or on Municipal Facilities of the City, provided that EarthLink obtains the duly authorized permission of the relevant Municipal Facilities owner. The obligations of EarthLink hereunder are conditioned on PUC/Board Approval of the Pole Use Agreement.

- 2.5 Attachment to Third-Party Property. The City hereby authorizes and permits EarthLink to enter upon the Public Rights-of-Way and to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace its Communications Equipment and Network in or on poles or other structures owned by public utility companies as may be permitted by the public utility company or property owner, as the case may be. Upon request, EarthLink shall furnish to the City confirmation of such permission from the individual public utility company or property owner.
- 2.6 Removal Obligations. EarthLink shall include in any agreement with a third party for use of poles in the Public Rights-of-Way a provision requiring removal of Communications Equipment from those third party poles at the end of the Term and any Transition Period upon similar terms and within a similar timeframe as set forth in the Pole Use Agreement.
- 2.7 No Interference. In the performance and exercise of its rights and obligations under this Agreement, EarthLink shall not adversely interfere with the existence and operation of any and all public and private rights-of-way, poles, aerial and underground electrical and telephone wires, cable television, and other telecommunications, utility, or municipal property, without the express written approval of the owner or owners of the affected property or properties, except as permitted by Applicable Law or this Agreement.
- 2.8 Limitations on Installation of EarthLink's Communications Equipment and Network. Notwithstanding anything to the contrary herein and in addition to any and all other requirements of this Agreement, the following limitations and conditions shall apply to EarthLink's installations of its Communications Equipment and Network.
 - 2.8.1 EarthLink shall not locate its Communications Equipment and Network on poles in the Public Rights-of-Way that are decorative, historically or architecturally significant, or specially designed poles.
 - 2.8.2 Location of EarthLink's Equipment and Network. Before locating its Communications Equipment and Network on poles in the Public Rights-of-Way, EarthLink shall obtain any required City permissions or approvals, including without limitation any required permission or approval of the City Planning Department or, if required, the City Planning Commission, and including without limitation any required certificates of appropriateness. With respect to any Historic District in which a City ordinance requires a certificate of appropriateness for changes to street furniture, EarthLink shall locate its Communications Equipment and Network on poles in a manner that conforms with the Secretary of Interior's Standards for the Treatment of Historic Properties, to the extent such Standards are applicable.

- 2.8.3 Design Standards. In locations where EarthLink installations are allowed, EarthLink shall adhere to the approved Initial Network Design Documents and approved Final Network Design Documents and shall locate its Communications Equipment and Network in the Public Rights-of-Way in a manner that complies with any applicable Design Criteria.
- 2.8.4 Backhaul Equipment. EarthLink shall obtain any required permissions and approvals, including without limitation any required conditional use permits or certificates of appropriateness and any other required permissions or approvals of the City Planning Department (or, if required, the City Planning Commission), before installing Backhaul Equipment. If EarthLink requests to install Backhaul Equipment on a property that is a historical resource or in a Historic District, EarthLink shall install the Backhaul Equipment in a manner that conforms with the Secretary of Interior's Standards for the Treatment of Historic Properties, to the extent such Standards are applicable. EarthLink will locate the Backhaul Equipment on structures such that: (i) the base of the Backhaul Equipment is at least twenty-five (25) feet above the ground; (ii) the Backhaul Equipment is visually compatible with the site and adjacent structures; (iii) the Backhaul Equipment, when placed on a building rooftop, is inconspicuous when viewed from the street level at the base of the building; and (iv) cabinets are located inside an existing structure where possible, or will be inconspicuous and compatible with the existing structure and landscape.
- 2.9 Non-Exclusive. The authorizations granted in this Agreement shall be non-exclusive and nothing contained in this Agreement shall be construed to limit, alter, or waive the right of the City to enter into agreements authorizing persons or entities other than EarthLink to access and use Municipal Facilities to install any form of communications equipment or for any other purpose, except as specifically set forth herein. Such authorizations by the City shall be made on a non-discriminatory and competitively neutral basis, taking into account material differences in the circumstances of each applicant for such authorization. The City shall give EarthLink prompt prior written notice of any applications received by the City from others requesting permission to install a substantial number of devices similar to the Communications Equipment on Municipal Facilities.
- 2.10 Antennae Site Lease Agreements. The City agrees to lease or license access to certain siren poles, rooftops, and other structures owned by the City to EarthLink provided that the City, in its sole discretion, deems such structures available and appropriate for such use and provided that parties mutually agree on terms. To the extent possible, the City and EarthLink will strive to promptly secure approval of any leases or licenses of property needed to support of EarthLink's Network implementation, as well as any approvals that may be required under Applicable Law (e.g., a conditional use permit).

SECTION 3. NETWORK UNDERTAKING.

- 3.1 Network Undertaking. Subject to the terms and conditions of this Agreement and the Pole Use Agreement, EarthLink will design, construct, install, test, operate, maintain, and upgrade a City-wide Network at its sole cost, according to the specifications set forth in the approved Final Network Design Documents, according to the project schedule set forth in the approved Final Network Design Documents.
- 3.2 Availability. The City acknowledges that there may be poles that are: (a) not supplied electrical power twenty-four (24) hours per day; (b) not approved by the City for use pursuant to Section 2.8.2; or (c) otherwise not suitable or available for EarthLink's use (collectively "Unsuitable Poles"). The City further acknowledges that there may be locations selected by EarthLink for placement of Backhaul Equipment that may not be approved by the City for use pursuant to Section 2.8.4. ("Unsuitable Backhaul Equipment Locations") The City further acknowledges that the existence of such Unsuitable Poles and Unsuitable Backhaul Equipment Locations may impair EarthLink's ability to satisfy the coverage requirements of Section 3.1 of this Agreement, the approved Final Network Design Documents, and the Service Level Agreement. EarthLink and the City agree to work together to maximize coverage through alternative poles to the extent possible. In the event that a material number of Unsuitable Poles or Unsuitable Backhaul Equipment Locations substantially impairs EarthLink's ability to satisfy coverage requirements, the City and EarthLink will agree upon modified coverage requirements based on the available poles that are not Unsuitable Poles and the available Backhaul Equipment Locations that are not Unsuitable Backhaul Equipment Locations.
- 3.3 EarthLink Workmanship. Work under this Agreement by EarthLink shall be performed only by competent personnel under the supervision of and in the employment of EarthLink or its Subcontractors. EarthLink will comply with City's reasonable requests regarding assignment of personnel, but all personnel, including those assigned at City's request, must be supervised by EarthLink. EarthLink shall commit adequate resources to complete the project within the project schedule specified in this Agreement. Except as otherwise provided herein, City shall not be responsible for any damage to persons or property as a result of the use, misuse or failure of any equipment used by EarthLink, or by any of its employees, even though such equipment be furnished, rented or loaned to EarthLink by City.

SECTION 4. EARTHLINK PAYMENTS TO CITY.

- 4.1 ROW Fee.
- 4.1.1 Amount of ROW Fee. EarthLink shall pay a fee to the City, during the Term and any Transition Period, for the use of the City's Public Right-of-Way, equal to five (5%) percent of Gross Access Revenues actually received by EarthLink from the Network for the preceding quarter ("ROW Fee"). Such ROW Fee shall be due and payable within forty-five (45) days of the end of the first Quarter following Proof of Concept Commencement Authorization, and every Quarter thereafter.

- 4.1.2 ROW Prepayment. A prepayment of ROW Fees shall be made to the City in the amount of six hundred thousand dollars (\$600,000) (“ROW Prepayment”) which ROW Prepayment will be due and payable as follows: (a) two hundred thousand dollars (\$200,000) within fifteen (15) days of the Effective Date of Agreement (“Payment 1”); (b) two hundred thousand dollars (\$200,000) within fifteen (15) days of the satisfaction of the Network Implementation Authorizations (“Payment 2”); and (c) two hundred thousand dollars (\$200,000) within fifteen (15) days of the Final Network Acceptance (“Payment 3”).
- 4.1.3 No Refund of ROW Prepayment. The ROW Prepayment is a nonrefundable prepayment of ROW Fees, with a maximum amount to be accrued and applied as a credit against owed ROW Fees by EarthLink each Quarter, beginning with the first payment of quarterly ROW Fees, to be up to eighteen thousand seven hundred and fifty dollars (\$18,750) per quarter, until the six hundred thousand dollars (\$600,000) ROW Prepayment is exhausted by credits applied to ROW Fees.
- 4.1.4 Reduction of ROW Prepayment Balance. At the time of PUC/Board Approval, and only at that time, the balance of the ROW Prepayment that may be applied toward ROW Fees by EarthLink shall be reduced by six thousand dollars (\$6,000) for every one dollar (\$1) that the Installed Street Light Pole Use Fee required to be paid during the Term of the Pole Use Agreement is below ninety-nine dollars and forty-eight cents (\$99.48) per pole per year at the time of PUC/Board Approval. For example, if the Installed Street Light Pole Use Fee at the time of PUC/Board Approval is eighty-nine dollars and forty-eight cents (\$89.48) per year (i.e. ten dollars (\$10) less than ninety-nine dollars and forty-eight cents (\$99.48)), the reduction of the ROW Prepayment balance would be sixty thousand dollars (\$60,000). The ROW Prepayment shall not be reduced by more than three hundred thousand dollars (\$300,000) in this manner.
- 4.2 Payments Due. Any sums due and owing the City by EarthLink as provided herein shall be paid when due and payable according to this Agreement. Where not otherwise specified in this Agreement or any other agreement between the City (or any City agency) and EarthLink, any sums due and owing the City by EarthLink pursuant to this Agreement, the Pole Use Agreement, or any other agreement between the City (or any City agency) and EarthLink, shall be due and payable within thirty (30) days of the date that written invoice is given by the City to EarthLink.
- 4.3 Late Payment Interest. If EarthLink fails to make any payment required to be made by EarthLink under this Agreement, the Pole Use Agreement, or any other agreement between the City (or City agency) and EarthLink, as and when due, and that failure continues for a period of ten (10) business days after written notice of nonpayment when due is given by the City to EarthLink, then interest shall accrue on the past due amount from the date of such non-payment notice at the rate of twelve percent (12%) per annum.
- 4.4 Advertising Revenue Reports. Within sixty (60) days of the end of each calendar year during the Term and any Transition Period, EarthLink shall provide a written report to

the City which shall include the total amount of revenue EarthLink received during the previous year from advertising, content, commerce, and applications derived from or enabled by the Basic Service or any Access Service offered by EarthLink for which there is no subscription fee. Such report shall include any actual amounts received. Inasmuch as calculations or imputed amounts are utilized, EarthLink shall provide such reports, and the background information used to derive the reports to the City.

- 4.5 Acceptance of Payment Not a Release. No acceptance by the City of any payment shall be construed as an accord that the amount paid is in fact the correct amount owed, nor shall such acceptance of such payment be construed as a release or waiver of any claim the City may have for additional sums payable or any known or unknown breach of this Agreement.

SECTION 5. NETWORK IMPLEMENTATION.

5.1 Proof of Concept, Network Plans and Approval.

- 5.1.1 Proof of Concept. EarthLink shall demonstrate through a limited implementation of the Network the viability of EarthLink's proposed technology and the Network's compliance with approved Initial Network Design Documents ("Proof of Concept").
- 5.1.2 Submission of Initial Network Design Documents. Prior to commencement of the initial installation of the Proof of Concept under this Agreement and within thirty (30) days of the later of the date of Board Approval and the date of PUC/Board Approval, EarthLink shall submit to the City, in a mutually agreed upon form, the plans and specifications for the Proof of Concept. These plans and specifications shall include: (a) a schedule of the Proof of Concept, the scope of work for the Proof of Concept including location (expected to be not less than two (2) square miles in size in an area to be mutually defined and agreed upon by EarthLink and the City), proposed POC Acceptance Test Criteria, and the anticipated number of poles to be used in the Public Rights-of-Way for the Proof of Concept; (b) a proposed plan for full Network implementation including design, scope of work, and schedule, and the anticipated number of poles to be used in the Public Rights of Way for the full Network implementation; and (c) a mutually acceptable plan for verification of the level of radio-frequency emissions from a representative sample, in a mutually acceptable number, of each type of installed Communications Equipment and installed Backhaul Equipment ("Initial Network Design Documents").
- 5.1.3 POC Acceptance Test Criteria. POC Acceptance Test Criteria may include, based on the mutual agreement of the Parties: outdoor coverage, indoor coverage up to a height of forty (40) feet, Network performance/throughput, Network availability, reliability, and prioritized service for municipal use.
- 5.1.4 Initial Network Design Document Approval. In consultation with EarthLink, the City will review, modify as necessary, approve, and gain EarthLink's consent to the proposed Initial Network Design Documents, as modified, within forty-five

(45) days of delivery of the proposed Initial Network Design Documents by EarthLink to the City (“Initial Network Design Document Approval”).

