



## Master Services Agreement

This Agreement (the "Agreement") is entered into and effective as of the later of the four signature dates below (the "Effective Date") between THE CUSTOMER (identified on the "Service Order" attached hereto), and Convergent Network Services (hereafter known as "CNS"), with its principal place of business at 51 Tec Street, Hicksville, NY 11801 with reference to the provisions set forth in the Recitals below.

### RECITALS

A. CNS owns or controls leaseholds or other interests in certain office and commercial space within commercial buildings at various locations suitable for the placement and operation of telecommunications and/or data equipment. The one or more designated premises to which this Agreement relates are set forth in the "Service Order" attachment hereto.

B. CNS provides telecommunications, computer consulting, and related data services. The one or more services to which this Agreement relates are set forth in the "Service Order" attachment hereto.

C. THE CUSTOMER has requested that CNS allow it one or more of the following:

1. Access to a portion of the premises for the purpose of locating certain telecommunications and/or data equipment and cabling to receive and deliver voice and/or data communications traffic and related services (such designated portion of the Premises, as identified in the application "Service Order" attachment hereto, the "Licensed Area".
2. Use of CNS owned data equipment and/or access to related data services and consulting and support services.

D. CNS is willing to provide specified services to CUSTOMER as described in "Service Order" attachment hereto, in the form of (i) a grant to CUSTOMER a revocable license for the non-exclusive access to and use of a specified Licensed Area within the Premises; and/or (ii) a revocable license for the use of specified data equipment, and/or (iii) the provision of managed, consulting and support services, all on the terms and conditions set forth herein, as may be supplemented or modified in the "Service Order" attachment hereto.

NOW THEREFORE, in consideration of the mutual covenants, promises, and conditions set forth in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, CNS and THE CUSTOMER, intending to be legally bound, agree as follows:

### Article 1

#### DEFINITIONS

1.1 "Service Order" shall mean the specifications for the services provided to THE CUSTOMER attached to this Agreement as Service Order, as it may be amended from time to time by mutual agreement of the parties, which agreement shall not be unreasonably withheld by either party; if and when the Service Order is modified in accordance with Article 2 below, the parties shall sign the new Service Order or amendments to the existing Service Order, and immediately following the last signing such new Service Order or amendments shall automatically be deemed to supercede or supplement (as the case may be) the earlier Service Order.

1.2 "Dedicated Servers" shall mean those computer servers and other hardware and third party software identified in the Service Order which are owned by CNS, the use and benefits of which are provided to THE CUSTOMER through the grant of a revocable license subject to the provisions of this Agreement.

1.3 "Bandwidth" shall mean the Internet network connectivity services identified in the Service Order.

1.4 "Colocation" shall mean the grant of a revocable non-exclusive license for access to one or more designated Licensed Areas for the use of, and access to, telecommunications and/or data equipment and cabling, ("the Equipment"), provided by THE CUSTOMER. During the time this license is in effect and subject to the provisions of this Agreement, THE CUSTOMER shall have access to the Licensed Area to the extent reasonable practical to allow THE CUSTOMER to realize the benefits of the License granted hereby.

1.5 "Consulting Services", "Support Services", and "Managed Services" shall mean the provision of intellectual and physical services provided by CNS, such that as may be desired by THE CUSTOMER, and those that are commonly associated with the setup, operation and maintenance of telecommunications and/or data equipment, the specifications of which identified in the "Service Order" attached hereto.

### Article 2

#### SERVICES

2.1 Services. CNS shall deploy, host and maintain the Services in accordance with the "Service Order" and the other terms and conditions contained in this Agreement. CNS agrees that the Services shall be performed in a professional manner and shall be of a high grade, nature, and quality.

#### Article 3 CONSIDERATION

3.1 Non-Bandwidth Service Fees. In consideration of the Services to be performed hereunder, THE CUSTOMER shall compensate CNS the total Recurring Fees due in advance of the upcoming month of service.

3.2 Bandwidth Fees. In consideration of the Services to be performed hereunder, THE CUSTOMER shall compensate CNS the total Recurring Fees due in advance for committed bandwidth in the upcoming month of service. THE CUSTOMER shall compensate CNS the total fees due for burstable or metered bandwidth (1) one month in arrears; except that CNS may require from THE CUSTOMER prepayment towards usage based fees should THE CUSTOMER begin to accrue an excessive amount of usage based fees mid-month.

3.3 Standard Consulting and Support Services. All such services will be billed at the rate(s) indicated on Service Order. If no technical support rate is present on Service Order, then the rate shall be one hundred twenty-five (\$125) dollars per hour in sixty (60) minute increments. Hardware reboot and power cycling requests are subject to standard technical support fees.

3.4 Expenses. In addition, CNS shall invoice THE CUSTOMER for reasonable out-of-pocket non-overhead costs and expenses incurred in the course of CNS's performance of its obligations hereunder (as evidenced by appropriate receipts or other documentary evidence). All estimated out-of-pocket non-overhead expenses must be pre-approved by THE CUSTOMER in writing.

