



MASTER SERVICE AGREEMENT

Subject to the Customer placing Service Orders and PS Lightwave accepting such Service Orders as contemplated herein, Customer agrees to purchase, and PS Lightwave agrees to provide, the services described in executed Service Orders ("Service Order") that comprise a part of this Agreement and that are agreed to by both parties ("PS Lightwave Services"), as well as any Third-Party Service described in Section 6 of this Agreement (PS Lightwave Services and Third-Party Service, collectively or individually, the "Services"). PS Lightwave Services may consist of any combination of those found in PS Lightwave's Product Description Sheets ("PDS"). All Services shall be provided only according to the terms and conditions in this Agreement and as specified in a Service Order placed by Customer.

1. **AGREEMENT.** The terms of this Agreement shall apply to the purchase and provisioning of all Services, and acceptance of PS Lightwave's Service Level Agreement ("SLA"), Acceptable Use Policy ("AUP", and Product Description Sheets ("PDS"), all of which are incorporated herein by reference (*collectively referred to as Schedules*)). This Agreement does not, by itself, order any Services. Orders for Services are placed and documented by use of a Service Order form each time Customer orders one or more Services and shall be incorporated by reference herein and governed by the terms and conditions of this Agreement. In the event of any conflict between this Agreement and the terms of any Service Order (with the exception of any special conditions noted in the applicable Service Order) precedence will be given to the terms of this Agreement. Unless otherwise agreed to in writing by PS Lightwave, no terms and conditions endorsed upon, delivered with or contained in Customer's purchase orders or in any other similar document, will amend or vary the provisions of this Agreement.

2. **TERM AND COMMENCEMENT DATE.**

- a. This Agreement shall begin upon the date the last party executes this Agreement and shall remain in effect throughout the duration of any and all Service Term(s) until the expiration or termination of the final existing Service Order(s) entered into under this Agreement, whichever occurs last.
- b. The Term of each Service Order commences when testing of the Service has been successfully completed by both Parties and the Service is operating within specification set forth in this Agreement and either Customer has expressly accepted the Service or is deemed to have accepted the Service. However, when PS Lightwave releases the applicable Services for the Customer's use, the Term shall Commence regardless of whether Customer has procured services from third-party vendors required to operate the Services or whether Customer is otherwise prepared to accept delivery of the provisioned Services ("Commencement Date"). When multiple Services are included in a single Service Order, the Service Term of the entire Service Order (and of each Service included in the applicable Service Order) commence on the date each of the delivered Services are released for the Customer's use. Invoicing and the term commencement date for that individual Service shall begin on the date the delivered Service is released for the Customer's Use. Upon expiration of the Service Order Term, the applicable Service Order shall renew for successive one (1) month terms unless either Party elects to not renew the Service Order by providing a minimum of thirty (30) days advance notice of the then current Service Order Term.

Services provided by PS Lightwave to the Customer are entirely independent, separate and distinct from any services which may be provided by a property owner, and are not included as part of any agreement executed by and between a property owner and its tenants and occupants.

SERVICE PORTABILITY.

- a. Customer may cancel an existing Service (a "Cancelled Service") without incurring any cancellation or early termination fees or

penalties, so long as:

- i. The Cancelled Service has been installed and in use; and
 - ii. The Cancelled Service is replaced with another On-Net Service having equal or greater On-Net Service MRCs and equal or greater term commitment (the "Replacement Service"); and
 - iii. The Replacement Service is ordered within thirty (30) calendar days of the effective date of the cancellation of the Cancelled Service (the effective date of cancellation being the "Cancellation Date"); and
 - iv. PS Lightwave determines, in its sole discretion, that adequate capacity is available on the PS Lightwave Network for the Replacement Service; and
 - v. Customer is not otherwise in breach of the Agreement.
- b. If Customer fails to meet any of the above criteria for any particular Cancelled Service, Customer shall pay 100% of the unpaid balance that would have been due throughout the Service Term for such Cancelled Service, which amount shall be identified on individual Service Orders.
 - c. To exercise this portability option, Customer must, prior to the date that Customer cancels the Cancelled Service, notify PS Lightwave in writing of its intent to replace a Cancelled Service with a Replacement Service. PS Lightwave shall credit Customer all applicable early termination fees charged to Customer's account, providing that Customer orders the Replacement Service within thirty (30) days of the Cancellation Date. Notwithstanding the foregoing, in no event shall Customer be credited back for any On-Net Service installation NRCs or any third-party expenses that were charged for any Cancelled service which Customer cancels pursuant to this Section.
 - d. Forced relocations are excluded under PS Lightwave's Service Maintenance & Support policy. Customer may incur non-recurring charges for a portion of any relocation. PS Lightwave reserves the right to modify its network or the facilities used to provide the Services and shall use reasonable efforts to notify Customer of any planned maintenance.

4. **CHANGE IN SERVICE LEVEL.** Customer may increase or reduce services provisioned under an existing Service Order by providing PS Lightwave with a minimum of thirty (30) days advance, written notice to be confirmed in an addendum to be executed by and between the Parties. Should Customer decrease service, Customer shall pay One Hundred Percent (100%) of applicable charges calculated on the balance of the term for such reduced service. PS Lightwave reserves the right to modify its network or the facilities used to provide the Services and shall use reasonable effort to notify Customer of any planned maintenance.

5. **EQUIPMENT**

- a. **Authorized Equipment.** "Authorized Equipment" shall be defined as any and all electronics provided by PS Lightwave necessary to provision the contracted Services.
- b. **Ownership.** Except as otherwise agreed, PS Lightwave reserves all rights, titles and interests in all Authorized Equipment. PS

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Lightwave's Authorized Equipment shall at all times be and remain personal property, notwithstanding that it may be or become attached to or embedded in real property.

