

MASTER SERVICE AGREEMENT

1. Delivery of Services; Terms; Definitions; Fees.

- 1.1. **General.** By executing this MSA and any subsequent Order Forms, Customer shall accept and pay for, and by executing an Order Form, Company shall provide and support, the Services during the Initial Term listed in the Order Form and for any Renewal Term. Accordingly, except as expressly provided in this MSA, Company shall provide, and Customer shall pay for, each Service through its Initial Term and any subsequent Renewal Term.
- 1.2. **Term.**
 - 1.2.1. **Term Commencement.** The term for each Service will commence on the Service Activation Date and shall continue for the entire Initial Term. An 'Attachment A Order Form' is not a service. A service is an individual product on an Order Form. If individual products on a single Order Form commence service at different times, billing will commence when the individual product is completed by Company. An order is complete when Company has completed installation of an individual product, not an "Attachment A Order Form". A service will begin billing on the date Company finishes installation and product is 'BandCon Ready.' This MSA shall continue in full force and effect until the termination of the last Order Form.
 - 1.2.2. **BandCon Ready.** BandCon ready is when an individual product on an Attachment A Order Form is complete and turned over to Customer. Billing will commence on individual product when a product is BandCon Ready. If customer has not completed work needed to use service (e.g. cross connects), that will not stop a service from being BandCon Ready.
 - 1.2.3. **Renewal Term.** Each term of each Order Form will renew automatically for additional terms equal in length to the Initial Term (each a "Renewal Term") unless Customer notifies Company in writing not less than thirty (30) calendar days prior to the end of the Initial Term (or any subsequent Renewal Term, as applicable), that it wishes to terminate such Service. The termination of any individual Service or Order Form will not affect Customer's obligations to accept and pay for all other contracted Services.
 - 1.2.4. **Early Termination.** Unless otherwise specified in this MSA, in the event of early termination of this MSA by Customer for default or any other reason, Customer shall pay Company as liquidated damages the monthly fees owed by Customer at the time of such termination multiplied by the total number of months remaining in the current term, together with any other fees (including Telco Fees) of all third parties contracted by the Company on behalf of Customer, as set forth in Section 2.1.
 - 1.2.5. **Default.** Customer will be in default if payment for services are late as described in section 2.3.1. In the event of default, company may suspend services as well as access to facility. If Customer is in default, Company can take possession of Customer equipment and sell the equipment to recoup the monies owed.
 - 1.2.6. **Abandonment.** If the customer abandons equipment during or after the Term of the Agreement, the Company will take possession of the equipment. The customer will be liable for all the storage and moving costs during any period that the company stores the equipment, which storage cost shall be at least the fair rental value of the premises while the property is being stored. If the Company takes possession, the Company may use the equipment for itself or otherwise privately sell or destroy the equipment. Alternatively, Company may sell or otherwise dispose of the equipment with or without notice, at a public or private sale, and apply the net proceeds (after deducting all costs related to the storage and moving, sale or other disposition of the equipment) to the amounts that customer owes Company. The customer agrees that if notice of sale or other disposition is required by law to be given ten (10) days notice shall constitute reasonable notice. The customer will remain responsible for any amounts that are due the Company beyond applied such net proceeds from such sale of other disposition.
 - 1.2.7. Unless otherwise specified in this MSA, all capitalized terms may be defined and have the meanings as set forth in Appendix A attached hereto.

2. Fees and Payment Terms.

- 2.1. **Fees and Expenses.** Customer will pay all fees due according to the prices and terms listed in all Order Forms. Further, Customer shall pay Company for all fees or costs for third party products or services that Company procures on behalf of Customer. The prices listed in the Order Forms will remain in effect during the Initial Term indicated in the Order Forms and will continue thereafter, unless modified as set forth in Section 2.2.
- 2.2. **Changes in Fees.** At any time after the Initial Term, Company may change any of the fees it charges Customer for any Service. Such changes in fees shall be effective thirty- (30) calendar days after Company provides written notice to Customer of the change. If any change in fees causes a material and adverse effect to the terms of the Services provided to the Customer, then within ten (10) calendar days from the date of the foregoing notice from Company, Customer must provide written notice to Company that it rejects the changed fees. Within ten- (10) calendar days thereafter, Company shall elect either to continue to provide the Services under the prior terms or terminate this MSA, which decision shall be effective ten- (10) calendar days after notice of same to Customer. In the event the power provider increases the price paid by Company for power provided to any Colocation Space, Company may pass-through to Customer such price increase upon prior written notice to Customer. Price increases are not retroactive.
- 2.3. **Payment Terms.**

