

## **SITE MASTER LICENSE AGREEMENT**

**THIS SITE MASTER LICENSE AGREEMENT** (this “Agreement”) is entered into between EARTHLINK, INC., a Delaware corporation, as licensee (“Licensee”), and the City of Houston, Texas, a municipal corporation and home rule city principally situated in Harris, Fort Bend and Montgomery Counties, Texas, as licensor (“Licensor”), pursuant to that certain Wireless Broadband Network License Agreement (the “Network Agreement”) between Licensor and Licensee. This Agreement is effective as of the date, (the “Effective Date”) of countersignature by the City Controller.

Licensee and Licensor hereby agree as follows:

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

**1. License to Use City Owned Property.**

(a) Subject to and upon the terms, provisions and conditions of this Agreement, Licensor hereby issues to Licensee a license (this “License”) over and upon the Property and/or Structure (each as defined in Section 1(b)) for the purpose of mounting, installing, using, operating, implementing, maintaining, modifying, replacing and removing attachment hardware and masts (“Antennae”), communications, networking, internet, computer and radio equipment (“Equipment”) and certain other personal property of Licensee, including without limitation equipment panels, cabling, cabinets, emergency power systems and other personal property necessary for the purpose of this License (“Personal Property”; collectively, the Antennae, Equipment and Personal Property are referred to herein as the “Licensee Facilities”), in such number, configuration, size, and location(s) as specified on the Site Schedule (as defined in Section 1(d)) relating to the specific Property or Structure.

(b) “Property” as used herein means real property and improvements, if any, owned, leased or otherwise under the control of Licensor and described on a specific Site Schedule. “Structure” as used herein means a pole or other structure owned, leased or otherwise under the control of Licensor and described on a specific Site Schedule.

(c) Licensor has, or will obtain by the date of execution of the Site Schedule relating to an individual Property or Structure, all approvals of third parties that are required for Licensor to grant the license rights as provided herein for such Property or Structure.

(d) This Agreement shall be effective on the Effective Date but, as to any individual Property or Structure, shall be effective on the date that a schedule (a “Site Schedule”)

substantially in the form of **Exhibit “A”** has been executed by a duly authorized representative of Licensee and by Licensor’s Director of Information Technology Department or his designee (“Director”) for such individual Property or Structure. Each Site Schedule shall reasonably describe the individual Property or Structure and shall also describe, by diagram or otherwise, any space to be occupied by Licensee in or on said Property or Structure (such space being referred to herein individually as a “Site” and collectively as “Sites”). The Site Schedule shall also set forth any specific requirements for use of the individual Site, and any provisions of this Agreement that must be modified for use of the individual Site. In the event of any conflict between this Agreement and a fully executed Site Schedule, the provisions of the Site Schedule shall control.

**2. Use.** The Sites may be used by Licensee for mounting, installing, using, operating, implementing, maintaining, modifying, replacing and removing the Licensee Facilities for any activity in connection with EarthLink wireless broadband internet access network in the City of Houston (the “Network”). Licensor agrees to cooperate with Licensee, at Licensee’s expense, in making application for and obtaining all licenses, permits and any and all other necessary approvals that may be required for Licensee’s intended uses of the Sites (the “Approvals”).

**3. Term.** The term of this Agreement shall be comprised of an initial term of ten (10) years (the “Term”), commencing on the Effective Date. Licensor shall renew this Agreement up to two (2) additional terms (“Renewal Term(s)”) of five (5) years each, provided that Licensee has complied with all material conditions under this Agreement and has no uncured defaults. In the event that Licensor does not renew, Licensor shall provide notice of such fact to Licensee at least six (6) months prior to the expiration of the Term or Renewal Term of this Agreement. Each Renewal Term shall be on the same terms and conditions as set forth in this Agreement and the related Site Schedule. After the expiration of the second Renewal Term, the parties may extend the term by an amendment to this Agreement. In the event the City and Licensee are unable after good faith negotiations to reach agreement to the terms and conditions of an extension of this Agreement, this Agreement shall terminate. In any event, the term for a Site will terminate on the same day as the termination of the Network Agreement.

**4. Fees.** In consideration for the License granted pursuant to this Agreement, Licensee agrees to pay to Licensor the fees required pursuant to Schedule A, Site Schedule, established for each site, including without limitation the License Fee and/or Mounting Platform Fee, as defined therein.

**5. Taxes.** If personal property taxes are assessed, Licensee shall pay any portion of such taxes directly attributable to the Licensee Facilities. Licensor shall pay all real property taxes attributable to the Structure or Property, except that Licensee shall reimburse Licensor for any increases in real property taxes that are assessed as a direct result of Licensee’s improvements to the Site. As a condition of Licensee’s obligation to pay such tax increases, Licensor shall provide to

Licensee the documentation from the taxing authority, reasonably acceptable to Licensee, indicating the increase is directly and solely due to Licensee's improvements.

**6. Improvements.** When installing Antennae, Equipment, Personal Property, Licensee Facilities, or any other items used by Licensee upon Sites, or when making repairs or replacing the foregoing, Licensee shall be mindful of the sentiments, needs, and preferences of the local community. Licensee shall submit designs for the foregoing for approval to Director, as well as any structural analysis needed. Licensee shall not commence installation of improvements or equipment without prior written consent of Director, which will not be unreasonably conditioned, delayed or denied. Licensor shall have the right to be present at and review all phases of the installation. As part of the approval process, Licensee shall identify space at the Site that is suitable for locating the Licensee Facilities and provide Director with a site map identifying such space for approval. Licensee shall allow Licensor to locate antennas or wireless equipment for the City of Houston services or other public services.

All of Licensee's construction and installation work shall be performed at Licensee's sole cost and expense and in a good and workmanlike manner. In performing work pursuant to this Agreement, Licensee shall be entitled to use any labor and other service providers and contractors it determines without restriction, except as required under the Network Agreement. Title to the Licensee Facilities shall be held by Licensee. All of the Licensee Facilities shall remain Licensee's personal property and are not fixtures.

