

Nocturnal Technologies LLC

Additional Terms and Conditions

APPLICATION OF ADDITIONAL TERMS AND CONDITIONS

The services ("Services") referenced in the Agreement will be offered to the Customer by the Company, or a subsidiary, affiliate, director, member, or employee of NOCTURNAL TECHNOLOGIES. The Agreement (as defined below) between Customer and Company sets forth the legal rights and obligations governing the Company's provisioning, and delivery of Services by NOCTURNAL TECHNOLOGIES to the Customer and Customer's use of the Services. Customer shall contract for the Services on each NOCTURNAL TECHNOLOGIES Service Order Agreement, as Company may update such form from time to time ("SOA" or "Order") with applicable operating entities providing such Services. The Agreement consists of the terms and conditions in the Agreement, each SOA, the Product Terms and Conditions (as defined herein) and these general Service terms and conditions (the Product Terms and Conditions and the General Terms and Conditions are collectively herein after referred to as the "Additional Terms"), both set forth here (collectively, and as applicable, the "Terms and Conditions"), and applicable tariffs (collectively, the "Agreement"). The supplemental product terms and conditions applicable to certain NOCTURNAL TECHNOLOGIES products and incorporated herein by reference (the "Product Terms and Conditions"). Only those Product Terms and Conditions for specific Services, as listed therein, ordered or used by Customer are applicable to this Agreement. In the event of any inconsistency between the terms contained herein and the Product Terms and Conditions, and only to the extent of the inconsistency, the Product Terms and Conditions shall control. In the event of any inconsistency between the Agreement or the Additional Terms, exhibits, or Orders made a part or in accordance with the Agreement precedence shall be given to:

- (1) Product Terms and Conditions
- (2) General Terms and Conditions set forth herein
- (3) The terms of the Agreement; and
- (4) Any SOA or Order executed pursuant to this Agreement.

THESE GENERAL TERMS AND CONDITIONS, THE PRODUCT TERMS AND CONDITIONS, THE ACCEPTABLE USE POLICY ("AUP"), AND THE PRIVACY POLICY, MAY BE MODIFIED FROM TIME TO TIME AT COMPANY'S DISCRETION OR AS REQUIRED BY APPLICABLE LAW. CHANGES TO AGREEMENTS SHALL TAKE FORCE IMMEDIATELY UNLESS OTHERWISE SPECIFIED IN WRITING. CUSTOMER AGREES TO REVIEW SUCH CHANGED ITEMS FROM TIME TO TIME AND BE BOUND BY SUCH CHANGES, AS THEY PERTAIN TO THE PARTICULAR SERVICES CUSTOMER HAS CHOSEN OR

MAY CHOOSE IN THE FUTURE. IF COMPANY DETERMINES THAT CHANGES TO THESE GENERAL TERMS AND CONDITIONS, THE PRODUCT TERMS AND CONDITIONS, THE AUP, AND/OR THE PRIVACY POLICY WILL MATERIALLY AND DETRIMENTALLY AFFECT CUSTOMER'S SERVICE OR RIGHTS THERETO AND ARE NOT MANDATED BY LAW OR REGULATIONS, COMPANY WILL USE COMMERCIALY REASONABLE EFFORTS TO PROVIDE NOTICE OF SUCH CHANGES AND AN OPPORTUNITY TO OBJECT IN WRITING IN THE MANNER PRESCRIBED IN SUCH NOTICE. IN ANY CASE, THE CHANGES SHALL NOT DIMINISH ANY APPLICABLE SERVICE LEVEL AGREEMENTS ENTERED INTO AT THE SERVICE COMMENCEMENT DATE. CUSTOMER HEREBY CONSENTS TO THE INCORPORATION OF THE PRODUCT TERMS AND CONDITIONS, THE PRIVACY POLICY, AND THE AUP. CUSTOMER AGREES THAT ACCEPTANCE OF THE AGREEMENT CONSTITUTES CONSENT TO THE USE OF ELECTRONIC RECORDS. CUSTOMER MAY REQUEST HARD COPIES OF PART OR ALL OF THE TERMS AT ANY TIME BY CONTACTING NOCTURNAL TECHNOLOGIES. THE OFFERING AND PROVISION OF SERVICES IS SUBJECT TO ANY NOCTURNAL TECHNOLOGIES REQUIRED APPROVALS AND REQUIREMENTS. IF CUSTOMER USES THE SERVICES, CUSTOMER IS DEEMED TO HAVE ACCEPTED THE TERMS AND CONDITIONS, THE AUP, THE PRIVACY POLICY, AND THE APPLICABLE TARIFFS.

Terms with initial caps not otherwise defined herein shall have the meanings ascribed in the Agreement.

1. DEFINITIONS

- 1.1. Agreement: The SOA (as defined herein), collectively with its incorporated Terms and Conditions, including but not limited to those set forth herein, including the Product Terms and Conditions (as defined herein), is the Agreement between the Customer and the Company. The SOA may also be called a Work Order.
- 1.2. Authorization Code(s): A code in numbers and/or letters employed by a Customer to gain access to a Company Service.
- 1.3. Communications Facilities: Communications facilities that the Company is required to construct and/or to acquire in order to provide Service(s) to the Customer.
- 1.4. Company: The applicable NOCTURNAL TECHNOLOGIES entity that is/are providing Services under the Agreement.
- 1.5. Customer: The person, firm, corporation or other entity, which order or uses Service and is responsible for the payment of charges for such Service and compliance with the Company's regulations.
- 1.6. Domain Name: In computer networks using the Transfer Control Protocol/Internet Protocol, the domain name is an address on the Internet that is comprised of a hierarchical sequence of names (labels) separated by periods (dots), e.g. cyclonenetworks.net.
- 1.7. End of Service Date: The End of Service Date is the last day of the minimum written

notice of termination period.

- 1.8. FCC: The Federal Communications Commission.
- 1.9. Individual Case Basis (ICB): A service arrangement in which the regulations, rates and charges, product, or terms and conditions are non-standard and are developed based on the specific circumstances of the Customer's situation.
- 1.10. Initial Term: The initial service term as set forth on the SOA. If no Initial Term is set forth on the SOA, the term of the Agreement is three (3) years.
- 1.11. Invoice Date: The invoice date is the date the invoice was created by the Company and turned over to the proper authorities for delivery to the Customer.
- 1.12. Malware: is any software developed for the purpose of doing harm to a computer or a set of hardware and software which processes data in a meaningful way. Examples of malware are but are not limited to ad ware, viruses, and worms.
- 1.13. M/M: Month to month.
- 1.14. MOU: Minutes of use.
- 1.15. Network Number: The part of an Internet address that designates the network to which the addressed node belongs.
- 1.16. Non-Recurring Charges: The one-time charges for Services or facilities, including but not limited to, charges for construction, installation or special fees for which the Customer becomes liable at the time the Service Order is executed.
- 1.17. Notice Period: The period of time during which an agreement may be canceled.
- 1.18. Product Terms and Conditions: The supplemental product terms and conditions for certain Company Services may be found by contacting NOCTURNAL TECHNOLOGIES.
- 1.19. Recurring Charges: The monthly charges to the Customer for services, facilities and equipment which continue until the End of Service Date.
- 1.20. Service Commencement Date: The date on which the Company notifies the Customer that the Services are installed or connected and are available for use. The parties may mutually agree on a substitute Service Commencement Date. The duration of Services is calculated from the Service Commencement Date to the End of Service Date.
- 1.21. Service Order Agreement or "SOA": The written agreement for communications Services, including the Terms and Conditions, executed by the Customer and the Company in the format specified by the Company. This may also be called a "Work Order".
- 1.22. Services: The services provided to the Customer by the Company either pursuant to an SOA or through the Customer's use of the Company's services.
- 1.23. Station: Denotes the network control signaling unit and any other equipment provided at the Customer's premises which enables a customer to establish communications connections and to effect communications through such connections.