- 2.3.1. Before the provisioning for each Service, Company shall bill Customer for all non-recurring fees indicated in the Order Form and the monthly recurring fees for the first full month of the term plus any prorate necessary. Example is customer turns up with 10 days remaining in a calendar month; the first bill would be for the first month of service plus the 10 day proration period. 95/5 billing is not prorated. Company will deliver service, to the best of its ability on the Customer Requested Date. If the Customer requests a service that is billed using 95/5 on a day other than the 1st day of the month, 95/5 billing rules will apply. If the Customer Company shall invoice Customer for the minimum monthly recurring fees for all subsequent months on the fifteenth day of the month prior to such Services being provided. All other fees for Services received and expenses incurred for Services during a month (e.g., excess bandwidth usage fees and professional services) will be invoiced along with the minimum monthly recurring fees, on the 1st day of the month following the month in which the Services were provided.
- 2.3.2. Payment Terms are Net-10 (Ten) from date of invoice.
- 2.3.3. International customers must pay by wire transfers
- 2.4. Late Payments. Any payment not received on the payment due date of the invoice is considered past due and will accrue interest at a rate of one and one-half percent (1½%) per month, or the highest rate allowed by applicable law, whichever is lower. If Customer's account becomes past due, and customer fails to make arrangements to bring the account current, Company may cease providing of Service until such time as Customer brings its account current. If customer continues to be habitually delinquent in its payments, Company may, upon written notice to Customer, modify the payment terms to require full payment before the continued use of all Services (both currently contracted and scheduled future provisioned), or require customer to agree to additional conditions to secure Customer's payment obligations hereunder.
- 2.5. Failure to remit payment. Customer's failure to bring its account current as set forth in the foregoing provision or remit payment for services rendered will constitute a material breach of this agreement. Such failure entitles company to enforce its right of action under section 10.6 of this MSA.
- 2.6. Taxes. All fees charged for Services are exclusive of all taxes and similar fees now in force, enacted or imposed in the future on the transaction and/or the delivery of Services, all of which Customer will be responsible for and will pay in full, except for taxes solely based on Company's net income.
3. **Confidential Information; Intellectual Property Ownership; License Grants.**
- 3.1. Confidential Information.
- 3.1.1. Nondisclosure of Confidential Information. Each Party acknowledges that it will have access to certain confidential information of the other Party concerning the other Party's business, plans, vendors, employees, customers, technology, products, and other information held in confidence by the other Party (collectively, "Confidential Information"). Confidential Information will include all information in tangible or intangible form that is marked or designated as confidential or that, under the circumstances of its disclosure, should be considered confidential. Confidential Information will also include, but not be limited to, Company Technology, Customer Technology, and the terms and conditions of this MSA. Each Party agrees that it will not use in any way, for its own account or the account of any third Party, except as expressly permitted by, or to the limited extent required to achieve the purposes of, this MSA, nor disclose to any third Party (except as required by law or to such Party's attorneys, accountants and other advisors as reasonably necessary), any Confidential Information of the other Party. Each Party will take reasonable precautions to protect the confidentiality of the Confidential Information of the other Party that are at least as stringent as it takes to protect its own Confidential Information.
- 3.1.2. Exceptions. Information will not be deemed Confidential Information if such information: (i) is known to the receiving Party prior to receipt from the disclosing Party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing Party; (ii) becomes known (independently of disclosure by the disclosing Party) to the receiving Party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing Party; (iii) becomes publicly known or otherwise ceases to be secret or confidential, except through a breach of this MSA by the receiving Party; or (iv) is independently developed by the receiving Party without use of or reference to the Confidential Information of the disclosing Party. The receiving Party may disclose Confidential Information pursuant to the requirements of a governmental agency or by operation of law, provided that it gives the disclosing Party reasonable prior written notice sufficient to permit the disclosing Party to contest such disclosure.
- 3.2. Intellectual Property.
- 3.2.1. Ownership. This MSA does not transfer to Customer any Company Technology, and all right, title and interest in and to Company Technology will remain the sole property of the Company. Except for the rights expressly granted herein, this MSA does not transfer to Company any Customer Technology, and all right, title and interest in and to Customer Technology will remain solely with Customer. Company and Customer each agrees that it will not, directly or indirectly, reverse engineer, decompile, disassemble or otherwise attempt to derive source code or other trade secrets of the other party.
- 3.2.2. General Skills and Knowledge. Notwithstanding anything to the contrary in this MSA, Company is not prohibited or enjoined at any time from utilizing any skills or knowledge of a general nature created by Company during the course of providing the Services, including, without limitation, information publicly known or available or that could reasonably be acquired in similar work performed for another customer of Company.

