

WIRELESS PHILADELPHIA BROADBAND NETWORK AGREEMENT

This Wireless Service Agreement ("Agreement") is made and entered into on this 21st day of February, 2006 ("Effective Date"), by and between Wireless Philadelphia, a Pennsylvania not-for-profit corporation ("WP"), and EarthLink, Inc., a Delaware corporation ("EarthLink"). EarthLink and WP may be referred to individually as a "Party" and collectively as the "Parties." Capitalized words in this Agreement shall have the meaning defined herein and if not defined herein then the meaning defined in the attached **Exhibit A**.

BACKGROUND

- A. Wireless Philadelphia was created by Mayor John F. Street to develop a metropolitan wireless broadband Internet access System (as defined herein) in the City of Philadelphia ("City") in order:
- To spur economic development
 - To enhance community neighborhoods
 - To help overcome the digital divide
 - To reduce the cost of government
- B. WP issued an RFP to build the System and selected EarthLink from among the twelve proposals received.
- C. EarthLink and WP have entered into this Agreement in order for EarthLink to own and deploy the System in the City.
- D. The City is entering into a Street Light Use Agreement ("City Pole Attachment Agreement") between the City and the Philadelphia Authority for Industrial Development ("PAID") effective on or about the Effective Date, granting the rights to PAID to allow EarthLink or its agent to use the Street Lights (as defined herein) for the operation of the System in the City.
- E. PAID is entering into a Street Light Use Agreement ("PAID Pole Attachment Agreement") between PAID and EarthLink effective on or about the Effective Date, granting EarthLink the right to use the Street Lights for installation, maintenance and operation of a System in the City.
- F. WP has chosen and hereby authorizes EarthLink to install and operate the System during the Term of, and pursuant to the terms of, this Agreement.
- G. From time to time, upon the request of either Party, the Steering Committee (as defined herein) will review the product offerings of EarthLink that are described on the attached **Exhibit I**.

NOW, THEREFORE, in consideration of the above referenced recitals and the following mutual covenants, agreements, and obligations of the Parties, which constitute good and valuable consideration, and with the intention to be legally bound hereby, WP and EarthLink agree as set forth above and as follows:

1. PAYMENTS

EarthLink will make the following payments during the Term:

1.1 Execution. Within twenty (20) days after the execution of this Agreement and satisfaction of the First Payment Conditions, EarthLink will pay to PAID, for the account of the City, Two Hundred and Fifty Thousand Dollars (\$250,000) as a non-refundable use fee for the Street Lights used by EarthLink in operating the System during the initial 10 year term of the PAID Pole Attachment Agreement.

1.2 Acceptance of Trial. Within twenty (20) days after Proof of Concept Acceptance (as defined in Section 3.2(c)) EarthLink shall pay to PAID, for the account of the City, Seven Hundred and Fifty Thousand Dollars (\$750,000) as a non-refundable use fee for the Street Lights used by EarthLink in operating the System during the initial 10 year term of the PAID Pole Attachment Agreement.

1.3 2nd Year Payment. One (1) year after Proof of Concept Acceptance EarthLink shall pay to PAID, for the account of the City, One Million Dollars (\$1,000,000) as a non-refundable use fee for the Street Lights used by EarthLink in operating the System during the initial 10 year term of the PAID Pole Attachment Agreement. Collectively the payments describes in this sub-section and as described in sub-sections 1.1 and 1.2 above and the same payments described also in the PAID Pole Attachment Agreement shall be referred to herein as the “\$2,000,000 Payments”.

1.4 Annual Pole Use Fee. A Use Fee of \$24.00 per year per Street Light on which EarthLink installs and maintains Communications Equipment as described in the PAID Pole Attachment Agreement will be paid to PAID, for the account of the City, (“Additional \$2 Pole Fee”).

1.5 Revenue Sharing. Beginning two (2) years after the Proof of Concept Acceptance, EarthLink shall pay to WP on a monthly basis the revenue share income set forth in Exhibit I within sixty (60) days after the end of the month in which the revenue share income was actually received by EarthLink. This revenue sharing must be used by WP, PAID and the City only for expenses incurred in the course of fulfilling the WP Mission set forth in the Articles of Incorporation of WP (“WP Mission”), including operational expenses and overhead of WP.

The above payments, which are also described in the PAID Pole Attachment Agreement, are not intended to be separate payments because they are the same payments.

WP will make the following payments:

1.6 Electricity. WP will pay to PECO the costs and charges for electricity for operation of the System during the term of the PAID Pole Attachment Agreement as

described below. WP will cooperate with the City to continue the manner of paying for electricity usage of the Communications Equipment that WP and the City have mutually agreed upon.

(a) WP will be responsible for arranging and establishing an account with PECO for the purchase, supply and use of electricity by EarthLink during the Term of the PAID Pole Attachment Agreement for all of the Communication Equipment (as defined in the PAID Pole Attachment Agreement) mounted on City Street Lights. The charges due for such electricity will be paid by WP and EarthLink as provided below.

(b) During the two (2) year period beginning with start of installation of the Proof of Concept Trial ("2 Year Period"), WP shall forward all invoices for electricity for the Communication Equipment mounted on City Street Lights to EarthLink and EarthLink will pay such invoices in a timely manner, provided that if the electricity for the Communications Equipment is not separately invoiced by the utility then the parties shall calculate the portion of the combined invoice that is attributable in the manner described in Exhibit P. The sum of such amounts paid by EarthLink during the 2 Year Period shall be referred to as the "EL Electricity Payment". During the remaining initial term of this Agreement WP shall reimburse EarthLink for EL Electricity Payment each month ("Reimbursement Payment") to the extent that the sum of such monthly reimbursement payment and the monthly payment in the next paragraph (c) ("Current Monthly Payment") is less than 50% of the Revenue Share payable by EarthLink to WP that month. Payments in the previous sentence shall be applied to EL Electricity Payment balance until it has been paid in full. EarthLink will not charge interest on the EL Electricity Payment and WP shall have no other obligation to repay the EL Electricity Payment except as provided herein. (For example purposes only: (i) If a given month had a Revenue Share of \$100,000 and the electricity bill for that month was \$30,000, the Current Monthly Payment under the below paragraph (c) would be \$30,000 for that month, and the Reimbursement Payment under this paragraph (b) would be \$20,000 for that month; (ii) If a given month had a Revenue Share of \$100,000 and the electricity bill for that month was \$60,000, the Current Monthly Payment under the below paragraph (c) would be \$50,000 for that month, and the Reimbursement Payment under this paragraph (b) would be \$0 for that month.)

(c) During the remaining Term of the Agreement after the 2 Year Period WP will pay for all of the electricity charges for the Communication Equipment mounted on City Street Lights as provided below. However, EarthLink shall pay each month for such electricity if and to the extent that such electricity cost in a month exceeds 50% of the Revenue Share payable by EarthLink to WP in that month. If and as long as EarthLink so elects by notice to WP, WP shall forward all invoices for electricity for the Communication Equipment mounted on City Street Lights to EarthLink and EarthLink will be entitled to pay such invoices directly in a timely manner. If the electricity for the Communications Equipment is not separately invoiced by the utility then the parties shall calculate the portion of the combined invoice that is attributable in the manner described in Exhibit P.

(d) EarthLink may offset amounts payable by WP to EarthLink pursuant to 1.6(b) and 1.6(c) against amounts payable for Revenue Share that month. Any amounts payable by EarthLink to WP pursuant to 1.6(c) shall be paid along with the Revenue Share each month. The reports provided by EarthLink to WP shall also report the amounts offset as provided in this Section.

(c) EarthLink shall arrange for and pay the costs of electricity for operating the System other than for Communication Equipment mounted on City Street Lights.

2. THE SYSTEM

EarthLink will design, build, install, test, operate, maintain and upgrade a City wide wireless broadband Internet access system (the "System"), at its own cost, according to the specifications set forth in Exhibit G (as may be amended, "Specification") that meets the requirements set forth in Exhibit F (as may be amended, "Requirements") according to the schedule set forth in Exhibit H (as may be amended, "Schedule") in order to provide the services and product offerings set forth in Exhibit I. EarthLink will be the owner of the System.

3. DESIGN, INSTALLATION, TEST & ACCEPTANCE OF THE SYSTEM

3.1 Design.

3.1(a) In accordance with the Schedule, prior to beginning the Proof of Concept Trial, EarthLink will prepare a detailed design document ("Design Control Documents") for the System which will be submitted to WP at least one week in advance of a detailed design review meeting including EarthLink, WP and principal Subcontractors ("Preliminary Design Review"). The Design Control Documents will incorporate and comply with the Specifications and Requirements, as amended, and will also include detailed testing plans for the Proof of Concept Trial and detailed acceptance criteria for the System ("Acceptance Criteria"), as well as a detailed schedule for the Proof of Concept Trial and System deployments. The Design Control Documents shall further include a matrix showing how each of the Requirements are met through the Acceptance Criteria.