- 5.1.5 Installation Beyond Proof of Concept at EarthLink’s Risk. During the first one hundred and twenty (120) days following the City’s approval of the Initial Network Design Documents, EarthLink shall be entitled to continue installation of Communications Equipment outside the area of the Proof of Concept at its own risk. EarthLink agrees that the City may require EarthLink to remove any such installations, within a reasonable time and at EarthLink’s sole expense, if the POC Acceptance is not accepted as provided herein. Following POC Acceptance, EarthLink shall cause the entire Network, including all previous installations, to conform to the approved Final Network Design Documents.
- 5.1.6 Proof of Concept Acceptance. EarthLink shall perform the Proof of Concept based on the approved Initial Network Design Documents and shall provide test results to the City for evaluation. The City’s acceptance of the Proof of Concept will occur when the Proof of Concept satisfies the POC Acceptance Test Criteria in the Initial Network Design Documents (“POC Acceptance”). EarthLink shall achieve POC Acceptance within six (6) months of Proof of Concept Commencement Authorization. If the POC Acceptance Test Criteria are not satisfied, the Parties will agree on how to proceed.
- 5.1.7 Submission of Final Network Design Documents. Upon Proof of Concept Acceptance, EarthLink will submit to the City, in a mutually agreed upon form, the plans and specifications for the Network implementation that shall include a schedule of the full Network implementation, the scope of work for the full Network implementation, the anticipated number of poles to be used in the Public Rights-of-Way for the full Network implementation, and proposed Final Acceptance Test Criteria (“Final Network Design Documents”).
- 5.1.8 Final Acceptance Test Criteria. The Final Acceptance Test Criteria shall measure whether network coverage, quality of service, and performance are provided on a non-discriminatory basis as agreed to in the Final Network Design Documents (“Final Acceptance Test Criteria”).
- 5.1.9 Approval of Final Network Design Documents. In consultation with EarthLink, the City will review, modify as necessary, approve and gain EarthLink’s consent to the proposed Final Network Design Documents, as modified, within forty-five (45) days of delivery of the proposed Final Network Design Documents by EarthLink to the City (“Final Network Design Document Approval”).
- 5.1.10 Submission of Proposed SLAs. At the same time EarthLink submits proposed Final Network Design Documents, EarthLink will submit to the City, in mutually agreed upon form, proposed Service Level Agreements applicable to the services offered over the Network.
- 5.1.11 Approval of SLAs. In consultation with EarthLink, the City will review, modify as necessary, approve and gain EarthLink’s consent to the proposed Service Level

Agreements, as modified, within forty-five (45) days of delivery of the proposed Service Level Agreements by EarthLink to the City.

5.1.12 Final Network Acceptance. EarthLink shall deploy the full Network in accordance with the approved Final Network Design Documents and shall provide test results to the City for evaluation. Final Network Acceptance will be based on the satisfaction of the Final Acceptance Test Criteria (“Final Network Acceptance”). EarthLink shall achieve Final Network Acceptance within eighteen (18) months of Network Implementation Authorization.

5.2 Interference. EarthLink will work with the City in a commercially reasonable manner to develop mutually acceptable procedures for resolving and escalating radio signal interference issues, to the extent EarthLink and the City can reach mutual agreement.

5.3 Network Upgrade. EarthLink agrees to keep the Network updated with industry standard technology, including, without limitation, updated equipment, software, protocols and other standards, provided that this obligation will not apply during the last eighteen (18) months of the Term unless the terms of this Agreement have been renewed by EarthLink and the City so that the end of the Term is more than eighteen (18) months away. Upgrades will be at parity with the upgrades performed in other comparable cities in which EarthLink operates wireless broadband Internet access networks. A list of comparable cities, which may be similar in terms of geographic size, population, household density or other such factors, shall be proposed by EarthLink and subject to approval by the City. EarthLink shall be entitled to keep the Network updated with new technology, including, without limitation, new equipment, software, protocols and other standards, subject to complying with the other provisions of this Agreement.

SECTION 6. MILESTONES.

The Parties anticipate the following milestones to occur, subject to the terms and conditions of this Agreement. The satisfaction and completion of all preceding milestones in this Section is a condition of each of the subsequent milestones (each is referred to as “Milestone” and collectively as “Milestones”).

6.1 Milestone 1: Full Execution of this Agreement. The full execution of this Agreement shall be satisfied upon the execution of this Agreement in a signed writing by authorized representatives of EarthLink and the City and the execution of the Pole Use Agreement in a signed writing by an authorized representative of EarthLink and the submittal of the Pole Use Agreement to the PUC for its approval by resolution. (“Full Execution of this Agreement”).

6.2 Milestone 2: Full Approval of this Agreement. The full approval of this Agreement shall be satisfied upon the completion of the following conditions:

6.2.1 The City Board of Supervisors has adopted an ordinance approving this Agreement and the Mayor has approved such ordinance either by signature or by

operation of law and the ordinance has become effective as law (“Board Approval”).

- 6.2.2 The PUC has approved the Pole Use Agreement by resolution and the City Board of Supervisors has approved the Pole Use Agreement (collectively “PUC/Board Approval”).

If at any time after the day that is one hundred and eighty (180) days after Full Execution of this Agreement: (A) the Board Approval and PUC/Board Approval are not successfully obtained, completed and continuing and such failure to obtain, complete and continue was not caused by EarthLink or Force Majeure Events, provided that if the Board of Supervisors has adopted an ordinance approving this Agreement and the Mayor has approved such ordinance either by signature or by operation of law (“Adoption of Ordinance”) and PUC/Board Approval has occurred during the one hundred and eighty (180) day period described above, then, for sixty (60) days after the Adoption of the Ordinance, EarthLink shall not be entitled to terminate as provided below even if the one hundred and eighty (180) day period described above has expired, but EarthLink shall be entitled to terminate as provided below if the Board Approval has not occurred by the end of such sixty (60) days; (B) Board Approval or PUC/Board Approval has been rescinded or reversed; or (C) there is a permanent injunction or a preliminary injunction issued by a court of competent jurisdiction enjoining implementation of this Agreement or the Pole Use Agreement, then EarthLink shall be entitled to terminate all of its obligations hereunder by sending a notice of termination after the end of such one hundred and eighty (180) day period. Instead of terminating as provided above, if any of the occurrences described in (A), (B) or (C) in the immediately preceding sentence occur, then EarthLink shall have the option, without waiving any rights, to not commence or continue the Proof of Concept or implementation of the Network until the occurrence described in (A), (B) or (C) is no longer in existence. If an Action is pending for longer than twenty-four (24) months, then EarthLink shall be entitled to terminate all of its obligations hereunder by sending a notice of termination after the end of such twenty four (24) month period. “Action” shall be defined as a petition, complaint or other procedurally proper pleading (collectively a “petition”) that has been filed with a court of competent jurisdiction or an administrative agency of competent jurisdiction or board of competent jurisdiction of the City or the State of California that seeks to invalidate either the Board Approval or the PUC/Board Approval and such court, board or administrative agency has the legal authority to invalidate either the Board Approval or the PUC/Board Approval. If an Action is pending for more than 45 days and EarthLink decides in good faith that it is unwilling to risk further investment in the Network because of the pendency of the Action, then EarthLink shall have the option to not commence or continue the Proof of Concept or implementation of the Network until such time as the Action is no longer pending.

- 6.3 Milestone 3: Proof of Concept Commencement Authorization. “Proof of Concept Commencement Authorization” shall be satisfied upon the completion of the following conditions:

- 6.3.1 EarthLink has made Payment 1 on the Effective Date and as outlined in Section 4.1.2.

- 6.3.2 EarthLink has submitted the proposed Initial Network Design Documents to the City and the City has approved the Initial Network Design Documents as outlined in Section 5.1.4.
- 6.3.3 Necessary authorizations of the City for the Proof of Concept have been issued (excepting those authorizations that the City and EarthLink have otherwise agreed will be issued on a rolling basis).
- 6.3.4 The City has obtained any approvals that might be required from PG&E in order to enable the PUC to provide electricity to the Communications Equipment on PUC Street Light Poles.

Upon satisfaction of the Proof of Concept Commencement Authorization, EarthLink shall have the obligation and authority to perform the Proof of Concept in accordance with the approved Initial Network Design Documents and the City and EarthLink will have the authority and obligation to evaluate the Proof of Concept results in accordance with the POC Acceptance Test Criteria.

- 6.4 Milestone 4: Proof of Concept Acceptance. POC Acceptance shall be satisfied as outlined in Section 5.1.6.
- 6.5 Milestone 5: Network Implementation Authorization. Network Implementation Authorization shall be satisfied upon the completion of the following conditions (“Network Implementation Authorizations”):
 - 6.5.1 Following POC Acceptance, EarthLink has submitted the proposed Final Network Design Documents and the proposed SLAs to the City, and the City has approved the Final Network Design Documents and the SLAs as outlined in Sections 5.1.9 and 5.1.11.
 - 6.5.2 EarthLink has entered into an agreement with PG&E for the use of PG&E street light poles and electricity in the City to attach Communications Equipment to PG&E poles and obtain the electricity needed to operate the Network (“PG&E Agreement Execution”).
 - 6.5.3 The City has granted all necessary authorizations of the City or EarthLink otherwise has all legal authorizations to install Backhaul Equipment (“Permits”) in nine (9) of the Backhaul Sites applied for by EarthLink, to the effect that EarthLink is able to provide Backhaul Sites to support more than seventy (70%) percent of the Entire Network (“Coverage Condition”). This Coverage Condition shall not be operative unless EarthLink, subject to Force Majeure, has (a) diligently requested and pursued any and all third party approvals that may be needed to install Backhaul Equipment; (b) within fifteen (15) days after the satisfaction of the Proof of Concept Commencement Authorization, submitted complete applications for Permits (excluding building permits for Backhaul Sites for which a conditional use permit is required) from the City for five (5) Backhaul Sites and delivered to the City complete applications to lease, and complete applications for Permits (excluding building permits for Backhaul Sites for which

a conditional use permit is required) from the City for, the Mendoza Water Tank and the Twin Peaks Tower for installation of Backhaul Sites; and (c) within the three (3) months after Proof of Concept Commencement Authorization, submitted complete applications for Permits (excluding building permits for Backhaul Sites for which a conditional use permit is required) from the City for seven (7) additional Backhaul Sites (collectively (a) (b), and (c) are referred to as "Minimum Backhaul Applications"), such that if all of the Minimum Backhaul Applications and any additional required building permits are approved by the City or, as the case may be, any additional approvals are granted by third parties, then EarthLink would be able to provide Backhaul Sites to support the Entire Network. When used herein "Backhaul Sites" means sites for the installation of Backhaul Equipment to support portions of the Network. When used herein "Entire Network" means the Network with installed Backhaul Sites sufficient to support all portions of the City. Notwithstanding anything to the contrary, if the Coverage Condition has not been satisfied within two (2) years after the POC Acceptance, and such failure to complete and satisfy was not caused by EarthLink or Force Majeure Events, then EarthLink shall be entitled to terminate all of its obligations hereunder by sending a notice of termination after the end of such two (2) year period.

Upon satisfaction of the Network Implementation Authorization, EarthLink shall have the obligation and authority to implement the Network according to the approved Final Network Design Document and this Agreement.

- 6.6 Milestone 6: Final Network Acceptance. Final Network Acceptance shall be satisfied upon EarthLink's payment of Payment 2 as outlined in Section 4.1.2 and the satisfaction of the Final Network Acceptance Test Criteria set forth in the approved Final Network Design Documents .

SECTION 7. TERM AND RENEWAL.

- 7.1 Effective Date. This Agreement shall become effective and binding on the date that Full Execution of this Agreement, Board Approval, and PUC/Board Approval have all occurred ("Effective Date").
- 7.2 Term. The term and duration of this Agreement ("Term") shall commence on the Effective Date and shall expire on the later of: (a) the date that is four (4) years after the satisfaction of the Network Implementation Authorizations ("Initial Term"); or (b) the end of the last Renewal Term to occur. The Term will automatically renew at the end of the Initial Term and the end of each Renewal Term that occurs, for a total of three (3) successive four (4) year renewal terms after the end of the Initial Term ("Renewal Terms"), on the same terms and conditions, provided that: (i) if either Party gives a Proposed Renewal Changes Notice and the Parties agree to modified terms and conditions prior to the end of the Transition Period, the Term will renew for a Renewal Term in accordance with the modified terms and conditions, with each such Renewal Term to commence at the later of the end of the Initial Term or the end of the most recent Renewal Term that has occurred, even if the modified terms are agreed upon during the Transition Period; or (ii) if either Party gives a Proposed Renewal Changes

Notice, and the other Party does not accept those Proposed Renewal Changes, or the Parties do not agree to other modified terms and conditions prior to the end of the Transition Period, the Term will not renew. If the Parties that have received a Proposed Renewal Changes Notice accept the Proposed Renewal Changes in those notices by the end of the then current Term (i.e. the later of the end of the Initial Term or the end of the most recent Renewal Term to have occurred), then the Term shall renew automatically for a Renewal Term commencing at the end of the then current Term (i.e. the later of the end of the Initial Term or the end of the most recent Renewal Term to have occurred) on the same terms as the current Agreement as modified by the accepted Proposed Renewal Changes. If the Term is not renewed by a Renewal Term at the end of the Initial Term or any of the Renewal Terms, then this Agreement shall continue in full force and effect for a transition period of eighteen (18) months after the end of the Term ("Transition Period") until the end of that Transition Period or the earlier occurrence of a Renewal Term as provided above.