- 1.24. Third Party Product: A third party product is a product that was neither created by the Customer or the Company.
- 1.25. United States: The 48 contiguous states and the District of Columbia, Hawaii, Alaska, Puerto Rico, the US Virgin Islands, as well as the off-shore areas outside the boundaries of the coastal states of the 48 contiguous states to the extent that such areas appertain to and are subject to the jurisdiction and control of the United States, including but not limited to, Puerto Rico, U.S. Virgin Islands, and American Samoa.
- 1.26. User or End User: Any person or entity that obtains or uses the Company's Services, regardless of whether such person or entity is so authorized by the Customer.

2. LIMITATIONS ON SERVICE

- 2.1. Service Offered Subject to Availability: Service is offered subject to the availability on a continuing basis of all necessary facilities, including facilities the Company may obtain from other entities to furnish Service. The Company reserves the right to limit or to allocate the use of existing facilities, Services or systems, or of additional facilities, Services or systems offered by the Company, when necessary because of lack of facilities, or due to some other cause beyond the Company's control.
- 2.2. Right to Make Service Changes: The Company reserves the right to change, increase or decrease from time to time, in its discretion and without liability to Customer, the methods, processes and/or the suppliers by which Company provides Services to Customer, as well as the right to change, add to or delete Service(s) or Service offerings with appropriate notice to Customer.
- 2.3. Right To Change Additional Terms: Additional Terms may be modified from time to time at the Company's discretion or as required by applicable law. Customer agrees to review such changed items from time to time and be bound by such changes, as they pertain to the particular Services Customer chooses now or may choose in the future. If the Company determines changes to the Additional Terms will materially and detrimentally affect Customer's Service or rights thereto, the Company will use commercially reasonable efforts to provide notice of such changes and an opportunity to object in writing in the manner prescribed in such notice. In any case, the changes shall not diminish any applicable service level agreements entered into at the Service Commencement Date.
- 2.4. Company's Right to Block or Discontinue Service
 - 2.4.1. Network Blockage or Degradation: The Company reserves the right to immediately discontinue furnishing Services when the manner in which the Customer uses or misuses the Services results, or may result, in network blockage or other service degradation which adversely affects service to members of the public, the Customer, or other customers of the Company.
 - 2.4.2. Customer Violation of the Agreement or the Law: The Company reserves the right to immediately discontinue furnishing Services, when the Customer is using the Services or threatens to use the Services in violation of the provisions of the Agreement, including any applicable tariffs or in violation of the law.

- 2.4.3. Unlawful or Unauthorized Use: Services may be discontinued by the Company, at any time and without notice to its Customers, by blocking traffic to or from certain countries, cities, exchanges, or individual stations, by blocking origination for Company Services, or by blocking using certain customer authorization codes and/or access codes when the Company deems it necessary to take such action to prevent unlawful and/or unauthorized use of its Services. The Company also reserves the right to suspend, at any time and without notice to Customer, the origination of domestic and/or international traffic associated with any or all Services if the Company deems that such action is necessary to prevent any unlawful and/or unauthorized use of the Services as a result of the failure (whether in full or in part) of any systems, software and/or equipment, including, but not limited to fraud detection systems, that are utilized by Company to provide and/or support any Service.
- 2.4.4. Customer Responsible for Charges: The Customer will be responsible for all charges incurred, including charges associated with the Customer's use of Services that may be owed to other carriers, including but not limited to any access charges the Company may incur as a result of Customer actions.

3. WARRANTIES AND STANDARDS FOR SERVICES

- 3.1. Company represents and warrants to Customer that it has the right to provide Customer the Service specified herein, and that it is an entity, duly organized, validly existing and in good standing under the laws of its origin, with all requisite power to enter into and perform its obligations under this Agreement in accordance with its terms. Each party represents and warrants that each is an entity, duly organized, validly existing and in good standing under the laws of its origin, with all requisite power to enter into and perform its obligations under this Agreement in accordance with its terms. COMPANY MAKES NO REPRESENTATIONS OR WARRANTIES, WHETHER EXPRESSED, IMPLIED OR STATUTORY, REGARDING THE FITNESS OF SERVICES RENDERED BY EMPLOYEES, MEMBERS OR AGENTS, SYSTEM EQUIPMENT, COMPANY-OWNED OR PROVIDED EQUIPMENT USED BY THE CUSTOMER, INCLUDING ANY EQUIPMENT WITH RESPECT TO WHICH TITLE MAY TRANSFER TO CUSTOMER (EXCEPT TO THE EXTENT SET FORTH IN A SEPARATE NOCTURNAL TECHNOLOGIES SALE TRANSFER DOCUMENT). THIS INCLUDES, BUT IS NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS OF THE SERVICE OR EQUIPMENT FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT OF ANY THIRD PARTY RIGHTS. ADDITIONAL WARRANTY LIMITATIONS RELATED TO SPECIFIC PRODUCTS MAY BE FOUND BY CONTACTING NOCTURNAL TECHNOLOGIES.
- 3.2. Limitation of Liability
- 3.2.1. LIMITATION ON COMPANY'S LIABILITY FOR DIRECT DAMAGES: COMPANY SHALL NOT BE LIABLE FOR ANY LOSSES OR DAMAGES RESULTING FROM: (A) THE DELIVERY, INSTALLATION, MAINTENANCE, OPERATION, USE OR MISUSE OF AN ACCOUNT, CUSTOMER OR COMPANY EQUIPMENT, OR SERVICE RENDERED TO THE CUSTOMER; (B) ANY ACT OR OMISSION OF CUSTOMER OR ITS END USERS, OR ANY OTHER ENTITY FURNISHING

EQUIPMENT, PRODUCTS OR SERVICES TO CUSTOMER; OR (C) PERSONAL OR PROPERTY DAMAGES DUE TO THE LOSS OF STORED, TRANSMITTED OR RECORDED DATA RESULTING FROM THE SERVICE OF THE EQUIPMENT, EVEN IF COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. CUSTOMER AGREES THAT THE LIMITATIONS OF LIABILITIES SET FORTH IN THIS AGREEMENT ARE FAIR AND REASONABLE IN THE CIRCUMSTANCES OF THIS AGREEMENT.