3.1(b) At the design review meeting EarthLink will receive and consider design comments from WP and shall provide updated Design Control Documents if necessary to create and amend Design Control Documents that are mutually acceptable to both parties. In the event that WP believes that the design does not comply with the Specification or cannot meet the Requirements, it may provide EarthLink with written notice within two weeks of the meeting ("Design Concern Notice"), in which case EarthLink may not proceed with the Proof of Concept Trial until WP withdraws the Design Concern Notice. The Design Control Documents, that are prepared and amended by EarthLink pursuant to the Preliminary Design Review and that are either (i) approved by WP or (ii) to which WP does not send a Design Concern Notice, will be the only specifications, requirements and schedule governing the installation services in the Proof of Concept Trial.

3.2 Proof of Concept Trial.

3.2(a) Upon successful completion and satisfaction of the Proof of Concept Conditions, but no sooner than two weeks after the later of (i) the Preliminary Design Review and (ii) EarthLink delivering updated Design Control Documents after the Preliminary Design Review, EarthLink shall install, implement and test the Proof of Concept Trial as provided in the test procedures and Acceptance Criteria set forth in the Design Control Documents.

3.2(b) EarthLink shall send WP notice when the results of the Proof of Concept Trial are available, as well as updated Design Control Documents including an updated Schedule for deployment of the System, test plans for the Zones and the System, and any proposed

changes suggested to the approved Design Control Documents (which may include proposed changes to the Acceptance Criteria). WP and EarthLink shall meet to review the test results as well as the updated Design Control Documents. If one of the Parties believes that the Proof of Concept Trial does not successfully meet the Acceptance Criteria then EarthLink shall not proceed to Implementation of the System and will use good faith commercially reasonable efforts to resolve any problems and/or provide alternatives or changes to the Design Control Documents, so that the Proof of Concept Trial can be mutually accepted.

3.2(c) EarthLink shall use commercially reasonable efforts to design the configuration and order of the installation of the Zones so that Digital Inclusion Areas are deployed at least at the same rate as the rest of the City. When the parties agree to proceed and agree on any requested changes to the Design Control Documents (including the configuration and order of installation of the Zones, Acceptance Criteria and Schedule) and agree that the Proof of Concept Trial has met the Acceptance Criteria (as may be amended) they and the City shall execute a written paper document acknowledging acceptance of Proof of Concept Trial and the revised Design Control Documents ("Proof of Concept Acceptance"). At such time the revised Design Control Documents (including Acceptance Criteria and Schedule) shall replace and supersede all previous versions of such documents and the Specifications and Requirements. The Design Control Documents, as amended and approved by the Proof of Concept Acceptance will be the only specifications, requirements and schedule governing the installation services in the Implementation.

3.2(d) In the event that Proof of Concept Acceptance cannot be achieved within ninety (90) days of the beginning of acceptance testing, WP or EarthLink may terminate this Agreement and the Pole Attachment Agreements, in which case neither EarthLink nor WP will have any further obligations or liabilities hereunder or under the Pole Attachment Agreements, except EarthLink's obligation to remove the Communications Equipment. Notwithstanding the above, EarthLink shall in good faith begin preparation for the Proof of Concept Trial prior to successful completion of the Proof of Concept Conditions. Such preparation shall be at the sole discretion of EarthLink and nothing herein shall obligate EarthLink to purchase Equipment, to create binding agreements or to utilize subcontractors or to begin any of the work outlined in this Agreement prior to successful completion of the Proof of Concept Conditions. When used herein, "Proof of Concept Trial" shall mean a fifteen (15) square mile test of the System with live users as further described in the Specification and to be further described in the applicable Design Control Document.

3.3 Effect of Design Concern Notice. The delivery of, failure to deliver, or withdrawal of a Design Concern Notice, WP's participation in the design review process, and WP's, and delivery of the Proof of Concept Acceptance, shall in no way alleviate EarthLink from its obligations to meet the Design Control Documents as amended pursuant to the above-described procedures, unless EarthLink has received an express written amendment to the relevant Design Control Documents.

3.4 Implementation. Upon successful completion and satisfaction of the Implementation Conditions EarthLink shall install, implement and test the System ("Implementation").

3.4(a) The System shall be implemented in zones specified by EarthLink and set forth in the Schedule and Design Control Documents ("Zones"). Each Zone shall be accepted by WP separately from the other Zones prior to EarthLink beginning the final System acceptance

testing, except that the testing of the final Zone shall happen at the same time as the final System testing. EarthLink may deploy multiple Zones simultaneously.

3.4(b) Acceptance of each Zone, shall be determined in accordance with the Acceptance Criteria and test procedures set forth in the Design Control Documents. When EarthLink believes a Zone is accepted it shall deliver notice, along with test data, to WP, and such Zone shall be deemed accepted unless WP objects in writing providing details of the basis for its objection, within two weeks or receiving such notice. If it is determined by such testing that the Zone does satisfy the Acceptance Criteria then that Zone will be "Accepted." If it is determined by such testing that the Zone does not satisfy the Acceptance Criteria then EarthLink shall use best efforts to correct any defects and resubmit the Zone for acceptance testing within a reasonable period of time taking into account the work to be accomplished, at which point the procedure set forth in this sub-section shall be repeated.

3.4(c) After each Zone is Accepted EarthLink shall bring that Zone into operation handling customers at speeds and functionality in accordance with the Design Control Documents ("Operational"). EarthLink shall keep each Zone Operational as it implements and tests each successive Zone.

3.4(d) System Acceptance. When all Zones of the System has been Accepted and are still Operational, EarthLink shall perform System acceptance testing in accordance with test procedures set forth in the Design Control Document. System acceptance testing shall be conducted for at least two (2) months from its starts. When EarthLink believes the System is accepted it shall deliver notice, along with test data, to WP, and the System shall be deemed accepted unless WP objects in writing providing details of the basis for its objection, within one month of such notice ("System Acceptance" and "Final Acceptance"). If, after such notice has been sent, it is determined by such testing that the System does satisfy the Acceptance Criteria then that will constitute System Acceptance, If, after such notice has been sent, it is determined by such testing that the System does not satisfy the Acceptance Criteria then EarthLink shall use best efforts to correct any defects and resubmit the System for acceptance testing within a reasonable period of time taking into account the work to be accomplished, at which point the procedure set forth in this sub-section shall be repeated. In the alternative, WP may provide written notice to EarthLink of System Acceptance.

4. CONDITIONS TO PERFORMANCE

The obligations to pay the sums pursuant to Section 1.1 shall be conditioned upon the timely successful completion and satisfaction of the First Payment Conditions. The obligations and authority of EarthLink to implement the Proof of Concept shall be conditioned upon the timely successful completion and satisfaction of the Proof of Concept Conditions. The obligations and authority of EarthLink to implement the Implementation phase shall be conditioned upon the timely successful completion and satisfaction of the Implementation Conditions. WP and EarthLink shall be entitled, but not obligated, to waive any of these conditions if they both agree to such waiver.

4.1 When used herein, "First Payment Conditions shall mean that all of the following has occurred and been satisfied:

4.1(a) This Agreement has been signed by both Parties through fully authorized representatives;

4.1(b) EarthLink shall secure from the City and PAID all necessary approvals to operate the System and the Services and WP shall secure the City Council's approval or authorization for execution of the City Pole Attachment Agreement and PAID Pole Attachment Agreement. The City Pole Attachment Agreement and PAID Pole Attachment Agreement have both been fully authorized and executed by the appropriate entities and governing bodies;

4.1(c) PECO has opened an account for WP, PAID, EarthLink or the City to use the electricity for the operation of the System Communications Devices on the Street Lights using PECO provided electricity in a manner that complies with applicable laws and regulations;

4.1(d) There are not any court actions or civil actions, that have resulted in EarthLink not having substantially all of the rights to perform as described in this Agreement;

4.1(e) There are not any laws, statutes, or regulations or any City Council ordinances that have the effect of EarthLink not having substantially all of the rights to perform as described in this Agreement; and

4.2 When used herein, "Proof of Concept Conditions" shall mean the following:

4.2(a) The First Payment Conditions have all been successfully completed and satisfied and continue to be accurate and satisfied;

4.2(b) All necessary and appropriate permits, licenses and authorizations of the City, County, State and Federal governments for the Proof of Concept Trial ("Proof of Concept Permits") have been issued and have not been terminated or revoked (excepting those Permits that the City and EarthLink have otherwise agreed will be issued on a rolling basis); and

4.2(c) A Design Concern Notice has not been delivered or, if any have been delivered, they have all been withdrawn.

4.3 When used herein, "Implementation Conditions" shall mean the following:

4.3(a)(i) All of the Proof of Concept Conditions have all been successfully completed and satisfied and continue to be accurate and satisfied;

4.3(a)(ii) The Proof of Concept Acceptance has occurred; and

4.3(a)(iii) All appropriate permits, licenses and authorizations of the City, County, State and Federal governments for the implementation of the entire System ("Permits") have been issued and have not been terminated or revoked (excepting those Permits that the City and EarthLink have otherwise agreed will be issued on a rolling basis).