3.5 Invoices. All invoices submitted to THE CUSTOMER hereunder are due and payable on the date indicated thereof.

3.6 Late Payment. THE CUSTOMER will be responsible for interest at an annualized rate of 18%, or the greatest rate permissible by the usury laws of New York State. In addition to interest THE CUSTOMER will be responsible for a late payment processing fee of one hundred (100) dollars for each calendar month elapsed while any payment due CNS is late. THE CUSTOMER's payment shall be deemed late if it is more than five (5) business days past the due date of the respective invoice. CNS may suspend performance at any time in the event of THE CUSTOMER's failure to timely pay fees due hereunder if (1) CNS has given THE CUSTOMER written Notice of such failure to pay and (2) THE CUSTOMER fails to make such payment within five (5) days of receipt of such written Notice. Service Fees (Art. 3.1) and Bandwidth Fees (Art. 3.2) will continue to accrue during any period of suspended performance.

3.7 Security Deposit. THE CUSTOMER shall deposit with CNS as security for performance of THE CUSTOMER's obligations hereunder funds in an amount equal to (a) one months projected Recurring Fees and (b) other such amounts as may be specified in the "Service Order" ("the Security Deposit"). CNS shall not be required to maintain the Security Deposit in a separate account. Except as may be required by law, THE CUSTOMER shall not be entitled to interest on the Security Deposit. If THE CUSTOMER's projected monthly Recurring Fees increase, or THE CUSTOMERs required monthly payments are received more than five (5) days in arrears for two (2) consecutive months CNS, in addition to other remedies hereunder, shall be entitled at its sole discretion to increase the required security deposit and require, by written Notice, that THE CUSTOMER provide such additional amount. Within five (5) business days after such written Notice, THE CUSTOMER shall deposit with CNS cash in an amount sufficient to restore the Security Deposit to its original or required increased amount. THE CUSTOMER's failure to do so shall constitute a material breach under this Agreement.

3.8 Electrical Power. In the event the effective cost of power exceeds fifteen cents per kilowatt hour, CNS shall have the right to invoice THE CUSTOMER for the proportional increase during the term of this agreement. The effective cost of power is calculated as the total of all usage, demand, tax, and any other fee based charges that appear on the electric utility invoice, divided by the total kilowatt hours consumed during the billing period of that invoice.

#### Article 4 TAXES

4.1 Taxes. Each party will bear all taxes for which it is legally liable in connection with this agreement. If one party is obligated to collect or remit any taxes for which the other is liable, the party that is liable will reimburse the other party upon request and submission of reasonable proof that the taxes were paid.

#### Article 5 TERM AND TERMINATION

5.1 Term. This Agreement will continue in full force and effect for a period indicated on Service Order from the Activation Date of the services ("the Initial Term"), and shall automatically be renewable for one year terms there after (each, a "Renewal Term"). The Renewal Term shall extend this agreement in full force and effect unless THE CUSTOMER submits to CNS in writing no less than sixty (60) days prior its intent not to renew.

5.2 Elective Termination by THE CUSTOMER. Promptly upon the Notice of termination of this Agreement for any reason during the Initial Term or any Renewal Term: (i) THE CUSTOMER shall pay to CNS any and all amounts then due and outstanding in connection with any applicable Services performed hereunder through the effective date of termination (last day of service); (ii) THE CUSTOMER shall pay to CNS, by way of liquidated damages and not a penalty, the aggregate monthly Recurring Fees otherwise due for the remainder of the term, whether it be an Initial Term or Renewal Term.

5.3 Additional Effects of Termination. CNS shall retain the right to liquidate upon written Notice all of THE CUSTOMER equipment in possession of CNS to satisfy any outstanding amounts owed to CNS stemming from this Agreement, with any excess funds returned to THE CUSTOMER. All rights and licenses granted hereunder and all obligations and covenants imposed on CNS hereunder shall cease, except as otherwise expressly set forth herein. THE CUSTOMER shall (A) stop using all Confidential Information, Marks, Content and/or Tools (as applicable) of CNS then under its possession or control; (B) erase or destroy all such Confidential Information, Marks, Content and/or Tools residing in any computer memory or data storage apparatus; and (C) at the option of CNS, either destroy or return to such other Party all such Confidential Information, Marks, Content, Tool Boxes and/or Tools in tangible form and all copies thereof; (v) no transfer of title to Dedicated Servers shall be effectuated with termination of this Agreement.

5.4 Customer Breach of Agreement; Payment Default; CNS Retention Rights in Customer Equipment. If (a) any payment due from THE CUSTOMER to CNS on account of any amounts due hereunder or under any Colocation Services Order, including late fees and any other charges, is not received by CNS in accordance with Article 3.6, or (b) THE CUSTOMER is in material breach of this Agreement (as supplemented by any further terms set forth in any Colocation Services Order), including unremedied violation of any Colocation Rules after receipt of a written "rule violation notice" from CNS; or (c) THE CUSTOMER is in material breach of any other written agreement between CNS (or any of its affiliate companies) and THE CUSTOMER; then in each such case CNS shall have the right (without limitation of any other remedies hereunder or under applicable law) in its sole discretion, upon written Notice ("Default Notice"), to revoke or suspend (in whole or in part) the revocable License granted hereby.