**7. Utilities.** Licensee will pay electricity charges and shall arrange to pay such charges directly to its provider of choice. Licensor will cooperate in assisting Licensee in obtaining access to electricity. Licensor agrees to sign such documents or easements as may be reasonably required by utility companies to provide services to the Sites, including the grant to Licensee or to the servicing utility company of an easement in, over, across, or through the Property or Structure as required by such servicing utility company to provide utility services as provided herein and by the Network Agreement. Any easement necessary for such power or other utilities will be over a location reasonably acceptable to Licensor and the servicing utility company. Licensee agrees that all connections to the Licensor's utilities shall be in strict compliance with all applicable laws. Licensee may be permitted to use the electrical connections presently located in the Structure or on the Property, and to utilize existing panels and connections in or on the Property or Structure for the connection of utilities to service the Licensee Facilities, subject to payment of the Electric Charge described in the following paragraph. Licensee may also install an electrical grounding system or improve any existing electrical grounding system located on the Property or Structure to provide the greatest possible protection from lightening damage to the Licensee Facilities

If Licensee is permitted to use the electricity supplied and billed to Licensor, then Licensee

shall pay Licensor for the electricity consumed by the Licensee Facilities in its operations on the Sites at a rate according to the Site Schedule (the "Electric Charge"). The Electric Charge will be adjusted annually on each anniversary date of the Effective Date by the percentage increase or decrease in the actual proportional increase or decrease in the electric charges then being paid by Licensor for the respective Site. Licensee shall pay the monthly Electric Charge to Licensor in the same manner as License Fee payments during the Term. Licensor shall not be liable to Licensee for any stoppages or shortages of electrical power furnished to the Site because of any act, omission, or requirement of the public utility serving the Site, or act or omission of any other licensee, tenant, or lessee of the Property or Structure, or for any other cause beyond the control of Licensor, and Licensee shall not be entitled to any abatement of the License Fee for any such stoppage or shortage of electrical power.

**8. Movement; Replacement; Removal; Removal/Relocation at Licensor's Direction.**

(a) Licensee is entitled to move any of the Licensee Facilities to other locations on the Property or the Structure without any additional charge by Licensor after obtaining the approval of Director, which approval will not be delayed or withheld unless the new location would interfere with a then existing use of the Property or Structure or it would constitute a structural support problem.

(b) Licensee is entitled to remove Licensee Facilities from the Sites and replace them with replacement, new or upgraded equipment and/or antennae without additional charge or approval by Licensor as long as the replacement, new or upgraded equipment is not substantially heavier or larger.

(c) Licensee shall remove all of the Licensee Facilities at a Site at its sole expense on or before the expiration or earlier termination of the Term for such Site. Licensee shall return the Structure or Property to the condition in which it existed immediately prior to Licensee's installation, taking into account normal wear and tear over the Term and damage and alterations caused by Licensor or others.

(d) If the Director reasonably determines that the protection, temporary disconnection, removal, relocation, or reconfiguration of any portion of the Licensee Facilities is necessary to protect the public health, safety, welfare or where there is imminent danger to a Property, Structure or other property owned by Licensor, then Licensee shall, at its sole cost and expense, promptly protect, disconnect, remove, relocate, or reconfigure such portion of the Licensee Facilities at the time and in the manner reasonably required by the Director. Should the public health, safety or welfare require, in the sole and reasonable opinion of the Director, that Licensor must undertake immediate maintenance, repair or other action as to the Licensee Facilities, then Licensor may do so at Licensee's sole expense. Licensee shall take the measures required under this Section immediately upon receiving notice from Licensor. In an emergency, as determined by the Director, where there is

an imminent danger to the public health, safety, welfare, or Property, the Director may take the measures required by Licensee under this Section without prior notice to Licensee, provided that the Director will make reasonable efforts to provide prior verbal notice to Licensee of such measures. Where immediate action is not required, Licensor shall give Licensee at least thirty (30) days prior written notice describing which of the Licensee Facilities are affected, and the date by which the work is to be completed by Licensee.

**9. Conditions Precedent.** Licensee's obligation to perform under this Agreement, with respect to any individual Site, shall be subject to and conditioned upon the following conditions (the "Conditions"):

(a) Licensee shall conduct a structural analysis of existing towers or other structures it intends to use for Sites and prepare an analysis for review and approval by Director.

(b) Licensee shall secure appropriate approvals for Licensee's intended use of the Sites from any other federal, state or local regulatory authority having jurisdiction over Licensee's proposed use of the Sites ("Governmental Approval") and all other Approvals.

(c) Licensee may conduct radio frequency propagation studies ("RF Studies") on the Property or Structure. If the RF Studies do not provide results that meet with the personal satisfaction of Licensee, Licensee shall have no obligation to locate a Site on such Property or Structure.

(d) Licensee shall secure consistent and reliable services at agreed upon rates and in sufficient capacities for electricity, broadband telecommunications data lines and other services required or appropriate for the operation of the Licensee Facilities ("Utility Services").

(e) Licensee must be able to interconnect the Equipment with the Antennae and connect the Licensee Facilities to the Utility Services.

Licensee's inability to successfully satisfy any of the conditions, or the occurrence of any other event outside of Licensee's control which effectively prohibits Licensee's intended use of any particular Site shall enable Licensee to terminate the License for such Site upon thirty (30) days written notice to Licensor.

**10. Emergency.** Licensor shall notify Licensee as soon as reasonably practicable in the event of an emergency that adversely impacts the use of the Licensee Facilities.

**11. Disconnection.** Licensor shall not remove or disconnect the Antennae or Equipment or other Licensee Facilities in any way unless (1) it is necessary to prevent bodily injury or material property damage, or (2) prior written notice is given to Licensee and Licensee approves such

disconnection.

