

**Amendment of the Whole
May 14, 2007.**

FILE NO. 070077

ORDINANCE NO.

1 [Approval of agreement with EarthLink, Inc. for a City-wide wireless broadband Internet
2 access network.]

3 **Ordinance approving an agreement with EarthLink, Inc. to, manage, operate and install**
4 **in the City rights of way a City-wide wireless broadband Internet access network that**
5 **provides free or affordable internet access for San Francisco residents, allocating**
6 **revenues received by the City under the agreement to a fund to promote Digital**
7 **Inclusion, and making General Plan and environmental findings.**

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9 Note: Additions are *single-underline italics Times New Roman*;
10 deletions are *strikethrough italics Times New Roman*.
11 Board amendment additions are double underlined.
12 Board amendment deletions are ~~strikethrough normal~~.

13 Be it ordained by the People of the City and County of San Francisco:

14 Section 1. Findings.

15 A. The Need for Increased Broadband Internet Access

16 (1) As technology and telecommunications have advanced, the internet has
17 become a key tool that individuals use to communicate, access information, and improve their
18 standard of living and quality of life. Broadband internet access provides individuals efficient
19 access to this life-changing technology.

20 (2) Since 2001, the United States has fallen from fourth to ~~twelfth~~fifteenth in the
21 world in the number of broadband subscribers per 100 inhabitants.

22 (3) Highly skilled jobs have been exported to countries that have exploited
23 advances in technology and telecommunications.

24 (4) These trends, if allowed to continue, will inevitably lead to higher prices, less
25 competition, higher unemployment, loss of competitiveness, and less consumer choice for
City residents.

1 (5) Increasing broadband Internet access will foster community development,
2 economic development, and government efficiency, and will better equip San Franciscans to
3 compete in the global economy.

4 (6) According to a recent survey taken by the Office of the Controller,
5 Approximately~~approximately~~ thirty~~twenty~~ per cent of San Francisco residents lack any
6 Internet and computer access at home ~~according to publicly available data~~, resulting in a
7 “Digital Divide” between households with Internet access and those without such access. San
8 Francisco’s non-white population is substantially less likely to have home computers and
9 Internet access than the City’s white population. Studies further show that limited English-
10 speaking and disabled populations are much less likely to use the Internet and own home
11 computers.

12 (7) Lack of computer access, knowledge and skills create a roadblock to obtaining
13 a good education, a better paying job, and a higher standard of living. Providing affordable
14 broadband Internet access to all San Franciscans is the necessary foundation to bridge the
15 digital divide and increase “Digital Inclusion.” The City can further foster Digital Inclusion
16 through other efforts, such as by expanding programs that offer free or low-cost computers,
17 training, and specialized content for those now lacking Internet access.

18 (8) The City wishes to provide free or affordable broadband Internet access to all
19 of its residents, businesses, institutions, and visitors.

20 (9) To meet the needs of all San Franciscans, the City should pursue a full range
21 of communications options. Wireless broadband Internet access provides one cost-effective
22 solution that can be deployed relatively quickly.

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1 B. City Competitive Solicitations and Public Input

2 (1) In August 2005, the City issued a Request for Information/Comment (RFI/C)
3 inviting interested parties to offer their ideas for how San Francisco can provide a universal,
4 free or affordable wireless broadband network. The City received over 300 public comments
5 and 26 proposals in response to that solicitation.

6 (2) In December 2005, incorporating ideas and practices obtained from RFI/C
7 responses, the City issued a Request for Proposals to install, manage, and operate a City-
8 wide wireless broadband Internet access network. The City required all proposals to include a
9 free wireless broadband service. The City received six proposals in response to that
10 solicitation.

11 (3) The City selected a proposal by EarthLink Inc. (EarthLink) as the best proposal
12 in that competitive solicitation process. EarthLink's proposal anticipated that the free wireless
13 broadband service required by the City would be provided by Google, Inc. (Google) through
14 an agreement between EarthLink and Google. After approximately seven months of
15 negotiations, the City has reached an agreement with EarthLink to provide a City-wide
16 wireless broadband Internet access network.

17 (4) During the competitive solicitation process, the City held two public meetings
18 to obtain public comments and address questions regarding the concept of a wireless
19 broadband Internet access network. The Government Audits and Oversight Committee and
20 the City Operations and Neighborhood Services Committee of the Board of Supervisors and
21 the City and County of San Francisco Local Agency Formation Commission have held several
22 hearings regarding the City's broadband infrastructure generally and the proposal for a
23 wireless broadband network specifically.