4.4 EarthLink's willingness to enter into this Agreement and ability to perform is dependent upon the completion and continued effectiveness of the conditions set forth in this Section. If by the day that is one hundred and eighty (180) days after the later of: (i) the date of City Council Approval; (ii) the date on which the Agreement is fully executed; or (iii) the Effective Date, the Implementation Conditions are not successfully completed and satisfied or have not continued to be successfully completed and satisfied, and such

failure to complete and satisfy was not caused by EarthLink, then EarthLink shall be entitled to terminate all of its obligations hereunder by sending a notice of termination within ninety (90) days after the end of such 180 day period; the Agreement shall remain in full force and effect throughout the ninety (90) day notice period and shall terminate on the last day of the notice period unless such conditions are completed and satisfied by the end of the ninety (90) day notice period, or the Agreement is sooner terminated by the written agreement of both parties or in accordance with its terms. Notwithstanding anything to the contrary, if the City Council's approval of the City Pole Attachment Agreement and PAID Pole Attachment Agreement (each in the form executed by all parties and dated on the Effective Date of this Agreement without addition, modification or condition) by ordinance and the ordinance becoming law ("City Council Approval") has not occurred prior to the earlier of: (a) July 1, 2006; or (b) the end of the Spring 2006 City Council term, then either Party shall be entitled to terminate this Agreement upon ten (10) days prior written notice of termination unless prior to the time of termination the City Council Approval has occurred. The fact that both parties wait and do not terminate this Agreement as provided in the immediately preceding sentence shall not be a waiver of such termination right and each shall continue to have the right thereafter to terminate this Agreement as provided in the immediately preceding sentence at any time until City Council Approval has occurred.

4.5 Pole Rights. EarthLink's rights, during the Term of this Agreement to mount, install, operate, repair and maintain at EarthLink's sole cost and expense, the equipment, radios and antennas, or such other comparable equipment on Street Lights are set forth in the PAID Pole Attachment Agreement ("Communications Equipment" as defined in the PAID Pole Attachment Agreement). EarthLink's obligation to provide wireless broadband data communication services to persons located within the boundaries of the City in accordance with the mutually agreed upon coverage area as defined in the Acceptance Testing Criteria and Design Control Documents, as amended ("Coverage Area") are dependent upon access rights being granted on poles in sufficient number and location. If the necessary rights to City assets in any location are not provided, without providing a reasonable alternative, then EarthLink will not be responsible to include coverage for such affected location. If EarthLink is unable to obtain the Street Lights from the City pursuant to the PAID Pole Attachment Agreement, then EarthLink's performance obligations will be reduced to the extent the Coverage Area cannot be obtained for a given location and EarthLink will not be in default for any failure to provide the Coverage Area originally set forth in the Design Control Documents. If EarthLink is unable to obtain the Street Lights for installation of any assets in locations EarthLink determines necessary to provide the agreed upon Coverage Area for at least Fifty (50%) percent of the City locations in which EarthLink and WP had proposed coverage pursuant to the Design Documents within nine (9) months after the later of: (i) the date of City Council Approval; (ii)) the date on which the Agreement is fully executed; or (iii) the Effective Date, then EarthLink may terminate this Agreement upon written notice to WP without penalty or further liability or obligation to perform, provided the termination notice is sent to WP within ninety (90) days after such nine (9) month period.

5. USE OF POLES AND UPGRADES. At all times during the test, construction and maintenance of the System EarthLink shall comply with such permitting, inspection and notice requirements required by the City and/or the Streets Department of the City ("City Guidelines").

EarthLink commits that it will keep the System updated with industry standard equipment, provided that this obligation will not apply during the last three (3) years of the term unless the terms of the PAID Pole Attachment Agreement and this Agreement have been renewed by WP, the City and PAID so that the end of the Term is more than three (3) years away.

6. PROGRAM MANAGEMENT

EarthLink will at all times during the term of this Agreement maintain a full time program manager located in the City responsible for implementing and operating the System. During the Implementation Phase EarthLink will provide WP with weekly status reports and updated schedules and the Parties will meet every two (2) weeks to review progress and resolve issues. After Acceptance of all of the Zones of the System the Parties shall meet at least once a month to discuss ongoing operation of the System including ongoing compliance with Requirements, market penetration, and success in reaching low income subscribers. EarthLink shall maintain and update a list of all open issues and resolutions throughout the term of this Agreement. WP or EarthLink may require additional meetings on reasonable cause.

7. INVOICE, BILLING AND PAYMENT

7.1 EarthLink will pay WP or PAID the fees as set forth in Section 1 as payable to WP or PAID and the fees set forth in Exhibit I. WP will pay the sums as set forth in Section 1, if any. EarthLink will make payments to WP monthly, without invoice, for Revenue Share for the immediate preceding month within sixty (60) days after the end of the month in which the revenue was actually received by EarthLink. Along with each such payment EarthLink will provide reasonable reports detailing the calculation of the payment. WP will be entitled to become an ISP on the System and to use the System only if WP first executes the appropriate ISP agreement of EarthLink and makes the payments as required therein, subject to the restrictions in Section 4 (k) of Exhibit I. In the event of any dispute regarding a portion of a payment, the undisputed portion shall be paid as provided herein. EarthLink shall only have the right to offset amounts owed by WP to EarthLink for fees expressly agreed to by WP (in this or another agreement) or for damages that have been liquidated by the Parties or otherwise reduced to monetary judgment.

7.2 EarthLink shall invoice each Subscriber and each individual Approved ISP providing Wireless Access Service to its customers through the System the fees set forth in the applicable Subscriber Fee Schedule and ISP Fee Schedule, which EarthLink shall be entitled to change from time to time, on a periodic basis as described in the applicable Subscriber Access Agreement and ISP Wholesale Agreement. EarthLink shall be solely responsible for collections of such amounts. EarthLink shall not separately attribute, break out or identify on subscriber bills or otherwise notify subscribers of any payments made to WP and shall ensure in its contracts with any third party ISPs that such ISPs are obligated not to do so. WP takes no position as to whether EarthLink may charge interest on late payments to Subscribers or Approved ISPs.

7.3 WP shall have the right to audit and verify the accurate payment of all fees due under this Agreement, including, without limitation, (i) the number of Street Lights in use by EarthLink for the System, and (ii) accurate reporting and payment of WP's share of Subscriber and ISP fees. If WP's audit determines any underpayment or overpayment, then EarthLink shall promptly (within thirty (30) days) adjust the fees for the current installment of the fees to the extent the underpayment or overpayment findings of the audit are correct.

If amount of the underpayment is greater than ten (10%) percent, then EarthLink shall also pay the actual cost of WP for such audit.

7.4 In the event that WP owes EarthLink any payments that are based upon facts held by WP and not otherwise held by EarthLink, such as electrical charges, EarthLink shall have the right to audit and verify such facts. If EarthLink's audit determines that the actual amount of use and the fees due for such use of the System exceeds the sum paid by WP to EarthLink then WP shall promptly (within thirty (30) days) adjust the fees for the current installment of the fees. If the underpayment is greater than ten (10%) percent of the sums actually owed by WP to EarthLink, then WP shall also pay the actual cost of EarthLink for such audit.

8. OWNERSHIP OF SYSTEM

Except as otherwise set forth in this Agreement, as between WP and EarthLink, EarthLink shall retain title to the System and each device and component thereof. No portion of the System shall become a fixture unless EarthLink expressly agrees otherwise in a signed paper writing. WP may access and use the System as described in the Subscriber Access Agreement and/or ISP Wholesale Agreement executed by WP and EarthLink. WP shall not gain any ownership rights in or to the System, in whole or in part. Without EarthLink's prior approval, WP will not translate, modify, disassemble, or reverse engineer the System or create derivative works based on any portion of the System or the Design Control Documents or authorize or permit others to do so. EarthLink will retain ownership of all intellectual property rights and ownership of all documents, data, studies, surveys, maps, models, photographs, designs, diagrams, Equipment, software, reports or other materials prepared by EarthLink or its subcontractors resulting from this Agreement.

9. OPERATION OF SYSTEM

9.1 EarthLink will operate the System and initially offer the products and Services to Service Subscribers directly and through Approved ISPs (which can include WP to the extent WP complies with the restrictions in Section 2 of Exhibit N) as described on the attached Exhibit I. EarthLink may alter these products and Services for Subscribers and Approved ISPs as described on Exhibit I. In addition, EarthLink may expand and upgrade the Services in any way that improves or enhances the Services and EarthLink shall be entitled to include upgrades and new technology in the System it operates under this Agreement if EarthLink so elects subject to any limitations in the PAID Pole Attachment Agreement and Exhibit I, if any.