**12. Access.**

(a) Subject to coordination with any applicable Property or Structure security guidelines or requirements as required by Director, Licensee, and its employees, agents, contractors, subcontractors, lenders, guests and invitees shall have access through the Property and the Structure to the Sites, with notice to Licensor, twenty-four (24) hours a day, seven (7) days a week, at no charge. Licensor grants to Licensee, and its employees, agents, contractors, subcontractors, lenders, guests and invitees, a non-exclusive right and license for pedestrian and vehicular (as appropriate) ingress and egress across the Property and a license for pedestrian ingress and egress through the Structure. If access is prevented for a period of thirty (30) consecutive days, Licensee shall have the right to terminate the License for such Site immediately upon written notice to Licensor.

(b) Licensor shall maintain all access roadways from the nearest public roadway to the Property or Structure in a manner sufficient to allow pedestrian and vehicular access at all times under normal weather conditions. Licensor shall be responsible for maintaining and repairing such roadways, at its sole expense, except for any damage caused by Licensee's use of such roadways.

**13. Non-Interference.**

(a) Licensee shall, at its own expense, install, operate, and maintain the Licensee Facilities in a good and workmanlike manner and in accordance with applicable City, state and federal laws, ordinances and regulations, including, without limitation, any applicable regulations of the Federal Communications Commission ("FCC").

(b) Licensee shall inspect, construct, and maintain the Licensee Facilities in a manner that will not cause unreasonable physical interference to Licensor and other tenants or licensees of the Property or Structure, including without limitation the operation or use of any portion of the sanitary sewers, storm sewers and drains, water mains, gas mains, poles or other Licensor Property except to the extent contemplated by a permit or other applicable license. Licensee shall also avoid physically blocking the transmissions of radio equipment operated by the Licensor.

(c) Licensee is not obligated to conduct any tests, studies or investigations. Licensee shall operate the Licensee Facilities Equipment in a manner that will not cause harmful radio frequency interference ("RF Interference") to the Licensor and other tenants or licensees of the Property or Structure. All operations by Licensee shall be in compliance with all FCC requirements and all other applicable laws, codes, rules and regulations.

(d) Subsequent to the installation of the Licensee Facilities, Licensor shall, to the extent practicable without limiting Licensor's ability to conduct its activities in accordance with its normal practices, attempt to avoid causing RF Interference to or physically blocking the signals of the

Licensee Facilities. Licensor shall also inform new tenants of the Property or Structure on which Licensee Facilities have been installed of the existence and location of such Licensee Facilities, and shall obligate each new tenant in its lease to operate its equipment in compliance with all applicable FCC regulations, to use commercially reasonable efforts not to cause RF Interference or to cause physical interference with the Licensee Facilities installed on the Property or Structure, and, if the new tenant causes RF Interference to the Licensee Facilities, to participate in the interference resolution process described in Section (d) below.

(e) In the event either party suffers from RF Interference as a result of the actions of the other party, the affected party shall give the other party written notice of the nature of RF Interference, including any studies that demonstrate or may have been performed in connection with such RF Interference. The parties shall then meet and mutually cooperate to determine the cause of the RF Interference and agree on a method for eliminating the RF Interference, or reducing it to an acceptable level. Notwithstanding the foregoing, in the event that the RF Interference continues for more than ten (10) days and causes material harm to Licensee's operation of the Licensee Facilities, the License Fee with respect to the Licensee Facilities affected by RF Interference shall abate proportionately on a per diem basis for each day after such ten-day period. Additionally, if such material RF Interference continues for a period of ninety (90) days and the parties are unable to agree on a mutually satisfactory resolution of the problem, Licensee shall have the right to terminate the License for the Site immediately upon notice to Licensor.

(f) Subject to Licensor's obligations set forth in this Section, Licensor shall have no liability to Licensee for RF Interference caused by any third party, provided that the foregoing provisions shall not affect Licensee's rights regarding the procedure for resolving RF Interference in this Agreement, including, without limitation, Licensee's right to terminate a License for an affected Site. Licensor shall exercise its best efforts to assist in the resolution of any dispute regarding RF Interference caused by the activities of an occupant of a Property or Structure other than Licensee or Licensor.

**14. No Liens.** Licensee will not permit any mechanics' or material men's or other liens on the Structure or the Property for any labor or material furnished at Licensee's request pursuant to this Agreement (a "Licensee Lien"). If a Licensee Lien is filed against a Property or Structure, Licensee shall provide a bond for such lien within thirty (30) days after written notice from Licensor. If a final judgment on the Licensee Lien is adverse to Licensee, Licensee shall immediately pay the determined amount of Licensee Lien with all costs, fees and charges, thereby releasing such Licensee Lien. Subject to its obligation to provide a bond, Licensee shall have the right to contest the validity, nature or amount of any such Licensee Lien, but upon the final determination of such questions, shall immediately pay any adverse judgment rendered with all costs, fees and charges and shall have the

lien released at its own expense.

**15. Waiver of Licensor's Lien.**

(a) Licensor waives any lien rights it may have concerning the Licensee Facilities, and Licensee has the right to remove the same at any time without Licensor's consent. The Licensee Facilities shall not be considered fixtures.

(b) Licensor acknowledges that Licensee may enter into financing arrangements, including promissory notes and financial and security agreements, for the financing of the Licensee Facilities ("Collateral") with a third party financing entity. Licensor (i) consents to the installation of the Collateral; (ii) disclaims any interest in the Collateral, as fixtures or otherwise; and (iii) agrees that the Collateral shall be exempt from execution, foreclosure, sale, levy, attachment, or distress for any License Fee due or to become due, and that such Collateral may be removed at any time without recourse to legal proceedings.