- i. Customer shall not, and shall not permit others, to rearrange, disconnect, remove, and attempt to repair or otherwise tamper with any Authorized Equipment provided by PS Lightwave without the prior written consent of PS Lightwave. Customer shall not, and shall not cause any End User (as defined below), to tamper with, remove or conceal any identifying plates, tabs, or labels affixed to Authorized Equipment or facilities. Customer shall be responsible for the cost of any loss, repair or maintenance occasioned by failure of Customer to perform its obligation under this Agreement.
 - ii. Customer shall not take any action to place any lien or encumbrance on the Authorized Equipment. In no event will PS Lightwave be liable to Customer or any other person for interruption of Services for any other loss, cost or damage caused or related to improper use or maintenance of the Authorized Equipment by Customer or third parties' access to the Services by Customer in violation of these terms, and Customer shall reimburse and indemnify PS Lightwave, for any damages incurred or claims made as a direct result thereafter.
 - iii. Customer is entitled to use any PS Lightwave provided Authorized Equipment in connection with the then applicable permissible use policy. However, Customer shall keep confidential all intellectual property provided through any such Authorized Equipment and shall not copy, alter, reverse-engineer, or tamper with such intellectual property nor use it other than in connection with the Services. Customer agrees not to resell, transfer, export or re-export any such Authorized Equipment or any technical data derived therefrom.
 - c. **Unauthorized Equipment.** Customer agrees not to interfere or install any unauthorized equipment that may cause technical difficulties or interfere with or disrupt PS Lightwave's network, backbone or nodes, nor allow or permit any End User or unauthorized third party to interfere or install any unauthorized equipment that may cause technical difficulties or interfere with or disrupt PS Lightwave's network, backbone or nodes.
 - d. **Power Requirements.** PS Lightwave provided network interface devices must be powered on and operational twenty-four (24) hours per day, seven (7) days per week. Customer warrants it is responsible for furnishing a reliable twenty-four (24) hour per day power source in capacities required for PS Lightwave provided Authorized Equipment.
6. **THIRD PARTY SERVICES.** In conjunction with Service provided, PS Lightwave may, upon Customer's request, arrange for Service to be provided by a third party ("Third Party Service"), such as local access service, interexchange service, or international service, PS Lightwave shall not be obligated to provide any Third Party Service except in connection with a Service Order. In the event Customer requests that PS Lightwave order Third Party Service, PS Lightwave shall make provision and coordinate the installation of such Service and conduct the initial testing of an interconnection between the PS Lightwave Service and Third Party Service. PS Lightwave will not begin billing Customer for such Third Party Service until related PS Lightwave Service is available. Customer may be required to execute a letter of authorization ("LOA"), in a form provided by PS Lightwave, authorizing PS Lightwave to deliver such Third Party Service to Customer's location. When Customer requests international service, PS Lightwave may arrange for the foreign end point of the Service or for a portion of the foreign end point of such Service to be provided by a third party carrier licensed in the relevant foreign point. In some cases, PS Lightwave may be unable, and Customer may be required to arrange the foreign end of such Service with a foreign carrier. Although this MSA governs the terms of PS Lightwave's arrangement of Third Party Service, service

level parameters and related warranties (if any), surcharges, outage credits, required commitments, termination liability, limitations, and other service-specific terms of the Third Party Service shall be those of the provider of the Third Party Service ("Third Party Provider"). If Third Party charges are incurred by PS Lightwave, including without limitation monthly recurring charges, installation charges, non-recurring charges; and applicable termination/cancellation charges of the Third Party Provider, shall be invoiced to Customer and Customer shall be responsible for the full timely payment thereof. Customer shall be notified, in advance within the agreed upon Service Order, if any Third Party charges will be included in the Services provisioned.

- a. Third Parties shall have no liability to the end user;
- b. Customers shall use Third Party services in accordance with all applicable laws; and
- c. Third Party Acceptable Use Policy terms and conditions shall apply to any provisioned Third Party Services.

7. **MULTIPLE USERS.** Customer acknowledges that Customer is executing this Agreement on behalf of all persons who use the PS Lightwave Services through Customer's facilities. Customer shall have sole responsibility for ensuring that all such other end users understand and comply with the terms and conditions of this Agreement and any or all Services Orders. Customer further acknowledges and agrees that Customer is solely responsible and liable for any and all breaches of the terms and conditions of this Agreement, subsequent Service Orders, SLA and AUP, whether such breach is the result of use of the PS Lightwave Services by Customer or by any other end user of Customer's computers, facilities or Services.

- a. **End User.** An End User is a user of Customer's Services and shall include any Customer, purchaser, lessor, employee, agent, donee, reseller or any other such person who uses PS Lightwave Services is through, as a result of, connected with or otherwise enabled because of the commercial relationship between PS Lightwave and Customer. Customer is liable for any and all End User charges, whether or not Customer receives payment or reimbursement for the same from End Users.

8. **CUSTOMERS' PREMISES.** Customer authorizes PS Lightwave, with reasonable notice where permission shall not be unreasonably withheld or delayed, and its employees, agents, contractors and representatives to enter Customer's premises to install, maintain, inspect, repair and remove Authorized Equipment, in order for PS Lightwave to perform its obligations and to exercise its privileges under this Agreement, including provision of working space and reasonable storage space, subject to Customer's reasonable and customary security, safety and environmental procedures, including accompanying PS Lightwave Personnel at all times when access to Customer's premises is required.

- a. **Access.** Customer shall provide PS Lightwave and any of PS Lightwave's authorized agents, employees, contractors and representatives all necessary Customer building access rights, facility access, appropriate space to provide, modify, cease or recover any Authorized Equipment or materials that facilitate providing Services under this Agreement. Customer shall provide, and shall ensure as reasonably as practicable, that End Users provide all necessary and appropriate space, power and environmental conditions at any demarcation point. Customer understands that failure to allow access or provide necessary conditions as described in this Agreement may be deemed a Customer default.

9. **PAYMENT & BILLING TERMS.** Customer shall pay the fees and other charges for each Service Order.