3.3. License Grants.

- 3.3.1. By Company. Company agrees that, if in the course of accessing and using the Services, it is necessary for Customer to use certain items of Company Technology, then Customer is hereby granted a limited, nonexclusive, personal, royalty-free license, during the term of this MSA, to use the Company Technology solely for purposes of accessing and using the Services. Customer shall have no right to use the Company Technology for any purpose other than accessing and using the Services in accordance with the terms of this MSA.
- 3.3.2. By Customer. Customer agrees that if, in the course of performing the Services, it is necessary for Company to access Customer Equipment and use Customer Technology, then Company is hereby granted a limited, nonexclusive, personal, royalty-free license, during the term of this MSA, to use the Customer Technology solely for the purposes of delivering the Services to Customer. Company shall have no right to use the Customer Technology for any purpose other than providing the Services.

4. Company Representations and Warranties.

- 4.1. Authorities and Performance of Company. Company warrants that (i) it has the legal right to enter into this MSA and perform its obligations hereunder, (ii) the performance of its obligations and delivery of the Services will not violate any applicable U.S. laws or regulations or cause a breach of any MSA's with any third parties, and (iii) it will perform the Services in a manner consistent with industry standards. In the event of a breach of the warranties set forth in Section 5.1, Customer's sole remedy is termination of this MSA pursuant to Section 9, provided that Section 1.2.3 shall not apply to such termination.
- 4.2. Service Level Warranty. Each Service Level Warranty is defined in the Schedule for each Service. Except for the express warranties set forth in each Schedule, the Services are provided exclusive on an "as is" basis, and Customer's use of the Services is at its sole risk. Company does not make, and hereby disclaims, any and all other express and implied warranties, including, but not limited to, warranties of merchantability, quality, performance, fitness for a particular purpose, non-infringement, title, and any warranties arising from a course of dealing, usage, or trade practice. Further, Company does not warrant that the Services will be uninterrupted, error-free, or completely secure.
- 4.3. Disclaimer of Third Party Actions. Company does not and cannot control the flow of data to or from the Company Network or within any portion of the Internet. Such flow depends in large part on the performance of Internet services provided or controlled by third parties. At times, actions or omissions of such third parties can impair or disrupt Customer's connections to the Internet (or portions thereof). Although Company will use commercially reasonable efforts to take actions it deems appropriate to remedy and avoid such events, Company cannot guarantee that such events will not occur. Accordingly, except to the extent of the express warranties set forth in any attached Schedule, Company disclaims any and all liability resulting from, or related to, such events.

5. Customer Obligations.

5.1. Warranties of Customer.

- 5.1.1. General. Customer represents and warrants that (i) it has the legal right and authority, and will continue to own or maintain the legal right and authority, during the term of this MSA, use any Customer Equipment or Customer Technology as contemplated under this MSA; (ii) the performance of its obligations and use of the Services (by Customer, its customers and users) will not violate any applicable laws, regulations or the AUP or cause a breach of any MSA's with any third parties or unreasonably interfere with use of the services offered by the Company to third parties.
- 5.1.2. Breach of Warranties. In the event of any breach of any of the foregoing warranties, in addition to any other remedies available at law or in equity, Company will have the right, in its sole reasonable discretion, to suspend immediately any of the Services if deemed reasonably necessary by Company to prevent harm to Company or its business. If practicable and depending on the nature of the breach, Company will provide notice and opportunity to cure. Once cured, Company will promptly restore the Services.