**16. Termination.** In addition to the other termination provisions set forth herein, the License for all Sites granted pursuant to this Agreement shall terminate in the event of termination of the Network Agreement. Licensee may, for any reason at its discretion, terminate the License for a Site at any time by giving a written termination notice at least one hundred and eighty (180) days prior to the designated termination date.

Nothing herein shall be construed to require or compel Licensor to maintain any particular Property or Structure for a period longer than that required by Licensor's needs. Nothing herein shall restrict Licensor from exercising its authority to vacate, abandon, or discontinue any portion of a Property or Structure, and remove the Licensee Facilities therefrom at any time, having first given written notice to Licensee and providing a period of ninety (90) days in which Licensee shall have to remove Licensee's Facilities. The License for that Site shall terminate effective at the expiration of such ninety (90) day period, or removal of the Lessee Facilities from the Site, whichever occurs earlier.

Neither termination nor expiration of this Agreement or License for one or more Sites or any authorization granted hereunder shall be deemed to relieve either party of any obligations that by their nature survive such termination or cancellation.

**17. Abandonment.** If any material portion of the Licensee Facilities at a Site is out of service for a period of six (6) months or more, then Licensee shall promptly notify Licensor in writing of such fact and such Licensee Facilities shall be considered abandoned. Within fifteen (15) days after Licensee's receipt of written notice from Licensor to remove such Licensee Facilities, Licensee shall remove the Licensee Facilities from the Site at Licensee's cost and expense. If Licensee fails to remove any abandoned Licensee Facilities as required by Licensor, then Licensor shall be entitled to

remove the Licensee Facilities from the Site without any liability whatsoever to Licensor. Licensee shall reimburse Licensor for its costs and expenses. At its sole option, Licensor shall be entitled to leave the abandoned Licensee Facilities in place at the Site and continue to collect all fees payable to Licensor pertaining to such Licensee Facilities.

**18. Removal of the Licensee Facilities.** At the termination or expiration of this Agreement, Licensee shall, within a reasonable time but not to exceed twelve (12) months, remove all of the Licensee Facilities from the Sites. Any Licensee Facilities that Licensee fails to remove within twelve (12) months of termination or expiration shall be considered abandoned and, at the option of Licensor, title shall pass to Licensor.

**19. Condemnation.** If Licensor receives notification of any condemnation proceedings affecting the Structure or Property, Licensor will provide notice of the proceeding to Licensee within thirty (30) days of Licensor receiving notice. If a condemning authority takes all of the Structure or Property, or a portion sufficient, in Licensee's reasonable determination, to render the Site unsuitable for Licensee, the License for such Site will terminate as of the date the title vests in the condemning authority. The parties will each be entitled to pursue their own separate awards in the condemnation proceeds, to the extent that any award to Licensee will not diminish Licensor's recovery. Licensor will refund to Licensee any License Fee paid for the period after such termination.

**20. Destruction.** Licensor will notify Licensee as soon as possible of any casualty or other event that damages any Site or the Licensee Facilities or, to Licensor's knowledge, prevents the Licensee Facilities from operating properly. If any part of the Licensee Facilities, Structure or Property is damaged by casualty to the extent that the Licensee Facilities cannot operate properly ("Destruction"), License Fees shall abate until the Sites and the Licensee Facilities are repaired and operating commercially again. Licensor agrees to use reasonable efforts to permit Licensee to place temporary transmission and reception facilities on the Property or Structure at no Licensee Fee until the Site and Licensee Facilities are repaired. Neither Licensor nor Licensee is obligated to rebuild and repair the damage of any such Destruction. If either party elects not to repair the damage of Destruction, then that party may terminate the License for the Site by providing written notice to the other party, which termination will be effective as of the date of such Destruction.

**21. Assignment.** Licensee may assign the Agreement subject to the following provisions:

(a) Licensee may assign this Agreement pursuant to the sale of all or substantially all of the assets or stock of Licensee (or managing Division of Licensee) without the consent of City Council;

(b) Licensee must obtain prior written consent of City Council to the extent Licensee is assigning the Agreement pursuant to the sale of the Network to an unaffiliated third party; and

(c) Licensee shall provide the assignment agreement to the City Council and City Council shall have a reasonable period of time, not to exceed thirty (30) business days, to consent to such transaction, such consent shall not to be unreasonably withheld.

**22. Warranty of Title and Quiet Enjoyment.** Each party represents and warrants to the other that, at the time of its execution of this Agreement and/or any Site Schedule hereunder, (i) that such party shall have full right to make and perform such Agreement or Site Schedule; (ii) that the making of such Agreement or Site Schedule and the performance thereof will not violate any laws, ordinance, restrictive covenants or other agreements under which such party is bound; (iii) that Licensor is a duly constituted Texas home rule municipality and Licensee is a duly organized and existing Delaware corporation; (iv) that the party is qualified to do business in the State of Texas; and

(v) that all persons signing on behalf of such party are authorized to do so by appropriate municipal or corporate action. Licensor represents and warrants that Licensor owns the Property or Structure in fee simple or has the right under a lease or license to grant the rights granted to Licensee herein and in the Site Schedule. Licensor covenants and agrees with Licensee that upon Licensee's paying the License Fee and observing and performing all of the terms, covenants and conditions on Licensee's part to be observed and performed, Licensee may peacefully and quietly enjoy the Sites and maintain the Licensee Facilities on the Sites.

**23. Repairs; Maintenance.**

(a) Licensee promptly shall repair or replace, at Licensee's sole cost and expense, any damage to the Property, Structure, or other property of Licensor that occurs during the attachment, installation, maintenance, reattachment, reinstallation, relocation, removal, and replacement of the Licensee Facilities, or as a result of acts of Licensee or its contractors or agents in connection with the operation of the Licensee Facilities. Without limiting any other remedies available to Licensor, if Licensee fails to repair, replace, or refinish such damage within seventy-two (72) hours after notice from Licensor to do so, or, in the event that repair or replacement cannot reasonably be completed within seventy-two (72) hours after notice from Licensor but Licensee has diligently initiated and pursued repair or replacement within seventy-two (72) hours after notice from Licensor, then Licensor may, in its sole discretion, but without any obligation to do so, repair or replace the damage. In the event that Licensor undertakes the repair or replacement as a result of Licensee's failure to do so, Licensee promptly shall, upon receipt of an invoice for such costs and expenses, reimburse Licensor all actual costs and expenses incurred in the repair or replacement.