- 3.2.2. LIMITATION ON COMPANY'S OR CUSTOMER'S LIABILITY FOR INDIRECT OR CONSEQUENTIAL DAMAGES: IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, EXEMPLARY, PUNITIVE OR OTHER CONSEQUENTIAL DAMAGES, WHETHER OR NOT FORESEEABLE, INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR THE LOSS OF DATA, GOODWILL OR PROFITS, SAVINGS OR REVENUE, HARM TO BUSINESS, WHETHER UNDER CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR ANY CAUSE WHATSOEVER. FOR PURPOSES OF THIS AGREEMENT, A PARTY'S OUT-OF-POCKET COSTS FOR DAMAGES OF THE KINDS SPECIFIED IN THE FIRST SENTENCE OF THIS SECTION 3.2.2 WHICH ARE RECOVERED FROM SUCH PARTY BY A THIRD PARTY SHALL BE DEEMED TO BE INDIRECT DAMAGES TO SUCH PARTY, EXCEPT TO THE EXTENT SUCH DAMAGES ARE PART OF CLAIMS FOR WHICH INDEMNIFICATION IS DUE UNDER SECTION 4 HEREIN.
- 3.2.3. Limitation of Company's Liability for Service Interruptions: With respect to claims or suits by Customers or any others for damages relating to or arising out of acts or omissions under the Agreement, Company's liability for service interruptions, if any, shall be limited to credit allowances as expressly provided in the Agreement and applicable tariffs or as otherwise set forth in the Additional Terms.
- 3.2.4. Limitation of Company's Liability for Installation Delay: The Company shall not be liable for any damages whatsoever resulting from delays in meeting Service delivery dates requested or specified by Customer, or inability to provide Service. Customer may not cancel the Agreement if there is a delay in installation related to the Services unless such delay is solely due to Company and such delay is longer than one hundred eighty (180) days beyond the parties agreed Service Commencement Date; provided however, in no event may Customer cancel if Company has incurred any cost, whether monetary or otherwise, associated with a Service Order.
- 3.2.5. Limitation of Company's Liability for Force Majeure Events: In no event shall Customer have any claim or right against Company for any failure of performance due to causes beyond its control, including but not limited to: acts of God, fire, explosion, vandalism, cable cut, storm, flood or other similar occurrences; any law, order regulation, direction, action or request of the United States Government, or of any other government, including state and local governments having or claiming jurisdiction over Company or of any department, agency, commission, bureau, corporation, or other instrumentality of any federal, state, or local government, or of any civil or military authority; national emergencies; unavailability of materials or rights-of-way; insurrections; riots, wars; or strikes, lock-outs, work stoppages, or other labor difficulties, supplier failures, shortages,

breaches or delays.

- 3.2.6. **Limitation of Company's Liability for the Facilities of Others:** The Company assumes no responsibility for the availability or performance of any systems or related facilities under the control of other entities, or for other facilities provided by other entities used for Service to the Customer, even if the Company has acted as the Customer's agent in arranging for such facilities or Services. Such facilities are provided subject to such degree of protection or non-preemptability as may be provided by the other entities. In addition to other limitations of liability set forth in the Agreement, the Company shall not be liable for any act or omission of any other company or companies furnishing a portion of the Service, or for damages associated with Service, circuits, or equipment that it does not furnish, or for damages which result from the operation of Customer-provided systems, equipment, facilities or services which are interconnected with Company Services.
- 3.2.7. **Limitation of Company's Liability for "On-Line" Services:** Company "on-line" Services are provided on an "As Is" basis. Customer acknowledges and accepts that communications and transactions conducted on-line may not be absolutely secure, that there may be system failure that may limit Customer's accessibility to on-line Services and that on-line Services are not guaranteed to be error free. By enrolling for and using such on-line Services, Customer agrees to accept all responsibility and risk associated with the use of such on-line Service and the Internet generally.
- 3.2.8. **Limitation of Company's Liability for Misuse of Customer's Service:** The Company shall not be liable for the use, misuse, or abuse of a Customer's Service, Equipment, or Customer's facilities by Customer, Customer's agents or employees, third parties including, without limitation, members or employees of the Company, or the members of the public
- 3.2.9. **Limitation of Company Liability for Billing Errors:** The liability of the Company for errors in billing that result in overpayment by the Customer shall be limited to a credit equal to the dollar amount erroneously billed. Furthermore, no errors shall change or diminish Customer's obligation to pay for Services rendered or used.
- 3.3. **Limitation of Company Liability for Licensing Errors or Omissions:** All operating systems, software, and any other relevant licensing is the Customer's responsibility. The Company cannot and will not be held responsible for any licensing violations of the Customer. The Customer acknowledges this and agrees to purchase any necessary licensing components needed to fulfill the requirements set forth in any and all Company and Third Party Products.
4. **INDEMNIFICATION**
 - 4.1. **Customer's Indemnification of Company:** Customer and/or end user shall indemnify, defend and hold harmless Company and its parent company, affiliates, subsidiaries, employees, directors, officers, and agents from and against all claims, demands, actions, causes of actions, damages, liabilities, losses, and expenses (including reasonable attorney's fees) incurred as a result of:
 - 4.1.1. Claims for libel, slander, infringement of copyright or unauthorized use of trademark,

trade name or service mark arising out of use of the Service, including any violation of the Agreement or related acts or omissions by Customer, its end users, or other users of its account, or the placement or transmission of any message, information, software or other materials on the Internet by Customer or end users of Customer's account;

- 4.1.2. Claims for patent infringement arising from combining or connection of Customer or third party materials, equipment, services, and/or facilities;
- 4.1.3. Claims for damage to property and/or personal injuries (including death) arising out of the gross negligence or willful act or omission; and
- 4.1.4. Claims related to any Customer representations herein regarding Customer's traffic and Customer's use of Services, including but not limited to those set forth in Sections 5 .8 and 6.1.
- 4.2. Company's Indemnification of Customer: Company shall indemnify, defend and hold harmless the Customer and its parent company, affiliates, employees, directors, officers, and agents from and against all claims, demands, actions, causes of actions, damages, liabilities, losses, and expenses (including reasonable attorney's fees) incurred as a result of:
 - 4.2.1. Claims for patent or copyright infringement relating to the Company's equipment or Company's software used by Company to provide the Services hereunder; and
 - 4.2.2. Claims for damages to property and/or personal injuries (including death) arising out of the gross negligence or willful act or omission of Company.
- 4.3. These indemnifications shall survive the termination of the Agreement.

5. CUSTOMER'S OBLIGATIONS

- 5.1. Initiation of Customer's Obligations: The execution of the Agreement by the Customer and acceptance thereof by the Company initiates the respective obligations of the parties. If the Customer uses the Services, but does not execute an SOA, the Customer is deemed to have consented to the terms of the SOA, including the incorporation of these General Terms and Conditions and any applicable Product Terms and Conditions.
- 5.2. Use and Maintenance of Equipment:
 - 5.2.1 Customer Must Maintain manufacturer warranties or service agreements on all equipment, servers, workstations, and networking gear. If no agreement is available from the original vendor or manufacturer, the customer will be responsible for all fees, parts, and repairs for equipment
 - 5.2.2 Customers should use a conscience effort to keep equipment maintained and up to date by using Service from Company and advice obtained from the Company.
 - 5.2.3 Customer agrees to maintain a suitable working environment for Company representatives.
 - 5.2.4 Customer agrees to provide a suitable environment for equipment maintained, serviced, owned by, or leas from the Company. Suitable environmental conditions may be obtained by contacting Company or via direct recommendation by a representative of the

Company.