In addition to the foregoing, and without limiting any other remedies of CNS hereunder, in the event of THE CUSTOMER's failure to cure any non-payment of fees and/or charges described in the related Default Notice ("Payment Default Notice"), then CNS shall be entitled to distraint and otherwise take all commercially reasonable steps to restrict THE CUSTOMER's access to and/or removal of any THE CUSTOMER Equipment from the affected Licensed Area ("THE CUSTOMER Equipment Retention"). THE CUSTOMER Monthly Recurring Fees (including Additional Power Charges, to extent provision of Electrical Power has not been suspended) shall continue to accrue and be payable by THE CUSTOMER, notwithstanding CNS exercise of available remedies set forth in this Section 6.1. The CNS right to THE CUSTOMER Equipment Retention shall continue until such time as THE CUSTOMER shall have paid in full all fees and charges due CNS under this Agreement and the related Colocation Services Order. In the event THE CUSTOMER shall have failed to pay in full all amounts due, as described in any Payment Default Notice, within one hundred twenty (120) days of delivery thereof, CNS shall be entitled, in connection with any THE CUSTOMER Equipment Retention, to treat such THE CUSTOMER Equipment as having been abandoned, and upon written Notice to THE CUSTOMER CNS shall be entitled to retain ownership and possession of, and otherwise sell, transfer and/or dispose of said THE CUSTOMER Equipment, consistent with applicable law.

5.5 Eminent Domain. In the event of a taking by eminent domain (or a conveyance by any landlord of all or any portion of the Premises to an entity having the power of eminent domain after receipt of actual Notice of the threat of such taking) of all or any portion of the Premises so as to prevent, the utilization by THE CUSTOMER of the Licensed Area(s) in such Premises, the relevant Colocation Services Order and this License shall terminate as of the date of such taking or conveyance with respect to the Licensed Area which is affected by such taking or conveyance, and the Colocation Services fees and charges paid or to be paid by THE CUSTOMER shall be adjusted accordingly. THE CUSTOMER shall have no claim against CNS for the value of the unexpired Term of this Agreement or the applicable Colocation Service Order affected thereby (or any portion thereof) or any claim or right to any portion of the amount that might be awarded to the landlord of the Premises or CNS as a result of any such payment for condemnation or damages.

5.6 Damage to Premises. If the building in which the Premises are located is damaged by fire or other casualty, CNS shall give Notice to THE CUSTOMER of such damage as quickly as practicable under the circumstances. If the landlord of the Premises or CNS exercises an option to terminate a particular lease or license due to damage or destruction of the Premises subject to such lease or license, or if landlord determines not to rebuild such building or portion thereof in which the Licensed Area is located, the relevant Colocation Services Order and this License shall terminate as of the date of such exercise or decision as to the affected Licensed Area, and the Colocation Services fees and charges paid by THE CUSTOMER shall be adjusted accordingly. If neither the landlord of the affected Premises nor CNS exercises the right to terminate, then once the landlord has restored the building and the Premises, CNS shall repair the particular Licensed Area to substantially the same condition it was in prior to the damage, completing the same with reasonable speed considering all of the facts and circumstances. In no event shall CNS have any obligation to repair or replace THE CUSTOMER-provided Equipment. In the event that CNS shall fail to complete the repair within a reasonable time period under the circumstances, THE CUSTOMER shall thereupon have the option to terminate the relevant Colocation Services Order and this License with respect to the affected Licensed Area, which option shall be the sole remedy available to THE CUSTOMER against CNS under this Agreement relating to such failure. If the Licensed Area or any portion thereof shall be rendered unusable by reason of such damage, the Colocation Services fees and charges for such Licensed Area shall proportionately abate, based on the amount of square footage of the Licensed Area which is rendered unusable, for the period from the date of such damage to the date when such damage shall have been repaired for the portion of the Licensed Area rendered unusable.

5.7 Survival. Article 7, 8, 10, and 11 shall survive the termination of this Agreement.

## Article 6

### WARRANTIES

6.1 Hardware warranties. CNS will replace any failing hardware components used in providing services here under for the term of the agreement provided THE CUSTOMER is up to date in all payments due THE COMPANY. This warranty is suspended during any period of time THE CUSTOMER is in breach.

## Article 7

## DISCLAIMERS

7.1 Warranty Disclaimer. EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN Article 6, CNS MAKES NO EXPRESS OR IMPLIED WARRANTIES OR REPRESENTATIONS WITH RESPECT TO ANY SITES, PRODUCTS, SERVICES, TECHNOLOGY OR CONTENT PROVIDED HEREUNDER, INCLUDING WITHOUT LIMITATION, WARRANTIES OF FITNESS, MERCHANTABILITY, NON-INFRINGEMENT, TITLE, OR ANY IMPLIED WARRANTIES ARISING OUT OF THE COURSE OF PERFORMANCE, DEALING OR TRADE USAGE. IN ADDITION, CNS MAKES NO REPRESENTATION THAT THE OPERATION OR USE OF ANY SITES, PRODUCTS, SERVICES, TECHNOLOGY OR CONTENT PROVIDED HEREUNDER WILL COMPLY WITH APPLICABLE GOVERNMENT CODES OR LAW, OR WILL BE UNINTERRUPTED, ERROR FREE, OR SECURE, AND CNS WILL NOT BE LIABLE FOR THE CONSEQUENCES OF ANY INTERRUPTIONS, ERRORS, OR BREACHES OF SECURITY. CNS MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND WITH RESPECT TO ANY THIRD PARTY SOFTWARE, TOOLS, HARDWARE, OR OTHER MATERIALS OR CONTENT WHICH MAY BE USED OR PROVIDED BY CNS IN THE PERFORMANCE OF SERVICES HEREUNDER. THE CUSTOMER ACKNOWLEDGES THAT CNS HAS ENTERED INTO THIS AGREEMENT AND HAS SET ALL APPLICABLE COMPENSATION TERMS IN RELIANCE UPON THE LIMITATIONS OF LIABILITY AND DISCLAIMERS OF WARRANTIES AND DAMAGES SET FORTH HEREIN, AND THAT THE SAME FORM IS THE ESSENTIAL BASIS OF THE BARGAIN.