- a. **Billing.** Billing shall begin on the date PS Lightwave notifies Customer that Services are fully available for Customer's use regardless of whether Customer has procured services from third-party vendors (i.e. equipment suppliers, software developers, telecommunication Customers, etc.) required to operate the Services, and regardless of whether Customer is otherwise

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prepared to accept delivery of ordered Services (the Commencement Date).

- b. **Invoicing.** PS Lightwave bills for one (1) full month of Monthly Recurring Charges ("MRC") in advance. Each MRC covers Services delivered from the first of the month through the end of the month. PS Lightwave will bill Services in arrears or as otherwise provided by the Service Order.
- c. **First Invoice.** The first invoice will be sent to the Customer following the Commencement Date. The invoice will include prorated MRC from the Commencement Date to the end of the month. When multiple Services are included in a single Service Order, Customer agrees to pay PS Lightwave the MRC and any additional charges associated with those Services that are installed or activated even though the Commencement Date for the entire Service Order has not commenced. Invoices shall be delivered via email (regular mail only if Customer requests).
- d. **Payment of Invoices.** All invoices are due upon receipt and become past due sixty (60) days from the date of receipt of a valid invoice by Customer (the "Delinquency Date"). If PS Lightwave is not in receipt of any payment on or before the Delinquency Date, such payment becomes a Late Payment. At PS Lightwave's discretion, in addition to the Customer's obligation to pay such Late Payment, Customer will pay interest on the Late Payment ("Late Payment Interest") at a rate equal to 1.5% (or the highest amount permitted by law) per month or portion thereof, on the outstanding balance unpaid for more than thirty (30) days; however a minimum interest charge of \$10.00 will be assessed for each billing period subject to a finance charge. In no event, however, shall the charges permitted under this Section or elsewhere in this Agreement, to the extent the same are considered to be interest under applicable law, exceed the maximum lawful interest rate. PS Lightwave shall not be prevented from exercising any of the other rights and remedies available to PS Lightwave hereunder or under any applicable laws. PS Lightwave shall have the right to suspend or terminate Services if an account is past due for more than thirty (30) days from the Delinquency Date. Customer is solely responsible for providing and updating a correct billing address to PS Lightwave.
- e. **Taxes and Fees.** Except for taxes based on PS Lightwave's net income and ad valorem, personal and real property taxes imposed on PS Lightwave's and not Customer's owned or leased property, Customer is responsible for payment of all property, sales, use, gross receipts, excise, building access, bypass, franchise, or other local, state, and federal taxes and/or fees, however designated, imposed on, or based upon the provision of the Services.
- f. **Disputed Invoices.** If Customer reasonably disputes any portion of a PS Lightwave invoice, Customer must pay the undisputed portion of the invoice in accordance with the terms and conditions of this Agreement or associated Service Order and submit a written claim to PS Lightwave for the disputed amount. All claims must be submitted in writing to PS Lightwave at ap@pslightwave.com within sixty (60) days from the invoice date for those Services. Customer waives the right to dispute any charges not disputed within the time frame set forth above. Customer must provide clear and specific reasons, along with their written notice of dispute. Customer must pay all undisputed charges in full when due. In the event the dispute is resolved against Customer in accordance with the procedures hereunder, Customer shall pay such amounts within ten (10) business days of receipt of notice of the determination from PS Lightwave.
- g. **Special Construction or Acquisition.** Notwithstanding anything to the contrary in this Agreement, if PS Lightwave is required to construct or acquire telecommunications facilities from a third party, or both, in order to provide Service, the estimated charges applicable to the construction or acquisition must be approved in writing prior to PS Lightwave commencing such

construction or acquisition. If Customer cancels this Agreement or any Service Order involving construction or acquisition after the acceptance of a Service Order but prior to the Commencement Date, Customer shall reimburse PS Lightwave for all previously agreed to Special Construction costs. This payment obligation is in addition to any other rights and remedies PS Lightwave may have at law, in equity, or as provided in this Agreement.

- h. **Backbilling.** If PS Lightwave fails to invoice a customer for provisioned services, then the Customer's account shall be corrected, and the Customer shall be backbilled for the amount that was underbilled. The backbilling shall not collect charges that extend more than six (6) months from the date the error was discovered by PS Lightwave. The service may be disconnected if the Customer fails to pay the amount due for any underbilled charges pursuant to Item d of this section. No interest or late penalties shall apply to the underbilled amounts.

10. TERMINATION AND/OR CANCELLATION. Termination and/or Cancellation of Services by either Party will occur without liability when one or more of the following conditions occur:

- i. if either Party violates any law, rule regulation or policy of any governmental authority related to the Services;
- ii. if either Party makes a material misrepresentation to the other in connection with the ordering or delivery of Services;
- iii. violates any provision of PS Lightwave's SLA; or
- iv. if either Party engages in any fraudulent use of Services; or if a court or other governmental authority prohibits the furnishing of any Services under this Agreement; or if either Party files bankruptcy or fails to discharge an involuntary petition within sixty (60) days.
- b. **Termination by Customer for PS Lightwave Default.** In the event Customer shall assert PS Lightwave is in default under any term or provision of this Agreement, or any applicable Service Order, Customer will give PS Lightwave written notice of such default with sufficient detail to allow PS Lightwave to attempt to cure such default. If PS Lightwave commences to cure such default within five (5) days after receipt of such notice and thereafter proceeds with the curing of such default with reasonable diligence and completes the curing of such default within thirty (30) days after receipt of such written notice, then no default on the part of PS Lightwave shall be deemed to have occurred. However, if PS Lightwave does not commence curing such default within such five (5) day period, or PS Lightwave does not thereafter proceed with the curing of such default with reasonable diligence, or if PS Lightwave does not complete the curing of such written default within thirty (30) days after PS Lightwave's receipt of such notice, then Customer may on twenty-four (24) hours written notice terminate the Service Order as to which such default relates (if such default relates to a particular Service Order), or terminate this Agreement (if such default relates to this entire Agreement). In the event of a breach of the warranties set forth herein, Customer's sole remedy is termination as described in this Section without liability for any Early Termination Fees.
- c. **Termination of Services by PS Lightwave for Customer Default.** Termination of Services by PS Lightwave will occur without liability when one or more of the following conditions occur:
 - i. Non-payment of any undisputed invoice amounts within sixty (60) days after receipt. A service interruption notice will be sent to the Customer in as referenced in Notices (via U.S. Mail Return Receipt Requested, electronic transmission, and/or certified mail when an invoice becomes forty-five (45) days past invoice date. Suspension of Services pursuant to this paragraph shall not relieve Customer of its obligation to pay charges during the time period in which Services are suspended.; or
 - ii. If Customer fails to cure its breach of any of these terms or conditions or any Service Order, AUP or SLA within ten

