

**1. Scope.** These terms and conditions of service (“**Terms**”) apply to the provision of services to Customer as identified in the applicable AFS (“**Service**” or “**Services**”) which may be provided by EarthLink Business, LLC, its subsidiaries and/or affiliates (“**EarthLink Business**”) and are governed by the Terms of this Agreement, the AFS, the applicable tariff, any applicable Supplemental Terms and Conditions, Customer Experience Guide and/or Service Level Agreement that may apply to such Service(s), and each incorporated amendment, exhibit, schedule or other attachment and associated documents referred to and available at [www.earthlinkbusiness.com](http://www.earthlinkbusiness.com) (“**Company Website**”) (collectively referred to as the “**Agreement**”). Optional features associated with the Service(s) that Customer may activate or deactivate and for which no additional charges apply may not be reflected on the AFS. EarthLink Business reserves the right to modify its AFS, tariffs, rate sheets, these Terms and any documentation corresponding to the applicable Service posted on the EarthLink Business Website.

1.2 Customer authorizes EarthLink Business to accept executed documentation by e-mail, facsimile or other electronic transmission and an electronically stored copy (i.e. PDF or fax) shall serve the same purpose as an original document.

1.3 The obligation of EarthLink Business to provide the Services to Customer is subject to approval by EarthLink Business of Customer’s credit status. Customer’s execution of this Agreement or AFS constitutes authorization for EarthLink Business to obtain credit information from any credit bureau or other investigative agency pertaining to the credit and financial condition of Customer. Customer understands that, as a result of this credit review, it may be required to submit a cash deposit or guaranty in order to receive the Services. In addition, in the event that EarthLink Business determines, in good faith, that the creditworthiness of Customer has materially deteriorated following execution of this Agreement, EarthLink Business reserves the right to require from Customer a cash deposit or such other security as EarthLink Business may reasonably require.

**2. Service Term and Renewal.** The term with respect to each Service shall begin on the date the Service is available for use by Customer (the “**Service Commencement Date**”) and shall continue for a period of months thereafter as set forth in the AFS, unless earlier terminated in accordance with the terms of this Agreement or the AFS (“**Service Term**”). The Service will be deemed available for use, and billing will commence, after the underlying facility has been delivered and/or installed per the product specific schedule at the service address, whether or not the Service(s) have been activated, but only in the event that such delay in the activation of the Service(s) is caused by Customer or its agents. The Service Term shall automatically renew on a month-to-month basis until either Party terminates the Service(s) by giving the other Party not less than thirty (30) days prior written notice of termination. Customer must provide thirty (30) days prior written notice for termination of any circuit, facility and/or service. If no term is set forth in the AFS, the Service Term will be one (1) year. EarthLink Business may increase the price of any Service in a month-to-month Service Term.

**3. Service Availability and Installation.** EarthLink Business makes no representation or warranty as to when Service will commence and will use commercially reasonable efforts to initiate Service as soon as possible. Customer understands and acknowledges that Service initiation is dependent upon the actions of third parties not under the control of EarthLink Business. Once installed, Services will be available 24 hours a day, 7 days a week, in accordance with the applicable Service Level Agreement (“**SLA**”) posted at [www.earthlinkbusiness.com](http://www.earthlinkbusiness.com), except for scheduled preventive maintenance or for unscheduled emergency maintenance. Additional fees may apply for unscheduled maintenance, after hours or custom installation requests. Under no circumstance shall EarthLink Business be liable to Customer or any third party for damages arising from delays in commencement of Service, loss of information, numbering or directory listing errors, or loss of business.

3.1 EarthLink Business may be required to provision part of the Service using “last-mile” or “local loop” facilities from the Local Exchange Carrier operating in each LATA or underlying access provider (“**LEC**”). EarthLink Business charges to the Customer may include rates charged by the LEC, and are subject to change upon notice to Customer. Customer is responsible for its facilities and any equipment, service or applications not ordered from EarthLink Business required to provide the Service, and any installation delay caused because such facilities, equipment, service or application are not installed or fully functional by the scheduled installation date, or any other Customer cause, will not relieve Customer of its obligations to pay for the Services as of the Service Commencement Date, which will be deemed to be the original scheduled installation date. EarthLink Business cannot guarantee rates from third-party providers until orders are placed and a firm order commitment date (“**FOC**”) is confirmed. If, prior to FOC, the rate(s) for the underlying facility change from the rate used in calculating the price reflected in the AFS, then EarthLink Business may revise the pricing provided to Customer, including all resulting monthly recurring charges (“**MRC**”) and/or non-recurring charges (“**NRC**”) and will provide Customer with notice of such new pricing for approval to proceed with the installation of Service. During the installation process and based upon the Customer’s needs and/or requests, EarthLink Business and Customer agree to accept any Services that are added and/or changed via phone or email. Any additional Services installed will be billed at the standard rate unless addendums for pricing have been executed. After Customer signature of this Agreement, this order will begin enrichment and progress toward Service Activation. In order for EarthLink Business to assure the Services being provided are configured in such a manner to