## Article 8 CONFIDENTIALITY

8.1 Confidential Material. Each Party acknowledges that confidential, proprietary and/or trade secret information may be disclosed or submitted by one Party (the "Providing Party") to the other (the "Receiving Party") hereunder, including, without limitation, trade secrets, processes, techniques, drawings, models, customer list, customer-related information and data, computer programs, databases, business plans, technical data, product ideas, marketing data, contracts and financial information conspicuously marked or otherwise designated as Confidential Information at the time of disclosure (the "Confidential Information").

8.2 Scope of Use. The Receiving Party shall preserve and protect the confidentiality of the Providing Party's Confidential Information using precautions at least as restrictive as those it takes to protect its own confidential, proprietary and/or trade secret information (but in no event less than a reasonable degree of care). Except as expressly authorized by this Agreement, the Receiving Party shall not itself, or allow others to, use, display, copy, disclose, transmit, reverse engineer, disassemble, decompile, translate, or modify all or any part of such Confidential Information, without the Providing Party's prior written consent. The Receiving Party agrees to limit access to the Providing Party's Confidential Information to its and its affiliates' directors, officers, employees, and contractors who: (a) have a need to know such Confidential Information for purposes of such Party performing its obligations hereunder; and (b) are obligated in writing to protect the confidentiality of such Confidential Information under terms at least as restrictive as those set forth in this Article 9. The Receiving Party shall be fully and directly responsible and liable to the Providing Party for any breach of this Article 9 by any individuals or entities receiving access to the Providing Party's Confidential Information through or on behalf of the Receiving Party.

8.3 Exclusions. The restrictions set forth in this Article 8 shall not apply with respect to any information which the Receiving Party can document: (a) became publicly known through lawful means; (b) was rightfully in the Receiving Party's possession prior to disclosure by the Providing Party; (c) is disclosed to the Receiving Party without confidential or proprietary restriction by a third party who rightfully possesses the information (without confidential or proprietary restriction); or (d) is independently developed by the Receiving Party without use of or reference to any Confidential Information of the Providing Party.

8.4 Injunctive Relief. Each Party acknowledges and agrees that, due to the unique and valuable nature of the Confidential Information and any other proprietary information and materials of the other Party, there can be no adequate remedy at Law for any breach by such Party of Article 8, that any such breach may result in irreparable harm to the non-breaching Party for which monetary damages would be inadequate to compensate the non-breaching Party, and that the non-breaching Party shall have the right, in addition to any other rights available under applicable Law, to seek from any court of competent jurisdiction preliminary and/or permanent injunctive relief to restrain any breach or threatened breach of, or otherwise to specifically enforce, any covenant or obligation of such Party under Article 8, as well as to obtain damages and equitable accounting of all earnings, profits, and other benefits arising from such violation, which rights shall be cumulative.

## Article 9 INDEPENDENT CONTRACTORS

9.1 Independent Contractor Relationship. CNS and THE CUSTOMER are acting solely as independent contractors. Nothing in this Agreement shall be construed so as to create any agency, partnership, joint-venture, principal and agent, master and servant, employer and employee relationship between the Parties. Except as otherwise expressly provided in this Agreement, neither Party shall have any right, power or authority to act or create any obligation, express or implied, on behalf of the other Party.

## Article 10 INDEMNIFICATION

10.1 Customer shall indemnify, defend, release and hold CNS and all of its affiliates, agents, clients, consultants, customers, employees, subcontractors, invitees, shareholders, directors, officers and licensees harmless from and against any action, claim, court costs, damages, demands, expense, liability, loss, penalty, proceeding or suit, including reasonable attorneys' fees, costs and disbursements (collectively "Claims") arising from or relating to injury to person or property, including death, as a result of any act or omission (whether intentional, negligent or otherwise) by Customer in connection with the Premises or Licensed Area, the provision

of Colocation Services, or otherwise related to the exercise by Customer of the License granted to Customer under this Agreement.

#### Article 11 REPRESENTATIONS

11.1 EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, IN NO EVENT SHALL CNS BE LIABLE TO ANY THIRD PARTY FOR ANY CONSEQUENTIAL, INDIRECT, SPECIAL, PUNITIVE, EXEMPLARY OR INCIDENTAL DAMAGES, WHETHER FORESEEABLE OR UNFORESEEABLE, ARISING IN CONNECTION WITH THE PRODUCTS AND/OR THE MARKETING, PROMOTION, OFFERING FOR SALE, SALE, PURCHASE, DISTRIBUTION, AND/OR USE THEREOF, INCLUDING, WITHOUT LIMITATION, CLAIMS FOR LOSS OF REVENUE, PROFITS, DATA, GOODWILL, PRODUCTS, OR USE OF MONEY, INTERRUPTION IN USE OR AVAILABILITY OF DATA, STOPPAGE OF OTHER WORK, OR IMPAIRMENT OF OTHER ASSETS, WHETHER BASED UPON BREACH OR FAILURE OF EXPRESS OR IMPLIED WARRANTY, MISREPRESENTATION, NEGLIGENCE, STRICT LIABILITY IN TORT, OR ANY OTHER FORM OF ACTION OR LEGAL OR EQUITABLE THEORY, AND WHETHER OR NOT EITHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, IN NO EVENT SHALL THE MAXIMUM AGGREGATE LIABILITY WHICH CNS MAY INCUR IN ANY ACTION OR PROCEEDING ARISING IN CONNECTION WITH THIS AGREEMENT OR ITS IMPLEMENTATION, EXCEED THE TOTAL AMOUNTS ACTUALLY PAID BY THE CUSTOMER TO CNS PURSUANT TO ARTICLE 3. FOR PURPOSES OF THIS ARTICLE 12 THE CUSTOMER SHALL MEAN, ITS FULFILLMENT VENDORS, ITS LICENSORS, ITS AND THEIR RESPECTIVE AFFILIATES, AND ANY RELATED PARTIES OF ANY OF THE FOREGOING.