(b) Licensee shall use commercially reasonable efforts to maintain the Licensee Facilities in a safe condition and location, in good repair, normal wear and tear excepted. Licensee shall use reasonable efforts in installing, maintaining, relocating, removing, repairing, and replacing the Licensee Facilities on the Site. The planning, design, construction, repair, attachment, installation, control, operation, maintenance, reattachment, reinstallation, relocation, removal, and replacement of the Licensee Facilities shall be performed by experienced construction personnel by the above described standards and by commonly accepted methods and/or devices to reduce the likelihood of damage, injury or nuisance to persons or entities, including the public.

(c) Licensor shall use commercially reasonable efforts to maintain the Property or Structure, other than the Site, in a safe condition, in good repair, normal wear and tear excepted. Licensor shall use commercially reasonable efforts to coordinate any maintenance or repair work at or near the Sites with Licensee and to conduct such work in such a manner as to prevent interference with the Licensee Facilities.

**24. Hazardous Materials.** Licensee shall comply in all material respects with all laws related to Hazardous Materials that are applicable to Licensee. Without limiting the foregoing, Licensee covenants that it will not use, generate, store, or dispose of any Hazardous Material on, under, about or within any Licensor Property in violation of any law or regulation. Licensor agrees to comply in all material respects with all laws related to Hazardous Materials that are applicable to Licensor. Without limiting the foregoing, Licensor covenants that it will not use, generate, store, or dispose of any Hazardous Material on, under, about or within any Licensor Property in violation of any law or regulation. Subject to the foregoing, however, Licensor makes no representation or warranty that any Licensor Property is free of Hazardous Materials, and Licensee must satisfy itself as to the condition of all such Licensor Property; provided that, upon written request by Licensee to Licensor with respect to a particular site located on Licensor Property, the Licensor shall notify Licensee of any known presence of Hazardous Materials. To the extent that the presence of Hazardous Materials on Licensor Property materially impairs Licensee's ability to provide Services, Licensee may temporarily (*i.e.*, for the period of such material impairment) alter or reduce the Services in a manner reasonably related to the effects of the presence of Hazardous Materials. As used in this Section, "Hazardous Material" shall mean substances that are identified as hazardous, toxic or dangerous in any applicable federal, state or local law or regulation.

**25. Release and Indemnification.**

(a) Licensee agrees to and shall release Licensor, its agents, employees, officers, and legal representatives (collectively the "Licensor") from all liability for injury, death, damage, or loss to persons or property sustained in connection with or incidental to performance under this agreement, even if the injury, death, damage, or loss is caused by the Licensor's sole or concurrent negligence and/or the Licensor's strict products liability or strict statutory liability.

(b) LICENSEE AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE LICENSOR, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "LICENSOR") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO LICENSEE'S PERFORMANCE UNDER THIS AGREEMENT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:

1. LICENSEE'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', CONTRACTORS', OR SUBCONTRACTORS' ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;

2. THE LICENSOR'S AND LICENSEE'S ACTUAL OR ALLEGED CONCURRENT NEGLIGENCE, WHETHER LICENSEE IS IMMUNE FROM LIABILITY OR NOT; AND

3. THE LICENSOR'S AND LICENSEE'S ACTUAL OR ALLEGED STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY, WHETHER LICENSEE IS IMMUNE FROM LIABILITY OR NOT.

(c) LICENSEE SHALL DEFEND, INDEMNIFY, AND HOLD THE LICENSOR HARMLESS DURING THE TERM OF THIS AGREEMENT AND FOR FOUR YEARS AFTER THE AGREEMENT TERMINATES. LICENSEE'S INDEMNIFICATION IS LIMITED TO \$500,000 PER OCCURRENCE. LICENSEE SHALL NOT INDEMNIFY THE LICENSOR FOR THE LICENSOR'S SOLE NEGLIGENCE.

(d) Subcontractors Indemnification. Licensee shall require all of its subcontractors (and their subcontractors) to indemnify Licensor to the same extent and in substantially in the same form as Licensee's indemnity to Licensor.

(e) Indemnification Procedures.

1. Notice of Claims. If Licensor or Licensee receives notice of any claim or circumstances which could give rise to an indemnified loss, the receiving party shall give written notice to the other party within 10 days. The notice must include the following:

- (a) a description of the indemnification event in reasonable detail,
- (b) the basis on which indemnification may be due, and
- (c) the anticipated amount of the indemnified loss.

This notice does not estop or prevent Licensor from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice. If Licensor does not provide this notice within the 10-day period, it does not waive any right to indemnification except to the extent that Licensee is prejudiced, suffers loss, or incurs expense because of the delay.

2. Defense of Claim.

(a) Assumption of Defense. Licensee may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to Licensor. Licensee shall then control the defense and any negotiations to settle the claim. Within 10 days after receiving written notice of the indemnification request, Licensee must advise Licensor as to whether or not it will defend the claim. If Licensee does not assume the defense, Licensor shall assume and control the defense, and all defense expenses constitute an indemnification loss.