- 5.3 Non SOA Customers: Work performed by Company for Customer that is not covered by an Agreement or for a Customer that is not bound under any Agreement shall be bound by the Additional Terms and Conditions and charged according the currently Active Services Schedule.
- 5.4 Prohibition on Customer's Use of Company Service Marks & Trademarks: A Customer shall not: (a) use any service mark or trademark either of the Company or any of its affiliated companies or of which the Company or any of its affiliated companies is a licensee, or (b) refer to the Company or any of its affiliated companies in connection with any Service, product, equipment offering, promotion, or publication of the Customer, without the prior written consent of the Company.
- 5.5 Customer's Agreement to Use of Electronic Records: Customer agrees and consents to the use of electronic records by the Company. Customer may request hard copies of part or all of the Additional Terms at any time by calling NOCTURNAL TECHNOLOGIES.
- 5.6 Notice of Claims: Customer shall immediately notify Company of any notices that are served on Customer that might adversely affect Company, including but not limited to notices of any claims or proceedings that involve the Services.
- 5.7 Notice of Problems: Customer shall promptly notify Company of any errors, "bugs" or problems with the Services of which Customer becomes aware.
- 5.8 Customer's Request for Additional Services: Should additional service(s) be requested by Customer subsequent to execution of the Agreement, Customer and Company agree to execute an additional agreement for such service(s). Customer agrees that additional Services are offered under and pursuant to the terms, conditions and limitations as set forth in any applicable tariff(s) and such additional agreement(s).
- 5.9 Cooperation: Customer agrees that, if another carrier and/or regulatory agency determine it is necessary to audit the traffic which is the subject of the Agreement, Customer will cooperate in any such investigation. In addition, to the extent any third party attempts to recover access charges from Company as a result of such audit/investigation, Customer agrees that it will indemnify and hold harmless Company for any and all costs and charges resulting from such third party actions. This does not prohibit Customer from challenging charges assessed by the third party or the classification of its traffic being subject to access charges.
- 5.10 Customer's Compliance with FCC Registration Requirement: Customer warrants and represents that if it is required by FCC rules or regulations to file FCC Form 499-A, it had on file with the FCC a valid, accurate and up-to-date FCC Form 499-A prior to the Service Commencement Date.
- 5.11 Customer's Compliance with Licensing Requirements: The Customer acknowledges and agrees to purchase any necessary licensing components needed to fulfill the requirements set forth in any and all Company and Third Party Products.
- 5.12 Customer Agrees to Maintain Documentation: Customer agrees that it has the sole responsibility and burden to keep current copies, understand and document any changes

made to any and all agreements between the Customer and the Company. This includes but is not limited to the Additional Terms and Conditions. Customer understands that it may contact the Company to obtain a written copy of any agreements that pertain to the relationship between the Customer and the Company. The Customer may have a representative of the Company describe any changes made at no cost to the Customer.

6. BILLING AND PAYMENT ARRANGEMENTS

- 6.1. Customer Is Responsible For Payment of All Charges, Including Customer Service Misuse: Customer shall pay Company for Services pursuant to the Agreement, including the recurring, non-recurring rates and charges and the usage charges set forth in the Order. An Order shall delineate the type of Service, quantity of product, location(s) serviced, order term and other information necessary for Company to provide Service to the Customer. The Customer is responsible for payment of all charges for Service furnished to the Customer. This responsibility is not changed by virtue of any use, misuse, or abuse of the Service or Customer provided systems, equipment, facilities, or Services interconnected to the Service, which use, misuse, or abuse may be occasioned by third parties, including, without limitation, the Customer's employees or other members of the public. For example, the Customer agrees to pay the Company for all charges billed as a result of any use of the Customer's authorization code(s), whether such use is by Customer or by a third party in connection with a lost, stolen or misappropriated authorization code, or otherwise. It is the Customer's responsibility to inform the Company that an authorization code(s) has been stolen or lost.
- 6.1.1 Rates and Fees: The rates and fees for Services shall be set forth in the applicable SOA and shall be valid for the Initial Term and any renewal term unless otherwise agreed; provided however, all rates for international Services are subject to change on five (5) days notice from Company (with new rates automatically effective on the 6th day from the date of such notice). If no rates are set forth, all rates shall be the Company's current rates as defined in the Services Schedule.
- 6.2. Billing Begins on Service Commencement Date: Regular billing for the Services will begin on the Service Commencement Date. Thereafter, invoices will be for the specified period of Service (monthly or yearly) and are due upon receipt. Receipt shall be presumed within three (3) days after mailing. Monthly Recurring Charges are billed in advance while Usage Charges are billed in arrears. When Service is initiated on other than the first day of the month or terminates on other than the last day of the month, the charge for that month shall be determined by prorating the monthly payment by the number of days during which Service was provided.
- 6.3. Billing Terminates at End of Service Date: For the purpose of billing, billing terminates at the End of Service Date.
- 6.4. Non-recurring Charges: Non-recurring charges are payable upon the Service Commencement Date or as otherwise billed by the Company.
- 6.5. Recurring Charges: Recurring charges which are fixed in amount and not dependent on usage are billed in advance.
- 6.6. Usage Charges: Usage and related charges will be billed by the Company in arrears.

- 6.7. Other Fees Not Included in Service Prices
- 6.7.1. Federal, State, and Other Fees: Customer is responsible for federal, state, local, franchise, or other surcharges, taxes and fees. These may not be defined at the time of the agreement.
- 6.7.2. Set-up, Installation and Disconnect Fees: Customer agrees to pay the applicable set-up, installation and disconnect fees. Installation and disconnect fees are non-refundable. Prices for Services contemplate installations made in normal locations and under normal working conditions. Any installations to be made under other circumstances are subject to additional charges.
- 6.7.3. Charges Imposed By Others: If an entity other than the Company imposes charges on the Company associated with the provision of Services to the Customer or while performing Service to the Customer, these charges will be passed onto the Customer.
- 6.8. Additional Payment Required for Additional Services: Customer agrees that any additional Services requested, whether verbally or in writing, or used (including but not limited to an upgrade or relocation of Customer's circuit) will incur additional fees and charges, and Customer agrees to pay these fees and charges when invoiced.
- 6.9. Interest Owed on Past Due Amounts: Invoices not paid in full within thirty (30) days of the invoice date, unless otherwise specified on the invoice, will be past due and subject to a 1.5% per month interest fee or the maximum rate permitted by law, whichever is greater, on all past-due balances. Interest on past due amounts will be applied at the sole discretion of the Company.
- 6.10. Fees Owed on Past Due Amounts: Invoices not paid in full within thirty (30) days of the invoice date, unless otherwise specified on the invoice, will be past due and subject to an administrative late processing fee. The fee for late payment shall be determined by the amount billed on the invoice. The fees are set forth as follows:
- 6.10.1. If the amount billed is under \$1000.00 the late processing fee shall be \$50.00.
- 6.10.2. If the amount billed is over \$1000.00 the late processing fee shall be \$50.00 per \$1000 invoiced. The invoiced amount shall be rounded up to the next \$1000.00 increment when figuring out the late processing fee.
- 6.11. Credit Balance in Closed Accounts: If a Customer whose account for Services has been closed has a credit balance showing, the Company will transfer the credit to another account of the Customer, if there is one, or will mail a check for the balance to the Customer if Company believes it has a valid and current address. If the Company is not certain that it has a valid and current address, it will include a notice with the final invoice, which will be mailed to the Customer's last known address, asking the Customer to verify the address so that it can make a refund, or it will write to the Customer at that address and request verification. Such verification can be made by calling a designated telephone number or by writing to a specified address. Upon receiving verification, a check for the balance will be mailed. If the final invoice or the notification letter is returned by the post office as undeliverable, or if no response is received within thirty (30) days of mailing, the Company at its option may begin applying a closed account maintenance charge of \$2.50 per month in the second monthly billing period following