1 (5) The City created the Community Digital Inclusion Task Force to advise the
2 Department of Telecommunications and Information Services (DTIS) on Digital Inclusion
3 programs that will complement the deployment of a City-wide wireless Internet network. The
4 Task Force consists of fifteen members, including community leaders from business, nonprofit
5 and philanthropy sectors with expertise and experience in technology, affordable housing,
6 community development, human and social services.

7 (6) Throughout the City's negotiations with EarthLink, the City posted on its
8 website for public review all documents exchanged between the parties that relate to the
9 positions of the parties, as well as summaries of the parties' positions to the extent that they
10 were not reflected in the exchanged documents.

11 C. The Agreement with EarthLink

12 The City's DTIS and EarthLink have signed an Amended Wireless Broadband
13 Internet Access Network Agreement (Agreement), which DTIS recommends for approval by
14 the Board of Supervisors. In summary, the key terms of the Agreement are as follows:

15 (1) Network. EarthLink shall install, manage, and operate at no cost to the City a
16 City-wide wireless broadband Internet access network using equipment placed on poles in the
17 City's public rights-of-way and on buildings or other structures in the City, subject to all
18 required permissions and approvals.

19 (2) Required Services. Required services provided over the network include: a
20 free service with a minimum average speed of 300 kilobits per second (kbps) and at least one
21 paid subscription service with a minimum average speed of one megabit per second (mbps).

22 (3) Payments. EarthLink shall pay the City \$600,000 in non-refundable
23 prepayments for the use of the City's rights-of way, to be paid in three \$200,000 installments
24 as certain milestones are achieved before final deployment of the network. Once the network
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1 is operating, EarthLink shall pay the City five percent of its revenues from subscription
2 services; the \$600,000 prepayment will be deducted from the five percent fee in increments
3 no greater than \$18,750 per quarter.

4 (4) Term. The initial term is four years, beginning after the City approves
5 EarthLink's final deployment plans, with the potential for three additional four-year renewal
6 terms. At the conclusion of each four-year term, the parties can seek new or modified
7 provisions in the agreement. If the parties do not renew the agreement after four years,
8 EarthLink shall operate the network for an additional 18 months.

9 (5) Test of the Network. Before beginning its full deployment of the network,
10 EarthLink must test the network technology in a not less than two-square-mile area of the
11 City. The trial must satisfy the test criteria before EarthLink will be permitted to complete the
12 installation of the network.

13 (6) Network Build-out. EarthLink shall complete its build-out of the network within
14 18 months of the City's approval of EarthLink's final network design plans and EarthLink's
15 diligent pursuit and acquisition of the legal authorizations to deploy backhaul equipment at a
16 minimum of nine structures in the City. If EarthLink has not obtained these nine
17 authorizations within two years of the City's acceptance of EarthLink's test network, and the
18 delay was not caused by EarthLink or force majeure events, then EarthLink shall be entitled to
19 terminate the Agreement.

20 (7) Open Access. EarthLink shall offer wholesale access to its Internet access
21 services (other than the free service and certain other services) on nondiscriminatory terms
22 and conditions.

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1 (8) Privacy.

2 (a) Privacy Policy for Subscription Services. EarthLink's privacy policy for
3 its paid subscription services shall meet at least the following requirements, and EarthLink
4 shall seek the City's approval before it makes any changes to its privacy policy that relate to
5 these requirements:

6 (i) Sharing of Protected Personal Information. Protected personal
7 information is information that identifies an individual, such as name, address, phone number,
8 social security number, financial profiles, medical profiles, and credit card information.
9 EarthLink may not share a subscriber's protected personal information without the
10 subscriber's affirmative voluntary consent, except that EarthLink may share information with
11 its vendors or partners for certain specified purposes, in response to civil legal demands (with
12 reasonable prior notice to the subscriber) and with law enforcement in accordance with
13 specified requirements and procedures.

14 (ii) Use and Retention of Location Information. Location information
15 is information about the location of a computer or other device that is being used to access
16 the network. EarthLink shall give subscribers an opportunity to opt out of EarthLink's use of
17 location information, except: to allow a connection to the network; to protect against crime,
18 fraud and network security breaches; and to respond to civil legal or law enforcement
19 requests (in accordance with specified requirements and procedures). EarthLink shall not
20 retain location information for longer than 60 days, except for certain exceptions relating to
21 law enforcement and data retained on an aggregated basis.