- 7.3 Renewal Process. During the Proposed Renewal Change Window, either Party may give the other Party a Proposed Renewal Changes Notice. Neither Party is entitled to give more than one Proposed Renewal Changes Notice in the Initial Term and in each Renewal Term. In order to submit a Proposed Renewal Changes Notice, the City must obtain, during the Proposed Renewal Change Window, the prior consent of its Board of Supervisors to the Proposed Renewal Changes and to the giving of the Proposed Renewal Changes Notice. Such prior consent of the Board of Supervisors shall be by ordinance or resolution (to which EarthLink has received, to the extent feasible in the circumstances, at least seven (7) days prior written notice that such issue is being proposed to the Board of Supervisors and at least forty-eight (48) hours prior written notice specifying the hearing date and time). In order to submit a Proposed Renewal Changes Notice, EarthLink must obtain, during the Proposed Renewal Change Window, the prior consent of its Board of Directors (to which the City has received, to the extent feasible in the circumstances, at least seven (7) days prior written notice that such issue is being proposed to the Board of Directors) to the Proposed Renewal Changes and the giving of the Proposed Renewal Changes Notice. Any Proposed Renewal Changes Notice that is not approved by the Board of Supervisors or Board of Directors (as the case may be) or is not timely sent as described above, shall not be effective to stop automatic renewal of the Term for another four (4) year Renewal Term. A Party receiving a Proposed Renewal Changes Notice shall accept or reject the Proposed Renewal Changes modification(s) or attempt to negotiate a mutually acceptable alternative. If the Parties do not reach agreement on the Proposed Renewal Changes or some mutually acceptable alternatives within thirty (30) days of the last-submitted Proposed Renewal Changes Notice, the Parties shall enter into an Internal Escalation process as described in Section 14.1 for thirty (30) days, and, if agreement is still not reached, the Parties shall enter into a mediation process during the period before the end of the then current four (4) year term. Such mediator will be empowered to require the Parties to meet during such time and discuss the Proposed Renewal Changes in Good Faith. The mediator will be chosen by both Parties or by the San Francisco office (or the office closest to San Francisco if JAMS does not then have an office in San Francisco) of JAMS if the Parties cannot agree. Such mediator shall be an individual who has experience serving in both the wireless industry and the

public sector, and who does not have any conflict of interest. The Parties shall negotiate in Good Faith until the end of the then current Term in an attempt to reach agreement on the Proposed Renewal Changes or other mutually agreeable modifications to this Agreement.

- 7.4 Agreed Changes. After the exchange of Proposed Renewal Changes Notices, if the Parties agree to modified terms and conditions, the modified terms and conditions shall apply during the next four (4) year Renewal Term and any successive terms, or as agreed to by the Parties in writing.
- 7.5 Effect of Non-agreement on Proposed Renewal Changes. After the giving of a Proposed Renewal Changes Notice by either or both Parties, if either Party does not accept the Proposed Renewal Changes of the other Party, or the Parties otherwise do not agree to modified terms and conditions by the date of the expiration of the then-current Term, the Agreement shall continue in effect for an additional eighteen (18) month Transition Period, during which time the Parties shall have the same rights and duties as under the Agreement. The Transition Period shall only come into effect as described in this Section and shall not otherwise come into effect. At the conclusion of the Transition Period, the Agreement shall terminate unless the Parties have reached agreement on modifications of the Agreement prior to the end of the Transition Period, in which case the Term shall renew for a Renewal Term commencing upon the expiration date of the Term (i.e. the end of the later of the Initial Term or the most recent Renewal Term to have occurred) in accordance with the modified terms and conditions.
- 7.6 Effect of Termination or Expiration of Term. This Section and the following Sections of this Agreement shall survive termination or expiration of this Agreement: 2.6, 3.3, 4, 7, 12.2, 13, 14, 15, 17, 18, 20.2, 20.3, 20.4, 20.6, 20.8, 20.11, 20.12, 20.14, 20.25, and 20.36.
- 7.7 Transition Period. After the end of the Term of this Agreement, this Agreement shall terminate except the Agreement shall be extended for the Transition Period only as set forth in Sections 7.2 and 7.5. This subsection shall survive termination of this Agreement.

SECTION 8. SERVICE LEVEL AGREEMENT.

In accordance with the procedures set forth in Sections 5.1.10 and 5.1.11, EarthLink shall propose, and the City shall approve, a Service Level Agreement (SLAs) establishing performance standards for the Network (“SLAs” and “Service Level Agreement”). The SLAs will address at least the following items: outdoor/indoor coverage, availability, throughput, and latency. The SLAs will specify the reporting interval (e.g., quarterly or annually), the measurement period (e.g., monthly or quarterly), other elements of the measurement method (e.g., number of measurements, geographic granularity of measurements) and other criteria mutually agreeable to EarthLink and the City. Following mutual agreement upon SLAs, and until Final Network Acceptance, EarthLink will provide reports as required by the SLAs for informational purposes only. Beginning with Final Network Acceptance, EarthLink will operate

the Network in a manner that satisfies the SLAs. Failure of the Network to satisfy the SLAs shall not be a Termination Default.

SECTION 9. NETWORK POLICIES.

9.1 Open Access.

9.1.1 Wholesale Access Required. Beginning no later than thirty (30) days after satisfaction of the Network Implementation Authorizations, EarthLink shall offer to any Service Providers wholesale access to any Access Service of the Network that EarthLink offers to the public (except for Digital Inclusion products, Occasional Use products, and Basic Service) on nondiscriminatory terms and conditions.

9.1.2 Written Notice Required. EarthLink shall give written notice to the City of each Service Provider offering commercial service over the Network, whether or not such Service Provider is charging a fee for service.

9.2 Network Non-Discrimination.

9.2.1 Non-Discrimination Required. EarthLink will promote the open and interconnected nature of the public Internet and the neutral and non-discriminatory treatment of consumers in the following respects:

9.2.1.1 By allowing users to run applications and use services of their choice, subject to the needs of law enforcement.

9.2.1.2 By allowing users to access the lawful Internet content of their choice.

9.2.1.3 By allowing users to connect their choice of legal devices that do not harm the Network.

9.2.1.4 By fostering competition among broadband providers, application and service providers, and content providers.

9.2.2 Non-Discrimination Standards. The Parties encourage all similarly-situated providers of broadband services to also abide by these principles. More specific standards may be established by a separate ordinance of general applicability, which would apply to all similarly situated providers of broadband service.

SECTION 10. PRIVACY.

10.1 Privacy Point-of-Contact. EarthLink and the City shall each identify a primary contact person to receive communications concerning privacy issues and the Privacy Policy Standard under this Agreement. The Parties shall promptly inform each other of any changes to the primary contact person.

10.2 EarthLink Privacy Policy. EarthLink shall publish and adhere to a privacy policy for EarthLink's Fee Service Subscribers on the Network that complies with this

Agreement and with Applicable Laws and the Privacy Policy Standard (“EarthLink Privacy Policy”), provided the EarthLink Privacy Policy shall not apply to the extent any Fee Service Subscriber opts out of a protection of the EarthLink Privacy Policy.

10.2.1 Proposed Changes to EarthLink Privacy Policy by EarthLink. EarthLink shall submit any proposed change to the EarthLink Privacy Policy related to the Privacy Policy Standard described in Section 10.3 to the City in writing. EarthLink shall not implement or publish the proposed change until the earlier of: (a) the City’s approval of the proposed change in writing or (b) forty-five (45) days have passed without a response from the City.

10.2.2 Proposed Changes by the City. If the City wishes to propose a change to the Privacy Policy Standard, it shall submit the proposed change to EarthLink in writing. EarthLink shall either: (a) implement and publish the change as proposed; or (b) provide the City detailed written objections to the proposed change.

10.2.3 Good Faith Cooperation. The Parties shall work in good faith to resolve any differences relating to proposed changes to the EarthLink Privacy Policy or the Privacy Policy Standard. EarthLink shall be entitled to and shall modify the EarthLink Privacy Policy as necessary to comply with Applicable Laws.

10.3 Fee Service Privacy Policy Standard. EarthLink's Privacy Policy shall, at a minimum, meet the requirements of the Privacy Policy Standard outlined in Sections 10.3.1.1 through 10.3.1.4 with respect to any Fee Service that EarthLink offers. It shall not be a violation of this Agreement if EarthLink's Privacy Policy contains provisions that are more protective of user privacy than the Privacy Policy Standard or are required to comply with Applicable Laws.

10.3.1 Privacy Policy Standard. The following elements shall constitute the “Privacy Policy Standard” for Fee Services.

10.3.1.1 Sharing of Protected Personal Information. EarthLink will not share Protected Personal Information with any person or entity without the voluntary, affirmative consent of the user, subject to the following exceptions:

a. EarthLink may share Protected Personal Information with EarthLink's Third Party Suppliers to deliver or promote EarthLink's services, provided that users may opt out of receiving marketing communications from EarthLink or EarthLink's Third Party Suppliers using Protected Personal Information obtained from use of any EarthLink Fee Service.

b. EarthLink may share Protected Personal Information with Third Party Suppliers for purposes of processing payments, collections, and order fulfillment and service delivery.

c. EarthLink may share Protected Personal Information with law enforcement in accordance with Section 10.3.1.2.

d. EarthLink may share Protected Personal Information with other persons or entities in connection with civil legal proceedings in accordance with Section 10.3.1.3.

e. EarthLink may share Protected Personal Information with entities that jointly promote EarthLink's service to their customers, provided that users may opt out of receiving marketing communications from such entities or EarthLink using Protected Personal Information obtained from use of any Fee Service.

10.3.1.2 Criminal Investigation and National Security. To the extent required by Applicable Laws, EarthLink may, without prior notice to the user, disclose Protected Personal Information to law enforcement as part of a criminal investigation or an investigation related to national security, provided that, to the extent permitted by Applicable Laws, EarthLink shall require court-ordered documentation before such disclosure. Additionally, EarthLink may, without prior notice to the user, disclose Protected Personal Information to law enforcement if it has a good faith belief that such disclosure is reasonably necessary to: (a) satisfy any Applicable Laws, legal process or enforceable governmental request, (b) enforce applicable terms of service, including investigation of potential violations thereof, (c) detect, prevent, or otherwise address fraud, security or technical issues, or (d) protect against imminent harm to the rights, property or safety of EarthLink, its users or the public as required or permitted by Applicable Laws.

10.3.1.3 Civil Legal Proceedings. Unless prohibited by Applicable Laws, before disclosing Protected Personal Information in response to a civil legal demand, EarthLink shall provide reasonable prior notice to the user.

10.3.1.4 Use of Location Information.

a. Opportunity to Opt Out. EarthLink shall provide Subscribers an opportunity to opt out of the use by EarthLink of Location Information derived from the Fee Service Subscriber's use of the Network. An opt out does not preclude EarthLink from using Location Information to: (i) enable a device to connect to the Network; (ii) provide other services which use Location Information from which the Subscriber has not opted out; (iii) comply with legal requests in accordance with Sections 10.3.1.2 and 10.3.1.3; or (iv) to protect EarthLink or its customers from a crime, fraud, or network security breaches of a material nature. The opportunity to opt out shall be made readily available, and the Subscriber shall have access to a mechanism to give effect to the opt out as to the use of Location Information.

b. Retention of Location Information. EarthLink shall retain Location Information properly collected pursuant to Section 10.3.1.4.a for no longer than sixty (60) days, except that this limitation period shall not apply to Aggregated Location Information or as required by: (i) Applicable Law; (ii) an order of a governmental authority evidenced by court-supported documentation; or (iii) a pending internal investigation to determine if a fraud, crime, or network security breach of a material nature has occurred.