11.2 Limitation of Liability; No Warranty. CNS shall use reasonable care and its employees and representatives shall operate in a professional workmanlike manner consistent with telecommunications industry standards in maintaining the Premises and in providing any Maintenance Services to the Licensed Area and Equipment. Notwithstanding the foregoing, in no event shall CNS, its officers, directors, employees or representatives be liable for any special, incidental, direct, indirect, punitive, reliance or consequential damages, whether foreseeable or not, including for damage or loss of property or Equipment, loss of profits or revenue, cost of capital, cost of replacement services, or claims for service interruption or transmission problems, occasioned by any defect, failure, alleged or otherwise, in the Premises, any provided Services, or inoperability malfunction of or damage to (in whole or in part) Customer Equipment, or any delay in availability of the Licensed Area, any lack of access to the Premises or any other cause whatsoever with respect to the Premises or provision of any Services, including damages arising from interruption of electrical power or HVAC services. The Licensed Area is accepted "AS IS" by Customer. CNS DISCLAIMS ALL EXPRESS AND IMPLIED WARRANTIES RELATING TO THE PREMISES, AND THE PROVISION OF ALL SERVICES, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

11.3 Indemnity. Customer shall indemnify, defend, release and hold CNS and all of its affiliates, agents, clients, consultants, customers, employees, subcontractors, invitees, shareholders, directors, officers and licensees harmless from and against any action, claim, court costs, damages, demands, expense, liability, loss, penalty, proceeding or suit, including reasonable attorneys' fees, costs and disbursements (collectively "Claims") arising from or relating to injury to person or property, including death, as a result of any act or omission (whether intentional, negligent or otherwise) by Customer in connection with the Premises or Licensed Area, the provision of any Services, or otherwise related to the exercise by Customer of the License granted to Customer under this Agreement.

#### Article 12 MISCELLANEOUS

12.1 Severability. If any provision of this Agreement is held to be invalid or unenforceable for any reason, the remaining provisions shall continue in full force without being impaired or invalidated in any way, the Parties agree to replace any invalid provision with a valid provision which most closely approximates the intent and economic effect of the invalid provision.

12.2 Governing Law. This Agreement shall be governed in all respects by the laws of the state of New York, Nassau County, without regard to its conflict of laws provisions, and the Parties agree that any dispute arising out of this Agreement which is not subject to Article 12.3 shall be resolved in the courts of New York, Nassau County, and the Parties hereby expressly consent to such jurisdiction therein.

12.3 Arbitration of Disputes. Any controversy of claim arising between the Parties out of or relating to this Agreement, its performance, or the breach thereof, shall be settled by binding arbitration in accordance with the rules then prevailing of the American Arbitration Association, before a single arbitrator mutually agreeable to the Parties, with all proceedings to be held within the county Nassau, state of New York. Judgment of the arbitrator shall be final and binding, and each Party expressly waives its right to an appeal and/or jury trial. Subject to any limitations of liability set forth herein, the arbitration award may include compensatory damages (defined for this purpose as amounts or types of damages necessary to recompense the damaged party for its losses subject to the terms of this agreement) against but under no circumstances shall the arbitrator be authorized to, nor shall the arbitrator, award punitive damages or multiple damages against either Party.

12.4 Integration. This Agreement, including the Exhibits attached hereto sets forth the entire understanding and agreement of the Parties and supersedes and terminates any and all oral or written agreements or understanding between the Parties as to the subject matter of this Agreement. Neither party is relying upon any warranties, representations, assurances or inducements not expressly set forth herein.

12.5 Modification/Upgrades. No amendment, change, waiver, modification or discharge hereof shall be valid unless in writing and signed by the Party against which such amendment, change, waiver, modification or discharge is sought to be enforced.

12.6 Headings. The headings used throughout this Agreement are for administrative convenience only and shall not be used for the purpose of construing and enforcing this Agreement.

12.7 Construction. Both Parties and their respective legal counsel have participated in drafting the language of this Agreement, and any construction of a language contained herein shall not be interpreted in a manner less favorable to either Party.

12.8 Notifications. Any Notice provided pursuant to this Agreement, if specified to be in writing, shall be in writing and shall be deemed given (i) if by hand delivery, upon receipt thereof, (ii) if by mail, three (3) days after deposit in the United States mail, postage pre-paid, certified return receipt requested, (iii) if by facsimile transmission, upon telephonic confirmation thereof, or (iv) if by next day delivery service, upon such delivery. All Notices shall be addressed as follows (or such other address as either Party may in the future specify in writing to the other):

In the case of Convergent Network Services:  
Convergent Network Services  
Attn: Contract Administrator  
51 Tec Street  
Hicksville, NY 11801

In the case of THE CUSTOMER Notice shall be sent to the address in Service Order.