22 (b) Privacy Policy for the Free Service. EarthLink shall require that the
23 privacy policy for the free service meet the following requirements and that the free service
24 provider give written notice to the City of any changes to its privacy policy that relate to these
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1 requirements: (i) users shall be given options for log in to the free service that require minimal
2 information from the user; and (ii) the free service provider may share protected personal
3 information with third parties in response to civil legal demands (with reasonable prior notice
4 to the subscriber) and with law enforcement in accordance with specified requirements and
5 procedures.

6 (9) Non-exclusive Access. EarthLink's access to the City public rights-of-way
7 is non-exclusive. The City may enter into similar agreements with other entities on a non-
8 discriminatory and competitively neutral basis.

9 (10) Upgrade of the Network. EarthLink shall keep the network updated with
10 industry standard technology, except that this requirement does not apply during the final 18
11 months of the term of the agreement. Upgrades are to be at parity with upgrades in other
12 comparable cities in which EarthLink operates wireless broadband networks.

13 (11) Upgrade of Speed of the Free Service. Annually, EarthLink shall
14 increase the speed of the free service to be at least fifteen per cent of the speed of
15 EarthLink's best-selling Internet access service. EarthLink must also increase the speed to
16 500 kbps if the total annual amount of pole use fees EarthLink is obligated to pay to all owners
17 of poles located in the City and County of San Francisco (excluding the PUC) is greater than
18 60% of the total annual amount of all pole fees EarthLink is obligated to pay to all owners of
19 such poles (including the PUC).

20 (12) Customer Service. EarthLink shall offer telephone and e-mail customer
21 service support, in at least English and Spanish, for paid subscription customers. Such
22 customer support is not required for the free service. EarthLink shall expand the languages in
23 which it provides customer service support to include any language in which EarthLink
24 conducts a marketing program.

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1 (13) Performance Standards. EarthLink shall operate the network in
2 accordance with performance standards to be developed and agreed to by EarthLink and the
3 City prior to City-wide deployment of the network.

4 (14) Reports. EarthLink shall maintain quarterly and annual reports to enable
5 the City to verify EarthLink's revenues from subscription services and shall provide the City an
6 annual report of such revenues prepared by a certified public accountant.

7 (15) Assignment of Agreement. Before EarthLink may sell the network and
8 transfer its rights under the agreement to a third party, EarthLink shall obtain the approval of
9 the Board of Supervisors. No such consent is necessary if EarthLink's entire company or the
10 municipal wireless division is sold to a third party, provided that, in this case, the third party
11 must meet additional specified open access requirements.

12 (16) City Opportunity to Purchase. If EarthLink wishes to sell the equipment
13 that makes up the network and fails to obtain any necessary City approval of the buyer,
14 EarthLink shall offer the City an opportunity to purchase the equipment on mutually agreeable
15 terms.

16 (17) Pole Use Agreement Required. EarthLink's rights and obligations are
17 contingent on an agreement between EarthLink and the City's Public Utilities Commission
18 (PUC) setting forth the terms and conditions under which EarthLink will be permitted to use
19 the street light poles owned or managed by the PUC.

20 (18) Insurance. EarthLink shall maintain insurance in prescribed amounts and
21 coverages and shall name the City as an additional insured on its general and automobile
22 liability policies.

23 (19) Indemnity. EarthLink shall indemnify the City against all legal actions,
24 costs or other losses directly or proximately caused by or resulting from EarthLink's
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1 negligence, willful misconduct, violations of the agreement, or violations of law, except to the
2 extent that such losses are directly or proximately caused by or result from the City's
3 negligence, willful misconduct, or violations of the agreement, ~~or violations of law.~~

4 (20) Limitation of Liability. Neither the City nor EarthLink are liable to the other
5 for incidental, consequential, punitive or exemplary damages. Neither party is liable to the
6 other for direct damages in excess of \$1,000,000, except for damages relating to loss of life,
7 bodily injury, or property damage, for which no damages cap applies.

8 (21) City Policies. EarthLink shall: establish a disadvantaged business
9 enterprise subcontracting participation goal of 15% of the sums paid by EarthLink for
10 installation, operation and maintenance of the Network; pay prevailing wages to any person
11 performing labor in the installation of the network; comply with all applicable First Source
12 Hiring requirements; comply with all applicable non-discrimination requirements of Chapters
13 12B and 12C of the San Francisco Administrative Code; and comply with other City policies
14 as specified in the Agreement.