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(10) days after written notice thereof provided by PS Lightwave; or

- iii. Failure to allow PS Lightwave's employees, agents, representatives or contractors the necessary access

d. **Effect of Termination.** Upon the effective date of termination of this Agreement:

- i. PS Lightwave will immediately cease providing the Service(s); and
- ii. Any and all payment obligations of Customer under this Agreement for Service(s) provided through the date of termination will immediately become due; and
- iii. PS Lightwave assess and collect from Customer any applicable termination charges that may be due hereunder or under an active Service Order;

e. **Early Termination.** PS Lightwave has established pricing under this Agreement based, in part, on Customer's promise to utilize and pay for the Services through the expiration of the entire Service Term of each Service Order. If Customer desires to terminate any Services after PS Lightwave's acceptance of the Service Order and prior to expiration of the Service Term, Customer may do so by providing written notification thereof to PS Lightwave at least thirty (30) days in advance of such. In the event of termination of Services, Customer shall pay to PS Lightwave, prior to the effective date of such termination, an amount equal to the Termination Charge, which shall be equal to the sum of:

- i. Any NRC applicable to the terminated Services to the extent not already paid by Customer, even if previously waived; and
- ii. Any applicable early termination penalty which may be provided for in an individual Service Order.
- iii. Any termination costs payable by PS Lightwave to any third party associated with any portion of the applicable terminated Service being provided on any Third-Party Facilities; and
- iv. Any reasonable internal costs that are not otherwise recovered by PS Lightwave through the payment of the amounts set forth in (i) through (iii) above; and
- v. All non-recurring and recurring charges that were waived or discounted by PS Lightwave. Customer agrees that PS Lightwave's damages will be impossible to ascertain if any Service is terminated and that the foregoing early termination charge establishes liquidated damages and is not a penalty.

f. **Cancellation**

- i. Customer may change or cancel a Service Order without incurring termination liability by submitting a written change or cancellation request to PS Lightwave prior to the Commencement Date, provided Customer will reimburse PS Lightwave for any applicable charges and/or any special build costs actually incurred by PS Lightwave.
- ii. Prior to the Commencement Date of Services, if Customer requests PS Lightwave change the type of Services ordered, the location of any part of the Services or to delay the Commencement Date more than thirty (30) days ("Substantive Change") or cancels a Service Order, Customer shall pay PS Lightwave's standard installation fees for such Services, any special build costs, and any provider charges associated with the changed Services; provided, however, if during the same time period, Customer submits a change order which is not a Substantive Change, Customer will only be required to reimburse PS Lightwave for any special build costs and provider charges associated with such change.

11. MUTUAL INDEMNITY & LIMITATIONS OF LIABILITY.

- a. Subject to the other provisions of this Agreement, Customer and PS Lightwave shall defend, indemnify and hold harmless the

other from and against any loss, debt, liability, damage, obligation, claim, demand, judgement or settlement of any nature or kind, known or unknown, liquidated or unliquidated, of any third party, including without limitation all reasonable costs and expenses, such as reasonable litigation costs and attorneys' fees ("Claim"), relating to damage to tangible property or bodily injury, or wrongful death, to the extent such Claim arises out of the negligence or willful misconduct of the respective indemnifying party, its employees, agents or contractors in connection with the Agreement or the provision of Services hereunder.

- b. **Customer Indemnity.** Subject to the other provisions of the Agreement, Customer agrees to release, defend, indemnify and hold harmless PS Lightwave, its officers, directors, employees, contractors and agents from and against any Claim to the extent such Claim (i) is brought by a downstream customer of Customer or an end user and arises out of an alleged defect in or failure of Service; or (ii) arises out of or relates to the content transmitted over PS Lightwave's network, whether sent by Customer, including without limitation, claims relating to any violation of copyright law, export control laws, or that such transmissions are libelous, slanderous or an invasion of privacy or illegal.

- c. **PS Lightwave Indemnity** PS Lightwave agrees to release, defend, indemnify and hold harmless Customer and its officers, directors, employees, contractors and agents from and against all third party claims, liabilities losses, expenses and damages related to actual or alleged infringement of any patent, copyright, trademark or other intellectual property right or trade secret misappropriation arising out of or related to the Services. PS Lightwave's obligations herein shall not apply if the infringement arises solely from information provided by Customer. **THE PARTIES INTEND THAT, TO THE EXTENT A CLAIM RESULTS, THE INDEMNITY OBLIGATIONS IN THIS SECTION SHALL APPLY PROPORTIONALLY EVEN IF CAUSED, IN WHOLE OR IN PART, BY THE SOLE, JOINT OR CONCURRENT BREACH, NEGLIGENCE OR WILLFUL MISCONDUCT, WHETHER PASSIVE OR ACTIVE, OF EITHER PARTY, ITS AFFILIATES, SUCCESSORS, ASSIGNS, OFFICERS, DIRECTORS, EMPLOYEES OR AGENTS.**

