

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

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

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

11 Section 1. Findings.

12 A. The Need for Increased Broadband Internet Access

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

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

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

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

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

10 (7) Lack of computer access, knowledge and skills create a roadblock to obtaining
11 a good education, a better paying job, and a higher standard of living.

12 Providing affordable broadband Internet access to all San Franciscans is the necessary
13 foundation to bridge the digital divide and increase “Digital Inclusion.” The City can further
14 foster Digital Inclusion through other efforts, such as by expanding programs that offer free or
15 low-cost computers, training, and specialized content for those now lacking Internet access

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

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

21 B. City Competitive Solicitations and Public Input

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

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

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

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

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

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

7 C. The Agreement with EarthLink

8 The City's DTIS and EarthLink have signed a Wireless Broadband Internet
9 Access Network Agreement (Agreement). In summary, the key terms of the Agreement are
10 as follows:

11 (1) Network. EarthLink shall install, manage, and operate at no cost to the City a
12 City-wide wireless broadband Internet access network using equipment placed on poles in the
13 City's public rights-of-way.

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

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

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

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

8 (6) Network Build-out. EarthLink shall complete its build-out of the network within
9 18 months of the City's approval of EarthLink's final network design plans.

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

13 (8) Privacy.

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

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

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

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

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

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

3 (11) Upgrade of Speed of the Free Service. Annually, EarthLink shall
4 increase the speed of the free service to be at least fifteen per cent of the speed of
5 EarthLink's best-selling Internet access service.

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

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

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

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

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

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

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

10 (19) Indemnity. EarthLink shall indemnify the City against all legal actions,
11 costs or other losses directly or proximately caused by or resulting from EarthLink's
12 negligence, willful misconduct, violations of the agreement, or violations of law, except to the
13 extent that such losses are directly or proximately caused by or result from the City's
14 negligence, willful misconduct, violations of the agreement, or violations of law.

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

19 (21) City Policies. EarthLink shall: establish a disadvantaged business
20 enterprise (DBE) subcontracting participation goal of 15% of the sums paid by EarthLink for
21 installation, operation and maintenance of the Network; pay prevailing wages to any person
22 performing labor in the installation of the network; comply with all applicable First Source
23 Hiring requirements; comply with all applicable non-discrimination requirements of Chapters
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1 12B and 12C of the San Francisco Administrative Code; and comply with other City policies
2 as specified in the Agreement.

3 D. Digital Inclusion Programs

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

10 E. Inapplicable Code Provisions and Board Process

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

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

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

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

20 Section 5. The Planning Department has reviewed the Agreement in accordance with
21 the California Environmental Quality Act (California Public Resources Code Sections 21000
22 et seq.) The Board hereby adopts the determination of the Planning Department, which is on
23 file with the Clerk of the Board of Supervisors in File No. _____ and which is hereby
24 declared to be a part of this ordinance as if set forth fully herein.

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1 APPROVED AS TO FORM:
2 DENNIS J. HERRERA, City Attorney

3 By: _____
4 Thomas J. Long
5 Deputy City Attorney

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