the month in which the account was closed, and will continue to apply that charge until the Customer requests a refund in writing or the balance is exhausted.

- 6.12. Customer Responsible for Collection Costs: Customer agrees to reimburse Company for any costs incurred as a result of any collection activity, including but not limited to reasonable attorneys' fees, unless otherwise prohibited by law.
- 6.13. Billing Modification Due to De Minimus Amounts Owing: The Company's invoices are due upon receipt, as otherwise noted in the Agreement, unless the Company indicates: (1) on the invoice some portion of or all of the charges on the invoice are not due until the balance reaches a specified amount because of the de minimus amount due; or (2) the Company temporarily suspends the billing process because of the de minimus amount due until the amount due from the Customer reaches a level, which, at the Company's sole discretion, is deemed large enough to justify re-initiating the billing process; or (3) or the Company modifies the billing process for Customer, in its sole discretion, because of the de minimus amount due, and invoices Customer every other month rather than monthly unless a Customer invoiced in such a manner requests monthly billing.
- 6.14. Refunds for Services and Hardware Sold: The Company shall grant no refunds, reimbursements, or credits for any type or kind of consulting services already rendered. The Company shall also grant no refunds on products sold unless otherwise specified in writing by the Company.

7. AGREEMENT TERM, TERM RENEWAL AND TERMINATION/DEFAULT

- 7.1. Termination by Either Party and Renewal: The initial Service term shall be as set forth on the Order (as specified, the "Initial Term" or "Term" of such Order) and shall begin on the Service Commencement Date. If no Initial Term is set forth, the term of such Order shall be three (3) years. If neither the Customer nor Company cancels the Agreement before the end of the Term, the Agreement will automatically renew for a similar term and at the rates specified in the Agreement (unless otherwise stated in the notice) and pursuant to the terms of the Agreement, including any applicable tariffs. Unless Company has already provided notice of its intent to terminate the Order, Company will notify Customer in writing at least sixty (60) days prior to the expiration of the Agreement, regarding the pending expiration of the Agreement and the automatic renewal of the Agreement if no action is taken prior to expiration.
 - 7.1.1 If Customer notifies Company of its decision to cancel the Agreement within the notice period, actual termination of Service may not occur until thirty (30) days after receipt of Customer's notification. If Customer chooses to take Service for a minimum term or minimum commitment and Customer cancels Service before the end of the Term or prior to the retirement of the minimum commitment or Service is terminated by Company for cause, actual termination of Service may not occur until thirty (30) days after receipt notice and Customer shall be subject to various early termination charges for the Agreement, or for any commitment shortfall, as set forth therein.
 - 7.1.2 If the term of the Agreement is month-to-month, the Agreement may be terminated by either party providing the other with written notice of termination at least thirty (30) days, but not greater than sixty (60) days prior to the termination date.

- 7.1.3 If the term of the Agreement is not month-to-month, the Agreement may be terminated by either party providing the other with written notice of termination at least sixty (60) days prior to the termination date. Written notice of cancellation will not be accepted if given less than sixty (60) or greater than ninety (90) days prior to the termination date.
- 7.2. Customer Default/Termination After Service Commencement Date: Except as otherwise required by law or applicable regulation, if, after the Service Commencement Date, Customer: (a) fails to pay any amount required under any Agreement with NOCTURNAL TECHNOLOGIES when due and such failure continues for ten (10) days after written notice to Customer that the same is due and payable; (b) fails to comply with any other material provision of the Agreement and such noncompliance continues for thirty (30) days after written notice to Customer thereof; or (c) Customer cancels or terminates Service, including any part of an integrated Service offering at any time before completion of the Initial Term or any renewal Term, then Company may elect to pursue one or more of the following courses of action, as applicable: (i) terminate, in whole or in part, any or all of Customer's Service(s) ordered hereunder, whereupon all charges for the remaining Term are immediately due and payable for the terminated Service(s), and Customer shall pay an early termination charge that shall be equal to seventy-five percent (75%) of Customer's average monthly usage for the six (6) months prior to the termination month (or such lesser period if fewer than six (6) months of Service were utilized), times the number of months remaining in the Term of the Agreement (provided, however, that in the event Customer has made an annual or other revenue commitment, the shortfall of that commitment over the remaining Term shall be the measure of the early termination charge); (ii) take immediate appropriate action to enforce payment, including suspension or discontinuance, in whole or in part, of all or any part of the Services ordered, and/or (iii) pursue any other remedies as may be provided at law or in equity.
- 7.3. Customer Default/Termination Before Service Commencement Date: In addition to any other rights and remedies that Company may have, including those set forth in the Agreement, Customer agrees that if Customer cancels, terminates or breaches the Agreement after execution of the Agreement but prior to the Service Commencement Date, except as termination is otherwise specifically permitted in the Agreement, Customer shall pay Company an early termination charge of five (5) months of the anticipated monthly recurring charges or commitment level, along with all nonrecurring charges.
- 7.4. Construction or Acquisition of Equipment or Facilities: In the event Company is required to construct facilities and/or acquire equipment to provide Service to Customer, Customer acknowledges and agrees that Company will incur significant costs in providing Service to Customer. Customer agrees that all costs for Equipment or facilities will be paid for by the customer before the Service Commencement Date.
- 7.5. Service Delays: Company will notify Customer that the Services are installed or connected and available for use. The date of such notice shall be the Service Commencement Date. Billing will begin on the Service Commencement Date. The parties may mutually agree in writing upon a substitute Service Commencement Date. If Customer notifies Company in writing that it is not prepared to utilize the Services or

facility immediately after Company has notified the Customer that the requested Service is ready for use, Company may nonetheless begin billing the Customer on the Service Commencement Date. Company may bill Customer for any costs Company has incurred in provisioning the Services. Customer agrees to cooperate with Company to accomplish Service activation by providing reasonably access to Customer's premises and facilitating testing and Service delivery requirements and Customer agrees Company shall have reasonable access to Customer's premises to repair, maintain, or retrieve Company's equipment throughout the term of the Agreement. Customer may not cancel the SOA if there is a delay in installation related to the Services unless such delay is solely due to Company and such delay is longer than one hundred eighty (180) days beyond the parties agreed Service Commencement Date; provided however, in no event may Customer cancel such Order if Company has agreed to construct or is constructing communications facilities to provide service to Customer.