d. **Damages / Causes of Action.**

- i. For purposes of this Section, the term "PS Lightwave" shall be deemed to include PS Lightwave, its Affiliates, owners, directors, officers, employees, and any person or entity assisting PS Lightwave in its performance pursuant to this Agreement.
- ii. NOTWITHSTANDING ANYTHING TO THE CONTRARY, THE LIABILITY OF PS LIGHTWAVE TO CUSTOMER, (A) FOR BODILY INJURY OR DEATH TO ANY PERSON OR FOR DAMAGE TO ANY REAL OR TANGIBLE PROPERTY CAUSED BY THE WRONGFUL ACT OR OMISSION OF PS LIGHTWAVE SHALL BE LIMITED TO CUSTOMER'S RIGHT TO PROVEN DIRECT DAMAGES, AND (B) FOR ALL OTHER DAMAGES OTHER THAN THOSE SET FORTH IN SUBSECTION (A) AND NOT OTHERWISE EXCLUDED OR LIMITED BY THIS AGREEMENT, SHALL, IF PS LIGHTWAVE IS JUDICIALLY DETERMINED TO HAVE SOME LIABILITY TO CUSTOMER, FOR WHATEVER REASON, ARISING UNDER OR RELATED TO ACTS OR OMISSIONS RELATED TO THIS AGREEMENT, IN THE AGGREGATE FOR ALL SUCH ACTS OR OMISSIONS, BE LIMITED TO AN AMOUNT EQUAL TO THE RECURRING CHARGES UNDER THIS AGREEMENT FOR THE FIRST TWELVE (12) MONTHS OF THE TERM HEREOF.
- iii. NOTWITHSTANDING ANYTHING TO THE CONTRARY, PS LIGHTWAVE SHALL NOT BE LIABLE FOR ANY DAMAGES SUFFERED BY CUSTOMER OR ANY END USER ARISING FROM OR RELATED TO ANY FORCE MAJEURE EVENT.
- iv. NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT TO THE CONTRARY, IN NO EVENT SHALL CUSTOMER OR PS LIGHTWAVE OR THEIR RESPECTIVE

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AFFILIATES BE LIABLE TO EACH OTHER FOR ANY INDIRECT, SPECIAL, PUNITIVE, EXEMPLARY, INCIDENTAL OR CONSEQUENTIAL LOSS OR DAMAGE (OTHER THAN SUCH DAMAGES AS MAY BE INCLUDED AS A COMPONENT OF LIQUIDATED DAMAGES OR TERMINATION CHARGES UNDER THIS AGREEMENT) SUFFERED BY SUCH OTHER PARTY AS A RESULT OF THE PERFORMANCE OR NONPERFORMANCE OF ITS OBLIGATIONS UNDER THIS AGREEMENT, OR ITS ACTS OR OMISSIONS RELATED TO THIS AGREEMENT WHETHER OR NOT ARISING FROM SOLE, JOINT OR CONCURRENT NEGLIGENCE, STRICT LIABILITY, VIOLATION OF LAW, BREACH OF CONTRACT, BREACH OF INDEMNITY PROVISIONS, BREACH OF WARRANTY OR ANY OTHER THEORY OR SOURCE, WHETHER OR NOT FORESEEABLE AND EVEN IF THE PARTIES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS OR REVENUE, AND EACH PARTY HEREBY RELEASES THE OTHER PARTY THEREFROM. IN ADDITION, PS LIGHTWAVE SHALL NOT BE LIABLE FOR ANY DAMAGES ARISING OUT OF OR RELATING TO: INTEROPERABILITY, ACCESS OR INTERCONNECTION PROBLEMS WITH APPLICATIONS, AUTHORIZED EQUIPMENT, SERVICES, CONTENT OR NETWORKS NOT PROVIDED BY PS LIGHTWAVE; SERVICE INTERRUPTIONS OR LOST OR ALTERED MESSAGES OR TRANSMISSIONS (EXCEPT TO THE EXTENT OF SERVICE CREDIT ALLOWANCES SPECIFIED IN THE RELEVANT PRODUCT SUPPLEMENT) OR UNAUTHORIZED ACCESS TO OR THEFT, ALTERATION, LOSS OR DESTRUCTION OF CUSTOMER'S OR ANY THIRD PARTY'S APPLICATIONS, CONTENT, DATA, PROGRAMS, INFORMATION, NETWORK OR SYSTEMS.

v. THE INDEMNIFIED PARTY SHALL PROMPTLY NOTIFY THE INDEMNIFYING PARTY IN WRITING OF ANY CLAIMS WHICH ARE SUBJECT TO THE TERMS OF THIS SECTION. THE INDEMNIFIED PARTY SHALL HAVE THE RIGHT AT ITS OWN EXPENSE TO APPOINT ITS OWN COUNSEL WHO SHALL BE ENTITLED TO PARTICIPATE IN ANY SETTLEMENT NEGOTIATIONS OR LITIGATION REGARDING ANY MATTER FOR WHICH IT IS ENTITLED TO BE INDEMNIFIED HEREUNDER. THE INDEMNIFYING PARTY SHALL NOT AGREE TO ANY SETTLEMENT OR CONSENT TO ANY DECREE, ORDER OR JUDGMENT WITHOUT OBTAINING THE CONSENT OF THE INDEMNIFIED PARTY, WHICH CONSENT SHALL NOT BE UNREASONABLY WITHHELD.

e. **Service Credits.** Customer's sole remedy for any failure of Service is the right to receive service outage credits, if applicable and as set forth in PS Lightwave's Service Level Agreement ("SLA") attached hereto and incorporated herein.