12.9 Assignment. Neither Party shall assign, delegate or otherwise transfer any of its material rights or obligations hereunder without the prior written consent of the Other Party, which consent will not be unreasonably withheld, except as otherwise specified within this Agreement. Provided, however, that the foregoing provision does not preclude CNS from subcontracting various aspects of its services as is its current business model. Subject to the foregoing sentence, this Agreement shall be binding upon, and inure to the benefit of, the Parties' respective successors and assigns.

12.10 Order of Precedence. In the event of any conflict, ambiguity or inconsistency between or among the terms and conditions of this Agreement and any Exhibit hereto, the terms and conditions of the Agreement shall control.

12.11 Force Majeure. If the performance of any part of this Agreement by either Party is prevented, hindered, delayed or otherwise made impracticable by reason of flood, riot, fire, terrorism, judicial or governmental action, power failure, computer virus, labor disputes, act of God or any other causes beyond the control of either Party, that Party shall be excused from such to the extent that it is prevented, hindered or delayed by such causes; however continued performance of this Agreement is expected to recommence within twenty (20) working days.

12.12 Waiver. The delay or failure of either Party to exercise any right in any respect provided for herein shall not constitute a waiver, and the waiver of either Party to exercise any right in any respect herein shall not be deemed a waiver of any further right hereunder.

12.13 Control over the Network. Notwithstanding anything to the contrary expressed or implied by this Agreement or any Exhibit hereto, CNS shall have the right, at any time, to remove or have removed from its Servers or any Marks, Content, Tools and/or other items and materials which CNS, in its sole discretion, deems may: (i) violate any applicable Law; (ii) violate or infringe upon any third party's Intellectual Property Rights, contractual rights, rights of publicity or privacy, or any other rights; (iii) promote illegal activities; or (iv) otherwise prejudice the interests of CNS or any third party.

12.14 Compliance with Laws. In implementing this Agreement, THE CUSTOMER and CNS: (a) have obtained and will obtain, and will maintain in full force and effect, all licenses, permits, approvals, and other authorizations that are necessary or required to perform its obligations under this Agreement; and (b) have complied with, and will comply with, all applicable Laws.

12.15 Third Parties. Except as specifically set forth or referred to herein, nothing herein expressed or implied is intended or shall be construed to confer upon or give to any individual or entity other than the Parties and their successors and permitted assigns any rights or remedies under or by reason of this Agreement.

12.16 Interpretation. The words and phrases herein shall have the respective meanings generally understood in the telecommunications industry. This Agreement shall be construed in accordance with its fair meaning and not for or against either party on the basis of which party drafted this Agreement. The descriptive headings of the several sections and paragraphs of this Agreement are inserted for convenience only and do not constitute a part of this Agreement. Such headings shall not in any way define or affect the meaning, construction or scope of any of the provisions hereof. Any time the word "including" is used herein and followed by an example or examples, such term shall be deemed to mean "including, without limitation".

12.17 Representation of Authority. Each party represents and warrants to the other that the execution and delivery of this Agreement and the performance of such parties' obligations hereunder have been duly authorized, and that this Agreement is a valid and legal agreement binding on such parties and enforceable in accordance with its terms.

12.18 Counterparts; Agreement by Facsimile Transmission. This Agreements may be executed in one or more counterparts, each of which shall constitute an original but all of which, taken together, shall constitute one and the same instrument. Each party agrees that the execution and delivery of this Agreement by facsimile shall have the same force and effect as delivery of original signatures and that each party may use such facsimile signatures as evidence of the execution and delivery of this Agreement by the parties to the same extent that an original signature could be used.

12.19 Expeditious Conduct and Delivery. Time is of the essence in all things to be done, including all payments to be made by THE CUSTOMER under this Agreement.

12.20 No Solicitation. THE CUSTOMER shall not use the Premises or Licensed Area for marketing or solicitation purposes. THE CUSTOMER shall place no signs or marking of any kind (except for a sign or other identification affixed to THE CUSTOMER's Equipment and reasonably necessary to identify THE CUSTOMER's Equipment, and which shall include a list of emergency contacts with telephone numbers), in the Premises or Licensed Area.

THE CUSTOMER shall not, and shall make sure that its employees, representatives, independent contractors and any other individuals accessing the Premises and licensed Area from time to time on behalf of the THE CUSTOMER (collectively, "THE CUSTOMER Representatives") shall not, during the Term of this Agreement and for a period of six (6) months thereafter, directly or indirectly (i) solicit, employ, offer to employ or engage as a consultant, any employee of CNS; or (ii) pay or offer to pay any employee of CNS any compensation (in cash or in kind), gifts or entertainment as an inducement (stated or implied) to perform any services in the Premises or Licensed Area for THE CUSTOMER or any THE CUSTOMER Representative. Any violation of this provision shall constitute a material breach of this Agreement.

## ARTICLE 13

### COLOCATION SPECIFIC PROVISIONS

13.1 Equipment Installation/Removal by THE CUSTOMER. Before beginning any delivery, installation, replacement, or removal work, with respect to THE CUSTOMER's equipment, THE CUSTOMER must obtain CNS's written approval (i) of THE CUSTOMER'S choice of suppliers and contracts, which approval shall not unduly be withheld, (ii) dimensions, weight, and power requirements, and other specifications of customer equipment which THE CUSTOMER intends to install in the Licensed Area. CNS approval of which shall not constitute an endorsement of Customer's supplier, contractor, or choice of equipment, and THE CUSTOMER will remain solely responsible for the selection and any obligations arising thereof, such as but not exclusively payment obligations.