7.6. Termination Not an Exclusive Remedy: Any action outlined herein by Company shall not be construed as an exclusive remedy and shall not waive Company's right to pursue any other rights and remedies. It is agreed that Company's damages in the event of Service cancellation or termination shall be difficult or impossible to ascertain. The early termination charges are intended, therefore, to establish liquidated damages and are not intended as a penalty.

8. CUSTOMER CREDIT HISTORY, SECURITY DEPOSITS AND OTHER FORMS OF PAYMENT ASSURANCE

8.1. Company May Seek Customer Credit History: Customer authorizes Company to request information from a reporting agency to enable Company to assess Customer's credit history and agrees that such action is not the extension of "credit" to Customer, and that Company may alter any Service or billing arrangements as a result, upon notice to Customer.

8.2. Applicants or Customers May be Required to Provide a Deposit or other Assurances of Payment: At the discretion of the Company, Applicants for Service or existing Customers whose financial condition is not acceptable to the Company, or is not a matter of general knowledge, may be required at any time to provide the Company a deposit, bond, retainer, or other financial assurance. It may be made in cash or the equivalent of cash, up to an amount equal to the applicable Agreement, up one (1) years service or estimated monthly recurring charges by the Company. Any applicant or Customer may also be required, at any time, whether before or after the commencement of Service, to provide such other assurances of, or security for, the payment of the Company's charges for Services to be provided as the Company deems necessary including, without limitation, advance payments for Service, third party guarantees of payment, pledges, or other grants of security interest in the Customer's assets, and similar arrangements. The required deposit, bond or other financial assurances may be increased or decreased by the Company as it deems At the Company's option. Deposit, bond, retainer, or other financial assurance provided by the Customer shall not be refundable.

8.3. Disconnection for Non-payment: If the Company disconnects a Customer's Service for non-payment of past due amounts, the Customer's Service will remain disconnected until such time as the Company receives payment for all past due amounts, including interest,

and confirms the availability of sufficient funds to satisfy the amount of payment.

9. BILLING DISPUTES

9.1. Customer Must Dispute Bills Within Thirty (30) Days of Invoice: In the event Customer disputes any billing by Company, Customer shall notify Company in writing within the payment period specified above (providing the billing identification, Circuit number, any trouble ticket number and an explanation for the dispute), and shall nevertheless pay the affected invoice within the payment period specified above. Customer may not withhold payment of the disputed amount of the invoice. Company will investigate the dispute and attempt to resolve the billing issues within fifteen (15) days. No charges may be disputed more than sixty (60) days after the date such charges are invoiced and if not disputed within that time, such charges shall be deemed undisputed by Customer. Payment shall not prejudice Customer's right to dispute charges, so long as they are disputed in the manner and within the time specified in this Section. The parties will cooperate in good faith to resolve any such disputes within a thirty (30) day period after the dispute is submitted to Company. If the dispute is not resolved during this period, then either party may seek alternative dispute resolution in accordance with the Dispute Resolution process set forth herein. If a disputed amount is determined to be a legitimate charge, interest, not to exceed 1.5% monthly may be charged on the unpaid balance, not paid within thirty (30) days after the original invoice date. If this interest rate exceeds the maximum rate allowable by law, then the interest chargeable shall be equal to the maximum rate allowed by law.

9.2. The Date of the Dispute: The date of the dispute shall be the date Company receives sufficient documentation to enable it to investigate the dispute.

9.3. The Date of Dispute Resolution: The date of the resolution is the date Company completes its investigation and notifies Customer of the disposition of the dispute.

10. DISPUTE RESOLUTION PROCESS

10.1. Dispute Resolution Process: Except for (i) action seeking a temporary restraining order or injunction, (ii) a suit to compel compliance with this dispute resolution process, (iii) disputes relating to the lawfulness of rates, terms, conditions or practices concerning Services that are subject to the Communications Act of 1934, as amended, or the rules and regulations of the FCC, a state public utility commission or other administrative agency, (iv) Customer non-compliance with publicity provisions, or (v) billing or payment disputes or collections matters, all of which may be litigated (or brought before the applicable agency in the case of subsection (iii)) at the election of Company, the parties agree to use the dispute resolution procedures set forth in this Section with respect to any controversy or claim arising out of or relating to the Agreement or its breach.

10.2 Upon ten (10) days written notice, either party may submit disputes to binding arbitration by a single arbitrator with a professional arbitration service selected by the parties. If the parties do not otherwise agree on an arbitration service, such services, shall be provided pursuant to the American Arbitration Association ("AAA") Commercial Arbitration Rules and Mediation Procedures. The costs of arbitration, including the fees and expenses of the arbitrator, shall be paid equally by the parties. Each party shall bear

the cost of preparing and presenting its case. The parties agree that Du Page County, Illinois shall be the location for the arbitration hearing.

10.3 The parties agree that this Section 11 and the arbitrator's authority to grant relief shall be subject to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, et seq. ("FAA"), the provisions of this Agreement, and the AAA Code of Ethics for Arbitrators in Commercial Disputes. The parties agree that the arbitrator shall have no power or authority to make any award that provides for punitive or exemplary damages or damages otherwise limited or excluded in this Agreement. The arbitrator's decision shall be final and binding. The award may be confirmed and enforced in any court of competent jurisdiction. All post-award proceedings shall be governed by the FAA.

11. CANCELLATION FOR CAUSE BY THE COMPANY

11.1. **Company's General Right To Discontinue Service(s):** The Company may discontinue the furnishing of any and/or all Service(s) to a Customer, without incurring any liability, immediately and without notice if the Company deems, in its sole discretion, that such action is necessary to prevent or to protect against fraud, tricks, tampering, schemes, false or invalid numbers, false credit devices, electronic devices, or any other fraudulent means or devices or to otherwise protect its personnel, agents, facilities or services or to protect against actual or potential adverse financial effect.

11.2. **Customer's Refusal to Furnish Information:** The Company may discontinue the furnishing of any and/or all Service(s) to a Customer, without incurring any liability, immediately and without notice if Customer refuses to furnish information to the Company regarding the Customer's creditworthiness, its past or current use of Company's communications Services, the jurisdictional nature or characteristics of the Services or its planned use of Service(s).

11.3. **Customer Provided False Information:** The Company may discontinue the furnishing of any and/or all Service(s) to a Customer, without incurring any liability, immediately and without notice if Customer provided false information to the Company regarding the Customer's identity, address, creditworthiness, past or current use of Company's communications Services, jurisdictional nature or characteristics of the Services or its planned use of Service(s).

11.4. **Customer Refuses to Provide Payment Security:** The Company may discontinue the furnishing of any and/or all Service(s) to a Customer, without incurring any liability, immediately and without notice if Customer states that it will not comply with a request by the Company for security for the payment for Service(s) or will not pay any amounts owing.