f. **Limitation of Representations and Warranties.** EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, PS LIGHTWAVE MAKES NO WARRANTY TO CUSTOMER OR ANY OTHER PERSON OR ENTITY, WHETHER EXPRESS, IMPLIED, OR STATUTORY, AS TO THE DESCRIPTION, QUALITY, MERCHANTABILITY, INFRINGEMENT, TITLE, COMPLETENESS OR FITNESS FOR ANY PARTICULAR PURPOSE OF ANY SERVICES PROVIDED OR NOT PROVIDED HEREUNDER OR DESCRIBED HEREIN, OR AS TO ANY OTHER MATTER, ALL OF WHICH WARRANTIES BY PS LIGHTWAVE ARE HEREBY EXCLUDED AND DISCLAIMED. CUSTOMER AGREES THAT PS LIGHTWAVE DOES NOT MONITOR, EXERCISE CONTROL OVER, NOR ACCEPT RESPONSIBILITY FOR THE CONTENT OF THE INFORMATION PASSING THROUGH OR CONTAINED WITHIN PS LIGHTWAVE'S FACILITIES, HOST COMPUTERS, NETWORK HUBS AND POINTS OF PRESENCE (THE "PS LIGHTWAVE NETWORK") OR THE INTERNET, OR THE CONTENT OF THE INFORMATION RESIDING ON THE CUSTOMER'S EQUIPMENT OR TRANSMITTED OVER ITS NETWORK, AND IS NOT LIABLE FOR THE CONTENT OF

ANY DATA TRANSFERRED EITHER TO OR FROM THE CUSTOMER OR STORED BY CUSTOMER OR ANY OF CUSTOMER'S CLIENTS VIA THE SERVICES PROVIDED BY PS LIGHTWAVE. CUSTOMERS SHALL INDEMNIFY AND HOLD PS LIGHTWAVE HARMLESS FOR ANY CLAIMS, LOSSES OR DAMAGES ARISING OUT OF OR RELATED TO CUSTOMER'S CONTENT OR USE OF ANY INFORMATION RESIDING ON CUSTOMER'S EQUIPMENT OR TRANSMITTED OVER ITS NETWORK. USE OF ANY INFORMATION OBTAINED VIA PS LIGHTWAVE'S SERVICES IS AT CUSTOMER'S OWN RISK. PS LIGHTWAVE SPECIFICALLY DENIES ANY RESPONSIBILITY FOR THE ACCURACY OR QUALITY OF INFORMATION OBTAINED THROUGH ITS SERVICES. IN THE EVENT THAT PS LIGHTWAVE PROVIDES CUSTOMER WITH PRODUCTS IN CONJUNCTION WITH THE SERVICES (I.E., THIRD PARTY SOFTWARE PRODUCTS OR EQUIPMENT), PS LIGHTWAVE ALSO PROVIDES SUCH PRODUCTS AS IS WITHOUT WARRANTY OF ANY KIND, WHETHER EXPRESS, OR IMPLIED.

g. **Survival and Duration.** These indemnification provisions and obligations shall survive this Agreement and as set forth, represent the entire liability of PS Lightwave and Customer's sole and exclusive remedies, with respect to any claim subject to indemnification under this Agreement.

12. NETWORK DISRUPTIONS & SECURITY

a. PS Lightwave shall have no liability whatsoever for any damage to or loss or destruction of any of Customer's hardware, software, files, data or peripherals caused by network disruptions. The installation, use, inspection, maintenance, repair and removal of the Authorized Equipment may result in network disruptions, service outages or potential damage to Customer's network operations. Customer therefore agrees to take reasonable precautions during use of the Services. In the event of an emergency, PS Lightwave has the right to perform maintenance and/or restoration of its facilities, including but not limited to actions required to restore continuity to a severed or partially severed fiber optic cable, restore dysfunctional power and ancillary support Authorized Equipment, or correction of any potential jeopardy conditions. PS Lightwave shall notify Customer as soon as is reasonably practicable of any further disruptions to Services related to the emergency event.

b. PS Lightwave shall not be liable for any third-party network breaches on Customer's premises, equipment, software or hardware. Customer assumes the risk of any unauthorized third-party access to Customer's network. PS Lightwave makes an effort to keep its network secure, but no network is perfect. Customer should take whatever steps it deems necessary to ensure its data is not accessed by unauthorized third parties.

13. **INSURANCE.** To insure against all risks of loss and damage from the Commencement Date, the Parties agree to maintain in force throughout the term of this Agreement, at their own expense, Employer's Liability insurance and Commercial-General Liability in an amount not less \$1,000,000 as required for operations under this Agreement. Upon the request of either Party, a certificate of insurance shall be provided that evidences the minimum levels of required insurance and includes and/or names the other Party as an additional insured.

14. GENERAL TERMS

a. **Assignment.** This Agreement shall be binding upon and inure to the benefit of Customer, PS Lightwave and their respective Affiliates, successors, assigns, officers, directors, employees and agents. Customer may not assign this Agreement or any of its rights or responsibilities hereunder without the advance written consent of PS Lightwave, and any attempt by Customer to do so shall be void and of no effect. Consent shall not be unreasonably withheld; however, Assignee of Customer may be required to complete and be approved as credit worthy prior to PS

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Lightwave's acceptance of assignment and shall agree in writing to accept all the terms and conditions here, without exception. PS Lightwave's rights and obligations under this Agreement may be assigned to any business entity, which succeeds to ownership or operation of the PS Lightwave Services. Notwithstanding the above, either party may assign this Agreement and any of its rights or obligations hereunder to any Affiliate or to any Person, including but not limited to, any entity which acquires the business or assets of Customer to which this Agreement relates, whether by merger, purchase or otherwise, but the other party to this Agreement is not bound by any assignment until such party has received written notice of such assignment signed by both the assignor and the assignee.