9.2 EarthLink will provide support for the Base Service as described in the attached Exhibit M. EarthLink will provide Tier 3 NOC support for the System 24 hours a day 7 days a week. Otherwise EarthLink and Approved ISPs may provide the type of support they elect.

9.3 Any Approved ISP that has been approved, qualified and certified as provided herein shall have the right to market, advertise and sell Services to Subscribers over the System as provided in the attached Exhibit N.

9.4 Because of the significant investment by EarthLink in the present wireless System, EarthLink wants to continue its relationship with WP for all upgrades and new

networks. Therefore, if during the Term of this Agreement WP desires from time to time to install one or more new or upgraded Internet Protocol (IP) data based network(s) in the City (“New Network”) for any reason including the availability of new technology then before WP enters into a binding agreement for the installation of the New Network with any other potential provider and if WP is not prohibited by the exclusivity provision set forth in Section 20 herein from participating in the New Network with another party, then WP shall: (1) give EarthLink written notice of such desire to implement a New Network and provide all relevant details and answer all reasonable questions of EarthLink not otherwise governed by a WP duty of confidentiality; and (2) attempt to negotiate with EarthLink for a reasonable period of time, not to exceed ninety (90) days, an amendment to this Agreement that will provide for the addition of the New Network by EarthLink on terms and conditions mutually acceptable to WP and EarthLink.

9.5 Notwithstanding anything to the contrary, the service levels and Coverage Area obligations of EarthLink are subject to PECO providing adequate electricity.

9.6 EarthLink will be responsible for marketing and administering the operations of the System. WP will cooperate in marketing, advertising and promotional plans, schedules and materials regarding the System in accordance with a mutually agreed upon marketing plan, including those described on the attached Exhibit L. EarthLink and WP shall work jointly in cooperation to market services enabled by the System and WP will require that the City cooperate to market services to the extent the applicable contracts between the City and WP require such cooperation from the City. The foregoing shall not obligate WP to spend any specific sum on marketing or training.

9.7 Trademark Licenses. EarthLink grants to WP a license during the term of this Agreement to use the marks of EarthLink in a manner consistent with the reasonable trademark guidelines of EarthLink, provided that each type of use of the EarthLink marks must be first approve in writing by EarthLink before its use, which approval will not be unreasonably withheld or delayed. WP shall use the EarthLink marks only with products and services that are related to the System and having a quality that is satisfactory to EarthLink using the exercise of reasonable judgment. WP grants to EarthLink a license during the term of this Agreement to use the marks of WP in a manner consistent with the reasonable trademark guidelines of WP, provided that each type of use of the WP marks must be first approve in writing by WP before its use, which approval will not be unreasonably withheld or delayed. EarthLink shall use the WP marks only with products and services that are related to the System and having a quality that is satisfactory to WP using the exercise of reasonable judgment. Either Party may terminate the use of its marks by the other Party if it is not using their marks as required herein. EarthLink can terminate the use of the WP marks on some or all locations of the System and advertisements if WP is no longer operating or in existence or if WP is not acting in good faith to accomplish the WP Mission for a period of two (2) months and WP does not commence operating and/or acting in good faith to accomplish the WP Mission within a period of two (2) months after EarthLink gives notice to WP of its intent to terminate as provided above.

9.8 EarthLink will provide WP with monthly reports in a mutually agreeable form regarding system performance, subscriber satisfaction, market penetration and low income subscriber penetration rates.

10. WARRANTIES

10.1 System Warranty. EarthLink warrants that the System will operate in material compliance with the Design Control Documents and continue to meet the Design Control Documents throughout the Term of this Agreement.

10.2 Authority. Each party warrants that it has the authority to enter into this Agreement and that doing so does not violate any other right, duties, or obligations, contractual or otherwise, it has to a third party.

10.3 Non-Indebtedness. EarthLink hereby certifies and represents that EarthLink, EarthLink's parent company(ies), subsidiary(ies) and subcontractors are not currently indebted to the City of Philadelphia (the "City"), and will not at any time during the term of this Agreement (including any extensions or renewals thereof) be indebted to the City, for or on account of any delinquent taxes (including, but not limited to, taxes collected by the City on behalf of the School District of Philadelphia), liens, judgments, fees or other debts for which no written agreement or payment plan satisfactory to the City has been established. In addition to any other rights or remedies available to the City at law or in equity, EarthLink acknowledges that any breach or failure to conform to this certification may, at the option of the City, result in the withholding of payments otherwise due to EarthLink and, if such breach or failure is not resolved to the City's satisfaction within a reasonable time frame specified by the City in writing, may result in the offset of any such indebtedness against said payments and/or the termination of this Agreement for default (in which case EarthLink shall be liable for all excess costs and other damages resulting from the termination in accordance with Section 16; provided, however, that if the breach or failure to conform is by a subcontractor of EarthLink (at any tier), the Agreement shall not be terminated if EarthLink pays to the City the amount of the taxes, liens, judgments, fees or other debts owed to the City by the subcontractor and constituting the basis for the breach or failure to conform.

10.4 Date Management. EarthLink represents and warrants that the System and all software and equipment furnished under the Agreement shall properly handle all dates, including, but not limited to, properly processing dates from before 2000, including, but not limited to the following: (1) No value for current date will cause interruptions in the operation of software, firmware, or equipment and software, firmware and equipment will operate without any date-related faults or failures and without producing inaccurate data, including any calculation involving a span of time, which crosses a century; (2) All manipulations of time-related data (including, without limitation, dates, durations, days of week, month, and year) will produce results that conform to the manufacturer's specifications for the software or equipment for all valid date values within the application domain.

11. SUBCONTRACTORS

11.1 Subcontractors. EarthLink shall inform WP of all subcontractors selected by EarthLink (a selected subcontractor, a "Subcontractor") and any changes thereto. The term "Subcontractor" includes any lower tier subcontractors that EarthLink does not have direct contracts with. Knowledge of a Subcontractor by WP shall not limit or absolve Earthlink's duties, obligations or warranties under this Agreement for any part of the System, and WP shall have no liability for any action or inaction by any Subcontractor that results in any damage or loss whatsoever to EarthLink.

11.2 Subcontractor Relationship. Nothing contained herein or in any agreement between EarthLink and a Subcontractor or vendor shall create (a) any contractual relationship between WP and any Subcontractor at any tier, or (b) any third-party beneficiary rights in any Subcontractor at any tier. EarthLink shall at all times be responsible for the work and conduct of its Subcontractors at any tier while performing services pursuant to this Agreement and shall ensure that its Subcontractors comply with all applicable terms and conditions of this Agreement. Nothing herein shall negate any rights of WP based upon a separate agreement with any Subcontractors.

11.3 Contract Requirements. All agreements with Subcontractors, including agreements between lower tier subcontractors that EarthLink, shall include the following:

11.3(a) A provision acknowledging that all claims are between the contracting parties and waiving any claim against WP or City arising from such contracts.

11.3(b) The provisions of Sections 12.1 (Non-Discrimination), 26 (Ethics/Taxes/Wages), 25 (Confidentiality) and 27.1 (Law and Venue).

11.3(c) Requirement for Insurance, such policies to name WP as an additional insured and to conform with the insurance requirements of Section 13 hereof. Insurance amounts for each Subcontractor shall be determined by EarthLink in its reasonable discretion.

11.3(d) The listing of specific contractual provisions herein shall not relieve or limit EarthLink's obligation under this Section above to ensure compliance with this Agreement by Subcontractors.

12. NON-DISCRIMINATION AND MINORITY, WOMAN AND DISABLED OWNED BUSINESS PARTICIPATION

12.1 Non-Discrimination. In performing this Agreement, EarthLink shall not discriminate or permit discrimination against any person because of race, color religion national origin, gender, or sexual orientation, and shall not discriminate or permit discrimination against any person who has AIDS or is HIV-positive. In the event of such discrimination, in material violation of the provisions of the Philadelphia Code referenced in this Section 12.1, WP may, in addition to any other rights or remedies available under this Agreement, at law or in equity, terminate the Agreement if EarthLink has not complied with this Section 12.1 within thirty (30) days following written notice of a violation. EarthLink agrees, in performing this Agreement, to comply with the provisions of the Fair Practices Ordinance of The Philadelphia Code (Chapter 9-1100). EarthLink agrees to cooperate with the Commission on Human Relations of the City of Philadelphia in any manner, which the Commission deems reasonable and necessary for the Commission to carry out its responsibilities under Chapter 17-400 of The Philadelphia Code. Failure to so cooperate shall constitute a substantial breach of this Agreement entitling WP to all rights and remedies provided herein or otherwise available at law or equity.