11.5. **No Use of Service:** The Company may discontinue the furnishing of any and/or all Service(s) to a Customer, without incurring any liability, immediately pursuant to this Section: (i) without notice, if the Customer's account has shown no usage for six (6) consecutive months; (ii) without notice, if a Customer who accesses the Service by use of an authorization code has not used the Service for ninety (90) days.

11.6. **Customer Insolvency:** The Company may discontinue the furnishing of any and/or all Service(s) to a Customer, without incurring any liability, immediately and without notice

if Customer becomes insolvent, assigns for the benefit of creditors, files for bankruptcy or reorganization, fails to discharge an involuntary petition within the time permitted by law, or abandons Service.

- 11.7. **Condemnation of Facilities:** Upon notice, Company may discontinue or suspend Service to Customer upon condemnation of any material portion of the facilities used by Company to provide Service to Customer or if a casualty renders all or any material portion of such facilities inoperable beyond feasible repair.
- 11.8. **Customer Obligated to Pay:** The discontinuance of Service(s) by the Company pursuant to this Section does not relieve the Customer of any obligation to pay the Company for charges past or now due and owing for Service(s) furnished up to the time of discontinuance. In the event the Company cancels the Customer's Service for cause, and the Customer is committed to a term or other plan for which charges apply, the Customer will be obligated to pay as though it had terminated Service early for its own convenience.

12. SYSTEMS SECURITY

- 12.1. **Customer's Use of Company's Systems:** Where Customers are permitted access to the Company's computer systems and data for the purpose of managing and maintaining their Services, they will comply with the following:
 - 12.1.1. Customers may access the Company's systems only to the extent required to administer and manage the Customer's systems. Access to information beyond that authorized may result in civil and/or criminal penalties.
 - 12.1.2. Customers may not disclose or use information which may be learned as a consequence of access to Company systems except as may be directly required to ensure the proper operations of the Customer's systems. Customers must take all reasonable precautions to prevent any other person or entity that does not have a need to know from acquiring such information.
 - 12.1.3. Customers shall not in any manner or form disclose, provide, or otherwise make available, in whole or in part, Company documentation, any related material or any other confidential material except to those who have a need to know incident to the use of Services. All documentation shall remain the property of the Company and may not be copied, reproduced, or otherwise disseminated without the prior written permission of the Company.
 - 12.1.4. Customers shall take all responsible precautions to maintain the confidentiality of all Company documents. Such precautions shall include the use of Personal Identification Numbers (PINs) and passwords selected by and known only to the Customer's individual authorized users. Company telephone numbers and dial-up access number(s) assigned to Customers by the Company, PINs, or any aspect of access and sign-on methodology shall not be posted or shared with others under any circumstances. Customers shall follow normal logoff procedures prior to leaving a terminal unattended. Customers should report any known or suspected attempt by others to gain unauthorized access.
- 12.2. **Security Access Devices:** In the event that a security access device assigned to a Customer for dial-up access is lost, stolen, or misplaced, the Customer must notify the

Company immediately.

- 12.3. Security of Passwords and Authorization Codes: Certain service offerings by Company may require the use of passwords for access. For these Services, a user ID and password will be selected for each user. Customer agrees that the security of all user ID and password information is extremely important, that it is necessary to access these systems, should be kept strictly confidential and that its accidental or unauthorized disclosure may have serious consequences. By enrolling for and using these Services, Customer accepts sole responsibility for the security of this information. Company shall have no liability for the consequences of Customer's failure to maintain the security of its user information, or the risks associated with using these Services.
- 12.4. Security of Web Hosting User IDs: In addition to the section entitled "Security of Passwords and Authorization Codes" above, Customer is responsible for the use of all user IDs associated with Customer's Web Hosting account, whether used under any name or by any person, and for ensuring full compliance with the Agreement by all users of Customer's user IDs or account. Customer is responsible for maintaining the confidentiality of Customer passwords. In the event of a breach of security through Customer's account, Customer will be liable for any unauthorized use of the internet service until Customer notifies Company's customer service department.
13. ALLOWANCE FOR INTERRUPTIONS
 - 13.1. Credit for Interruptions: Except as otherwise provided in applicable tariffs or service level agreements, in which event such tariffs or service level agreements shall control, when the use of Service or facilities furnished by the Company is interrupted due to any cause other than the negligence or willful act of the Customer, or the operation or failure of the facilities or equipment provided by the Customer, and except as otherwise provided in the Agreement or applicable tariffs, upon notice by the Customer, a pro rata adjustment of the monthly Recurring Charges subject to interruption will be allowed for the Service and facilities rendered useless and inoperative by reason of the interruption whenever said interruption continues for a period of one (1) hour or more from the time the interruption is reported to or known to exist by the Company. If the Customer reports a Service or facility to be inoperative but declines to release it for testing and repair, it is considered to be impaired, but not interrupted.
 - 13.2. Application of Credit Allowances: For calculating credit allowances, every month is considered to have thirty (30) days. A credit allowance is applied on a pro rata basis against the monthly Recurring Charges specified in the Agreement and is dependent upon the length of the interruption. Only those facilities on the interrupted portion of the Service will receive a credit. Credit allowances for Service outages that exceed twenty-four (24) hours in duration will be rounded up to the next whole twenty-four (24) hours.
 - 13.3. Limitations on Allowances: No credit allowance will be made for:
 - 13.3.1. Interruptions due to the negligence of, or noncompliance with the provisions of the Agreement, including applicable tariffs, by the Customer or other entity providing Service in connection with the Company's Service;
 - 13.3.2. Interruptions due to the negligence of any person other than the Company including but

- not limited to, the Customer or other entities connected to the Company's facilities;
- 13.3.3. Interruptions due to the failure or malfunction of non-Company equipment, systems or Services;
 - 13.3.4. Interruptions of Service during any period in which the Company is not given full notice and/or free access to its facilities and equipment for the purpose of investigating and correcting interruptions;
 - 13.3.5. Interruptions of Service during a period in which the Customer continues to use the Service on an impaired basis;
 - 13.3.6. Interruptions of Service during any period when the Customer has released Service to the Company for maintenance purposes or for implementation of a Customer order for a change in Service arrangements;
 - 13.3.7. Interruption of Service due to circumstances or causes beyond the control of the Company.
- 13.4. Use of Alternative Service Provided by the Company: Should the Customer elect to use an alternative Service provided by the Company during the period that a Service is interrupted, the Customer must pay the charges for the alternative service used.
14. CUSTOMER PRIVACY AND CONTENT
- 14.1 Customer Privacy: Upon contacting Company for Services or information, Company may request customer information. This information will be kept with regards to Company's Privacy Policy.
 - 14.2 Eavesdropping: Company facilities are used by numerous Customers or entities including, without limitation, other subscribers to Company's Services. As a result, there is a risk that Customer could be subject to "eavesdropping." This means that other Customers or entities may be able to access and/or monitor your use of the Service. This risk of eavesdropping exists not only with our facilities, but also on the Internet and other services to which access is provided as a part of the Service. Any sensitive or confidential information posted, stored, transmitted or disseminated by Customer is done so at the sole risk of the Customer, and neither Company and its parent company, affiliates, subsidiaries, employees, directors, officers, or agents shall have any liability whatsoever for any claims, losses, actions, damages, suits or proceedings arising out of or otherwise relating to such actions of Customer. Customer acknowledges that software programs claiming to be capable of encryption are commercially available. The Company makes no representation or warranty regarding the effectiveness of these programs.
 - 14.2. Customer Responsibility for Content: Customer acknowledges that Internet sites and use of the Internet might consist of, include and/or provide access to images, sound, text and other content that may be unsuitable for children and may be objectionable to adults. Customer acknowledges that Company and its parent company, affiliates, subsidiaries, employees, directors, officers, and agents are not responsible for any such content or material and agrees that access to same through use of the Services is at Customer's sole risk. The reliability, availability and performance of resources accessed through the