10.4 Basic Service Privacy Policy. EarthLink shall be responsible for requiring that the provider of the Basic Service publishes and adheres to a privacy policy applicable to Basic Service users of the Network that complies with this Section 10.4 (“Basic Service Privacy Policy”). EarthLink shall furnish to the City the Internet URL address at which this Basic Service Privacy Policy can be viewed. The Basic Service Privacy Policy shall, at a minimum, meet the requirements in the Basic Service Privacy Policy Standard as outlined in Section 10.4.1. (“Basic Service Privacy Policy Standard”). If the Basic Service Privacy Policy materially fails to meet the Basic Service Privacy Policy Standard requirements in Section 10.4.1, then EarthLink shall provide an alternative Basic Service that meets all of these requirements until such time as the Basic Service Privacy Policy meets the requirements of the Basic Service Privacy Policy Standard.

10.4.1 Basic Service Privacy Policy Standard. With respect to Protected Personal Information obtained from users of the Basic Service and collected as a result of the provider of the Basic Service administering the Basic Service (“Basic Service Protected Personal Information”), EarthLink shall require the provider of the Basic Service to maintain a privacy policy that complies with the requirements of the Basic Service Privacy Policy Standard outlined in this Section 10.4.1.

10.4.1.1 Criminal Investigations and National Security.

a. To the extent required by Applicable Laws, EarthLink may allow the provider of the Basic Service, without prior notice to the user, to disclose Basic Service Protected Personal Information to law enforcement as part of a criminal investigation or an investigation related to national security, provided that, to the extent permitted by Applicable Laws, Earthlink shall require the provider of the Basic Service to require court-ordered documentation before such disclosure.

b. Additionally, EarthLink may allow the provider of the Basic Service, without prior notice to the user, to disclose Basic Service Protected Personal Information to law enforcement if the provider of the Basic Service has a good faith belief that such disclosure is reasonably necessary to: (i) satisfy any Applicable Laws, legal process or enforceable governmental request; (ii) enforce applicable terms of service, including investigation of potential violations thereof; (iii) detect, prevent, or otherwise address fraud, security or technical issues; or (iv) protect against imminent harm to the rights, property or safety of provider of the Basic

Service, its users or the public as required or permitted by Applicable Law.

10.4.1.2 Civil Legal Proceedings. EarthLink shall require the provider of the Basic Service, unless prohibited by Applicable Laws, to provide reasonable prior notice to the user before disclosing Basic Service Protected Personal Information in response to a civil legal demand.

10.4.2 Basic Service Login. EarthLink shall require that users of the Basic Service be directed to a Capture Portal, which shall be branded by the provider of the Basic Service, where such users shall be presented with options to register or login that require minimal information from the user.

10.4.3 Proposed Changes by the City. If the City wishes to propose a change to the Basic Service Privacy Policy Standard, it shall submit the proposed change to EarthLink or the provider of Basic Service in writing. EarthLink shall provide notice to the City as to whether the proposed change will be implemented by the provider of the Basic Service.

10.4.4 Good Faith Cooperation. The Parties shall work in good faith to evaluate any City-proposed changes to the Basic Service Privacy Policy Standard. The provider of Basic Service shall be entitled to and shall modify the Basic Service Privacy Policy as necessary to comply with Applicable Laws.

10.4.5 Changes to the Basic Service Privacy Policy. EarthLink shall require the provider of the Basic Service to provide written notice to the City of changes to the published privacy policy applicable to Basic Service Protected Personal Information of users of the Network.

SECTION 11. NETWORK SERVICES.

11.1 Minimum Initial Products. Throughout the Term and any Transition Period, EarthLink shall, at a minimum, offer, or cause to be offered, each of the following products, or substitute products with equal or more capability in lieu of each such products (“Minimum List of Initial Products”):

11.1.1 Premium Service. The Network may provide multiple Premium Services, provided that the Network shall include at least one product that has a minimum average symmetric throughput of one (1) Mbps.

11.1.2 Digital Inclusion Product. Prior to Final Network Acceptance, EarthLink and the City will mutually agree upon a program tailored to the specific needs and existing programs of the City that is designed to expand access to the Network, featuring an Access Service with a minimum average symmetric throughput of one (1) Mbps, priced at the discounted rate of twelve dollars and ninety-five cents (\$12.95) per account per month, or at a price mutually agreed upon by the Parties. EarthLink will make available three thousand and two hundred (3,200) Digital

Inclusion Products to the City. The Subscribers to the Digital Inclusion Product will be EarthLink account Subscribers for all purposes under this Agreement.

11.1.2.1 Digital Inclusion Product Mechanics. With input from EarthLink, the City will determine guidelines and qualification criteria to determine individuals eligible for the Digital Inclusion Product. The qualification of Subscribers for the Digital Inclusion Product shall be the responsibility of the City. The City and EarthLink will mutually agree upon a communication process to enable the identification of Subscribers qualifying for the EarthLink Digital Inclusion Product without EarthLink being obligated to request or retain any income information from a Subscriber.

11.1.2.2 Digital Inclusion Product CPE. EarthLink shall make available CPE to Subscribers of the Digital Inclusion Product. The City, the City's designated third party representative, or the Subscriber shall bear the cost of such CPE. EarthLink shall make available such CPE to the City at the then current cost of the CPE and associated fulfillment charges, or one hundred dollars (\$100), whichever is less.

11.1.3 Occasional Use Service. EarthLink will offer Occasional Use Service.

11.1.4 Roaming Service. EarthLink will offer Roaming Service.

11.1.4.1 Roaming Service Mechanics. The Network shall support unilateral, inbound and outbound roaming capabilities whereby users of other fee-based wireless broadband services may access Roaming Services provided over the Network, and Subscribers to Premium Services may access other wireless networks. Service Providers shall be solely responsible for forming and maintaining any business relationships required to enable outbound roaming for their Subscribers onto other wireless networks.

11.1.5 Basic Service. EarthLink will offer, or cause to be offered, Basic Service.

11.1.5.1 Basic Service Speed Adjustment. The Basic Service will be available at a minimum average symmetric throughput of three hundred (300) kbps (best effort), which shall remain the minimum speed for the Basic Service throughout the Term of the Agreement and any Transition Period. Upon request of the City made after the occurrence of the Final Network Acceptance but prior to the end of one (1) year after the Final Network Acceptance, EarthLink will report within ninety (90) days after such request (such report to verified in a mutually agreed manner), in a mutually agreed manner that complies with all applicable confidentiality and trade secret obligations and rights, if the total annual amount of all pole use fees EarthLink is obligated to pay to all owners of poles located in the City and County of San Francisco in consideration of EarthLink installing Communications Equipment or similar equipment as a portion

of the Network (excluding the PUC) (“Third-Party Annual Pole Fees”) is greater than sixty percent (60%) of the total annual amount of all pole use fees EarthLink is obligated to pay to all owners of poles located in the City and County of San Francisco in consideration of EarthLink installing Communications Equipment as a portion of the Network (including the PUC) (“Aggregate Annual Pole Fees”). If the Third Party Annual Pole Fees are greater than sixty (60%) of the Aggregate Annual Pole Fees, then within six (6) months of the delivery of such report, EarthLink will increase the minimum average symmetric throughput of the Basic Service from three hundred (300) kbps (best efforts) to five hundred (500) kbps (best efforts), which shall remain the minimum speed for the Basic Service throughout the remaining Term of the Agreement and any Transition Period. During the Term of this Agreement (including any Transition Period), on an annual basis beginning with the first anniversary of the Effective Date, EarthLink shall increase the speed of the Basic Service to always be the greater of three hundred (300) kbps (or five hundred (500) kbps if the minimum speed of the Basic Service is increased as described in the preceding sentence) or fifteen percent (15%) of the advertised speed of the Best Selling Wireless Broadband Product. Throughout the Term of this Agreement (and including any Transition Period), within ten (10) business days of the date that is the anniversary of the Effective Date, EarthLink shall provide a written or electronic report to the City identifying the Best Selling Wireless Broadband Product and the then-current advertised speed of that product.

11.2 Premium Service and Occasional Use Capture Portal.

- 11.2.1 Capture Portal. Users of Premium Service and Occasional Use Service shall be directed to a City and EarthLink branded Capture Portal where they shall be presented with options to login to the Network, to purchase Premium Services or Occasional Use Services, or other options as may be made available from time to time.
- 11.2.2 Selection of Premium Services. If a user chooses the option of purchasing Premium Services, the user will be directed to pages in the Capture Portal where options for EarthLink and all Service Providers will be presented. EarthLink shall design the Network such that any Service Provider offering Premium Services over the Network shall be listed and allowed to promote their service within the Capture Portal, including by means of a hyperlink to the Service Providers’ sign-up pages. All Service Providers shall be clearly and reasonably presented in the Capture Portal, provided that EarthLink may receive preferential position above other Service Providers throughout the Capture Portal.
- 11.2.3 Selection of Occasional Use Service. If a user chooses the option of purchasing Occasional Use Service, the user will be directed to pages where options for Occasional Use Service will be presented. Users shall select an Occasional Use Service option (e.g. one (1) hour subscription, twenty-four (24) hour subscription,

multi-day subscription) and shall be directed to the Occasional Use Service sign up and billing pages to complete the transaction.

11.2.4 City Hyperlinks. The City shall be entitled to designate up to six (6) hyperlinks to be listed on the Capture Portal pages for announcements, community notices, and municipal purposes. To the extent it is technically feasible, EarthLink shall allow access from the City hyperlinks to the underlying Web sites, including to end users that have not logged in or signed up for an Access Service.

11.3 Basic Service Capture Portal. Users of the Basic Service shall be directed to a Capture Portal, which shall be branded by the provider of Basic Service, where users shall be presented with options to register or login. Municipal content shall be made available to users through a mechanism that allows the user to personalize their start pages, or through other such mechanisms as may be made available.

11.4 Customer Service.

11.4.1 EarthLink. EarthLink will offer Tier 1 and Tier 2 customer service 24x365 for its retail service Subscribers, but is not obligated to provide Tier 1 and Tier 2 customer service for the Subscribers of Service Providers or Basic Service users. EarthLink will provide Tier 3 Network Operations Center support 24x365 for the Network.

11.4.2 Service Providers. Service Providers may offer Tier 1 and Tier 2 customer service, but may choose to package services in different ways (e.g. discounted service with limited/no customer service).

11.4.3 Telephone, E-mail, and Language Support. EarthLink will provide telephone and email support in English and Spanish for its retail service Subscribers, but is not obligated to provide telephone and email support in English and Spanish for the Subscribers of Service Providers or Basic Service users. EarthLink agrees to make good faith efforts to secure wholesale arrangements with Service Providers focused on serving other non-English speaking customers. EarthLink will provide customer service in any language in which EarthLink conducts a marketing program (excluding isolated advertisements) for EarthLink retail products.

11.5 Payment Options. At a minimum, EarthLink will offer its Subscribers the option of paying for its retail Premium and Occasional Use Services by credit card or debit card (banking or prepaid), provided that this requirement does not apply to Service Providers. Subscribers to Digital Inclusion Products will also have the option to pay by cash.

11.6 Network Security. The City and EarthLink agree that the Network will support industry best practices security provisions that are from time to time mutually agreed upon by EarthLink and the City.

- 11.7 Product Notices. Within ten (10) business days of a request by the City, EarthLink will provide the City with a list of all of the Network products and services it offers.
- 11.8 Future Products.
- 11.8.1 Fixed Wireless. EarthLink will offer a high speed point-to-point fixed wireless product (three (3) Mbps best effort, no guaranteed rate of speed) by the time of Final Network Acceptance.
- 11.8.2 Notice of Future Products. At least ten (10) business days before EarthLink makes a Network wholesale or retail Access Service commercially available, EarthLink will give the City written or electronic notice of any such new Access Service.
- 11.8.3 Format of Notice. The notice shall include the anticipated date the Access Service will first be offered, a short description of the Access Service, and whether a fee will be charged. The notice requirement will not be triggered by changes to existing Access Services including promotions or price changes.
- 11.9 Future Municipal Network Services. The City will consider EarthLink for the provision of certain Municipal Services for which EarthLink may in the future qualify as a sole source provider through the City's established contracting processes and policies. EarthLink may also bid on any projects the City makes available through a competitive solicitation process. The City and EarthLink will negotiate mutually agreeable terms and written agreements for such Municipal Services as appropriate.
- 11.10 Disaster Planning. EarthLink and the City will work together to develop a Network disaster preparedness plan to the extent EarthLink and the City can reach mutual agreement.

SECTION 12. ASSIGNMENTS.

- 12.1 Consent Required for Assignment. Neither this Agreement, nor any rights conferred by this Agreement, shall be assigned by EarthLink in whole or in part without the prior written consent of the City, including its Board of Supervisors if the Board of Supervisors so requires, which consent shall not be unreasonably withheld, conditioned, or delayed.
- 12.2 Exempted Transfers. Notwithstanding the foregoing, the transfer of the rights and obligations of EarthLink to a parent, subsidiary, or another affiliate of EarthLink, or to any successor in interest or entity acquiring all or substantially all of EarthLink's stock or assets, or acquiring all or substantially all of the assets of the division of EarthLink that is operating the Network (collectively "Exempted Transfers"), shall not be deemed an assignment for the purposes of this Agreement and therefore shall not require the consent of the City, so long as any such transferee assumes by a written instrument all of EarthLink's obligations under the Agreement. EarthLink shall give written notice to the City within thirty (30) days of the public announcement of any such proposed Exempted Transfer. Upon consummation of any Exempted Transfer,

the Assignment Open Access Requirements shall become part of the Agreement assumed by the Assignee.