(b) Continued Participation. If Licensee elects to defend the claim, Licensor may retain separate counsel to participate in (but not control) the defense and to participate in (but not control) any settlement negotiations. Licensee may settle the claim without the consent or agreement of Licensor, unless it (a) would result in injunctive relief or other equitable remedies or otherwise require Licensor to comply with restrictions or limitations that adversely affect Licensor,

(b) would require Licensor to pay amounts that Licensee does not fund in full, or (c) would not result in Licensor's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

**26. Insurance.**

(a) Licensee shall maintain the following coverages and limits of liability:

Workers Compensation	Statutory
Employer's Liability	Bodily Injury by accident \$500,000 (each accident) Bodily Injury by Disease \$500,000 (policy limit) Bodily Injury by Disease \$500,000 (each employee)
Commercial General Liability: including Broad Form coverage, Contractual Liability, Bodily and Personal Injury, and Completed Operations	Bodily Injury and Property Damage, Combined Limits of \$500,000 each occurrence, and \$1,000,000 aggregate
Automobile Liability Insurance (for vehicles Licensee uses in performing under this Agreement, including Employer's Non-Owned and Hired Auto Coverage)	\$1,000,000 Combined single limit
Catastrophic Network Damage	Replacement value of the Network

Defense costs are excluded from the face amount of the policy. Aggregate Limits are per 12-month policy period unless otherwise indicated.

(b) Form of Policies. The Director may approve the form of the insurance policies, but nothing the Director does or fails to do relieves Licensee from its duties to provide the required coverage under this Agreement. The Director's actions or inactions do not waive Licensor's rights under this Agreement.

(c) Issuers of Policies. The issuer of any policy (1) shall have a Certificate of Authority to transact insurance business in Texas, or (2) shall be an eligible non-admitted insurer in the State of Texas and have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition *Best's Key Rating Guide*.

(d) Insured Parties. Each policy, except those for Workers' Compensation and Employer's Liability, must include Licensor (and its officers, agents, and employees) as Additional Insured parties on the policy and all renewals or replacements

(e) Deductibles. Licensee shall be responsible for and pay any claims or losses to the extent of any deductible amounts and waives any claim it may have for the same against Licensor, its officers, agents, or employees.

(f) Cancellation. Each certificate must state that it may not be canceled or nonrenewed unless the insurance company gives the Director thirty (30) days' advance written notice.

(g) Subrogation. Each policy must contain an endorsement to the effect that the

issuer waives any claim or right of subrogation to recover against Licensor, its officers, agents, or employees.

(h) Endorsement of Primary Insurance. Each policy, except Workers' Compensation, must contain an endorsement that the policy is primary to any other insurance available to the Additional Insured with respect to claims arising under this Agreement.

(i) Liability for Premium. Licensee shall pay all insurance premiums, and Licensor shall not be obligated to pay any premiums.

(j) Subcontractors. Licensee shall require all subcontractors to carry insurance naming Licensor as an additional insured and meeting all of the above requirements except amount. The amount must be commensurate with the amount of the subcontract, but in no case less than \$500,000 per occurrence. Licensee shall provide copies of insurance certificates to the Director.

(k) Proof of Insurance. On the Effective Date and at any time during the term of this Agreement, Licensee shall furnish the Director with Certificates of Insurance. Licensee shall continuously and without interruption, maintain in force the required insurance coverages specified in this Section. If Licensee does not comply with this requirement, the Director, at his or her sole discretion, may

(i) immediately suspend Licensee from any further performance under this Agreement and begin procedures to terminate the Network Agreement and this Agreement for default, or

(ii) purchase the required insurance with Licensor's funds and deduct the cost of the premiums from amounts due to Licensee under the Network Agreement.

Licensor shall never waive or be estopped to assert its right to terminate this Agreement because of its acts or omissions regarding its review of insurance documents.

(l) Other Insurance. If requested by the Director, Licensee shall furnish adequate evidence of Social Security and Unemployment Compensation Insurance, to the extent applicable to Licensee's operations under this Agreement.

**27. Building and Safety Requirements.** During the Term of this Agreement, Licensor shall maintain the applicable Properties and Structures in compliance with all applicable state and federal building codes, statutes, orders, ordinances and regulations.

**28. Marking and Lighting Requirements.** Licensor shall take all reasonable actions to cooperate with Licensee with respect to compliance with all marking and lighting requirements of the Federal Aviation Administration ("FAA") and the FCC. Should Licensee be cited because the Property or Structure is not in compliance due to the Licensor's operations and actions or inactions on the Property, and should Licensor fail to either have the citations dismissed or cure the conditions of noncompliance within thirty (30) days after written notice thereof by Licensee, Licensee may, in addition to any other remedies, cure the conditions of noncompliance at Licensor's expense, and

deduct such amounts from the License Fee for the Site.

**29. Parties Bear their Own Costs.** Except as expressly set forth herein, each party shall pay its own costs of performing hereunder. The Licensee shall bear all costs incurred in connection with the planning, design, construction, repair, modification, disconnection, attachment, installation, control, operation, maintenance, reattachment, reinstallation, relocation, removal, and replacement of the Licensee Facilities. The Licensee shall be responsible for, and shall bear all costs of, any movement in, damage to, repair of, or deterioration of, the Licensee Facilities due to repair, maintenance and/or failure/collapse of any street or highway improvements, sanitary sewers, storm sewers and drains, water mains, gas mains, poles, aerial and underground electric and telephone wires, cable television facilities, and other telecommunications, utility or City-owned property, or any other improvements or works proximate to the Licensee Facilities. This Agreement and the Site Schedules state the only charges and sums that Licensee is required to pay during the Term for installation, attachment, and maintenance of the Licensee Facilities, and for electricity usage. Licensee shall not owe Licensor for the services of employees or contractors of Licensor unless described expressly on a Site Schedule, or Licensee has executed on paper a written agreement specifying the charges Licensee agrees to pay and the work to be performed by such employees or contractors. In the event existing equipment or facilities on the Property encumber the space to be licensed by Licensee, Licensor shall remove such existing equipment or facilities prior to the commencement of the license at Licensor's sole expense

**30. Liability.**

(a) It is the intent of the parties that nothing in this Agreement shall create any right or action by any third party against Licensor or any of its elected or appointed officials, officers, or employees for any negligence or consequential, exemplary, or incidental damages, including but not limited to any lost profits, data, savings, or revenues, arising out of, or in connection with, this Agreement or any other agreement the Licensee may have with any of its subscribers, whether under tort, contract, or other theories of recovery, even if Licensor or its elected and appointed officials, officers, employees or agents have been advised of the possibility of such negligence or damages. This Agreement is for the benefit of the Licensee and Licensor and not for the benefit of any other party.