- 5.2. Compliance with Law and AUP. Customer shall use the Service(s) only for lawful purposes and in accordance with this MSA. Customer will comply at all times with all applicable laws and regulations and the AUP, as updated by Company from time to time. The AUP is incorporated herein and made a part hereof by this reference. Company may change the AUP by posting such changes to the Company web site located at http://www.bandcon.com/usage_comp.php. Customer agrees that it has received, read and understands the current version of the AUP. The AUP contains restrictions on Customer and Customer's users' online conduct (including, but not limited to, prohibitions against unsolicited commercial email). Customer shall comply with such restrictions and, in the event of a failure to comply, Customer will be subject to immediate suspension or termination of Services. Notwithstanding any suspension or termination of the Service due to violation of this Section 5.2, Customer shall continue to pay its committed monthly Service Charge and all other charges as set forth on all Order Forms. Customer will provide Company with twenty-four-(24) hour contact information for notification of AUP violations, which notification shall be sent by creating a trouble ticket. Customer acknowledges that Company exercises no control over the content of the information passing through Customer's web sites and that it is the sole responsibility of Customer to ensure that the information it and its users transmit and receive complies with all applicable laws and regulations and the AUP.

- 5.3. Restrictions on Use of Services. Customer shall not, without the prior written consent of Company (which may be withheld in its sole discretion), resell the Services, in whole or in part, to any third parties. Reselling of the Service(s) is defined as any sale of any part of the Service(s) to a third party that requires Company to invoice a third party directly.

Customers providing access to the Service(s) to Customer's clients in whole or in part, and subsequently invoicing the client(s) directly are not considered reselling the Service(s).

5.4. Company Supplied Equipment.

- 5.4.1. Delivery and Term. On or prior to the Service Activation Date, if required, Company shall deliver to Customer, at the designated Customer Location, any contractually obligated Company Supplied Equipment. Customer shall have the right to use the Company Supplied Equipment for the Initial Term set forth in the Order Form and any additional period agreed to by Company as defined in this MSA. Customer shall not remove or alter in any manner any Company Supplied Equipment without the prior written consent of Company. Customer will not remove, alter or destroy any labels on the Company Supplied Equipment stating that it is the property of Company and shall allow reasonable access to Company Supplied Equipment for Company employees and/or designated authorized agents. The Customer must provide prior written notice and the written approval from Company before moving any Company Supplied Equipment from the address listed on the applicable Order Form and Hand Receipt that accompanies the Company Supplied Equipment.
- 5.4.2. Title. The Company Supplied Equipment shall always remain the sole property of Company. Customer shall have no right or interest in or to the Company Supplied Equipment except as expressly provided in this MSA and the applicable Order Form and shall possess the Company Supplied Equipment subject and subordinate to the rights of Company. Customer will, at its own expense, keep the Company Supplied Equipment free and clear from any liens or encumbrances of any kind (except any caused by Company) and will indemnify and hold Company harmless from and against any loss or expense caused by Customer's failure to do so. Customer shall give Company immediate written notice of any attachment or judicial process affecting the Company Supplied Equipment or Company's ownership.
- 5.4.3. Use, Maintenance and Repair. Customer will, at its own expense, keep the Company Supplied Equipment in good repair, appearance and condition, other than normal wear and tear. Customer shall use the Company Supplied Equipment in a commercially reasonable manner. Any repair of the Company Supplied Equipment caused by normal use and not due to negligence of the Customer will be the sole responsibility of Company. The Customer will be responsible for any reasonable assistance in this process (i.e. boxing equipment up and shipping it to Company or providing access to the equipment for Company or third party personnel).
- 5.4.4. Upgrades and Additions. Customer may not affix or install any accessory, addition, upgrade, equipment or device on to the Company Supplied Equipment (other than electronic data) unless expressly approved in writing by Company.