meet Customer requirements and installation, it is possible additional information and communications with the Customer or their designated contact must occur. Additional Information required may include but not limited to, additional details around the Customer's physical address, physical building, existing and ordered equipment as well as configuration data needed for Service Installation. The Customer or their designated contact agrees they will be available to provide such information as needed in a timely manner when identified. However, if before Service Activation, EarthLink Business is delayed in implementation of the Services due to Customer's lack of response to provide this needed information, EarthLink Business reserves the right to notify Customer in writing that the order is being delayed due to the Customer's actions. If the additional information is not provided within ten (10) business days of such notice, EarthLink Business may, begin billing the full amount of the MRC or some portion thereof, or may elect to deem the Customer in breach of the Agreement and apply the Cancellation Fee and cancel the order in process.

3.2 In the event the NRC or MRC to be incurred by Customer associated with the delivery and installation of the underlying facility and establishment of Service exceeds the price quoted in the AFS, or special construction or equipment for the provider of the underlying facility is necessary resulting in fees that Customer does not want to incur, Customer may cancel the Services without a Cancellation Fee (as set forth below in Section 8) by providing written notice to EarthLink Business to cancel within ten (10) days of receipt of notice of such price change.

3.3 Except for standard Service installation, repair and maintenance provided with the Services, Customer shall be responsible for any time and material charges associated with the dispatch of EarthLink Business personnel, sub-contractors or suppliers to Customer premises necessary to provide repair to Services resulting from a Customer caused service interruption. EarthLink Business shall use all commercially reasonable efforts to notify Customer of any such costs in advance.

**4. Customer Premises Equipment.** EarthLink Business reserves the right to deliver the Services using such delivery technology and/or facilities as it chooses from time to time and Customer acknowledges that the delivery of the Services over certain technologies may require the installation of customer premises equipment, including all EarthLink Business provided hardware to include, without limitation, phones, switches, modems, routers and originally-supplied router parts and materials, provided and owned by EarthLink Business ("CPE"). Customer shall not make any physical modification, or permit third party access to, the EarthLink Business CPE without prior written consent of EarthLink Business. In the event that the CPE is accessed by entities other than EarthLink Business or their agents due to the actions of the Customer, the Customer shall reimburse EarthLink Business for any costs incurred to return the CPE to the proper condition. Additionally should these actions cause loss, damages or liabilities to EarthLink Business the Customer will be solely responsible to compensate EarthLink Business for the loss, damage or liability. Upon termination of any Service or the AFS, Customer's right to use the CPE will immediately end and Customer shall return the CPE within thirty (30) days of such termination. In the event that Customer fails to return such CPE to EarthLink Business (or, at EarthLink Business' option, to permit recovery of CPE by EarthLink Business) in good working order, reasonable wear and tear excepted, Customer shall be responsible for the full replacement cost of the CPE and shall pay EarthLink Business all charges associated with the recovery of that equipment. For avoidance of doubt, the foregoing CPE conditions do not apply with respect to routers or IP PBX systems purchased by Customer from EarthLink Business. All CPE provided and owned by EarthLink Business will, at all times, remain the property of EarthLink Business. Customer shall not (a) reverse engineer, disassemble, decompile or otherwise attempt to recreate the CPE configurations, or modify, translate, adapt, alter or create derivative works therefrom, (b) reproduce, publish, display, distribute, disclose, or otherwise make available the CPE configurations, or any part thereof; (c) use the CPE for any purposes other than those explicitly stated herein. Customer is at all times responsible for properly maintaining the safety and security of the CPE installed at the customer premise. Customer shall bear the risk of loss arising from any unauthorized or fraudulent use of the CPE unless such fraud resulted from the gross negligence or willful misconduct of EarthLink Business. Customer shall pay the reasonable time and materials cost incurred by EarthLink Business to gain access to the hardware, troubleshoot the hardware, reconfigure the hardware and/or replace the hardware.