- 12.3 Security Interests Permitted. In the performance of this Agreement, EarthLink may lease Communications Equipment from third parties, which may become subject to security interests of vendors or lenders, and the City shall have no rights in or to such Communications Equipment, except as may be agreed to by the Parties in a signed written agreement. EarthLink may assign, mortgage, pledge, hypothecate, or otherwise transfer its interest in this Agreement, without the City's consent, to any financing entity, or agent on behalf of any financing entity to secure loans to EarthLink.

SECTION 13. REPORTING AND AUDIT REQUIREMENTS.

- 13.1 EarthLink Shall Maintain Records. EarthLink shall maintain for a period of five (5) years or, in the event of a claim by the City, until such claim of City has been fully ascertained, fixed, and paid, separate and accurate records of Gross Access Revenues from its operations in accordance with generally accepted accounting principles. Such records shall show in detail all of EarthLink's operations related to the calculation of Gross Access Revenues under this Agreement. EarthLink shall enter all receipts arising from such business in regular books of account, and all entries in any such records or books shall be made at or about the time the transactions respectively occur. The form and method of EarthLink's reporting of Gross Access Revenues will be adequate to provide a control and test check of all Gross Access Revenues.
- 13.2 Quarterly and Annual Reports. EarthLink shall maintain quarterly and annual reports of Gross Access Revenues, using a form and method mutually agreeable to the City and EarthLink. Such forms and methods shall be employed by EarthLink throughout the Term and any Transition Period.
- 13.3 City May Verify Accounts. EarthLink shall keep and maintain records that will enable the City and the City's Controller to ascertain, determine, and audit: (a) the share of Gross Access Revenues received by the City; and (b) the accuracy of EarthLink's other payments under the Agreement. EarthLink shall make available to the City no less than quarterly the data and information reasonably necessary to monitor EarthLink's compliance with the ROW Fee payments and other terms of this Agreement. The City shall also have the right to request an inspection at any time, during normal business hours at the nearest office of EarthLink, or at a mutually agreeable location within the City, the data and information reasonably necessary to monitor EarthLink's compliance with the ROW Fee payments and other terms of this Agreement. EarthLink shall provide such data and information to the City, and the City shall receive such data and information, in a manner that preserves the confidentiality of any data, information, or trade secrets that are marked confidential, subject to applicable public disclosure laws and ordinances, and in accordance with Section 15 of this Agreement.
- 13.4 Certified Annual Reports. No later than ninety (90) days after each anniversary of the Effective Date, if required by the City, EarthLink shall furnish to the City a report

from a Certified Public Accountant of the Gross Access Revenues derived from EarthLink's operations with respect to the prior year.

SECTION 14. DISPUTE RESOLUTION AND DEFAULTS.

- 14.1 Internal Resolution of Disputes. Any dispute between the Parties or any claimed default by either Party which arises during the Term of this Agreement and which the Parties cannot then resolve shall be subject to the following administrative remedy. If the City believes that a Termination Default has occurred, then, prior to any termination by the City of the rights of EarthLink or this Agreement for a Termination Default, the City must comply with the following administrative remedy:
- 14.1.1 Request for Internal Resolution. Both Parties shall attempt to resolve any controversy, claim, problem, default, or dispute arising out of, or related to, this Agreement ("Dispute") through Good Faith consultation in the ordinary course of business. In the event that a Dispute cannot be resolved by the project managers of each Party, either Party may, upon written notice to the other, request that the matter be referred to senior management officials within each respective organization with express authority to resolve the Dispute ("Request for Internal Resolution"). Senior management officials shall meet or confer at least once in a Good Faith attempt to negotiate a mutually acceptable resolution. ("Internal Resolution"). Senior management officials may mutually agree to meet more than once if it appears that further meetings may successfully resolve the Dispute. Any applicable cure periods shall run at the same time as the period of Internal Resolution. Project managers and senior management for each Party shall be the General Market Manager and Vice President, Municipal Networks respectively, for EarthLink, and the City Project Manager and the City Administrator or City Administrator's designee respectively, for the City, and their respective successors in office. The project managers and senior management may be changed by notice given by the Party that is changing its personnel.
- 14.2 Condition Precedent to Termination of Parties' Rights. Neither the Parties' rights hereunder nor this Agreement shall be terminated by either Party without the prior completion of all of the procedures required by this Section. that either Party has requested.
- 14.3 Force Majeure. Neither Party shall be deemed in default of a provision of this Agreement where performance has been rendered impossible or delayed by causes beyond the Party's reasonable control, including without limitation wars or riots, labor strikes or civil disturbances, floods, earthquakes, fire, explosions, or epidemics, or other acts of God, unforeseeable delays by the City, or failures of providers of electricity, telecommunications, and other necessary services (other than services provided by Subcontractors or the provider of the Basic Service) (collectively, "Force Majeure Events"), and this Agreement shall not be terminated or the Party penalized for such noncompliance, provided that it takes immediate and diligent steps to bring itself back into compliance with this Agreement and to comply as soon as possible under the circumstances without unduly endangering the health, safety, and integrity of the Party's employees or property, or the health, safety, and integrity of the public,

Public Rights-of-Way, public property, or private property. Acts beyond EarthLink's reasonable control shall not include: (a) failure to obtain financing or have adequate funds, (b) work shortages when qualified workers are available, or (c) the reasonably foreseeable period of time necessary to obtain agreements or approvals from the City or third parties. A delay shall not be excused to the extent that the Party could reasonably have avoided or mitigated the delay by altering its conduct. The provisions of this Section shall have no application unless a Party seeking an extension of time for performance under this Agreement shall have first notified the other Party in writing of the cause or causes thereof within thirty (30) days after its reasonable determination that an event may constitute a Force Majeure delay under this Section. The time for performance by the City or EarthLink of any term, provision, or covenant of this Agreement, except for payments, shall be deemed extended by time lost due to delays resulting from any Force Majeure Event.

- 14.4 Termination. Notwithstanding anything to the contrary, except as provided in Sections 1.5, 12.2, 16, 20.16, 20.18, 20.21, and 20.24, this Agreement and the rights granted to EarthLink hereunder shall not be terminated or Communications Equipment removed from, or refused installation on poles and street lights in the City (except as permitted by the Pole Use Agreement), except as otherwise provided in Sections 1.5, 12.2, 16, 20.16, 20.18, 20.21, and 20.24, unless a Termination Default as defined below has occurred, and the required notice, cure period, and dispute resolution process is followed.
- 14.5 Termination Default. The occurrence of any one or more of the following events constitutes an event of default and breach of this Agreement by EarthLink that justifies termination of this Agreement by the City ("Termination Default"):
- 14.5.1 Failure to accomplish Final Network Acceptance. The failure of EarthLink to achieve Final Network Acceptance (as defined in Section 5.1.12) by the date that is eighteen (18) months after satisfaction of the Network Implementation Authorizations. This time for completion will be extended for Force Majeure Events.
- 14.5.2 Failure to Pay City Fees. The failure by EarthLink to make any payment required by this Agreement, as and when due, where that failure continues for a period of ninety (90) days after written notice is sent by the City to EarthLink.
- 14.5.3 Abandonment of the Basic Service. (a) No Basic Service is available to any users for fifteen (15) continuous days, provided that EarthLink shall not be deemed in default under this provision where EarthLink's performance was rendered impossible or delayed by a Force Majeure Event ("Abandonment of the Basic Service"); (b) the City gives EarthLink written notice of default based on the Abandonment of the Basic Service continuing for fifteen (15) continuous days; and (c) Earthlink does not restart or cause to be restarted the Basic Service or a substantially similar equivalent within forty-five (45) days of receipt of such written default notice from the City or, if such Basic Service cannot be restarted in that forty-five (45) day period, and if EarthLink is taking reasonable steps to restart such Basic Service or cause such Basic Service to be restarted, then the

cure period will be extended past forty-five (45) days for a period that is a reasonable period of time to restart the services.

- 14.5.4 Exempted Transfer. If an Exempted Transfer has occurred as provided in Section 12.2 then, and only then, Termination Defaults shall include a material failure by the Assignee to comply with the Assignment Open Access Requirements as provided in Section 12.2 that continues for a period of ninety (90) days after written notice from the City specifying that such material failure shall constitute a Termination Default.
- 14.6 City Exercise of its Right to Terminate. Upon any of EarthLink's Termination Defaults noted in Section 14.5, the City may at any time thereafter that the Termination Default still continues, in its sole discretion, with or without notice or demand and without limiting the City in the exercise of a right or remedy that the City may have by reason of that default or breach: (a) terminate EarthLink's rights under this Agreement, including without limitation the rights to use Municipal Facilities for operation of the Network; and/or (b) pursue any other remedy now or hereafter available to the City under federal or state laws, provided further that any order for specific performance and injunction shall not require EarthLink to pay or expend any sums in excess of the liability limitation set forth herein.
- 14.7 Non-Termination Defaults. Should EarthLink fail to observe or perform any of the covenants, conditions, or provisions of this Agreement required herein to be observed or performed by EarthLink, other than those Termination Defaults described in Section 14.5, the City will notify EarthLink of the default and require its cure. Should that failure continue for a period of sixty (60) days after written notice thereof by the City to EarthLink, the City may find EarthLink in default and shall be entitled to exercise all other remedies for breach of the Agreement, including the right to obtain specific performance, injunctive relief and money damages, provided that none of these remedies shall prohibit the continued use of Municipal Facilities or order the removal of Communications Equipment by EarthLink and provided further that any order for specific performance and injunction shall not require EarthLink to pay or expend any sums in excess of the liability limitation set forth herein. If such default cannot reasonably be cured in that sixty (60) day period, and if EarthLink is taking reasonable steps to begin curing such default, then the cure period will be extended past sixty (60) days for a period that is a reasonable period of time to cure such default, provided that this extension shall not exceed sixty (60) additional days.
- 14.8 City Default. In the event the City violates any of its material obligations hereunder ("City Default") and does not cure such City Default within sixty (60) days after a default notice is delivered to the City, then EarthLink shall be entitled to exercise all remedies available at law or in equity, provided that it shall first comply with the dispute resolution requirements of Section 14.1. If such City Default cannot reasonably be cured in that sixty (60) day period and if City is taking reasonable steps to begin curing such default, then the cure period will be extended past sixty (60) days for a period that is a reasonable period of time to cure such default, provided that this extension shall not exceed sixty (60) additional days.

- 14.9 Equitable Relief. Each Party agrees that any threatened or actual failure of the other Party to comply with its obligations of this Agreement may cause immediate irreparable harm to the non-defaulting Party for which there is no adequate remedy at law. Accordingly, each Party agrees that the non-defaulting Party will be entitled to an order for specific performance and to injunctive relief from a court of competent jurisdiction as remedy for any such threatened or actual default. Nothing in this Agreement will prevent or prohibit either Party from obtaining an order of specific performance and an injunction from a court of competent jurisdiction requiring the defaulting Party to comply with the provisions of this Agreement, and not to take actions that violate its obligations under this Agreement; provided that such order shall not prevent EarthLink from operating the Network and maintaining the Communications Equipment on the Municipal Facilities, except on account of expiration of the Term or in the event of termination in compliance with this Agreement and Applicable Law; and provided further that such order for specific performance and injunction shall not require either Party to pay or expend any sums in excess of the liability limitation set forth herein.
- 14.10 Waiver And Remedies. The omission by either Party at any time to enforce any default or right reserved to it, or to require performance of any of the terms, covenants, or provisions hereof by the other Party at the time designated, shall not be a waiver of any such default or right to which the Party is entitled, nor shall it in any way affect the right of the Party to enforce such provisions thereafter.

SECTION 15. CONFIDENTIALITY.

