


City of Alexandria, Virginia

MEMORANDUM

DATE: DECEMBER 3, 2008

TO: THE HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: JAMES K. HARTMANN, CITY MANAGER 

SUBJECT: TERMINATION OF CITYWIDE WIRELESS NETWORK FRANCHISE WITH EARTHLINK, INC.

ISSUE: Consideration of an agreement to terminate the wireless network franchise previously awarded to EarthLink, Inc.

RECOMMENDATION: That City Council authorize the City Manager to execute a settlement agreement with EarthLink, Inc., substantially in the form reflected in the attachment, to terminate the wireless network franchise previously awarded to EarthLink, Inc.

BACKGROUND: In June 2006, City Council adopted an ordinance to solicit proposals for the creation of a Citywide wireless network. Council received 10 competitive proposals from private sector entities, which were evaluated by a committee consisting of representatives from Information Technology Services, Police, Fire, the Alexandria City Public Schools, and the Commission on Information Technology. After carefully evaluating the proposals, interviewing finalists, and researching references, the Committee unanimously recommended EarthLink, Inc. as the preferred wireless network provider. Staff from Information Technology Services and the City Attorney's Office negotiated a franchise agreement and related right-of-way agreement with EarthLink, which Council authorized the City Manager to execute in December 2006.

Under the original agreements, EarthLink would have invested approximately \$1.9 million in the initial capital deployment of the wireless network. The entire cost of the network's construction and operation would be funded by EarthLink, which would then recoup its investment by charging residential, business, and wholesale Internet subscribers for a variety of wireless services. In exchange for the franchise, EarthLink agreed to provide to the City public benefits and some fee revenues estimated in total at more than \$13 million over the initial eight-year term.

EarthLink's proposal was selected primarily on the basis of the company's financial strength and previous experience with municipal wireless projects; its proposed technology to deploy the network; and its offer of public benefits in exchange for the franchise. Founded in 1994, EarthLink was a recognized national Internet service provider with more than 5.3 million current subscribers in the United States and several other municipal wireless deployments (including Philadelphia, Anaheim and New Orleans). EarthLink is a publicly-traded company and, in the year before the franchise was awarded, had total revenues of \$1.3 billion. Its revenues are now a fraction of that amount.

Approximately two weeks after City Council awarded the franchise, EarthLink's chief executive officer passed away. Since EarthLink's municipal wireless projects were overseen by a dedicated division of the company, this did not have an immediate effect on Alexandria's franchise. EarthLink continued to work on the project, completing the necessary radio signal studies, zoning approvals, and leases of space. The company purchased approximately 500 wireless access points, and was days away from mounting them across the City.

When a new EarthLink CEO was appointed, he began to implement several major operational changes, including the reduction of half the company's workforce and the discontinuation of a number of products and services. Most notably, EarthLink eliminated its municipal wireless division entirely, and began to withdraw from its municipal wireless projects across the country. In part, this was due to cost and service quality issues seen in the implementation of wireless franchises in cities such as Philadelphia. After a lengthy period of inactivity, EarthLink eventually notified the City that it no longer intended to proceed with the project in Alexandria. EarthLink also stopped implementation of planned networks in all other cities in the United States with which it had such agreements.

Proposed Settlement: The main franchise agreement and related right-of-way agreement are still legally in effect, and the City believes that EarthLink may continue to have certain obligations under these agreements even if no network is ever constructed. However, the way the franchise agreement was structured, a significant portion of EarthLink's liability was tied to the annual revenue from the franchise that the company never realized. This provision recognized that EarthLink was taking on nearly all of the project risk, with no taxpayer investment.