Notwithstanding anything to the contrary contained in this Agreement, THE CUSTOMER shall NOT be permitted to remove any Customer equipment from the Licensed area at a time when THE CUSTOMER is in breach of this Agreement or otherwise has any outstanding payment obligations to CNS.

13.2 Cross Connections. THE CUSTOMER shall NOT be permitted to run any type of cabling whatsoever outside of the confines of the Licensed Area ("Cross Connections") without the express written consent of CNS. Failure to obtain the written consent of CNS shall constitute material breach of this Agreement and CNS may pursue any legal or equitable remedy available to it, including the immediate removal of such impermissible cross connections and/or the immediate termination or suspension of the License granted by this Agreement without liability to any party.

13.3 Inspections. CNS may inspect THE CUSTOMER'S equipment and facilities in the Licensed area prior to the activation of such, and from time to time as CNS deems necessary or appropriate to verify the suitability of the equipment for operation within the Licensed area.

13.4 Access to Premises and Licensed Area. CNS shall have the right to keep the Premises and Licensed Area locked at all times. During the period of existence of the License, provided THE CUSTOMER shall not be in material breach or default hereunder and is otherwise current in payments of all fees and charges then due CNS, THE CUSTOMER shall have access to the Licensed Area(s) of the Premises on a 24 hour 7 day a week basis, in accordance with the building security procedures or rules applicable to the building in which the Premises are located. If a key or other access granting device is provided to THE CUSTOMER, THE CUSTOMER shall not duplicate the key or device. Upon termination, suspension, or revocation of the License, THE CUSTOMER shall return to CNS and key and/or access granting device used to access to the Premises and Licensed area.

13.5 Authorized Personnel. THE CUSTOMER shall advise CNS in writing of the names of all representatives of THE CUSTOMER who will be authorized by THE CUSTOMER to have access to the Licensed area pursuant to this Agreement. No individual shall be permitted access to the Licensed area by CNS unless he or her name has been provided to CNS in writing in advance. No more than (2) two representatives of THE CUSTOMER shall be permitted access to the Licensed Area(s) at any given time. THE CUSTOMER shall take all reasonable precautions to preserve the security of the Premises and the Licensed Area(s). THE CUSTOMER'S representatives shall be required to utilize the escort services furnished by CNS in connection with any visit to the Premises. Charges for required escort services shall be set forth in the "Service Order" attached hereto.

13.5 Colocation Rules. THE CUSTOMER'S use of the Licensed area, installation of equipment and access to the Premises shall be at all times subject to THE CUSTOMER'S adherence to the CNS Colocation Rules of Conduct and Safety Specifications for the Premises and Licensed Area(s) ("Colocation Rules") as posted on the Premises. Such colocation rules may be amended or updated from time to time by CNS.

## ARTICLE 14

### INSURANCE

14.1 Coverage. For the entire Term of this Agreement, THE CUSTOMER shall maintain, and provide to CNS proof of (i) comprehensive general liability insurance with a combined single limit per occurrence of not less than one million dollars (\$1,000,000) per occurrence for bodily injury, including death, and property damage liability, including coverage extensions for blanket contractual liability, personal injury liability and products and completed operations liability (ii) "all risk" Property Insurance covering all of THE CUSTOMER's Equipment and any other property of THE CUSTOMER located on Premises. Any Equipment or other property maintained by THE CUSTOMER in the THE CUSTOMER's Area shall be insured solely by THE CUSTOMER and shall be insured for the full value of such Equipment and property. THE CUSTOMER shall look solely to said insurance in the event of any damage or loss to such Equipment or other property and CNS shall have no liability therefore. THE CUSTOMER's comprehensive general liability insurance policy shall specifically insure THE CUSTOMER against liability with respect to the Licensed Area and Premises and shall name CNS as an additional insured as its interests may appear.

14.2 In addition, THE CUSTOMER shall provide evidence of the following coverages:

- a. Employers Liability - Employers Liability coverage in the amount of one hundred thousand dollars (\$100,000) each accident, one hundred thousand dollars (\$100,000) each employee, and five hundred thousand dollars (\$500,000) policy limit; and Workers Compensation in an amount not less than that prescribed by statutory limits.
- b. Automobile Liability - Automobile Liability insurance with a combined single limit of one million dollars (\$1,000,000) each occurrence for bodily injury and property damage to include coverage for all owned, non-owned, and hired vehicles.

14.3 THE CUSTOMER may elect to purchase business interruption and contingent business interruption insurance, having been advised that CNS assumes no liability for loss of profit or revenue should an interruption of any service occur.

14.4 The insurance limits set forth above may be increased by CNS from time to time during the term of this Agreement upon thirty (30) days prior written Notice to License to at least such minimum limits as shall then be customary with respect to comparable occupancy of CNS colocation facilities.

14.5 All policies purchased by THE CUSTOMER shall be deemed to be primary and not contributing to or in excess of any similar coverage purchased by CNS. All costs and deductible amount will be for the sole account of the THE CUSTOMER. The insurance limits set forth above are minimum limits and shall not be construed to limit THE CUSTOMER's liability. All insurance must be in effect on or before the date Equipment is delivered to the Premises and shall remain in effect for the term of this Agreement or until all THE CUSTOMER's Equipment and other property has been removed from the Premises, whichever period is longer.

14.6 THE CUSTOMER shall submit certificates of insurance reflecting the coverages required pursuant to this Section a minimum of ten (10) days prior to the commencement of any work or delivery of Equipment to, the Licensed Area. Failure to provide such certificates of insurance may result in construction and Equipment installation delays.