- 15.1 City Confidential Information. EarthLink understands and agrees that, in the performance of the work or services under this Agreement or in contemplation thereof, EarthLink may receive from the City information that the City owns or controls that may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to City. City shall prominently mark such information as "Proprietary" or "Confidential." EarthLink agrees that all such information disclosed by City to EarthLink that is so marked "Proprietary" or "Confidential" shall be held in confidence and used only in performance of the Agreement. EarthLink shall exercise the same standard of care to protect such information as a reasonably prudent contractor would use to protect its own proprietary data. EarthLink shall not in any way be liable or responsible for the disclosure of any confidential information provided by City if EarthLink reasonably determines that disclosure is required by Applicable Law or court order and EarthLink has acted in accord with the provisions set forth below regarding responding to Process.
- 15.2 EarthLink Confidential Information. If EarthLink shares any information with the City that EarthLink wishes to have held in confidence, EarthLink shall prominently mark such information as "Trade Secret", "Proprietary," or "Confidential." The City shall not disclose such confidential information that is so marked "Trade Secret", "Proprietary" or "Confidential" to any third party except as may be required by Applicable Law. In accordance with Chapter 67 of the San Francisco Administrative Code ("San Francisco Sunshine Ordinance") and California Government Code Section 6254(k), the City shall not disclose to the public such confidential information if the

City reasonably determines, after consultation with EarthLink, that the confidential information is Exempt Information. If the City reasonably determines that such confidential information is Exempt Information and if an action is brought against the City under the San Francisco Sunshine Ordinance or the California Public Records Act seeking disclosure of such information, the City will oppose such action if EarthLink so requests. In the event that EarthLink requests the City to oppose such an action, EarthLink agrees to defend and indemnify the City from all costs and expenses, including attorneys' fees, in any such action or liability arising under the San Francisco Sunshine Ordinance or California Public Records Act, provided that, if EarthLink provides a defense as described above, then no further sums will be due to the City for legal fees or costs that are incurred by the City in addition to the defense provided by Earthlink. City shall not in any way be liable or responsible for the disclosure of any confidential information provided by EarthLink if the City reasonably determines that disclosure is required by Applicable Law or court order and City has acted in accord with the provisions of the San Francisco Sunshine Ordinance and California Public Records Act and as set forth below regarding responding to Process.

- 15.3 Disclosure of Non-Confidential Information. This Section imposes no obligation upon a Party that is a recipient of confidential information from the other Party that: (a) was known to the recipient before receipt from the discloser; (b) is or becomes publicly available through no fault of the recipient; (c) is rightfully received by the recipient from a third party without a duty of confidentiality; (d) is independently developed by the recipient without a breach of this Agreement; (e) is disclosed by the recipient with the discloser's prior written approval; or (f) is required to be disclosed by Process; provided that (i) the recipient shall promptly notify the discloser of such Process; (ii) the recipient shall not produce or disclose confidential information in response to the Process unless the discloser has: (a) been given a reasonable opportunity based on the circumstances, and to the extent allowed, to request protection from the legal or governmental authority requiring the Process and such request has been denied, (b) consented in writing to the production or disclosure of the Confidential Information in response to the Process, or (c) taken no action to protect its interest in the confidential information within fourteen (14) business days after receipt of notice from the recipient of its obligation to produce or disclose confidential information in response to the Process; and (iii) notwithstanding any disclosure in connection with the Process, the restrictions of this Agreement shall otherwise continue to apply to the confidential information except for matters relating to the Process.

SECTION 16. INSURANCE.

- 16.1 Required Insurance. Without in any way limiting EarthLink's liability pursuant to the "Indemnification" section of this Agreement (Section 17), EarthLink must maintain in force, during the full Term of the Agreement and any Transition Period, insurance in the following amounts and coverages:

- 16.1.1 Worker's Compensation. Worker's Compensation in statutory amounts, with Employers' Liability Limits not less than one million dollars (\$1,000,000) each accident.

- 16.1.2 Commercial General Liability Insurance. Commercial General Liability Insurance with limits not less than one million dollars (\$1,000,000) each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations; and
- 16.1.3 Commercial Automobile Liability Insurance. Commercial Automobile Liability Insurance with limits not less than one million dollars (\$1,000,000) each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.
- 16.2 Other Provisions. Commercial General Liability and Commercial Automobile Liability Insurance policies must provide the following:
- 16.2.1 Additional Insureds. Name as additional insured the City and County of San Francisco, its officers, agents, and employees as respects the negligence of EarthLink.
- 16.2.2 Primary Insurance. That such policies as respects the negligence of EarthLink are endorsed as (or the policy provides for) primary insurance to any other insurance available to the additional insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.
- 16.3 Notice of Cancellation. EarthLink shall provide thirty (30) days' advance written notice to City of cancellation for any reason and the policies' certifications shall require the insurer to endeavor to mail thirty (30) days notice of cancellation, but failure by the insurance carrier will not impose any liability on the insurance company, mailed to the following address:
- Department of Telecommunications and Information Services
City and County of San Francisco
Contract Administration
875 Stevenson St., 5th Floor
San Francisco, CA 94103-0948
- 16.4 Claims Made Policies. Should any of the required insurance be provided under a claims-made form, EarthLink shall maintain such coverage continuously throughout the Term of this Agreement, including any Transition Period, and, without lapse, for a period of three (3) years beyond the expiration of this Agreement, to the effect that, should occurrences during the Term and any Transition Period give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies.
- 16.5 Aggregate Limits. Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs be included in such general annual aggregate limit,

such general annual aggregate limit shall be double the occurrence or claims limits specified above.

- 16.6 Lapse of Insurance. Should any required insurance lapse during the Term of this Agreement, including any Transition Period, requests for payments originating after such lapse shall not be processed until the City receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, the City may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.
- 16.7 Proof of Insurance Required. Before commencing any operations under this Agreement, EarthLink shall furnish to City certificates of insurance and the policy or endorsements including status as an additional insured with insurers with ratings comparable to A-VIII or higher, that are authorized to do business in the State of California, and that are satisfactory to City, in form evidencing all coverages set forth above. EarthLink shall furnish complete copies of policies promptly within ninety (90) days after a covered claim being denied coverage of the City as an additional insured upon City request. Failure to maintain insurance shall constitute a material breach of this Agreement entitling the City to terminate this Agreement if EarthLink does not re-establish the insurance coverage within five (5) business days after prior written notice from the City, provided that if EarthLink re-establishes the insurance coverage within thirty (30) days of the cancellation of insurance so that there is no gap in coverage, then this Agreement shall be restored to good standing as if the termination had not occurred.
- 16.8 Insurance Does Not Limit Liability. Approval of the insurance by City shall not relieve or decrease the liability of EarthLink hereunder.
- 16.9 Subcontractors. If a Subcontractor will be used to complete any portion of this Agreement, EarthLink shall ensure that the Subcontractor is covered by insurance that complies with the above requirements and the policy or an endorsement shall name the City and County of San Francisco, its officers, agents and employees and EarthLink as additional insureds.

SECTION 17. INDEMNITY.

- 17.1 EarthLink's Indemnity. EarthLink agrees to indemnify, defend, protect, and hold harmless the City, its Board of Supervisors, Mayor, and officers and employees from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings, and orders, judgments, and all costs and expenses incurred in connection therewith, including reasonable attorneys' fees and costs of defense (collectively, the "Losses") directly or proximately caused by or resulting from: (a) EarthLink's negligence or willful misconduct in the performance of this Agreement or (b) EarthLink's violations of this Agreement or Applicable Law, except that the above obligations shall be reduced to the extent and in proportion to the portion of such Losses that were directly or proximately caused by or resulting from the negligence, willful misconduct, or violations of this Agreement by the City, its Board of Supervisors, Mayor, officers, or employees. In addition to EarthLink's

obligation to indemnify City, EarthLink specifically acknowledges and agrees that it has an immediate and independent obligation to defend City from any claim to the extent the City is entitled to indemnification under this provision, even if the allegations are or may be groundless, false, or fraudulent, which obligation arises at the time such claim is tendered to EarthLink by City and continues thereafter.

- 17.2 Infringement Indemnity. EarthLink shall indemnify and hold City harmless from all loss and liability, including attorneys' fees, court costs and all other litigation expenses for any infringement of patent rights, copyright, trade secret, or any other proprietary right or trademark, and all other intellectual property claims of any person or persons in consequence of the use by City, or any of its officers or agents, of services enabled by the Network that are offered for sale to the public by EarthLink or are provided to the City by EarthLink pursuant to this Agreement.

SECTION 18. LIMITATION OF LIABILITY.

- 18.1 NO INCIDENTAL OR CONSEQUENTIAL DAMAGES. THE PARTIES EXPRESSLY AGREE THAT EARTHLINK AND THE CITY SHALL NOT BE LIABLE TO THE OTHER FOR INCIDENTAL, CONSEQUENTIAL, PUNITIVE, OR EXEMPLARY DAMAGES, REGARDLESS OF WHETHER ADVISED OF, OR OTHERWISE SHOULD HAVE BEEN AWARE OF, THE POSSIBILITY OF SUCH DAMAGES, REGARDLESS OF THE LEGAL THEORY OR BASIS FOR SUCH CLAIM.

- 18.2 Limitation of Liability. The Parties expressly agree that neither Party's liability to the other for direct damages under this Agreement shall exceed one million dollars (\$1,000,000.00). This Subsection 18.2 shall not apply to damages relating to or arising from loss of life, bodily injury, or damage to property. This Subsection 18.2 shall not reduce the insurance proceeds otherwise owed by insurance companies to either Party.

SECTION 19. DISADVANTAGED BUSINESS ENTERPRISES.

- 19.1 DBE Goal. EarthLink shall establish a disadvantaged business enterprise ("DBE") (as defined in San Francisco Administrative Code §14A) subcontracting participation goal for this contract and the Pole Use Agreement of fifteen (15%) percent of the sums actually paid by EarthLink for installation, operation, and maintenance services in San Francisco for the Network ("DBE Goal"). These percentages are based on the labor costs of deployment and ongoing operations and are exclusive of the cost of the Network hardware, equipment, site leasing cost, and related or similar costs.
- 19.2 Quarterly Reports. In a quarterly report, EarthLink shall submit to the City, on behalf of itself and its Subcontractors, the following information, in a form reasonably acceptable to the City: (a) the name of the DBE contractors; (b) the total payments by EarthLink to each DBE for the performance of installation, operation, and maintenance services in San Francisco for the Network; (c) the total payments to DBE and non-DBE contractors in the aggregate by EarthLink for the performance of installation, operation, and maintenance services in San Francisco for the Network

through the end of the relevant period; and (d) such additional information as the City may reasonably request to verify compliance with this Section.

19.3 Maintenance of Records. EarthLink agrees to maintain records necessary for monitoring its compliance with the DBE Goal for a period of three (3) years following the year in which the performance of installation, operation, and maintenance services occurred pursuant to this Agreement, and shall make such records available for audit and inspection by the Director of HRC or the Controller upon reasonable request.

19.4 Subcontractor to Maintain Records. EarthLink's subcontracts used in the performance of this Agreement shall require the Subcontractor to maintain records necessary for monitoring compliance with the DBE Goal for a period of three (3) years following the year in which the performance of installation, operation, and maintenance services occurred pursuant to this Agreement and make such records available for audit and inspection by the Director of HRC or the Controller upon reasonable request.

SECTION 20. MISCELLANEOUS.

20.1 Notice. Unless otherwise indicated elsewhere in this Agreement, all written communications sent by the Parties on paper, which shall include facsimile transmissions, may be by U.S. mail or by fax, and shall be addressed as follows:

To City: Department of Telecommunications and Information Services
City and County of San Francisco
875 Stevenson St., 5th Fl.
San Francisco, CA 94103-0948
Attn: Wireless Broadband
Project Manager
Fax: (415) 554-0854

With Copy to: Telecommunications and Energy Team Leader
Office of the City Attorney
City Hall, Room 234
San Francisco, California 94102
Fax: (415) 554-4763

To EarthLink: EarthLink, Inc.
1375 Peachtree Street, Level A
Atlanta, Georgia 30309
Attn: General Counsel
Fax: (404) 287-4905

With Copy to: EarthLink, Inc.
1375 Peachtree Street, Level A
Atlanta, Georgia 30309
Attn: President, Municipal Wireless Division
Fax: (404) 287-1059

Any notice of default must be sent by registered mail. Notices shall be deemed given hereunder on the next business day if the notice is sent by facsimile or regular mail. Either Party may change its address by written notice to the other Party. Notice may also be provided to such other address as either Party may, from time to time, designate in writing.