(b) The Licensee shall be liable to Licensor and to others for the acts and omissions of the Licensee's employees, agents, contractors and subcontractors, except where Licensee's liability, and that of its officers, employees, agents, contractors and subcontractors may be limited as provided in other parts of this Agreement. Licensee hereby acknowledges and assumes all responsibility, financial and otherwise, for the permitted use of any and all Properties and Structures for the Licensee Facilities, and the planning, design, construction, repair, attachment, installation,

control, operation, maintenance, reattachment, reinstallation, relocation, removal, and replacement of the Licensee Facilities, which shall be undertaken without risk to, or liability of, Licensor whatsoever. All planning, design, construction, repair, attachment, installation, control, operation, maintenance, reattachment, reinstallation, relocation, removal, and replacement work shall be performed at Licensee's sole cost and expense in accordance with applicable law, using City construction standards.

**31. Miscellaneous.**

(a) Entire Agreement. This Agreement, the Network Agreement and exhibits thereto and the Site Schedules contain the entire understanding between the parties with respect to the subject matter hereof. There are no representations, agreements, or understandings, whether oral or written, between the parties relating to the subject matter of this Agreement, which are not fully expressed herein. The terms and conditions of this Agreement shall inure to the benefit of the City. All exhibits referred to in this Agreement are incorporated into this Agreement and shall be deemed a part hereof. Any amendments to this Agreement must be in writing and executed on paper by authorized representatives of both parties. Facsimile shall be considered paper. This Agreement may be executed in duplicate counterparts, each of which shall be deemed an original.

(b) Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable with respect to any party, the remainder of this Agreement or the application of such provision to persons other than those as to whom it is held invalid or unenforceable, shall not be affected and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

(c) Successors. This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees of the respective parties.

(d) Third Party Rights. No provision of this Agreement shall create, or be construed to create for the public or any member thereof, or any other person or business, rights as a third party beneficiary hereunder, or to authorize any person not a party to this Agreement to maintain a suit for damages of any sort pursuant to the terms or provisions of this Agreement.

(e) Headings. Section headings of this Agreement are inserted only for reference and in no way define, limit, or describe the scope or intent of this Agreement nor affect its terms or provisions.

(f) Relationship of Parties. Nothing contained in this Agreement, nor any acts of the parties hereto, shall be deemed or construed to create the relationship of principal and agent, or of partnership, or of joint-venture, or of any association whatsoever between City and Licensee other than that of licensor and licensee.

(g) Notice. Any notice or demand permitted or required to be given herein shall be

made by certified or registered mail, return receipt requested, or reliable national overnight courier to the address of the respective parties set forth below:

**LICENSOR:**

City of Houston  
Information Technology Department  
611 Walker, 8<sup>th</sup> Floor  
Houston Texas 77002  
Attn: Information Technology Director

**LICENSEE:**

EarthLink, Inc.  
1375 Peachtree Street  
Atlanta, Georgia 30309  
Attn: General Counsel

Licensor or Licensee may from time to time designate any other address for this purpose by written notice to the other party. Notice shall be deemed received on the next business day if it is sent by first class mail or the date of delivery or refusal of delivery if it is sent by over night delivery service.

(h) Governing Law. This Agreement is subject to the laws of the State of Texas, the City of Houston Charter and Ordinances, the laws of the federal government of the United States, and all rules and regulations of any regulatory body or officer having jurisdiction. Venue for any litigation relating to this Agreement is Harris County, Texas.

(i) 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.

(j) Equitable Relief. Each party agrees that any threatened or actual default may cause immediate irreparable harm to the non-defaulting party for which there is no adequate remedy at law. Accordingly, each party agrees that the non-defaulting party will be entitled to an order for specific performance and to injunctive relief from a court of competent jurisdiction as remedy for any threatened or actual default. Nothing in this Agreement will prevent or prohibit either party from obtaining an order of specific performance and an injunction from a court of competent jurisdiction requiring the defaulting party to comply with the provisions of the Agreement, and not to take actions that violate its obligations under the Agreement.

(k) Reasonable Treatment. In any case where the approval or consent of one party hereto is required, requested or otherwise to be given under this Agreement, such party shall not unreasonably condition, delay or withhold its approval or consent. Each party agrees to furnish to the other, within thirty (30) days after request, such truthful estoppel information as the other may

reasonably request.

(l) Sovereign Immunity. Notwithstanding any other provisions of this Agreement to the contrary, nothing in this Agreement nor any action taken Licensor pursuant to this Agreement, nor any document that arises out of this Agreement, shall constitute or be construed as a waiver of either the sovereign immunity or governmental immunity of Licensor, or of its elected and appointed officials, officers and employees.

(m) Applicable Law and Venue. This Agreement shall be construed and enforced in accordance with the laws of the State of Texas. The courts of Harris County shall be the proper forum for any disputes arising hereunder.

(o) Force Majeure.

(1) “Force Majeure” is defined as war, government regulations, government interferences (not including the right of the Licensor to exercise Licensor’s rights hereunder), fire or other casualty or any circumstances reasonably beyond the party's control regardless of whether any such circumstance is similar to any of those enumerated or not.