4.1 CUSTOMER SHALL DEFEND AND INDEMNIFY EARTHLINK BUSINESS FROM ANY AND ALL CLAIMS, ACTIONS, LOSSES, DAMAGES, (INCLUDING REASONABLE ATTORNEYS FEES) ARISING OUT OF THE PURCHASE, POSSESSION, OPERATION, CONDITION, RETURN, USE OR MISUSE OF THE CPE, THE SOFTWARE OR BY OPERATION OF LAW, EXCLUDING, HOWEVER, ANY OF THE FOREGOING RESULTING SOLELY AND DIRECTLY FROM THE NEGLIGENT OR WILLFUL ACTS OF EARTHLINK BUSINESS. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.

**5. Termination for Default.** Customer shall be in default of this Agreement in the event it (a) knowingly provides materially inaccurate, false or otherwise misleading information in an application for Service; (b) utilizes any Service for any unlawful purpose or for any purpose other than that for which the Service is designed and intended by EarthLink Business; (c) utilizes any Service in violation of Section 6 herein; (d) has an outstanding balance which remains uncured as set forth in Section 7.2;

and (e) materially violates any provision of EarthLink Business' Acceptable Use Policy ("AUP"). Notwithstanding any other remedies that EarthLink Business may have available to it at law or in equity, in the event of any Customer default which is not cured within thirty (30) days following the Customer's receipt of written notice thereof, EarthLink Business may terminate the Agreement without further notice and immediately discontinue any and all Services provided to Customer. EarthLink Business may also terminate the Agreement immediately without notice or opportunity to cure as provided in Section 6.1, and either immediately or on a date designated by EarthLink Business by notice as provided in Section 7.2. Nothing contained herein shall relieve Customer of its obligations to pay EarthLink Business for all Services provided including any ETF (as set forth in Section 9 below).

5.1 The Parties agree that, in the event of a decision or ruling by a regulatory authority at the federal, state or local level, with competent jurisdiction over such matters, that materially affects the rights or obligations of either Party arising out of this Agreement, the Parties will negotiate in good faith to modify this Agreement in light of such decision. Should said decision or ruling prohibit EarthLink Business from furnishing the Services, then either Party may terminate this Agreement with notice to the other Party without further liability hereunder, except Customer's liability to pay for Services provided through the effective date of such termination.

5.2 Customer may terminate the Agreement in the event that EarthLink Business is in material breach of its obligations and such breach remains uncured for a period of thirty (30) days from the date that EarthLink Business receives written notice thereof from Customer. In such case, Customer shall not incur any termination liability for the termination of the affected Service but shall be obligated to pay for Services rendered prior to the effective date of such termination.

**5.3 Business Downturn.** Notwithstanding any provision of this Agreement to the contrary, twelve (12) months following the Service Commencement Date, Customer may permanently close one (1) service location due to a downturn in its business and/or adverse change in its financial condition without incurring the applicable ETF, but will be liable for any documented expenses incurred by EarthLink Business to discontinue any third party services or circuits used in providing the Service, so long as (i) Customer's account with EarthLink Business is current, (ii) Customer provides EarthLink Business with at least sixty (60) days prior written notice of the termination date, and (iii) the termination of Service is not due to a transfer of any portion of the Service to another provider. In any such event, however, Customer shall remain liable for the Services through the effective date of the termination.

**5.4 Chronic Downtime.** In the event that a specific circuit element at a particular Service location ("Affected Service") experiences (i) three (3) or more occurrences of repairs during a given month not resulting from a Customer caused impairment or (ii) three or more violations of the same Network Availability SLA Objective within a given month ("Chronic Downtime"), Customer may request an escalation of repair by emailing [support@earthlinkIT.com](mailto:support@earthlinkIT.com). Upon receiving Customer's request, EarthLink Business will have fifteen (15) business days to evaluate and prescribe a resolution, including a reasonable timeline to complete the prescribed repairs ("Cure Period"). If EarthLink Business is unable to resolve the Chronic Downtime within the Cure Period, Customer may terminate the Affected Service with thirty (30) days advance written notice to EarthLink Business without incurring an early termination fee ("ETF"); however, Customer will remain obligated to pay for all Services received through the actual termination date.