- b. **Severability.** If any provision of this Agreement shall be held by a court of competent jurisdiction to be invalid, unenforceable, or void, the remainder of this Agreement shall remain in full force and effect.
- c. **Force Majeure.** Neither party shall be liable to the other or in default of this Agreement, nor shall any credit allowance or other remedy be extended, for any failure of performance or Authorized Equipment due to causes beyond such party's reasonable control including but not limited to any catastrophic event, earthquakes or other Acts of God, wars, civil disturbances, revolts, sabotage, theft, vandalism, transportation disasters, explosions, fire, acts or omissions of suppliers, fiber/cable cut, equipment or power failure, rodent damage, flood, any law, order or regulations or requests of any governmental entity, national emergency, terrorist activities, insurrections, riots, any acts or restraints of government or any regulatory authority, work stoppages or disruptive labor activities, global or natural disasters or like events, lack or delay in transportation, or failure of a third party to grant or recognize a right beyond the reasonable control of the party delayed. Both parties shall be excused from such performance to the extent, *but only to the extent*, that it is prevented, hindered or delayed by such causes. Upon the occurrence of any of such events, the party whose performance is prevented, interrupted, hindered or delayed shall give prompt notice to the other party, updating such notice at regular intervals regarding such event and the effect thereof, and use reasonable efforts to continue performance notwithstanding such cause. Financial inability to perform shall never be deemed a force majeure event unless it is caused by a moratorium on banking operations.
- d. **No Waiver.** No failure by either party to enforce any rights hereunder shall constitute a waiver of such right(s).
- e. **Notices.** Notices hereunder shall be deemed properly given when delivered. If delivered in person, or when sent via facsimile, overnight courier, electronic mail or when deposited with the U.S. Postal Service. Customer shall notify PS Lightwave of any changes to its address listed on any Service Order.

If to PS Lightwave:

5959 Corporate Drive, Suite 3300
Houston, Texas 77036
832.615.8000
Attn: Legal Group
Email: legalgroup@pslightwave.com

- f. **Acceptable Use Policy ("AUP").** Customer's use of Services shall at all times comply with PS Lightwave's then-current AUP as amended by PS Lightwave from time to time attached hereto and incorporated herein. Violation of federal or state laws or regulations or failure of Customer to comply with the AUP shall be grounds for immediate termination of Services. Termination for violation of the AUP shall in no event release Customer from the obligation to pay all amounts due and payable hereunder. Upon termination for violation of the AUP, any and all of Customer's payment obligations become immediately due.

- g. **Entire Agreement.** This Agreement and the attached and incorporated Service Orders, Change Orders, Exhibits, if any, contain the entire Agreement of the parties and there are no representations, inducements, promises, agreements, arrangements or undertakings, oral or written, between the parties to this Agreement other than those set forth in this Agreement and duly executed in writing, and supersedes all previous representations, understandings or agreements. No modification of this Agreement may be made except in writing signed by both parties.
- h. **Governing Law.** The validity, interpretation, enforceability and performance of this Agreement shall be governed by and construed in accordance with the laws of the State of Texas.
- i. **Jurisdiction & Venue.** ALL PARTIES HEREBY SUBMIT TO THE EXCLUSIVE JURISDICTION OF THE STATE DISTRICT COURT OF HARRIS COUNTY, TEXAS AND HEREBY AGREE THAT ANY SUCH COURT AND ONLY SUCH COURT SHALL BE THE PROPER FORUM AND VENUE FOR THE DETERMINATION OF ANY DISPUTE ARISING HEREUNDER. EACH PARTY WAIVES ALL DEFENSES OF EACH OF PERSONAL JURISDICTION AND FORUM NON CONVENIENS. PROCESS MAY BE SERVED ON EITHER PARTY IN THE MANNER AUTHORIZED BY APPLICABLE LAW OR COURT RULE.
- j. **Consent to Electronic Contracting.** By entering into this Agreement, the Parties consent during term of this Agreement:
 - (i) to conduct this transaction and enter into Service Orders, SLAs, billing and other agreements electronically;
 - (ii) to use electronic signature and records in connection with this Agreement, any amendment of this Agreement and any Service Order or other document issued under this Agreement; and
 - (iii) to receive electronic mail and other electronic communications with respect to any document or transaction relating to or regarding this Agreement and the Services PS Lightwave provides to Customer, including any Service Order, invoice, billing, notice, certificate, consent or record.

The Parties may provide documents to each other electronically by emails that include attachments or embedded links. The delivery of any Party to the other of an electronic signature to this Agreement or any notice hereunder, shall have the same effect as the delivery of an original signature.

15. WAIVER OF JURY TRIAL & ATTORNEYS' FEES.

- a. **Waiver of Jury Trial.** Each Party hereby irrevocably waives its rights to trial by jury in any action or proceeding arising out of this Agreement or the transactions relating to its subject matter.
- b. **Attorney's Fees.** The Parties agree that if either Party to the Agreement brings any civil action related in any manner to the Agreement, the prevailing party in such civil action shall recover all of its reasonable attorneys' fees and litigation expenses incurred from the non-prevailing Party.

- 16. **REGULATIONS.** The Parties agree that in the event of a decision by a telecommunications regulatory authority at the federal, state or local level necessitates material modifications in this Agreement, the Parties will negotiate in good faith to modify this Agreement in light of such decision. Customer warrants that the traffic which Customer places on each Service will have no more than ten percent (10%) interstate traffic component. Upon request, Customer will make its record available to PS Lightwave for inspection and verification of such warranty.

- 17. **DISPUTE RESOLUTION.** Except under circumstances requiring immediate injunctive relief, any dispute, controversy or claim arising out of or relating to the Agreement, the Parties' performance under

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it, or its breach ("Dispute") shall, upon the written request of either Party, be dealt with in accordance with the dispute resolution process before resorting to litigation.