- 20.2 NO WARRANTIES. THE ONLY WARRANTIES CONCERNING THE MUNICIPAL SERVICES, NETWORK, AND OTHER SERVICES AND DELIVERABLES PROVIDED UNDER THIS AGREEMENT ARE THOSE CONTAINED HEREIN, AND ARE MADE FOR THE BENEFIT OF THE CITY ONLY IN LIEU OF ALL OTHER WARRANTIES AND REPRESENTATIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE, NON-INFRINGEMENT OR OTHERWISE. EARTHLINK ALSO SPECIFICALLY DISCLAIMS ANY WARRANTIES OR REPRESENTATIONS RELATED TO THE INTERNET OR SECURITY-RELATED FEATURES OF THE NETWORK, SERVICES AND/OR MUNICIPAL SERVICES, EXCEPT FOR ANY EXPRESS WARRANTIES OR REPRESENTATIONS MADE BY EARTHLINK. EARTHLINK DOES NOT GUARANTEE COMPLETE SECURITY VIA THE INTERNET OR THE NETWORK, SERVICES OR MUNICIPAL SERVICES. EARTHLINK SHALL HAVE NO LIABILITY FOR THE CONDUCT OF SUBSCRIBERS USING OR ACCESSING THE NETWORK OR SERVICES.
- 20.3 Ownership. Notwithstanding anything to the contrary, nothing in this Agreement shall be construed as a transfer or assignment of ownership in any intellectual property of a Party to the other Party. Any interest of EarthLink or its Subcontractors in drawings, plans, specifications, blueprints, studies, reports, memoranda, computation sheets, computer files, and media or other documents prepared by EarthLink or its Subcontractors in connection with services to be performed under this Agreement, shall remain the property of EarthLink and its suppliers and Subcontractors as applicable and will not be assigned or transmitted to the City, except as the Parties may agree in a signed written agreement. At the end of the Term of this Agreement and any Transition Period, EarthLink shall continue to own the Network and all Communications Equipment and all related intellectual property of EarthLink.
- 20.4 EarthLink Responsible for Any Work Performed by Subcontractors. Any Subcontractor used by EarthLink in the performance of this Agreement must be properly licensed pursuant to Applicable Law. Each such Subcontractor shall have the same obligations with respect to its work as EarthLink would have if EarthLink performed the work. EarthLink shall ensure that all Subcontractors and all employees who perform work for it are trained and experienced. EarthLink shall be responsible for ensuring that the work of Subcontractors is performed consistent with this Agreement and other Applicable Law, shall be responsible for acts or omissions of Subcontractors under this Agreement to the same degree it is responsible for the acts of its employees, shall be responsible for promptly correcting acts or omissions by any

Subcontractor, and shall implement a quality control program to ensure that the work contemplated by this Agreement is properly performed.

- 20.5 Reasonable Treatment. The City agrees not to withhold unreasonably or unreasonably delay any approvals or other actions necessary or appropriate for EarthLink to exercise the rights and to perform as specified herein. EarthLink agrees not to withhold unreasonably or unreasonably delay or condition any approvals or other actions necessary or appropriate for City to exercise the rights and to perform as specified herein.
- 20.6 Applicable Law and Venue. The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in San Francisco.
- 20.7 Compliance with Applicable Laws. The Parties will comply with all Applicable Laws as they currently exist and as they may be amended from time to time.
- 20.8 Severability. Should the application of any provision of this Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then: (a) the validity of other provisions of this Agreement shall not be affected or impaired thereby; and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the Parties and shall be reformed without further action by the Parties to the extent necessary to make such provision valid and enforceable.
- 20.9 Construction. All section captions are for reference only and shall not be considered in construing this Agreement.
- 20.10 Authority. The City represents and warrants that: (a) the City and the officials of the City executing this Agreement are authorized to grant to EarthLink all of the rights granted herein; and (b) all necessary and appropriate authorizations and approvals have been obtained by the City and the officials of the City signing this Agreement.
- 20.11 Independent Contractor. EarthLink or any agent or employee of EarthLink shall be deemed at all times to be an independent contractor and is wholly responsible for the manner in which it performs the services and work under this Agreement. EarthLink or any agent or employee of EarthLink shall not have employee status with City, nor be entitled to participate in any plans, arrangements, or distributions by City pertaining to or in connection with any retirement, health or other benefits that City may offer its employees. EarthLink and its agents are liable for the acts and omissions of itself, its employees and its agents. EarthLink shall be responsible for all obligations and payments, whether imposed by federal, state or local law, including, but not limited to, FICA, income tax withholdings, unemployment compensation, insurance, and other similar responsibilities related to EarthLink's performing services and work, or any agent or employee of EarthLink providing same. Nothing in this Agreement shall be construed as creating an employment or agency relationship between City and EarthLink or any agent or employee of EarthLink.

- 20.12 Third Party Rights. This Agreement shall not create for, nor give to, any third party, including without limitation the provider of the Basic Service, Service Providers and Subcontractors, any claim or right of action against either Parties to this Agreement that would not arise in the absence of this Agreement. This Agreement shall not create for, nor give to, the Parties any claim or right of action against third parties, including without limitation the provider of the Basic Service, Service Providers and Subcontractors, that would not arise in the absence of this Agreement.
- 20.13 Conflict of Interest. Through its execution of this Agreement, EarthLink acknowledges that it is familiar with the provision of Section 15.103 of the San Francisco Charter, Article III, Chapter 2 of the San Francisco Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitutes a violation of said provisions and agrees that it will immediately notify the City if it becomes aware of any such fact during the term of this Agreement.
- 20.14 Nondisclosure of Private Information. As of March 5, 2005, EarthLink agrees to comply fully with and be bound in the performance of this Agreement by all of the provisions of Chapter 12M of the San Francisco Administrative Code to the extent it is applicable to this Agreement.
- 20.15 MacBride Principles. Pursuant to San Francisco Administrative Code §12.F.5, the City urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. The City urges San Francisco companies to do business with corporations that abide by the MacBride Principles. By signing below, the person executing this Agreement on behalf of EarthLink acknowledges and agrees that he or she has read and understood this Section.
- 20.16 Graffiti Removal.
- 20.16.1 City Policy to Prevent Graffiti. Graffiti is detrimental to the health, safety, and welfare of the community in that it promotes a perception in the community that the laws protecting public and private property can be disregarded with impunity. This perception fosters a sense of disrespect of the law that results in an increase in crime; degrades the community and leads to urban blight; is detrimental to property values, business opportunities and the enjoyment of life; is inconsistent with the City's property maintenance goals and aesthetic standards; and results in additional graffiti and in other properties becoming the target of graffiti unless it is quickly removed from public and private property. Graffiti results in visual pollution and is a public nuisance. Graffiti must be abated as quickly as possible to avoid detrimental impacts on the City and its residents, and to prevent the further spread of graffiti.
- 20.16.2 EarthLink Shall Remove Graffiti. EarthLink shall remove all Graffiti from any real property owned or leased by EarthLink in the City within forty-eight (48) hours of the earlier of EarthLink's: (a) discovery or notification of the Graffiti or

(b) receipt of notification of the Graffiti from the Department of Public Works. This Section is not intended to require EarthLink to breach any lease or other agreement that it may have concerning its use of the real property. The term "Graffiti" means any inscription, word, figure, marking or design that is affixed, marked, etched, scratched, drawn or painted on any building, structure, fixture or other improvement, whether permanent or temporary, including by way of example only and without limitation, signs, banners, billboards and fencing surrounding construction sites, whether public or private, without the consent of the owner of the property or the owner's authorized agent, and which is visible from the Public Right-of-way. "Graffiti" shall not include: (1) any sign or banner that is authorized by, and in compliance with, the applicable requirements of the San Francisco Public Works Code, the San Francisco Planning Code or the San Francisco Building Code; or (2) any mural or other painting or marking on the property that is protected as a work of fine art under the California Art Preservation Act (California Civil Code Sections 987 et seq.) or as a work of visual art under the Federal Visual Artists Rights Act of 1990 (17 U.S.C. §§ 101 et seq.).

20.16.3 Grounds for Default. Any failure of EarthLink to comply with this Section of this Agreement shall constitute a default of this Agreement.

- 20.17 Tropical Hardwood. Pursuant to section 804(b) of the S.F. Environment Code, the City urges contractors not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product.
- 20.18 Resource Conservation. Chapter 5 of the San Francisco Environment Code ("Resource Conservation") is incorporated herein by reference. Failure by EarthLink to comply with any of the applicable requirements of Chapter 5 will be deemed a material breach of contract.
- 20.19 Sunshine Ordinance. In accordance with San Francisco Administrative Code section 67.24(e), contracts, contractors' bids, responses to solicitations and all other records of communications between the City and persons or firms seeking contracts, shall be open to inspection immediately after a contract has been awarded. Nothing in this Section requires the disclosure of a private person or organization's net worth or other proprietary financial data submitted for qualification for a contract or other benefit until and unless that person or organization is awarded the contract or benefit. Information provided which is covered by this Section will be made available to the public upon request.
- 20.20 Limitation on Contributions. Through execution of this Agreement, EarthLink acknowledges that it is familiar with Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the rendition of personal services or for the furnishing of any material, supplies or equipment to the City, whenever such transaction would require approval by a City elective officer of the board on which that City elective officer serves, from making any campaign contribution to the officer at any time from the commencement of

negotiations for the contract until the later of either: (a) the termination of negotiations for such contract; or (b) three (3) months after the date the contract is approved by the City elective officer or the board on which that City elective officer serves.

20.21 Prohibition on Political Activity With City Funds. In accordance with San Francisco Administrative Code Chapter 12.G, EarthLink may not participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure in the performance of the services provided under this Agreement. EarthLink agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the City's Controller. The terms and provisions of Chapter 12.G are incorporated herein by this reference. In the event EarthLink violates the provisions of this Section, the City may, in addition to any other rights or remedies available hereunder: (a) terminate this Agreement, and (b) prohibit EarthLink from bidding on or receiving any new City contract for a period of two (2) years. The Controller will not consider EarthLink's use of profit as a violation of this Section.

20.22 Preservative-Treated Wood Containing Arsenic. To the extent such laws are applicable to EarthLink and this Agreement, EarthLink may not purchase preservative-treated wood products containing arsenic in the performance of this Agreement unless an exemption from the requirements of Chapter 13 of the San Francisco Environment Code is obtained from the Department of the Environment under Section 1304 of the Code. The term "preservative-treated wood containing arsenic" shall mean wood treated with a preservative that contains arsenic, elemental arsenic, or an arsenic copper combination, including, but not limited to, chromated copper arsenate preservative, ammoniacal copper zinc arsenate preservative, or ammoniacal copper arsenate preservative. EarthLink may purchase preservative-treated wood products on the list of environmentally preferable alternatives prepared and adopted by the Department of the Environment. This provision does not preclude EarthLink from purchasing preservative-treated wood containing arsenic for saltwater immersion. The term "saltwater immersion" shall mean a pressure-treated wood that is used for construction purposes or facilities that are partially or totally immersed in saltwater.

20.23 First Source Hiring Program.

20.23.1 Incorporation of Administrative Code Provisions by Reference. The provisions of Chapter 83 of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. EarthLink shall comply fully with, and be bound by, all of the provisions that apply to this Agreement under such Chapter, including but not limited to the remedies provided therein. Capitalized terms used in this Section and not defined in this Agreement shall have the meanings assigned to such terms in Chapter 83.

20.23.2 First Source Hiring Agreement.

- 20.23.2.1 Interviewing, Recruitment and Hiring. EarthLink will comply with first source interviewing, recruitment and hiring requirements, which will provide the San Francisco Workforce Development System with the exclusive opportunity to initially provide qualified economically disadvantaged individuals for consideration for employment for entry level positions. The duration of the First Source interviewing requirement shall be ten (10) days, unless business necessity requires a shorter period of time.
- 20.23.2.2 Notification of Available Positions. EarthLink will comply with requirements for providing timely, appropriate notification of available entry level positions to the San Francisco Workforce Development System so that the system may train and refer an adequate pool of qualified economically disadvantaged individuals to participating employers.
- 20.23.2.3 Good Faith Efforts. EarthLink agrees to use good faith efforts to comply with the First Source hiring requirements. EarthLink may establish its good faith efforts by filling: (a) its first available entry level position with a job applicant referred through the first source program; and, (b) fifty percent (50%) of its subsequent available Entry level Positions with job applicants referred through the San Francisco Workforce Development System. Failure to meet this target, while not imputing bad faith, may result in a review of EarthLink's employment records.
- 20.23.3 Hiring Decisions. EarthLink shall make the final determination of whether an Economically Disadvantaged Individual referred by the System is "qualified" for the position.
- 20.23.4 Exceptions. Upon application by EarthLink, the First Source Hiring Administration may grant an exception to any or all of the requirements of Chapter 83 in any situation where it concludes that compliance with this Chapter would cause economic hardship.
- 20.23.5 Liquidated Damages. Violation of the requirements of Chapter 83 is subject to an assessment of liquidated damages in the amount of two thousand and seventy dollars (\$2,070) for every new hire for an Entry Level Position improperly withheld from the first source hiring process. The assessment of liquidated damages and the evaluation of any defenses or mitigating factors shall be made by the FSHA.
- 20.23.6 Subcontracts. Any subcontract entered into by EarthLink shall require the Subcontractor to comply with the requirements of Chapter 83 and shall contain contractual obligations substantially the same as those set forth in this Section.
- 20.24 Nondiscrimination.