12.2 Minority, Woman and Disabled Owned Business Participation. EarthLink shall in good faith, meet, and will strive to exceed the Minority, Woman and Disabled Owned Business participation ranges as outlined by the guidelines set forth by WP on the attached **Exhibit O** in the installation of the Equipment in Philadelphia, provided this

participation shall not extend to any other operations of EarthLink. The participation levels shall be based on the labor costs of deployment and ongoing operations and shall be exclusive of the cost of the System hardware, equipment, site acquisition and leasing costs. EarthLink shall provide periodic (as reasonably requested by WP) reports of use of qualifying Subcontractors and actual payments made to Subcontractors.

13. INSURANCE.

13.1 EarthLink shall, at its sole cost and expense, procure and maintain in full force and effect, covering risks associated with the construction, installation, placement, operation, maintenance, use, renewal, replacement, relocation, repair and removal of Communications Equipment placed or to be placed on Street Lights or otherwise on City property or in the Right-of-Way, the types and minimum limits of liability insurance specified below. All insurance shall be procured from insurers (i) licensed and authorized to write insurance in Pennsylvania, (ii) acceptable to WP's Risk Manager and to WP, which acceptance will not be unreasonably withheld or delayed, and (iii) with an A.M. Best rating of A-VIII or higher, unless agreed otherwise in writing by WP's Risk Manager and WP. All insurance required herein shall be written on an "occurrence" basis, or if any policy is written on a claims made basis, the retroactive date may not be advanced beyond the date of this agreement and coverage shall be maintained in full force and effect for two (2) years after termination of this Agreement, which coverage may be in the form of tail coverage or extended reporting period coverage if agreed by the parties. The certificate of insurance shall provide for at least thirty (30) days prior written notice to be given to Chief Executive Officer, Wireless Philadelphia, PO Box 36666, Philadelphia PA 19107 in the event coverage is cancelled or non-renewed. In the event coverage is materially changed, EarthLink or its insurer shall provide at least thirty (30) days prior written notice to the WP.

13.2 EarthLink shall require that WP, and its respective officers, directors, and employees, shall be named as additional insureds on each insurance policy required of EarthLink by this Agreement, except policies for Workers' Compensation, and on any insurance EarthLink requires of any Person, agent, or employee engaged or employed in, about or upon the work by, at the instance of, or with the approval or consent of EarthLink, as respects the acts, omissions, operations and activities of, or on behalf of, the named insured, in regard to products supplied, or work or services performed for, or under an agreement with WP.

13.3 A certificate of insurance shall be provided to WP's Risk Manager, as set forth below, that evidences the coverage afforded WP and their officers and employees, as additional insureds. The certificate of insurance shall state that such coverage will be primary to any coverage available to them and will be noncontributory.

13.4 Types and Minimum Limits of Insurance.

EarthLink shall furnish the following types and minimum limits of insurance:

13.4.1 Workers' Compensation and Employers' Liability insurance.

(1) Workers' Compensation: To meet Pennsylvania statutory requirements.

- (2) Employers' Liability: \$500,000 each Accident - Bodily Injury by Accident; \$500,000 Each Employee - Bodily Injury by Disease; and \$500,000 Policy Limit Bodily Injury by Disease.

13.4.2 Commercial General Liability insurance.

- (1) Limit of liability: The Commercial General Liability Insurance Policy in an amount not less than Five Million Dollars (\$5,000,000) per occurrence, Twenty Million Dollars (\$20,000,000) annual aggregate, written on an occurrence form, provided this coverage may be maintained by EarthLink combining primary and excess policies to meet these requirements.
- (2) Types of insurance: Applicable dollar limit, as set forth in (1), per occurrence combined single limit for bodily injury (including death) and property damage liability; applicable dollar limit, as set forth in (1), for personal and advertising injury; applicable dollar limit, as set forth in (1), general aggregate; and applicable dollar limit, as set forth in (1), for products and completed operations.
- (3) Coverage: Premises operations; blanket contractual liability; personal injury liability (employee exclusion deleted); products and completed operations; independent contractors; employees and volunteers as additional insureds; cross liability; broad form property damage (including completed operations); and explosion, collapse, underground hazards (XCU).

13.4.3 Commercial Automobile liability insurance.

- (1) Limit of liability: Five Million Dollars (\$5,000,000) per occurrence combined single limit for bodily injury (including death) and property damage liability, provided this coverage may be maintained by EarthLink combining primary and excess policies to meet these requirements.
- (2) Coverage: Owned, non-owned and hired vehicles.

13.4.4 WP's Risk Manager is hereby authorized to reduce the requirements set forth herein in the event he determines that such reduction is in WP's best interest.

13.4.5 Evidence of Insurance Coverage.

Prior to commencing any work under an agreement with WP or accessing or using any Street Light, EarthLink shall deliver to WP certificates of insurance evidencing the required coverages and additional insureds, which must specifically reference in the description sections of the certificates such agreement between WP and EarthLink and this Agreement. Original certificates of insurance must be submitted to WP at the following address:

Wireless Philadelphia
c/o Chief Executive Officer
PO Box 36666
Philadelphia PA 19107

WP reserves the right to inspect on the site of EarthLink copies of policies of all insurance required in this Section 13, and to require EarthLink to demand that its authorized insurance representatives furnish written responses to all inquiries made by the WP pertaining to the insurance required under the Agreement at any time upon ten (10) days written notice by WP to such insurance representatives. Also, in the event that (i) a claim is filed against WP, or its officers, employees, agents, or representatives, for which WP believes, in good faith, there may be coverage under an insurance policy required by this Agreement, and (ii) WP has tendered such claim to the insurer that issued such policy, and (iii) such insurer has not agreed, within ninety (90) days, to cover such claim, including defense and indemnity, without reservation, then WP has the right to demand of EarthLink, and to receive within thirty (30) days, a copy of such insurance policy.

13.4.6 Self-Insurance

WP's Risk Manager may accept a plan of self-insurance as a substitute for such insurance, if the Risk Manager determines that such self-insurance adequately protects WP and the public. In the event that EarthLink desires to self-insure any of the coverages listed above, it shall submit to the Risk Manager a certified copy of EarthLink's most recent audited financial statement, and such other evidence of its qualifications to act as a self-insurer (e.g., state approval of self-insurance for workers compensation and automobile liability or, for self-insurance of general liability, a confirming letter from a corporate risk manager or other corporate officer) as may be requested by the Commissioner. In the event such approval is granted, it is understood and agreed that WP, its officers, and employees shall be entitled to receive the same coverages and benefits under EarthLink's self-insurance program that they would have received had the insurance requirements been satisfied by an insurance carrier with an A.M. Best rating of A-VIII which is authorized to do business on a direct basis in the Commonwealth of Pennsylvania or which is otherwise acceptable to WP. If EarthLink self-insures its workers' compensation coverage, EarthLink may, in lieu of the foregoing, furnish to the Risk Manager a current copy of the state certification form for self-insurance or a current copy of the State Insurance Commissioner's letter of approval, whichever is appropriate. The insurance (including self-insurance) requirements set forth herein are not intended and shall not be construed to modify, limit, or reduce the indemnifications made by EarthLink to WP pursuant to any agreement (including, without limitation, this Agreement) entered into by EarthLink and WP, or to limit EarthLink's liability under such indemnification to the limits of the policies of insurance (or self-insurance) required to be maintained by EarthLink thereunder.

14. HOLD HARMLESS/INDEMNIFICATION

14.1 **Intellectual Property Indemnification.** EarthLink will indemnify WP, its officers, employees, contractors, consultants, and agents, but not any customers or third parties ("Indemnitees"), from losses, costs and damages and defend any suit or proceeding brought against the Indemnitees to the extent that the suit or proceeding is based on a claim that the System Operations constitute infringement of any United States patent, mask work, trade secret

or copyright and EarthLink will pay, or EarthLink will cause the supplier of the infringing System Operations to pay, all damages awarded by final judgment (from which no appeal may be taken) against the Indemnitees, but not any customers or third parties, holding that the System Operations do so infringe, on condition that EarthLink (i) is promptly informed and furnished a copy of each communication, notice or other action relating to the alleged infringement, (ii) is given authority, information and assistance necessary to defend or settle the suit or proceeding in a manner as EarthLink may determine and (iii) is given sole control of the defense (including the right to select counsel and to require and allow the supplier of the infringing System Operations to pay damages and defend as provided herein), and the sole right to compromise and settle the suit or proceeding. If any System Operations are held to infringe any valid United States patent, mask work, trade secret or copyright as set forth above, and an injunction from a court of competent jurisdiction permanently prohibits the use of the same in the System, or if EarthLink believes infringement is likely, then EarthLink will (a) procure the right to use the System Operations in the System free of any liability for infringement, (b) replace or modify the System Operations in the System with a non-infringing substitute otherwise complying substantially with the specifications for the System; or (c) comply with the subsequent sentence. In the event that (i) a court of competent jurisdiction determines that the System Operations infringe the above-defined rights of another party, (ii) all right of appeal or stay is exhausted as to such order, and (iii) EarthLink is unable to replace or modify such infringing System Operations in the System or otherwise procure the right to continue using the System Operations in the System then EarthLink will be entitled to remove the infringing System Operations from the System and obtain substitutes that will result in the System performing substantially as required herein. "System Operations" means (i) the System or any portion thereof (ii) products and services as described in Exhibit I (including Future Products) offered for sale and provided directly by EarthLink, its parents and subsidiaries of EarthLink and companies commonly owned with EarthLink ("Affiliates") or Subcontractors through the System, and (iii) operation and design (including attaching devices to Street Lights) of the System.