THE CUSTOMER shall arrange for CNS to receive thirty (30) days advance Notice of cancellation of or reduction in coverage from THE CUSTOMER's insurance company. THE CUSTOMER shall forward a certificate of insurance and Notice of cancellation to CNS at the address indicated herein.

14.7 If CNS determines, in its reasonable, sole discretion, that additional insurance coverage or increased coverage limits are required for any particular reason or location, such requirement shall be included on the applicable Colocation Service Order. THE CUSTOMER shall obtain such insurance within five (5) business days and otherwise comply with the provisions of this Section 9 in connection with obtaining and maintaining such insurance. Notwithstanding anything to the contrary contained herein, to the extent any additional insurance requirements contained in a Colocation Services Order conflict with the insurance requirements contained in this Article 14, the insurance requirements contained in the Colocation Service Order shall control. Failure to obtain and maintain such additional insurance shall constitute material breach hereunder.

## ARTICLE 15

### NO PROPERTY INTEREST; SOLE USE OF LICENSED AREA BY CUSTOMER

15.1 THE CUSTOMER acknowledges that it has been granted only a license to occupy the Licensed Area and that it has not been granted any real property interest in the Licensed Area or the Premises or the building in which the Premises are located. THE CUSTOMER further agrees that, subject to required procedures and conditions to any sublicense (set forth below), neither this Agreement nor any interest created herein shall be assigned, mortgaged, subleased, sub-licensed, encumbered or otherwise transferred by customers by any act or omission on the part of THE CUSTOMER. THE CUSTOMER further agrees that neither the Licensed Area or any part thereof shall be used or occupied, nor permitted to be used or occupied, by any entity (including any affiliated entity) other than THE CUSTOMER. Any attempt to allow the use or occupancy of the Licensed Area by any entity other than THE CUSTOMER, or to assign, mortgage, sublease, sub-license or encumber any rights under this Agreement by THE CUSTOMER shall be void and constitute a material breach of the License granted hereby, unless otherwise agreed to in writing by CNS.

15.2 Sub-license Procedures and Conditions. THE CUSTOMER may not sub-license any Licensed Area except with the express prior written consent of CNS. In the event THE CUSTOMER desires to sub-license a portion of the Licensed Area it shall submit a written request to CNS ("Sub-license Request") identifying the desired sub-licensee(s) ("Sub-licensees") and providing specific information



about the proposed physical configuration of Sub-licensee racks and equipment within the Licensed Area. Included with such information shall be a proposed network diagram. Additionally, THE CUSTOMER shall provide to CNS such additional information about the prospective Sub-licensee as CNS shall reasonably request. Any consent to the sub-license of the Licensed Area may be dependent upon approval of the landlord, but in any event shall be in the sole absolute discretion of CNS.

No Sub-License Request will be honored and no consent given unless: (i) THE CUSTOMER shall guarantee that its Sub- licensees shall abide by all terms and conditions set forth or referenced in this Agreement; (ii) THE CUSTOMER shall indemnify, defend and hold CNS harmless from all claims brought against CNS arising from any act or omission of any Sub-licensee or its agents and (iii) each Sub-licensee shall be considered THE CUSTOMER's agent and all of Sub-licensees' acts and omissions and usage of the Licensed Area shall be attributable to THE CUSTOMER for the purposes of this Agreement.

As a condition to permitting a grant of sub-license, CNS may impose such other terms and conditions as it determines in its sole commercial judgment. CNS reserves the right to impose, with respect to Sub-licensees, CNS standard fees and charges in connection with (among others) access to and cross-connections wholly within the Licensed Area ("Intra-Licensed Area Cross-Connects"), and all such cross-connections shall be further subject to the provisions and conditions of Article 13.2 hereof (Cross-Connections). Payment of Intra-Licensed Area Cross-Connect fees shall be the primary responsibility of the THE CUSTOMER, which shall be invoiced accordingly.

Each Sub-licensee agreement shall be subject to CNS written approval of terms, and shall: (i) incorporate all of the terms and conditions (other than economic/commercial terms) contained in, and shall not otherwise be inconsistent with, this Agreement; (ii) contain an affirmative assumption by the Sub-licensee of all of the obligations of THE CUSTOMER contained in this Agreement; (iii) contain a provision for CNS to enforce as against any Sub-licensee directly any of the provisions contained in this Agreement or such sub-license agreement; and (iv) provide that no additional sub-licenses by Sub-licensee shall be permitted.

15.3 Revocability. Under no circumstances will the License become irrevocable. THE CUSTOMER acknowledges and agrees that CNS has made no representations of any kind that the License is irrevocable or may become irrevocable, or from which THE CUSTOMER could infer or has inferred that the License is or may become irrevocable. THE CUSTOMER waives any claim that CNS is estopped from revoking this License in accordance with the terms of this Agreement. THE CUSTOMER represents and warrants that any Equipment used by THE CUSTOMER in connection with this Agreement was not acquired by THE CUSTOMER in reliance on any representation by CNS as to the duration or availability of the License.

Nothing in this ARTICLE 15 is intended to limit or restrict CNS's right to maintain control over, limit access to, or to revoke any license for, the Licensed Area.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date of signature below.

THE CUSTOMER

For Convergent Network Services

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

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

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

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

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

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

Date: \_\_\_\_\_

Date: \_\_\_\_\_