6. Insurance.

- 6.1. Company Minimum Levels. Company agrees to keep in full force and effect during the term of this MSA: (i) comprehensive general liability insurance in an amount not less than \$1 million per occurrence for bodily injury and property damage; and (ii) workers' compensation insurance in an amount not less than that required by applicable law. Company agrees that it will ensure and be solely responsible for ensuring that its contractors and subcontractors obtain and maintain the same types and amount of coverage's as required of Company herein.
- 6.2. Customer Minimum Levels. In order to provide Customers with Company Supplied Equipment at Customer Location, Company is required by its insurers to ensure that Customer maintains adequate insurance coverage. Customer agrees to keep in full force and effect during the term of this MSA: (i) comprehensive general liability insurance in an amount not less than \$1 million per occurrence for bodily injury and property damage; and (ii) workers compensation insurance in an amount not less than that required by applicable law. Customer agrees that it will ensure and be solely responsible for ensuring that its agents (including contractors and subcontractors) obtain and maintain the same types and amount of coverage's as required of Customer herein.
- 6.3. Certificate of Insurance. Prior to installation of any Customer Equipment in the Customer Location, Customer will deliver to Company, certificates of insurance which evidence the minimum levels of insurance set forth above and property insurance on the Company Supplied Equipment, if any, and cause its insurance provider(s) to name Company as an additional insured and notify Company in writing of the effective date thereof.

7. Limitations of Liability.

- 7.1. Damage to Customer Equipment. Company shall not be liable for any damage to, or loss of, any Customer Equipment resulting from any cause other than from the willful misconduct of Company. Further, to the extent Company is liable for any damage to, or loss of, Customer Equipment, such liability will be limited solely to the then-current replacement value of the Customer Equipment, excluding lost data, software and firmware.
- 7.2. Consequential Damages Waiver. Except for a breach of Section 3.1, In no event will either party be liable or responsible to the other for any special, incidental, punitive, indirect, exemplary, or consequential damages, including, but not limited to, lost revenue, lost profits, replacement goods, loss of technology, rights or services, loss of data, or interruption or loss of use of service or equipment, even if advised of the possibility of such damages, whether arising under theory of contract, tort (including negligence), strict liability or otherwise. Except for a breach of Section 3.1, in no event will Company be liable to Customer for any direct damages in excess of the amounts paid under this Agreement in the twelve (12) months immediately preceding the act or omission giving rise to such action.
- 7.3. Basis of the Bargain. Failure of Essential Purpose. The parties acknowledge that Company has set its prices and entered into this MSA in reliance upon the limitations of liability and the disclaimers of warranties and damages set forth

herein, and that the same form an essential basis of the bargain between the parties. The parties agree that the limitations and exclusions of liability and disclaimers specified in this MSA will survive and apply even if found to have failed of their essential purpose.

8. Indemnification.

- 8.1. **Indemnification.** Each party will indemnify, defend and hold the other harmless from and against any and all costs, liabilities, losses, and expenses (including, but not limited to, reasonable attorneys' fees and costs) (collectively, "Losses") resulting from any claim, suit, action, or proceeding (each, an "Action") brought by any third party against the other alleging (i) the infringement or misappropriation of any intellectual property right relating to the delivery or use of the Services (but excluding any infringement contributorily caused by the other party); (ii) bodily injury caused by the negligence or willful misconduct of the other party; and (iii) any violation of or failure to comply with the AUP. Further, Customer will indemnify, defend and hold Company, its affiliates and customers harmless from and against any and all Losses resulting from or arising out of any Action brought against Company, its affiliates or customers alleging any damage or destruction to the Customer Location, Company equipment or other customer equipment caused by Customer, or any of its agents, representatives, or designees.
- 8.2. **Notice.** Each party's indemnification obligations hereunder shall be subject to: (i) receiving prompt written notice of the existence of any Action; (ii) being able to, at its option, control the defense of such Action; (iii) permitting the indemnified party to participate in the defense of any Action; and (iv) receiving full cooperation of the indemnified party in the defense thereof.