At this point, both EarthLink and the City would be best served by a mutual settlement of the original agreements, rather than prolonged litigation with an uncertain outcome. To that end, City staff negotiated the attached settlement agreement with EarthLink, which contains the following key provisions:

1. EarthLink will make a one-time payment to the City in the amount of \$100,000.
2. EarthLink will provide the City with 50 unused wireless routers, and related parts, of the type that would have been used in the citywide network. This equipment has an approximate retail value of \$120,000.
3. The original franchise agreement and related right-of-way agreement will be terminated, and neither party will make any further claims against the other under those agreements.

Although the settlement is less valuable than the original franchise would have been, it still represents a value to the City at no cost to the taxpayer.

Arlington County had also awarded a similar franchise to EarthLink. Arlington has terminated their franchise in exchange for a cash payment of \$120,000, with no additional equipment. Alexandria's proposed settlement is worth approximately \$220,000.

Future Steps: Since EarthLink was the leader in the municipal wireless industry, its decision to abandon the market had significant implications for other providers. Specifically, the new EarthLink CEO made several public statements indicating his belief that the business model on which EarthLink's municipal wireless agreements had been based (in which the host locality does not share in the investment risk) was not viable.

In part based on this change of direction by EarthLink, other major wireless providers have also moved away from such as model. Informal discussions between City staff and other potential franchisees have indicated that a second attempt at a citywide wireless network would require either a substantial upfront cash investment by the City, or a guarantee to purchase at least the equivalent value of wireless services. Although this could still result in community benefits, the City is not currently in the budgetary position to participate in this type of arrangement.

Staff continue to monitor market trends and explore other possibilities. In the meantime, the pilot "Wireless Alexandria" coverage area remains operational along the lower King Street pedestrian corridor. The free equipment received under the settlement with EarthLink could be used in part to expand this and other free public Internet areas through the City, at a low ongoing operating cost. Staff will continue to review the costs and benefits of expansion of Wireless Alexandria, including how it might support City government wireless needs.

FISCAL IMPACT: The proposed settlement totals \$220,00 in value to the City, including \$100,000 in cash and about \$120,000 in equipment.

ATTACHMENT: Proposed Settlement Agreement with EarthLink, Inc.

STAFF:

Mark Jinks, Deputy City Manager

Craig Fifer, E-Government Manager, Office of Communications

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Settlement Agreement") is dated this ____ day of _____, 2008 between EarthLink, Inc., a Delaware corporation ("EarthLink"), and the City of Alexandria, Virginia (the "City"). EarthLink and the City may be individually referred to hereafter as a "Party" or jointly as the "Parties."

RECITALS

WHEREAS, on March 16, 2007, the City and EarthLink entered into a Franchise Agreement and Right-of-Way Franchise Agreement, including exhibits thereto (collectively, the "Agreement"), pursuant to which Agreement EarthLink is authorized to establish, own, operate and maintain a wireless access network ("Network") within the boundaries of Alexandria, Virginia;

WHEREAS, EarthLink desires to terminate the Agreement in accordance with the terms set forth below.

NOW THEREFORE, in exchange for the mutual benefits and undertakings described herein, and on other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. TERMINATION OF AGREEMENT AND PAYMENT BY EARTHLINK

The Agreement, and all rights and obligations of the Parties to each other thereunder, are terminated in their entirety. EarthLink shall pay to the City the sum of One Hundred Thousand Dollars (\$100,000.00), which payment shall be made to the City by wire transfer or certified or cashiers check payable to "Treasurer, Alexandria, Virginia." In addition, EarthLink agrees to transfer ownership to the City, for Zero Dollars (\$0.00), in a single, one-time transaction, fifty (50) unused Motorola Canopy HotZone MTR-52103000 wireless routers, including unused antennae and used or unused power cables with shipment to a City facility, with such transfer of ownership being deemed complete upon the delivery of the equipment to such City facility. City understands and agrees that the transfer of ownership of this equipment is in its "as is" condition and that this transfer is being made without any warranties of any kind whatsoever, express or implied, as to the operation or functionality of the equipment, including without limitation any warranties of merchantability or fitness for a particular purpose. The City shall be solely responsible for the payment of all transfer/sales taxes, if any, associated with the transactions contemplated hereby, and all other taxes associated with the transactions contemplated hereby. The payment of cash and transfer of equipment by EarthLink to the City shall be made within fifteen (15) days of receipt by EarthLink of a fully executed counterpart original of this Settlement Agreement, and shall be in full and final satisfaction and release of all payment obligations and other contractual obligations of EarthLink under the Agreement.