Internet are beyond Company's control and are not in any way warranted or supported by Company. Customer acknowledges that safeguards relative to copyright, ownership, decency, obscenity, reliability and integrity of content may be entirely lacking with respect to the Internet and content accessible through it. Company does not evaluate, endorse or in any way vouch for the accuracy, completeness, truthfulness or reliability of any service, opinion, material of information made available through the Services. Customer assumes all risk and liability of its use of the Internet.

- 14.3. Malware: Company makes no representation or warranty that any software or content installed on Customer computer(s) or downloaded from the Service does not contain malware or other harmful features and it is the sole responsibility of the Customer to take appropriate precautions to protect any computer or other hardware from damage to its software, files or data as a result of any such malware or other harmful feature. Company may, but is not required to, terminate all or any portion of the installation or operation of the Service if malware is found to be present on Customers system(s). Company is not required to provide you with any assistance in removal of the malware. If Company, in its sole discretion, decides to install or run malware check software on Customer computer(s), Company make no representation or warranty that the malware check software will detect or correct any or all malware. Customer acknowledges that additional charges will be incurred for any service call made or required on account of any problem related to malware or other harmful feature detected on Customer system(s). NEITHER Company and its parent company, affiliates, subsidiaries, employees, directors, officers, or agents SHALL HAVE ANY LIABILITY WHATSOEVER FOR ANY DAMAGE TO OR LOSS OR DESTRUCTION OF ANY HARDWARE, SOFTWARE, FILES OR DATA RESULTING FROM ANY MALWARE OR OTHER HARMFUL FEATURE OR FROM ANY ATTEMPT TO REMOVE IT.
- 14.4. File Sharing and Services: The Service functions in some ways as a Local Area Network (LAN) with each Customer constituting a node on the network. As such, users outside of the Customer may be able to access the Customer Equipment and other equipment connected in some way to the Customer Equipment. In addition, some available software includes capabilities that will permit other users to gain access to the Customer Equipment and other equipment connected in some way to the Customer Equipment, and to the software, files and data stored on such equipment. You acknowledge that if you choose to run these applications or services, you should take appropriate security measures, and that any failure by you to follow this recommendation is at your sole risk. Neither Company and its parent company, affiliates, subsidiaries, employees, directors, officers, or agents shall have any liability whatsoever for any claims, losses, actions, damages, suits or proceedings resulting from, arising out of or otherwise relating to access by others of the Customer Equipment or any other equipment connected in some way to the Customer Equipment, or to the software, files and data stored on such equipment.
15. ASSIGNABILITY
- 15.1. Assignment: Customer may not sell, transfer or assign the Agreement without the prior written consent of the Company. Any such assignment without Company's prior written

consent shall be void. Notwithstanding the foregoing, in the event the Agreement is assigned by Customer to any other party, by assignment, operation of law or otherwise, which party, prior to the assignment, has an agreement (the "Prior Agreement") with the Company or any of its affiliates for the provision of services, the Services being provided shall continue to be governed by the Prior Agreement, and the Service provided hereunder shall continue to be governed by the Agreement, each without reference to the other except that the Company may require a deposit or additional financial assurances as provided in the Agreement.

Company shall designate, from time to time, the Authorized Entities, as defined herein, that own and/or operate telecommunications facilities in various geographical areas to provide Services under this Agreement. Such designation shall constitute an assignment to and assumption by such Authorized Entity of all of Company's rights and responsibilities related to the provision of Services under this Agreement in such Authorized Entities' respective geographical areas; provided, however, that Company shall continue to invoice Customer for Services rendered and shall manage ordering pursuant to the applicable Order. The term "Authorized Entities" shall mean either an affiliate or subsidiary of Company.

16. NOTICES

- 16.1. Notice: Notices under the Agreement shall be in writing and delivered by certified mail, return receipt requested, to the persons whose names and business addresses appear below and such notice shall be effective on the date of receipt or refusal thereof by the receiving party. If to Company:

NOCTURNAL TECHNOLOGIES

20 Danada Square West
Suite 210
Wheaton IL 60189

17. MISCELLANEOUS

- 17.1. Neither Party the Legal Representative of the Other: The Agreement does not render either party the agent or legal representative of the other party and does not create a partnership or joint venture between Customer and Company. Neither party shall have any authority to agree for or bind the other party in any manner whatsoever. The Agreement confers no rights of any kind upon any third party.
- 17.2. Severability: Any provisions struck by a court or legal body shall be deemed severed.
- 17.3. Choice of Law and Venue: The Agreement is made pursuant to and shall be construed and enforced in accordance with the substantive law of the State of Illinois without reference to its principles of conflicts of laws.
- 17.4. Non-exclusive: The Agreement is non-exclusive. Nothing in the Agreement shall prevent Customer or Company from entering into similar arrangements with, or otherwise providing services to, any other person or entity.
- 17.5. No Publicity: Customer shall not issue a news release, public announcement, advertisement, or other form of publicity concerning the existence of the Agreement or

the supplies or Services to be provided hereunder without obtaining the prior written approval of Company. Failure to comply shall permit the Company to immediately terminate the Agreement, in addition to any and all other rights and remedies the Company may have at law or equity.

- 17.6. **Survivability:** The terms and provisions contained in the Agreement that by their sense and context are intended to survive the performance thereof by the parties shall survive the completion of performance and termination of the Agreement, including, without limitation, the making of any and all payments hereunder.
- 17.7 **No Waiver:** No Waiver of any of the provisions of the Agreement shall be binding unless it is in writing and signed by both parties. The failure of either party to insist on the strict enforcement of any provision of this Agreement shall not constitute a waiver of any provision and all terms shall remain in full force and effect.
- 17.8 **Rights to Offset:** Should Customer be in default of an invoiced contractual obligation for more than a thirty (30) day period and Company has moneys payable to the defaulting Customer, upon notification to the defaulting Customer, Company may offset respective payments by first applying such moneys to the full balance due by the defaulting Customer and the remaining balance remitted in the normal course of business.
- 17.9 **Complete Agreement:** The Agreement, incorporating all the items referenced herein, represents the complete agreement of the parties with respect to the Services, and supersedes all other agreements whether written or oral. In no event shall the Agreement, including all appendices, addenda, order forms and exhibits, be modified or amended in anyway by e-mail.
- 17.10 **Online Location:** <http://www.nocturnaltech.com>

REV 03/14/2011