- 20.24.1 EarthLink Shall Not Discriminate. In the performance of this Agreement, EarthLink agrees not to discriminate against any EarthLink employee, City employee working with EarthLink or an EarthLink Subcontractor, applicant for employment with EarthLink or an EarthLink Subcontractor, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.
- 20.24.2 Subcontracts. EarthLink shall incorporate by reference in all subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code and shall require all Subcontractors to comply with such provisions. EarthLink's failure to comply with the obligations in this subsection shall constitute a material breach of this Agreement.
- 20.24.3 Nondiscrimination in Benefits. EarthLink does not as of the Effective Date of this Agreement and will not during the Term of this Agreement or any Transition Periods, in any of its operations in San Francisco, on real property owned by San Francisco, or where work is being performed for the City elsewhere in the United States, discriminate in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits, as well as any benefits other than the benefits specified above, between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration, subject to the conditions set forth in Section 12B.2(b) of the San Francisco Administrative Code.
- 20.24.4 Condition to Contract. As a condition to this Agreement, EarthLink shall execute the "Chapter 12B Declaration: Nondiscrimination in Contracts and Benefits" form (form HRC-12B-101) with supporting documentation and secure the approval of the form by the San Francisco Human Rights Commission.
- 20.24.5 Incorporation of Administrative Code Provisions by Reference. The provisions of Chapters 12B and 12C of the San Francisco Administrative Code are incorporated in this Section by reference and made a part of this Agreement as though fully set forth herein. EarthLink shall comply fully with and be bound by all of the provisions that apply to this Agreement under such Chapters, including but not limited to the remedies provided in such Chapters. Without limiting the foregoing, EarthLink understands that pursuant to Section 12B.2(h) of the San Francisco Administrative Code, a penalty of fifty (\$50) dollars for each person for each calendar day during which such person was discriminated

against in violation of the provisions of this Agreement may be assessed against EarthLink.

20.25 Taxes.

20.25.1 Payment of Applicable Taxes. Payment of any applicable taxes shall be the obligation of EarthLink.

20.25.2 Possessory Interest Taxes. EarthLink recognizes and understands that this Agreement may create a “possessory interest” for property tax purposes for which EarthLink would be responsible to the extent such tax is applicable to EarthLink. Generally, such a possessory interest is not created unless the Agreement entitles EarthLink to possession, occupancy, or use of City property for private gain. If such a possessory interest is created, then the following shall apply:

20.25.2.1 Potential Real Property Tax Assessment. EarthLink, on behalf of itself and any permitted successors and assigns, recognizes and understands that EarthLink, and any permitted successors and assigns, may be subject to real property tax assessments on the possessory interest.

20.25.2.2 Potential Change in Ownership. EarthLink, on behalf of itself and any permitted successors and assigns, recognizes and understands that the creation, extension, renewal, or assignment of this Agreement may result in a “change in ownership” for purposes of real property taxes, and therefore may result in a revaluation of any possessory interest created by this Agreement. EarthLink accordingly agrees on behalf of itself and its permitted successors and assigns to report on behalf of the City to the County Assessor the information required by Revenue and Taxation Code section 480.5, as amended from time to time, and any successor provision.

20.25.2.3 Reporting Changes in Ownership. EarthLink, on behalf of itself and any permitted successors and assigns, recognizes and understands that other events also may cause a change of ownership of the possessory interest and result in the revaluation of the possessory interest. (*see, e.g., Rev. & Tax. Code Section 64, as amended from time to time*). EarthLink accordingly agrees on behalf of itself and its permitted successors and assigns to report any change in ownership to the County Assessor, the State Board of Equalization or other public agency as required by Applicable Law.

20.25.2.4 Other Information. EarthLink further agrees to provide such other information as may be requested by the City to enable the City to comply with any reporting requirements for possessory interests that are imposed by Applicable Law.

- 20.26 Americans with Disabilities Act. EarthLink acknowledges that programs and services provided by the City to the public, whether directly or through a contractor operating on the City's behalf, must be accessible to the disabled public in accordance with the provisions of the Americans with Disabilities Act ("ADA"). EarthLink also acknowledges that this requirement may apply to services under this Agreement. In performing the services inside the City pursuant to the requirements of this Agreement, EarthLink will provide the services specified in this Agreement in a manner that substantially complies with the applicable provisions of the ADA and other applicable federal, state and local disability rights laws and regulations.
- 20.27 Prevailing Wages. EarthLink agrees that any person performing labor in the installation of the Network shall be paid not less than the prevailing rate of wages, as the prevailing wages are established according to Section 6.22(E) of the San Francisco Administrative Code, and that EarthLink shall include, in any subcontract for installation of such Network, requirement that all persons performing labor under such contract shall be paid not less than the prevailing rate of wages for the labor so performed. EarthLink shall provide, and shall require any Subcontractor to provide, upon request, certified payroll reports with respect to all persons performing labor in the installation of the Network.
- 20.28 Headings. The heading references herein are for convenience purposes only, do not constitute a part of this Agreement and shall not be deemed to limit or affect any of the provisions hereof.
- 20.29 Integrated Document. This Agreement and the Pole Use Agreement constitute the entire agreement between the Parties and the provisions of these Agreements shall not be superseded, overridden or contradicted by any provisions contained in City standard form permit or approval applications. Except as set forth herein, there are no promises, representations or understandings between the Parties of any kind or nature whatsoever.
- 20.30 Amendments. This Agreement may be amended from time to time only by amendments that are written and executed on paper by both Parties to this Agreement.
- 20.31 Counterparts. This Agreement may be executed in duplicate counterparts, each of which shall be deemed an original.
- 20.32 Public Announcements. The City and EarthLink agree, subject to any public disclosure law requirements, to consult each other on public statements, press releases, publications, or claims about the Network's status.
- 20.33 Parties Bear Their Own Costs. Except as expressly set forth herein, each Party shall pay its own costs of performing hereunder. This Agreement and the Pole Use Agreement state the only charges and sums that EarthLink is required to pay the City during the Term for installation, attachment, maintenance, and use of the Municipal Facilities and electricity. Any other charges that EarthLink may be required to pay the City shall be stated in a separate signed written agreement of the Parties. In the event of litigation arising out of any dispute or default related to this Agreement, the Parties

shall each pay their respective attorneys fees, expert witness costs, and cost of suit, regardless of the outcome of the litigation.

20.34 Successors. This Agreement shall be binding on and inure to the benefit of the successors and permitted Assignees of the respective Parties.

20.35 Right of Condemnation Reserved. Nothing in this Agreement shall limit or increase any right the City may have to acquire by eminent domain or otherwise any property of EarthLink; provided, however, that EarthLink shall be compensated for any such acquisition pursuant to Applicable Law.

20.36 City Opportunity to Purchase.

20.36.1 Opportunity to Purchase Communications Equipment. Should EarthLink elect to sell the Communications Equipment and, at EarthLink's discretion, any other Network assets, and no suitable Assignee is presented to the City for any approval that may be required under Section 12 herein, EarthLink will offer the City the opportunity to purchase the Communications Equipment and, at EarthLink's discretion, other Network assets, upon terms to be negotiated and mutually agreed. EarthLink shall also reasonably assist the City, at the City's expense, in transferring licenses to software embedded in any Communications Equipment and, at EarthLink's discretion, other Network assets, so transferred to the City.

20.36.2 Agreement and Consents Required. EarthLink and the City are not obligated to agree to a purchase of any of the Communication Equipment by the City unless a mutually acceptable agreement on all the essential terms is reached in a written agreement signed by authorized representatives of both Parties, and the consent to such assignment or transfer is obtained from all required third parties, including lessors and lenders that have any interest in the Communication Equipment and any other Network assets that may be included in the agreement.

20.37 No Joint Venture. Nothing contained in this Agreement shall be deemed or construed as creating a partnership or joint venture between the City and EarthLink or between the City and any third party, or cause the City to be responsible in any way for the debts or obligations of EarthLink. The City shall not be liable for any act of EarthLink and EarthLink shall not be liable for any act of the City, and nothing herein contained shall be construed as creating the relationship of employer and employee between the City and EarthLink or any of their respective agents. EarthLink is not a state or governmental actor with respect to any activity conducted by EarthLink hereunder. The subject of this Agreement is a Network, with neither Party acting as the agent of the other Party in any respect. Nothing contained in this Agreement shall create or justify any claim against the City by any third party with whom EarthLink may have contracted or may contract relative to this Agreement or by any other third party.

20.38 EarthLink's Representations and Warranties. EarthLink represents, warrants and covenants to the City as follows, as of the Effective Date:

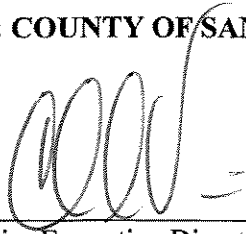
- 20.38.1 Valid Existence; Good Standing. EarthLink is a corporation duly organized and validly existing under the laws of the State of Delaware. EarthLink has all requisite power and authority to own its property and conduct its business as presently conducted. EarthLink has made all required corporate filings and is a corporation in good standing in the State of Delaware.
- 20.38.2 Authority. EarthLink has all requisite power and authority to execute and deliver this Agreement and to carry out and perform all of the terms and covenants of this Agreement. The execution and delivery of this Agreement by EarthLink has been duly and validly authorized by all necessary action.
- 20.38.3 No Limitation on Ability to Perform. Neither EarthLink's articles of incorporation or operating agreement, nor the organizational documents of any of EarthLink's members or partners, nor any rule, policy, constitution, by-law, agreement or law, in any way prohibits, limits or otherwise affects the right or power of EarthLink to enter into and perform all of the terms and covenants of this Agreement. Neither EarthLink nor any of its members or partners are party to or bound by any contract, agreement, indenture, trust agreement, note, obligation or other instrument which could prohibit or limit the same. There are no pending or threatened suits or proceedings affecting EarthLink or any of its members or partners before any court, governmental agency, or arbitrator which might materially adversely affect the EarthLink's ability to install and operate the Network or perform its obligations under this Agreement.
- 20.38.4 Suspension or Disbarment. EarthLink has not been suspended or disbarred by the U.S. General Services Administration, nor has EarthLink been suspended, disciplined, or prohibited from contracting with any federal, state or local governmental agency. EarthLink covenants that it shall not, in connection with this Agreement, hire any Subcontractor that Earthlink knows or has reason to know has been suspended or disbarred by the City.
- 20.39 False Claims. If EarthLink submits a false claim in violation of the applicable portions of Article 5 of Chapter 6 of the San Francisco Administrative Code, EarthLink shall be liable to the City for three (3) times the amount of damages that the City sustains because of the false claim. EarthLink shall also be liable to the City for the cost, including attorneys' fees and costs, of a civil action brought to recover any of those penalties or damages and may be liable to the City for a civil penalty of up to ten thousand dollars (\$10,000) for each false claim. EarthLink will be deemed to have submitted a false claim to the City if EarthLink knowingly makes, uses or causes to be made or used a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the City or otherwise submits a false claim in violation of the applicable portions of Article 5 of Chapter 6 of the San Francisco Administrative Code.
- 20.40 Board of Supervisors Approval. The City shall cause this Agreement to be submitted to the Board of Supervisors for approval. Notwithstanding anything herein to the contrary, EarthLink understands and agrees that no officer or employee of the City has authority to commit the City to this Agreement unless and until the City Board of

Supervisors shall have duly enacted an ordinance approving this Agreement, and such ordinance has further been approved by the City's Mayor. The Board of Supervisors and Mayor may approve or reject this Agreement in their sole discretion. Therefore, any obligations of the City or EarthLink hereunder are contingent upon such approvals, and this Agreement shall not be effective unless and until such approvals are obtained in accordance with the San Francisco Charter. In the event that the Board of Supervisors or Mayor does not approve this Agreement, then this Agreement shall terminate and shall be of no force and effect whatsoever.

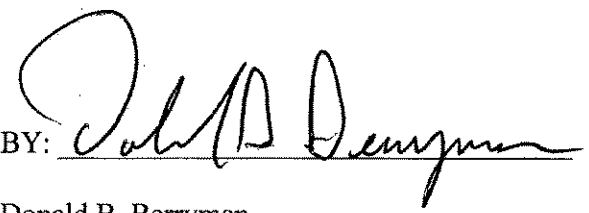
IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates set forth below.

CITY & COUNTY OF SAN FRANCISCO

EARTHLINK, INC.

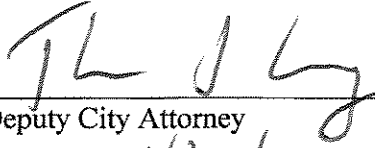
BY: 
Chris Vein, Executive Director and Chief
Information Officer
Department of Telecommunications and
Information Services

Date: 4/20/07

BY: 
Donald B. Berryman
EVP and President
EarthLink Municipal Networks

Date: April 20, 2007

Approved as to form:
DENNIS J. HERRERA, City Attorney


Deputy City Attorney

Date: 4/20/07