14.2 Limitation of Intellectual Property Indemnification. In no event will EarthLink or its suppliers be liable for an infringement that: (i) would not have existed but for the use of products or services in the System that were not provided by EarthLink or its Affiliates or Subcontractors; or (ii) would not have existed but for modification of, or additions to, the System Operations by WP or the City or its contractors or agents. Prior to a final determination that the infringement arose from subsection (i) or (ii) in the preceding sentence, EarthLink shall remain fully responsible, at its expense, for the defense and indemnification of any infringement claim in accordance with this Section: provided, that if it is finally determined that the infringement arose from subsection (i) or (ii) in the preceding sentences, then WP will reimburse EarthLink for its reasonable expenses (including reasonable litigation costs and attorneys fees) incurred therein.

14.3 Limitation of Liability. *THE FOREGOING CONTAINS THE SOLE AND EXCLUSIVE LIABILITY FOR EARTHLINK'S AND ITS SUPPLIERS' INDEMNITY AGAINST INFRINGEMENT IN THIS SECTION 14 OF THIS AGREEMENT, WHETHER DIRECT OR CONTRIBUTORY, AND IS IN LIEU OF ALL WARRANTIES, EXPRESS, IMPLIED OR STATUTORY IN REGARD THERETO, INCLUDING, WITHOUT LIMITATION, THE WARRANTY AGAINST INFRINGEMENT SPECIFIED IN THE UNIFORM COMMERCIAL CODE.*

14.4 Indemnity. EarthLink shall indemnify, defend and hold harmless WP, and its officers, employees, contractors, consultants, and agents, from and against any and all losses, costs (including, but not limited to, litigation and settlement costs and counsel fees), claims, suits, actions, damages, liability and expenses, caused by EarthLink's act or omission or negligence or fault, or the act or omission or negligence or fault of EarthLink's agents, subcontractors, suppliers, or employees in connection with this Agreement, use of the Street Lights by EarthLink or its agents, subcontractors, suppliers, or employees, and the installation, repair, replacement, operation, maintenance, and/or use of Communications Equipment on Street Lights, including, but not limited to, those in connection with loss of life, bodily injury, personal injury, damage to property, contamination or adverse effects on the environment, intentional acts, failure to pay such Subcontractors or suppliers.

15. DISPUTE ESCALATION PROCEDURE

Any dispute between EarthLink and WP which arises during the Term of this Agreement and which the parties to the dispute cannot then resolve, shall be subject to the following dispute resolution procedure.

15.1 The parties shall attempt to resolve any controversy claim, problem or dispute (a "Dispute") arising out of, or related to, this Agreement through good faith consultation in the ordinary course of business. In the event that the Dispute is not resolved by the project managers of the parties to the Dispute, any party to the Dispute may upon written notice to the other party or parties to the Dispute 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"). A written Request for Internal Resolution shall be given by any party to the Dispute within thirty (30) calendar days of the party's knowledge of the unresolved Dispute. Senior management officials shall meet or confer at least once in good faith, to negotiate a mutually acceptable resolution within thirty (30) days of the Request for Internal Resolution ("Dispute Resolution Period"). For the purposes of this paragraph, the designated project manager or senior management official for WP shall be the Chief Executive Officer of WP; and for Earthlink, shall be the President of EarthLink Municipal Networks. The project managers and senior management may be changed by notice given by the party changing its personnel.

15.2 Project managers and senior management officials are required to meet only once but may mutually agree to meet more than once if it appears that further meetings may successfully resolve the Dispute.

15.3 The provisions of this Section 15 shall not apply to a Termination Default as set forth in Section 16.3, *Termination and Default*, though the executives of each party shall make themselves available to each other upon request during the cure periods set forth therein.

16. TERM, RENEWAL, DEFAULT AND REMEDIES

16.1 Term. This Agreement shall become effective on the Effective Date and shall continue in effect for ten (10) years after the date of Proof of Concept Acceptance. The initial term and all renewal terms described below shall be referred to as the "Term."

16.2 Renewal. This Agreement may be renewed for additional five (5) year terms upon the mutual written consent of the parties.

16.3 Termination for Termination Default. Notwithstanding anything to the contrary, WP shall not terminate this Agreement unless one of the following defaults described below in this Section 16.3 has occurred and continued uncured until after the end of all applicable cure periods set forth herein ("Termination Default") and only as set forth below, provided Sections 3.2(d), 4.4, 4.5, 10.3, 12.1, 16.6 and 16.7 ("Other Termination Provisions") shall also permit termination strictly as set forth therein. Any other default of failure of EarthLink to comply with this Agreement shall not permit termination of this Agreement, the Term of any rights of EarthLink and this provision shall control and govern in the event of a conflict with any other provision of this Agreement.

16.3(a) Failure to Accomplish System Implementation. In the event that deployment of the System in substantially all of the Coverage Area (as described in the Design Control Documents) is not accomplished within twelve (12) months after the date set forth on the Schedule for completion of the System implementation, such time to be extended by any delays caused by WP, PAID, the City, providers of telecommunications, electricity, or third parties (other than Subcontractors of EarthLink) not under the control of EarthLink and for Force Majeure Events. Provided that System elements in the Design Control Document have been deployed and activated, the parties agree that System performance problems, System configuration problems and the inability of computers to receive wireless internet from the System will not constitute a default under this subsection.

16.3(b) Failure to Pay the Additional \$2 Payments or the \$2,000,000 Payments. In the event that EarthLink fails to pay any of the \$2,000,000 Payments or undisputed Additional \$2 Payments within sixty (60) days after written notice of failure to pay when due is delivered to EarthLink, provided that such notice must state that such failure if not cured will constitute a Termination Default under this Agreement.

16.3(c) System Outage. In the event that less than 20% of the receiving/transmitting nodes in the System are capable of connecting Subscribers to the Internet for an entire calendar day, the System will be considered "Dark" and that day will be considered a "Dark Day" provided that such day will not be considered a Dark Day if the failure to satisfy the above test was caused by WP, PAID, the City, providers of telecommunications, electricity, or third parties (other than Subcontractors of EarthLink) not under the control of EarthLink or by Force Majeure Events. If the System is continuously Dark for a period of thirty (30) or more days, WP may send a notice of termination, which shall be effective upon ninety (90) days from receipt by EarthLink if such default has not been cured by the System operating without any Dark Days for thirty (30) days continuously. If EarthLink does cure the default by the System operating without any Dark Days for thirty (30) days continuously prior to the end of such ninety (90) day period then the termination shall not be effective and the defaults shall be cured. If EarthLink is unable to cure the default within said ninety (90) days by the System operating without any Dark Days for thirty (30) days continuously, then the Term of this Agreement shall

terminate twelve (12) months after the end of said ninety (90) day cure period and during such twelve (12) months EarthLink will be entitled to continue operating the System and EarthLink's equipment on the Street Lights will not be removed, except as provided in Section 12.1.4 of the PAID Pole Attachment Agreement. In addition, during such twelve (12) months EarthLink shall be entitled to sell the Communications Equipment, and to the extent the City, PAID and WP approve of the purchaser, to also transfer the System and its ongoing operations and the rights hereunder to a third party.

16.4 Non-Termination Defaults.

16.4(a) In the event that EarthLink's System fails in a material manner to comply with the same one (1) of the mutually agreed upon Three Important SLAs for a period of at least three (3) months, provided that it will not be considered a failure if the failure to comply with that same one (1) of the Three Important SLAs was caused by WP, PAID, the City, providers of telecommunications, electricity, or third parties (other than Subcontractors of EarthLink) not under the control of EarthLink or by Force Majeure Events. Then if WP gives notice of such a failure to comply with the same one (1) of the Three Important SLAs ("Three Important SLAs Failure Notice"), the parties shall use the Dispute Escalation Procedure to attempt to resolve the problems in good faith for a period of one (1) month. If the System continues to not comply with the same one (1) of the applicable Three Important SLAs in a material manner at the end of three (3) months after the delivery of the Three Important SLAs Failure Notice, then the WP shall be entitled to terminate: (i) the trademark license of WP trademarks set forth in Section 9.7 above; and (ii) the exclusivity provision set forth in Section 20 herein, but not any other rights of EarthLink hereunder. If WP so terminates the trademark license for EarthLink to use WP trademarks then the license for WP to use EarthLink trademarks shall also terminate. This Agreement may not be terminated by WP, PAID or the City for failure to meet the Three Important SLAs as described above or for any other failure or default except as provided in the Termination Defaults in Section 16.3 above. However the City, PAID and WP shall be entitled to exercise all other remedies for breach of the Agreement if the failure is a material failure to comply with the mutually agreed upon Three Important SLAs, including the right to obtain specific performance, injunctive relief and money damages, provided that none of these remedies shall prohibit the continued use of the Street Lights for the System radios or order the removal of the System radios or other equipment, except as provided in Section 12.1.4 of the PAID Pole Attachment Agreement.