**6. Use of Service.** Customer shall use the Service in compliance with, and subject to, all applicable government codes, ordinances, laws, rules and regulations, applicable tariff, and, in the case of Internet services, the AUP, and any additional documentation corresponding to the applicable Service posted on the EarthLink Business Website, and shall secure, prior to the delivery of the Service, and maintain in full force and effect during the applicable Service Term, any and all necessary approvals, consents, rights of way, permits, franchises, licenses or similar approvals from all governmental and other authorities which are necessary or required to be obtained by the Customer in connection with the Services.

6.1 Customer shall not (a) use, or attempt to use, any Service for any fraudulent, unlawful, improper, harassing, excessive, harmful, or abusive purpose, in violation of the AUP or applicable tariff, and Customer shall at all times be responsible for ensuring compliance with the delivery of its calling party identifying information, including but not limited to calling party name and calling party number; (b) resell or attempt to resell any aspect of the Service without the prior written consent of EarthLink Business, whether for profit or otherwise; (c) use the Services as an auto dialer, telemarketer, dial-up internet service provider, call center or other similar type of businesses. Customer shall indemnify and hold EarthLink Business harmless for any costs incurred by EarthLink Business relating to such improper use, including, but not limited to, any fines imposed upon EarthLink Business by a governmental or regulatory body. If EarthLink Business suspects a violation of this provision, EarthLink Business may: (i) begin legal action; (ii) suspend or terminate Service(s) immediately and without prior notice; (iii) suspend or terminate service(s) provided to Customer under any other agreement with us; and (iv) cooperate with law enforcement in prosecuting

offenders. EarthLink Business may terminate Customer's Service or change Customer's rate plan at any time if EarthLink Business determines, in EarthLink Business' sole discretion, that Customer's use of the Service is excessive, unusually burdensome, or unprofitable to EarthLink Business.

6.2 EarthLink Business may cooperate with law enforcement organizations that have lawfully requested pursuant to a valid subpoena or court order (i) trap and traces, pen registers, wire taps and similar call intercept methods, and (ii) information regarding Customer or any end user of Customer and provide such organizations with any information requested, including, but not limited to, names, email addresses, mailing or contact addresses, IP addresses, telephone numbers, call detail records, or call content. Customer agrees to cooperate with EarthLink Business in investigating suspected violations.

6.3 Customer shall bear the risk of loss arising from any unauthorized or fraudulent use of the Services unless such fraud resulted from the gross negligence or willful misconduct of EarthLink Business and EarthLink Business retains the right to analyze any and all information at its disposal, including credit surveys, call detail records and any other information to confirm unauthorized use. Customer shall pay for unauthorized or fraudulent use of service at EarthLink Business' highest usage charges applied to network usage and attempted network usage, whether or not a terminating connection was achieved, plus all costs incurred by EarthLink Business to detect, discover, observe, investigate, analyze, examine and locate the party responsible for unauthorized or fraudulent use.

6.4 EarthLink Business will restrict (i) calls to 900, 976, 700 numbers and other "pay-as-you-call" services and (ii) international long distance calling functionality from Customer's account originating on the EarthLink Business provided service (with the exception of Canada or any other country that follows the North American Numbering Plan) with respect to the Services ordered and will only restore such functionality upon request by an authorized representative of Customer. In no event will EarthLink Business be liable for fraudulent calls originating from Customer owned or operated equipment, for claims arising out of equipment provided by third party vendors that may be installed at the Customer premises in connection with the Services, or for damages associated with or arising from any service, channels, or equipment, which it does not furnish.

6.5 Customer remains responsible for its own network security and security violation response procedures. While a virtual private network ("VPN") or Managed Network Service ordered from EarthLink Business may enhance Customer's ability to impede unauthorized access to its network and data, and may aid Customer in detecting potential security breaches and network irregularities, Customer understands and acknowledges that no Service is guaranteed to ensure Customer's network security or to prevent security incidents, and that EarthLink Business is not responsible for any unauthorized third party or Customer employee access to Customer's facilities or data.