9. Termination.

- 9.1. **Termination for Cause.** Either party may terminate this MSA if: (i) the other party breaches any material term or condition of this MSA and fails to cure such breach within thirty- (30) calendar days after receipt of written notice of the same, except in the case of Customer's failure to pay fees, which must be cured within five (5) calendar days after receipt of written notice from Company; (ii) the other party becomes the subject of a voluntary petition in bankruptcy or any voluntary proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of creditors, if such petition or proceeding is not dismissed within sixty- (60) calendar days of filing.; or (iii) the other party becomes the subject of an involuntary petition in bankruptcy or any involuntary proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of creditors, if such petition or proceeding is not dismissed within sixty- (60) calendar days of filing. If Customer terminates this MSA for cause for any of the reasons set forth in this Section 9.1, then Section 1.2.3 shall not apply to such termination.
- 9.2. **Effect of Termination.** Upon the effective date of termination of this MSA:
- 9.2.1. Company will immediately cease providing the Services; and
- 9.2.2. any and all payment obligations of Customer under this MSA for Services provided through the date of termination will immediately become due. If Customer fails to pay such amounts on the date due, then Company shall impose the late fees set forth in Section 2.4; and
- 9.2.3. within thirty- (30) calendar days of such termination, each party will return all Confidential Information of the other party in its possession and will not make or retain any copies of such Confidential Information, except as required to comply with any applicable legal or accounting record keeping requirement; and
- 9.2.4. Customer will remove, package and ship (shipping charges will be paid by Company and such removal and packaging to be undertaken in a commercially reasonable manner) all Company Supplied Equipment back to Company within fifteen- (15) calendar days of effective date of termination. If Customer fails to do so, Company will have the right to (a) charge the Customer and the Customer will pay the fair market value of the Company Supplied Equipment; or (b) recover and take possession of such Equipment, and for this purpose may enter any premises of Customer where such equipment is located during normal working hours to remove Company Supplied Equipment. Customer will promptly surrender the Company Supplied Equipment to Company in as good order and condition as originally delivered, reasonable wear and tear excepted.
- 9.3. **Survival.** The following provisions will survive any expiration or termination of the MSA: Sections 1.2.3, 2, 3.1, 3.2, 4.2, 5.4.4, 7, 8, 9, and 10.

10. Miscellaneous Provisions.

- 10.1. **Force Majeure.** Except for Customer's obligation to make payments to Company, neither party will be liable for any failure or delay in its performance under this MSA due to any cause beyond its reasonable control, including acts of war, acts of God, terrorism, earthquake, flood, embargo, riot, sabotage, labor shortage or dispute, governmental act or failure of the Internet (not resulting from the actions or omissions of Company), provided that the delayed party: (a) gives the other party prompt notice of such cause, and (b) uses its reasonable commercial efforts to promptly correct such failure or delay in performance. If Company is unable to provide Service(s) for a period of thirty (30) consecutive calendar days as a result of a continuing force majeure event, Customer may cancel the Services.
- 10.2. **Marketing.** Customer agrees that, during the term of this MSA, Company may publicly refer to Customer, orally and in writing, as a customer of Company. Any other reference to Customer by Company requires the written consent of Customer. Customer must receive expressed written permission from Company prior to publicly referring to Company as an entity supplying services to Customer.
- 10.3. **Government Regulations.** Customer will not export, re-export, transfer, or make available, whether directly or indirectly, any regulated item or information to anyone outside the U.S. in connection with this MSA without first complying with all

export control laws and regulations which may be imposed by the U.S. Government and any country or organization of nations within whose jurisdiction Customer operates or does business.