2. RELEASE OF CONTRACT OBLIGATIONS

The City hereby releases EarthLink from all past, present and future obligations of EarthLink under the Agreement.

EarthLink hereby releases the City from all past, present and future obligations of the City under the Agreement.

3. CONFIDENTIALITY

The release of this Agreement and all documents related thereto are governed by the applicable provisions of the Virginia Freedom of Information Act ("FOIA"). Within the two (2) years following the effective date of this Settlement Agreement, the City will make reasonable efforts to notify EarthLink of any release of the Settlement Agreement made in response to a written FOIA request. Notification will be made in writing to:

EarthLink, Inc.
1375 Peachtree Street, Level A
Atlanta, Georgia 30309
Attention: General Counsel
Facsimile: 404-287-4905

3. GENERAL PROVISIONS

(a) Each Party covenants and agrees that it will not make, assert or maintain any claim, demand, action or cause of action that is discharged by this Settlement Agreement against the other Party; provided, however, that any Party hereto may bring an action against any other Party hereto to enforce this Settlement Agreement.

(b) Each Party warrants and represents that it has had the opportunity to consult with and/or rely upon legal counsel of its own choosing concerning the Party's settlement and the execution of this Settlement Agreement. Each Party further warrants and represents that it has relied solely upon its investigations, knowledge, information, belief and judgment, or the advice of the party's own attorney, and not upon any statements, opinions or representations of any other party or the other Parties' attorneys, employees or agents, in settling their claims and executing this Settlement Agreement. The Parties represent that they have not conveyed or assigned any claims released by this Settlement Agreement to any third parties. The Parties represent and warrant that they have the power and authority to enter into this Settlement Agreement. Any breach of this Settlement Agreement shall be subject to all remedies available to the Parties at law or in equity.

(c) The Settlement Agreement sets forth the entire agreement of the Parties

with respect to its subject matter, there being no other promise or inducement to or for the execution of this Settlement Agreement other than the consideration cited above. There are no contingencies, conditions precedent, representations, warranties, or other agreement, oral or otherwise, regarding settlement between the Parties not stated herein.

(d) This Settlement Agreement supersedes and replaces all prior settlement agreements between the Parties concerning the Agreement.

(e) The Parties acknowledge that this Settlement Agreement is the product of negotiations between the Parties and does not constitute an admission of liability on the part of any Party. For purposes of construction, neither Party shall be deemed the sole author of this Settlement Agreement.

(f) This Settlement Agreement shall inure to the benefit of, and shall be binding on, the Parties' respective successors and assigns.

(g) This Settlement Agreement may not be modified or amended, nor any of its terms waived, except by an amendment signed by duly authorized representatives of the Parties.

(h) This Settlement Agreement shall be construed and enforced in accordance with the law of the Commonwealth of Virginia. All actions or suits brought hereunder or arising out of this Agreement shall be brought in the General District or Circuit Court of Alexandria, or in the United States District Court for the Eastern District of Virginia, Alexandria Division and in no other courts.

(i) This Settlement Agreement shall be effective upon the date when it is executed on behalf of the City.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed by duly authorized representatives of each Party on the dates written below.

City of Alexandria,
a municipal corporation of the
Commonwealth of Virginia

By: _____
James K. Hartmann, City Manager
Date: _____

APPROVED AS TO FORM:

By: _____
City Attorney

EARTHLINK, INC.

By: _____
Name (Printed): _____
Title: _____
Date: _____