- a. **Executive-Level Negotiations.** If any Dispute is not resolved promptly in the ordinary course of business, either Party may request to resolve such Dispute through face-to-face executive level negotiations, as provided herein, before resorting to litigation. Any such executive level negotiations shall be initiated within five (5) business days (or such other period as the Parties shall otherwise agree) of the date of written notice from the requesting Party to the other Party of the Dispute ("Negotiation Notice"), which Negotiation Notice shall be delivered to the other Party in accordance with the notice section of the applicable, disputed Service Order, and shall: (i) outline the allegations that form the basis of any anticipated complaint; (ii) invite a written response within a reasonable period of time; and (iii) request to initiate to executive level negotiations within the aforementioned five (5) day time period. All executive level negotiations shall be conducted by a management representative of each Party with authority to settle the Dispute. Either Party may elect, upon two (2) business days written notice to the other Party, to bring its legal counsel to such executive level negotiations. The location, form, frequency, duration and conclusion of the executive level negotiations will be at the discretion of the Parties' representatives; provided, however, that either Party shall be entitled to terminate executive level negotiations at any time.
- b. **Non-Binding Mediation.** If the Parties do not resolve the Dispute in accordance with the negotiation process set forth above, the Dispute must be submitted to non-binding mediation before an independent mediator, who shall be mutually designated and agreed upon by the Parties. All costs associated with non-binding mediation shall be borne equally by the Parties.
- c. **Settlement.** Completion of Dispute Resolution Process. All matters resolved pursuant to this Section shall be documented through the Parties' execution of a written settlement agreement. The Parties agree that the refusal or failure of either Party to participate in executive levels discussions, as described herein, or to otherwise engage in good faith informal dispute resolution efforts, including but not limited to non-binding mediation above, shall constitute an unjust and unreasonable practice. In the event any Dispute is not resolved through the dispute resolution process set forth herein, either Party may seek any legal remedies to which it may be entitled before any Harris County State District Court.
- d. **Effect of Dispute Resolution.** All conferences, discussions and correspondence that occur in connection with the dispute resolution procedures conducted shall be deemed settlement discussions, and nothing said or disclosed, nor any document produced, which is not otherwise independently discoverable, shall be offered or received as evidence, or used for impeachment or for any other purpose, in any current or future litigation. Unless otherwise agreed, each Party shall bear its own costs and expenses, including attorneys' fees, incurred in connection with the dispute resolution process, except that the expenses and fees for independent mediation services, and for any independent facilities used for mediation, if any, shall be shared equally between the Parties.

18. CONFIDENTIALITY.

- a. If PS Lightwave and Customer have executed a Confidentiality and Non-Disclosure Agreement or similar agreement, the Parties agree that the terms therein shall apply to any disclosure made hereunder and remain in full effect throughout the term of the Agreement. If no such agreement is in effect, Customer and PS Lightwave agree to maintain in strict confidence all technology, research and development, business affairs, pricing, trade secrets, and other proprietary information of the other party disclosed under the Agreement. No obligation of confidentiality shall apply to disclosed information that is in the public domain (through no violation of this Section by recipient) that the recipient: (1) already possesses at the time of disclosure without obligation of confidentiality; (ii) develops independently; or (iii) rightfully receives without obligation or confidentiality from a third party. The Parties' obligations under this Section shall survive expiration or termination of the Agreement.
- b. If the recipient is required by law, rule, regulation or court order to disclose any confidential information, the recipient will promptly notify the disclosing party in writing prior to making any such disclosure in order to facilitate the disclosing party seeking a protective order or other appropriate remedy from the appropriate body. The recipient agrees to cooperate with the disclosing party in seeking such order or other remedy. The recipient further agrees that if the disclosing party is not successful in precluding the requesting legal body from requiring the disclosure of the confidential information, it will furnish only that portion of the confidential information which is legally required and will exercise all reasonable efforts to obtain reliable assurances that confidential treatment will be accorded the confidential information.
- c. Neither party shall use the other's name in publicity or press releases without obtaining the other's prior written approval.

19. **CONSTRUCTION OF AGREEMENT.** By execution of this Agreement, the Parties acknowledge that they have read and understood each provision, term and obligation contained in this Agreement. This Agreement, although drawn by one Party, shall be constructed fairly and reasonably and not more strictly against the drafting party than the non-drafting Party. Customer acknowledges and understands that it has had the opportunity to review this agreement with independent counsel and enters into this agreement with full knowledge and understanding of its terms and conditions.

20. **HIRING PROHIBITION.** During the term of this Agreement, the Customer or any of its affiliates will not, directly, or indirectly, for their own account or for or on behalf of any other person or entity, whether as an officer, director, employee, partner, principal, joint venture, consultant, investor, shareholder, independent contractor or otherwise, hire or employ, or attempt to hire or employ, in any fashion (whether as an employee, independent contractor or otherwise), any employee or independent contractor of PS Lightwave, or solicit or induce, or attempt to solicit or induce or take away, any of PS Lightwave's employees, consultants, clients, Customers, vendors, suppliers, or independent contractors to terminate their relationship with PS Lightwave or the other party.

CUSTOMER REPRESENTS AND WARRANTS THAT CUSTOMER HAS FULL AUTHORITY TO ENTER INTO THIS AGREEMENT. BY SIGNING THIS AGREEMENT OR ANY SERVICE ORDER, CUSTOMER ACKNOWLEDGES AND REPRESENTS THAT PRIOR TO ITS EXECUTION IT HAS FULLY READ AND UNDERSTANDS (a) THIS AGREEMENT, (b) THE DEFINITIONS AND GENERAL TERMS DEFINED HEREIN, (c) ANY OTHER REFERENCED SCHEDULES, EXHIBITS, ATTACHMENTS AND/OR SERVICE ORDERS EXECUTED IN CONJUNCTION HERewith OR PURSUANT TO THE TERMS HEREOF AND AGREES THAT THE DEFINITIONS AND GENERAL TERMS, THE APPLICABLE PRODUCT SUPPLEMENTS, SERVICE ORDERS AND ANY OTHER DOCUMENTS REFERRED TO AND INCORPORATED INTO THIS AGREEMENT ARE A PART OF THIS AGREEMENT AS IF SET FORTH HEREIN IN THEIR ENTIRETY. EXECUTION HEREOF BY THE PARTIES CONSTITUTES AN AGREEMENT AND

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ACKNOWLEDGMENT THAT THE RELEASE, INDEMNIFICATION, AND LIMITATION OF LIABILITY PROVISIONS CONTAINED IN THIS AGREEMENT COMPLY WITH THE EXPRESS NEGLIGENCE RULE AND ARE CONSPICUOUS.