- 10.4. Non-Solicitation. During the term of this MSA and continuing through the first anniversary of the termination of this MSA, Customer agrees that it will not, and will ensure that its affiliates do not, directly or indirectly, solicit or attempt to solicit for employment any persons employed by Company or contracted by Company to provide Services to Customer.
- 10.5. No Third Party Beneficiaries. Company and Customer agree that, except as otherwise expressly provided in this MSA, there shall be no third party beneficiaries to this MSA, including but not limited to the insurance providers for either party or the customers of Customer.
- 10.6. Governing Law; Dispute Resolution. This MSA is made under and will be governed by and construed in accordance with the laws of the State of California (except that body of law controlling conflicts of law) and specifically excluding from application to this MSA that law known as the United Nations Convention on the International Sale of Goods. The parties will endeavor to settle amicably by mutual discussions any disputes, differences, or claims related to this MSA. Failing such amicable settlement, any controversy, claim, or dispute arising under or relating to this MSA, including the existence, validity, interpretation, performance, termination or breach thereof, shall finally be settled by arbitration in accordance with the Arbitration Rules (and if Customer is a non-U.S. entity, the International Arbitration Rules) of the American Arbitration Association ("AAA"). There will be three (3) arbitrators (the "Arbitration Tribunal"), the first of which will be appointed by the claimant in its notice of arbitration, the second of which will be appointed by the respondent within thirty (30) calendar days of the appointment of the first arbitrator and the third of which will be jointly appointed by the party-appointed arbitrators within thirty (30) calendar days thereafter. The language of the arbitration shall be English. The Arbitration Tribunal will not have the authority to award punitive damages to either party. Each party shall bear its own expenses, but the parties will share equally the expenses of the Arbitration Tribunal and the AAA. This MSA will be enforceable, and any arbitration award will be final, and judgment thereon may be entered in any court of competent jurisdiction. The arbitration will be held in Irvine, California, USA. Notwithstanding the foregoing, claims for preliminary injunctive relief, other pre-judgment remedies, and claims for Customer's failure to pay for Services in accordance with this MSA may be brought in a state or federal court but must be venued within Orange County, California.
- 10.7. Severability; Waiver. If any provision of this MSA is held by a tribunal of competent jurisdiction to be contrary to the law, then the remaining provisions of this MSA will remain in full force and effect. The waiver of any breach or default of this MSA will not constitute a waiver of any subsequent breach or default, and will not act to amend or negate the rights of the waiving party.
- 10.8. Assignment. Upon the prior written notice to Company, Customer may assign this MSA in whole as part of a corporate reorganization, consolidation, merger, or sale of substantially all of its assets provided the assignee's financial condition and credit rating is comparable to or better than that of Customer and (as would be reasonably determined) the proposed assignee is not one of the Company's major competitors. Customer may not otherwise assign its rights or delegate its duties under this MSA either in whole or in part without the prior written consent of Company, and any attempted assignment or delegation without such consent will be void. Company may assign this MSA in whole or part as part of a corporate reorganization, consolidation, merger, or sale of substantially all of its assets. Company also may delegate the performance of certain Services to third parties, including Company's wholly owned subsidiaries, provided Company controls the delivery of such Services to Customer and remains responsible to Customer for the delivery of such Services. This MSA will bind and inure to the benefit of each party's successors and permitted assigns.
- 10.9. Notice. Any notice or communication required or permitted to be given hereunder may be delivered by hand, deposited with an overnight courier, sent by email, confirmed facsimile, or mailed by registered or certified mail, return receipt requested, postage prepaid, in each case to the address of the receiving party as listed on the Order Form or at such other address as may hereafter be furnished in writing by either party to the other party. Such notice will be deemed to have been given as of the date it is delivered, mailed, emailed, faxed or sent, whichever is earlier.
- 10.10. Relationship of Parties. Company and Customer are independent contractors and this MSA will not establish any relationship of partnership, joint venture, employment, franchise or agency between Company and Customer. Except as specifically set forth in Section 2.1, neither Company nor Customer will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent.
- 10.11. Entire MSA; Counterparts; Originals. This MSA, including all Appendices, Attachments, documents, Exhibits, and Schedules incorporated herein by reference, constitutes the complete and exclusive MSA between the parties with respect to the subject matter hereof, and supersedes and replaces any and all prior or contemporaneous discussions, negotiations, understandings and MSA's, written and oral, regarding such subject matter. Any additional or different terms in any purchase order or other response by Customer shall be deemed objected to by Company without need of further notice of objection, and shall be of no effect or in any way binding upon Company. This MSA may be executed in two or more counterparts, each of which will be deemed an original, but all of which together shall constitute one and the same instrument. Once signed by both parties, any reproduction of this MSA made by reliable means (e.g., photocopy, facsimile) is considered an original. This MSA may be changed only by a written document signed by authorized representatives of Company and Customer in accordance with this Section 10.11.
- 10.12. Right to Attorney Fees and Costs. In the event that any claim or dispute rises under this MSA, or about the terms, duties, or requirements of this MSA, and an action is instituted for a temporary restraining order, a preliminary injunction or pre-judgment remedies or due to the Customer's failure to pay for services and equipment in accordance with this MSA as set forth under section 10.6, the prevailing party in such matter or dispute will be entitled to an award of reasonable attorneys fees and costs.