15 (22) Legal Challenges. If the Board's approval of the Agreement or the PUC
16 pole use agreement is rescinded or reversed or enjoined by a permanent or preliminary
17 injunction, EarthLink may terminate the Agreement. If a legal action to invalidate the Board's
18 approval of the Agreement or the PUC pole use agreement is pending for longer than 45 days
19 and EarthLink decides in good faith that it is unwilling to risk further investment during the
20 pendency of the action, EarthLink may postpone its deployment of the test network or its final
21 network build-out until the action is concluded. If a legal action to invalidate the Board's
22 approval of the Agreement or the PUC pole use agreement is pending for longer than 24
23 months, EarthLink may terminate the Agreement.

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1 D. Digital Inclusion Programs

2 Payments received from EarthLink for use of the City’s rights-of-way will allow the City
3 to fund Digital Inclusion programs to benefit the City’s most disadvantaged residents and
4 families. Such programs should include efforts to: (i) increase ownership of computers,
5 printers and other necessary equipment; (ii) increase community-based and multi-lingual
6 technology training and support; and (iii) increase multi-lingual and local Internet content
7 geared to underserved communities.

8 E. Inapplicable Code Provisions and Board Process

9 The provisions of Articles One through Eight of Chapter 11 of the San Francisco
10 Administrative Code (relating to franchises) and the provisions of Sections 786 through 786.7
11 of the San Francisco Public Works Code (relating to street encroachment permits) do not
12 apply to this Agreement. Notwithstanding the inapplicability of these provisions and to allow
13 expanded time for consideration of this ordinance by the public, this ordinance may not be
14 passed within 90 days of its introduction and shall take effect no sooner than 60 days after
15 passage.

16 Section 2. The Board of Supervisors hereby approves the Amended Wireless
17 Broadband Internet Access Network Agreement Between the City and County of San
18 Francisco and EarthLink, Inc. (the Agreement), which is on file with the Clerk of the Board of
19 Supervisors in File No. 070077 and which is hereby declared to be a part of this ordinance as
20 if set forth fully herein, and which requires EarthLink, at no cost to the City, to install, manage,
21 and operate a wireless broadband Internet access network in the City’s rights-of-way and to:
22 make specified payments to the City, provide specified services, abide by specified policies,
23 and otherwise comply with the requirements of the Agreement.

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1 Section 3. The amounts paid by EarthLink to the City for the use of the City's rights-of-
2 way pursuant to Section 4.1 of the Agreement shall be allocated to an account to promote
3 Digital Inclusion. This account will be administered by DTIS and will support Digital Inclusion
4 programs, such as programs to increase computer ownership, training and useful Internet
5 content for the benefit of the City's most disadvantaged residents and families. This allocation
6 is intended for the benefit of the City only, and no other person may rely upon, or seek to
7 enforce or benefit from, the proposed allocation or failure to allocate. There shall be no
8 obligation for the allocation, payment or expenditure of money by the City unless the City's
9 Controller first certifies, pursuant to Section 3.105 of the Charter, that there is a valid
10 appropriation from which the expenditure may be made and that unencumbered funds are
11 available for the allocation or expenditure.

12 Section 4. In a letter dated May 10, 2007, the Planning Department has determined
13 that the Agreement and all the actions contemplated thereunder are is consistent with the
14 priority policies of Section 101.1(b) of the Planning Code and that, on balance, the Agreement
15 is in conformity with the City's General Plan. The Board hereby adopts the findings of the
16 Planning Department, which findings are on file with the Clerk of the Board of Supervisors in
17 File No. 070077 and which is hereby declared to be a part of this ordinance as if set forth fully
18 herein.

19 Section 5. The Planning Department has reviewed the Agreement and all the actions
20 contemplated thereunder in accordance with the California Environmental Quality Act
21 (California Public Resources Code Sections 21000 et seq.) (CEQA) and determined that the
22 Agreement is categorically exempt from CEQA. The Board hereby ~~adopts~~ affirms the
23 determination of the Planning Department, which is on file with the Clerk of the Board of
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1 Supervisors in File No. 070077 and which is hereby declared to be a part of this ordinance as
2 if set forth fully herein.

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4 APPROVED AS TO FORM:
5 DENNIS J. HERRERA, City Attorney

6 By: _____
7 Thomas J. Long
8 Deputy City Attorney

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