16.4(b) In the event that EarthLink's System fails to comply with a material portion of the mutually agreed upon SLAs for a period of at least three (3) months, provided that it will not be considered a failure if the failure to comply with the SLAs was caused by WP, PAID, the City, providers of telecommunications, electricity, or third parties (other than Subcontractors of EarthLink) not under the control of EarthLink or by Force Majeure Events, then the parties shall use the Dispute Escalation Procedure to attempt to resolve the problems in good faith for a period of one (1) months. If the System continues to not comply with the applicable SLAs in a material manner, then the parties will select and retain an independent third party technical expert (to be paid by EarthLink) to review the operation of the System and make reasonable recommendations to cure the failure of the performance of the System to comply with the Three Important SLAs, which recommendations EarthLink shall implement. If the parties cannot agree on an independent third party technical expert, then such expert will be selected by the director of the AAA office in

Philadelphia. This Agreement may not be terminated by WP, PAID or the City for failure to meet the SLAs as described above or for any other failure or default except as provided in the Termination Defaults in Section 16.3 above. However the City, PAID and WP shall be entitled to exercise all other remedies for breach of the Agreement if the failure is a material failure to comply with the mutually agreed upon SLAs, including the right to obtain specific performance, injunctive relief and money damages, provided that none of these remedies shall prohibit the continued use of the Street Lights for the System Communications Equipment or order the removal of the System Communications Equipment or other equipment, except as provided in Section 12.1.4 of the PAID Pole Attachment Agreement. EarthLink agrees that WP, PAID and the City would be irreparably harmed and that money damages would not be sufficient if EarthLink failed to implement the above-described recommendations of the technical expert for a material failure to comply with the mutually agreed upon SLAs.

16.5 Removal. Upon termination for a Termination Default only, or pursuant to one of the Other Termination Provisions or upon expiration of the Term, EarthLink, at its own expense, shall remove its Communications Equipment from the Street Lights within one (1) year of said date of termination in compliance with the PAID Pole Attachment Agreement.

16.6 In addition to any termination rights granted hereunder, EarthLink may terminate this Agreement if a law, rule, regulation, ordinance or directive of any governmental agency prohibits or otherwise restricts the use of all of such Street Light(s) for the purposes contemplated in this Agreement.

16.7 Either party shall be entitled to terminate this Agreement if the PAID Pole Attachment Agreement or the City Pole Attachment Agreement is terminated and is not renewed within thirty (30) days thereafter.

16.8 Default Caused by Rapid Growth. If a default (except for a Termination Default) is caused in whole or in part by rapid growth of the number of ISPs and/or subscribing users then all of the applicable cure periods shall be twice as long as is set forth above herein in order to allow EarthLink to increase the capabilities of the System to serve the increased load.

16.9 The parties understand and agree that all terms, conditions and covenants of this Agreement, together with the exhibits and attachments hereto, if any, which, by reasonable implication, contemplate continued performance or compliance beyond the expiration or termination of this Agreement (by expiration of the term or otherwise), shall survive such expiration or termination and shall continue to be enforceable as provided herein. Without limiting the generality of the foregoing, WP's and EarthLink's obligations for the provision of insurance and indemnity shall survive for a period equal to any and all relevant statutes of limitation, plus the time necessary to fully resolve any claims, matters, or actions begun within that period.

17. NOTICE

17.1 Addresses. Except as otherwise set forth herein, all notices given or which may be given pursuant to this Agreement must be in writing and delivered (i) in

Communications Equipment may be subject to security interests of vendors or of lenders, and WP shall have no rights in or to Communications Equipment, except as expressly set forth herein. In the event that EarthLink transfers all or substantially all of the assets or stock of EarthLink to a third party, EarthLink will transfer this Agreement to such third party as well.

19. AMENDMENT

This Agreement may be amended from time to time. Any amendments shall be written on paper and executed by both Parties to this Agreement. WP, in recognition of the investment EarthLink will make in the System, agrees that WP will not agree to or allow any amendment or termination of the City Pole Attachment Agreement, the PAID Pole Attachment Agreement or the PECO Agreement, and any violation of this obligation shall be void and not effective, unless EarthLink signs a paper agreement consenting to the amendment or termination.

20. EXCLUSIVE MARKETING. Subject to termination pursuant to Section 16.3 or 16.4(a) above, during the Term of this Agreement WP shall not market or promote an internet service that competes with the System or allow any other party to use the trademarks of WP or EarthLink for marketing or selling internet services (except where WP is marketing the System's Services pursuant to Section 4(k) in Exhibit I.

21. WAIVER AND REMEDIES

Failure of either Party to enforce any provision of this Agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision but the same shall nevertheless be and remain in full force and effect. The remedies expressly provided in this Agreement shall be in addition to any other remedies available at law or in equity.

22. FORCE MAJEURE

The time for performance by EarthLink, the City, PAID, or WP of any term, provision, or covenant of this Agreement, except for the payment of fees, shall be deemed extended by time lost due to delays resulting from acts of God, acts of third parties, acts of terrorism, strikes, civil riots, floods, material or labor restrictions by governmental authority, failures by providers of telecommunications, electricity or other essential services, and any other cause not within the reasonable control of WP or EarthLink, as the case may be (collectively, "Force Majeure Events").

EarthLink shall not be responsible for any of its obligations under this Agreement prevented or delayed by Force Majeure Events. If a Force Majeure Event delays performance of EarthLink, then the time within which such performance must be performed under the terms of this Agreement shall be extended for a reasonable time that is at least equal to the duration of the delay so caused. EarthLink shall be entitled to a reasonable extension of the time for performing any action required of EarthLink under this Agreement if its failure to perform such action is caused by a WP delay or a City delay; provided, however, that no such extension shall be granted unless a written request, setting forth in reasonable detail the grounds therefor, is received by WP within five (5) days prior to the expiration of the time for performance. EarthLink's sole and exclusive remedy for costs or damages arising from any delay to its performance of actions required under this Agreement or under the PAID Pole Attachment Agreement that is caused by any act or omission of WP or the City (including its officers,

employees, contractors and agents) shall be an extension of the time of performance, as provided in this Section (and in the PAID Pole Attachment Agreement for actions required under the PAID Pole Attachment Agreement). In no event shall EarthLink be entitled to monetary payment or compensation of any kind from WP or the City for any costs or damages incurred as a result of delay in its performance of any obligation of EarthLink to the City, WP, EarthLink's contractors, or any other party that is caused by any act or omission of WP or the City (including its officers, employees, contractors and agents), including, without limitation, such delay to the construction of the System and/or delay in the performance of any other obligation of EarthLink under the PAID Pole Attachment Agreement or under this Agreement.

23. EQUITABLE RELIEF

Each party agrees that any threatened or actual breach of the confidentiality obligations of either party or the obligations of any party as described herein may cause immediate irreparable harm to the non-breaching party for which there is no adequate remedy at law. Accordingly, each party agrees that the non-breaching party will be entitled to seek injunctive relief from a court of competent jurisdiction in the event of any such breach or threatened breach by the other party. Except the limitations on termination and injunctive relief that are stated herein nothing contained herein will limit either party's right to any other remedies at law, including the recovery of damages from the other party for breach of this Agreement in accordance with the Agreement. Nothing herein or in the liability limitations in Section 27.6 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 perform in compliance with the provisions of this Agreement and not to take actions that violate the obligations of the Party hereunder, provided such order shall not prevent EarthLink from operating the System and maintaining the Communications Equipment on the Street Lights, except in the event of termination for Termination Default, or pursuant to one of the Other Termination Provisions or expiration of the Term or as provided in Section 12.1 of the PAID Pole Attachment Agreement. Nonetheless, this specific performance and injunction shall not require either party to pay to the other party any sums in excess of the liability limitation amount set forth in Section 27.6.

24. ORDER OF PRECEDENCE

In the event of conflicting or inconsistent provisions, the following precedence shall prevail: the terms and conditions of any amendments, read most recent to earliest document, the terms and conditions of this Agreement, provisions set forth in the referenced documents; provided that any conflicting or inconsistent provisions in the referenced or attached documents shall be governed by the most recent document to the earliest document.