(2) Timely performance by both parties is essential to this Agreement. If either party is delayed in or prevented from the performance of any act required hereunder by reason of an event of Force Majeure, then the performance of that act will be excused for the period of the delay, and the period for the performance of that act will be excused for a period equivalent to the period of the delay. Nothing in this Section will excuse either party from the prompt payment of any license fees, taxes, insurance premiums, or any other charges that are required of the Licensee or Licensor hereunder.

(3) This relief is not applicable unless the affected party does the following:

(A) uses due diligence to remove the effects of the Force Majeure as quickly as possible and to continue performance notwithstanding the Force Majeure; and

(B) provides the other with prompt written notice of the cause and its anticipated effect.

(4) If an event of Force Majeure renders it impossible or commercially unreasonable for Licensee or Licensor to perform the obligations under this Agreement in all or a portion, and such event of Force Majeure continues for or cannot be remedied in a commercially reasonable manner within ninety (90) days (unless then parties mutually agree in writing to a longer period to cure), either party may terminate the License for any affected Site, or terminate this Agreement if such termination is reasonably proportional to the effect caused by the Force Majeure. Licensee is not relieved from performing its obligations under this Agreement due to a strike or work slowdown of its employees. Licensee shall employ only fully trained and qualified personnel during a strike.

(p) Approvals. This Agreement shall not become effective unless and until the City Council of the City of Houston approves this Agreement and it is duly executed on behalf of Licensor. If this Agreement is not approved by the City Council and executed by an authorized person, then no liability whatsoever shall accrue to Licensor or Licensee, and Licensor and Licensee shall have no obligations whatsoever to each other.

(q) Authority. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity and authority to enter into and to execute this Agreement on behalf of Licensor and Licensee, respectively.

(r) Recitals. The Recitals are incorporated into this Agreement by reference.

(s) Confidentiality. To the extent permitted by applicable law, Licensor will not disclose any of the Confidential Information of Licensee during the Term and any Renewal Term, and for a period of three (3) years after the Term ends. If applicable law requires disclosure of Licensee's Confidential Information or the terms of this Agreement, or any other agreements ancillary or to be executed in connection with this Agreement, then Licensor will promptly give Licensee written notice and assist Licensee in limiting the disclosure to only those portions of that Confidential Information as is necessary to be disclosed according to applicable law. "Confidential Information" of Licensee means the business plans, financial information and technical information about the Licensee Facilities and the customers of Licensee and its vendors that are confidential or otherwise trade secrets under applicable law. In addition, Licensor's obligations not to disclose the trade secrets of Licensee will continue as long as they are trade secrets under applicable law.

**IN WITNESS WHEREOF**, the parties have executed this Agreement.

**LICENSOR:**

EARTHLINK, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**LICENSEE:**

**CITY OF HOUSTON**

By: \_\_\_\_\_  
Bill White  
Mayor

Attest:

\_\_\_\_\_  
Anna Russell  
City Secretary

APPROVED:

\_\_\_\_\_  
Director, Information Technology Dept.

COUNTERSIGNED BY:

\_\_\_\_\_  
Annise Parker  
City Controller  
Date Countersigned: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
Gary W. Dzierlenga  
Senior Assistant City Attorney  
L.D. File Number \_\_\_\_\_  
EarthLink Site License

**3-26-07 5:30 CST**

**EXHIBIT "A"**

**SITE SCHEDULE**

This Site Schedule (this "Schedule") is entered into between EARTHLINK, INC., a Delaware corporation, as licensee, ("Licensee"), and the City of Houston, Texas, a municipal corporation and home rule city principally situated in Harris, Fort Bend and Montgomery Counties, Texas, as licensor ("Licensor"), pursuant to that certain Site Master License Agreement dated \_\_\_\_\_, 2007 (the "Master Agreement") between Licensor and Licensee. Any initial capitalized terms that are not defined herein are used as defined in the Master Agreement. All of the terms and provisions of the Master Agreement are incorporated herein, provided that, in the event of any conflict between this Schedule and the Master Agreement, the provisions of this Schedule shall control.

The purpose of this Schedule is to agree to a Site that shall be used by Licensee pursuant to the terms of the Agreement and any special terms of this Schedule.

Licensor and Licensee agree as follows:

1. **Property or Structure:** The Property or Structure that this Site shall be located on is set forth on **Exhibit "1"** hereto.
2. **Site:** The Site location is shown on **Exhibit "2"** hereto.
3. **Special Provisions:** The special provisions that apply to the use of this Site are set forth on **Exhibit "3"** hereto.
4. **Effective Date:** This Effective Date of this Schedule shall be the last date that it is executed by either of the parties.
5. **Mounting Platform Fee:** After completion of the Build-out, Licensee will pay quarterly, at the beginning of each quarter, the amount equal to One Thousand Two Hundred Dollars (\$1,200.00) per month during the Term until expiration or earlier termination of the Term, adjusted on every fifth anniversary date of the Effective Date by three percent (3%), for each Access Point using a Mounting

Platform on City Facilities used by Licensee. Any Site selected after Build-out is complete will start at a rate equal to the current rate of other Sites already in use.

**6. Electricity Charge:** If Licensee is permitted to use the electricity supplied and billed to Licensor, then Licensee shall pay Licensor for the electricity consumed by the Licensee Facilities in its operations on the Site based on a flat rate or sub-metered rate of \_\_\_\_\_ (the “Electric Charge”).

**IN WITNESS WHEREOF**, the parties have executed this Schedule.

**LICENSOR:**

**LICENSEE:**

**CITY OF HOUSTON**

**EARTHLINK, INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

*[Attach Exhibits “1,” “2” and “3”]*

**EXHIBIT "1"**

**PROPERTY OR STRUCTURE**

*[Identify or depict the Property or Structure where the Site will be located]*

**EXHIBIT “2”**

**SITE**

*[Depict the location of the Site]*

**EXHIBIT “3”**

**SPECIAL PROVISIONS**

*[Identify any special provisions that relate to this Property, Structure or Site.]*

*[If none, state “None.”]*