25. CONFIDENTIALITY

Except as permitted by this Agreement, neither party will use the Confidential Information of the other. Each party will use reasonable efforts, to the extent it does for its own proprietary and confidential information of like nature, to prevent any Confidential Information of the other party from being disclosed to third parties except as set forth in this Agreement or as authorized by a party in writing. "Confidential Information" will mean a party's trades secrets under applicable law and also the proprietary and confidential information disclosed to the other party. WP acknowledges that all information concerning EarthLink, its business plans, pricing, proprietary rights, Subscribers, customers and suppliers will be deemed Confidential Information of EarthLink, whether or not marked "CONFIDENTIAL", and will not be used or disclosed by

WP except in the proper performance of its obligations imposed by law or under this Agreement. Any obligation contained herein that requires the disclosure of information of a third party shall not be required if it would violate an applicable agreement of a Party with that third party. Each party agrees that this Section is intended to protect the Confidential Information of the providers and Subcontractors Links of EarthLink. This paragraph will not apply to any information which: (A) is or becomes public knowledge through no wrongful act of the receiving party; (B) is already known to the receiving party without obligation of confidentiality; (C) is rightfully obtained by the receiving party from any third party without similar restriction and without breach of any obligation owed to the disclosing party; (D) is independently developed by the receiving party; (E) is furnished to a third party by the disclosing party without a similar restriction on the third party's rights; (F) is disclosed pursuant to a lawful requirement or request of a governmental agency; (G) is approved for release by written authorization of the disclosing party; or (H) is disclosed in an enforcement or defense in a court of law pursuant to this Agreement or as is appropriate to assert and protect the rights of either party. Despite the restrictions of this paragraph, EarthLink will be entitled to provide WP's Confidential Information to third party Subcontractors of EarthLink who have executed a written confidentiality agreement. The provisions of this Section shall survive for any trade secret for so long as such information qualifies as a trade secret under applicable law and for three (3) years following the termination of this Agreement for Confidential Information that does not rise to the level of a trade secret. Upon any termination or expiration of this Agreement or as otherwise requested in writing by the disclosing party, to the extent permitted by the law, the receiving party will return or destroy (as requested by the disclosing party) all copies of the Confidential Information provided by the other Party and certify in writing that all copies of such Confidential Information have been returned or destroyed. Each party shall be responsible for any use or disclosures by its employees or agents. This Agreement and its Exhibits is not considered Confidential Information of either party.

25.1 Subscriber Privacy. EarthLink and WP shall divulge, individually or in the aggregate, information about system Subscribers only in compliance at all times with the privacy requirements set forth in Exhibit J.

26. ETHICS/TAXES/WAGES

26.1 Ethics Requirements. EarthLink and WP shall comply with PAID's and the City's ethics policies to the extent that they apply to WP.

26.2 Tax Requirements. EarthLink is subject to Philadelphia's business tax and Ordinances and regulations. EarthLink, if not already paying the aforesaid taxes, shall apply to the Department of Revenue, 1401 John F. Kennedy Blvd., Public Service Concourse, Municipal Services Building, Philadelphia, PA 19102, for a tax identification number and to file appropriate business tax returns as provided by law. Questions should be directed to the City of Philadelphia Department of Revenue, Business Earnings Unit at (215) 686-6600. WP shall pay any sales tax or other taxes applicable to the free and for fee services offered to WP under this Agreement or the PAID Pole Attachment Agreement, that is not based on income or gross receipts, whether actual or imputed.

26.3 Prevailing Wages. Contracts resulting from this Agreement shall require the payment of prevailing wages. Accordingly, employees of EarthLink and its contractors performing work that would be subject to Section 17-107 of the Philadelphia Code, if performed for the City of Philadelphia, shall be paid at least the applicable prevailing wages

for the respective occupational classifications designated in Section 17-107, in accordance with its requirements.

27. MISCELLANEOUS

27.1 Applicable Law and Forum; Consent to Jurisdiction. This Agreement shall be governed by, construed and enforced in accordance with the laws of the Commonwealth of Pennsylvania, without regard to the conflict of law provisions thereof. The parties agree that any lawsuit, action, claim, or legal proceeding involving, directly or indirectly, any matter arising out of or related to this Contract, or the relationship created or evidenced thereby, shall be brought exclusively in the United States District Court for the Eastern District of Pennsylvania (“EDPA”) or in a Pennsylvania state court sitting in Philadelphia County. It is the express intent of the Parties that jurisdiction over any lawsuit, action, claim, or legal proceeding shall lie exclusively in one of these forums. The Parties further agree not to raise any objection, as to forum or venue, to any lawsuit, action, claim, or legal proceeding which is brought in one of these forums, and the parties expressly consent to the jurisdiction and venue of these forums. Nothing in this Section 27.1 shall be construed to waive the right of either Party to remove any action brought in a Pennsylvania state court to the EDPA if otherwise permitted by law

27.2 No Partnership. Nothing contained herein shall be deemed or construed by the parties hereto or by any third person to create the relationship of principal and agent, partnership, joint venture or any association between the Parties.

27.3 Approvals. If the approval or consent of any Party is required under this Agreement, such approval or consent may only be given in writing, and shall not be unreasonably withheld or delayed.

27.4 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.

27.5 Integrated Document. This Agreement is intended as the complete integration of all understandings between the parties as to the subject matter of this Agreement. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a written amendatory or other Agreement properly executed by the parties on paper. No oral representation by any officer or employee of the City at variance with the terms and conditions of this Agreement or any written amendment to this Agreement shall have any force or effect or bind either party hereto. Amendments to this Agreement will become effective when approved by both parties and executed in the same manner as this Agreement. This Agreement and any amendments shall be binding upon the parties, their successors and assigns. Electronic communications and documents will not be sufficient to modify this Agreement however a facsimile transmission of a signed paper writing is sufficient and shall be deemed to be a signed writing on paper.

27.6 LIMITATION OF LIABILITY - THE PARTIES EXPRESSLY AGREE THAT EARTHLINK AND WP SHALL NOT BE LIABLE 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. The Parties expressly agree that EarthLink and WP shall not be liable for direct damages in an amount in the aggregate in excess of One Million (\$1,000,000.00) Dollars, except for personal injury and property damages and intellectual property infringement indemnification as provided in Sections 14.1, 14.2 and 14.3.

27.7 NO WARRANTIES. THE ONLY WARRANTIES CONCERNING THE SERVICES, NETWORK, SYSTEM AND OTHER DELIVERABLES PROVIDED UNDER THIS AGREEMENT ARE THOSE EXPRESSLY CONTAINED HEREIN, AND ARE MADE FOR THE BENEFIT OF WP 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 OR OTHERWISE. EARTHLINK ALSO SPECIFICALLY DISCLAIMS ANY WARRANTIES OR REPRESENTATIONS RELATED TO THE INTERNET SECURITY-RELATED FEATURES OF THE SYSTEM AND/OR SERVICES. EARTHLINK CANNOT GUARANTEE SECURITY VIA THE INTERNET OR WIRELESS SERVICES AND EARTHLINK SHALL NOT BE LIABLE FOR BREACHES OF SUCH SECURITY OR ANY OTHER RELATED WARRANTIES, EITHER EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION, INTERNET FUNCTION AND/OR PERFORMANCE WARRANTIES. EARTHLINK SHALL HAVE NO LIABILITY TO WP FOR THE CONDUCT OF SUBSCRIBERS USING OR ACCESSING THE NETWORK, SYSTEM OR SERVICES.

27.8 Counterparts Of This Agreement. This Agreement may be executed in counterparts, each of which shall be on paper and each of which shall be deemed an original, and all of which shall constitute one instrument; provided, that the Agreement shall be effective and binding on the parties upon, but only upon, the execution by each party of one paper copy hereof.

27.9 Third Party Beneficiaries. Provided that the City is bound by the terms and conditions of this Agreement as WP is bound, EarthLink and WP expressly agree that the City is an intended third party beneficiary of this Agreement and shall be entitled to enforce the terms and conditions of the Agreement (subject to and in accordance therewith) in the City's own name and on its own behalf against either or both of EarthLink and WP. Such rights of the City as third party beneficiary shall vest immediately upon execution of this Agreement and may not be modified or diminished except with the written consent of the City. Except as expressly provided otherwise in this Section 27.9 and elsewhere in the Agreement, nothing in this Agreement, express or implied, is intended or shall be construed to confer upon or give to any person, firm, corporation, or legal entity, other than EarthLink, WP and the City, any rights, remedies, or other benefits under or by reason of the Agreement.

IN WITNESS WHEREOF, the Parties grant, acknowledge and accept the terms, conditions and obligations of this Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Agreement shall become operative on the later of: (i) the date of City Council Approval; (ii) the date on which the Agreement is fully executed; or (iii) the Effective Date but the obligations of EarthLink shall not commence until all of the Implementation Conditions have been fully satisfied.

EARTHLINK, INC.

WIRELESS PHILADELPHIA

By: /s/ Donald B. Berryman
Name: Donald B. Berryman
Title: President
Municipal Wireless

By: /s/ Derek N. Pew
Name: Derek N. Pew
Title: Interim Chief Executive Officer