6.6 Customer is responsible for informing EarthLink Business if (i) Customer is a Covered Entity or Business Associate (both as defined in HIPAA); and (ii) Customer Content includes Protect Health Information ("PHI") (as defined in HIPAA). If Customer notifies EarthLink that it is a Covered Entity or Business Associate and that Customer Content includes Protected Health Information, then the terms set forth in Section 16 related to compliance with HIPAA will apply. If Customer does not so notify EarthLink Business, EarthLink Business will have no obligation to provide the Services in compliance with HIPAA.

**7. Billing and Payment Terms.** All invoices are due and payable within thirty (30) days from the date of invoice. Should Customer fail to pay any undisputed amount when due, Customer shall pay interest on such unpaid amount at the rate of one and a half percent (1.5%) per month, or such lesser amount as is the maximum amount permitted under applicable law, until such sum is paid in full. Customer shall notify EarthLink Business in writing of any charge or amount disputed, in good faith, within sixty (60) days of Customer's receipt of the applicable invoice ("Dispute Notice"). In no event shall Customer's notice of a good faith dispute relieve Customer from its obligation to pay, in full, all undisputed charges and amounts. The Parties shall work in good faith to promptly resolve any billing dispute initiated pursuant to this Agreement. If a dispute is resolved in favor of EarthLink Business, and Customer has not already paid the disputed amount, Customer will pay such amount to EarthLink Business, plus any applicable late fees, on the next billing cycle. If a dispute is resolved in favor of Customer, EarthLink Business will apply a credit in the appropriate amount to Customer's EarthLink Business account in the next billing cycle, subject to the billing cycle cut-off date. Credits that miss the billing cycle cut-off date will be applied in the next billing cycle.

7.1 Customer shall notify EarthLink Business of any billing dispute by sending an email to [customercare@earthlinkbusiness.com](mailto:customercare@earthlinkbusiness.com) with "Billing Dispute" in the subject line, which states (i) the date of the disputed invoice, (ii) Customer's account number, (iii) the amount disputed, and (iv) the basis of the dispute ("**Dispute Notice**"), or by contacting a Customer Care Representative at **(855) EL-Care-1**. Instruments tendered as full satisfaction of any debts, must be delivered or sent by registered mail, return receipt requested, to 330 Monroe Ave, Rochester, NY 14607, attn. Legal Department.

7.2 If any undisputed invoiced amount remains unpaid on the due date, and such default remains uncured ten (10) days after EarthLink Business provides Customer written notice of such default ("**Suspension Notice**"), EarthLink Business may immediately suspend the Services, in whole or in part. Following the issuance of a Suspension Notice, EarthLink Business may terminate all or any part of the Services without further notice to Customer if all outstanding amounts are not paid on or before the scheduled termination date specified in the Suspension Notice. EarthLink Business shall not suspend service for non-payment provided that Customer provides EarthLink Business with a Dispute Notice. Neither suspension nor termination of the Service will relieve Customer of any obligation to pay for Services prior to suspension and/or termination, or for any amounts due for early termination.

7.3 Customer will pay the charges for the Services set forth in each AFS and/or SOW ("**Charges**"), which may include reasonable travel and other out-of-pocket expenses incurred by EarthLink Business in connection with its performance of the Services. In addition to the MRC and NRC set forth in the AFS, Customer also agrees to pay (i) unless and until Customer provides EarthLink Business with satisfactory evidence of its exemption from such impositions, all applicable federal, state and local taxes (other than taxes on EarthLink Business net income), imposed on, or with respect to, the Services and any CPE purchased by Customer from EarthLink Business, (ii) all governmental fees and/or other surcharges in effect from time to time including, but not limited to, Universal Service Fund (USF), E-911, state TRS and payphone surcharges, required or permitted by applicable law, rule or regulation, to be charged to Customer, (iii) Administrative Services Fee, (iv) fees for special features or services requested by the Customer such as hunting, directory listing, 800 service, inside wiring/cabling, DMARC extension and custom and after hour installations and (v) any originating access charges or fees that are charged by the incumbent local exchange carrier to EarthLink Business as a result of the Service, (vi) and all other similar charges in effect from time to time, however designated. EarthLink Business shall not increase the MRC set forth in the associated AFS more than five percent (5%) in each twelve (12) month calendar term during the Service Term.

7.4 **Pricing Changes.** All non-recurring and monthly recurring pricing is based on EarthLink Business' understanding of technical requirements, scope of support and service expectations provided by Customer and is subject to change based upon discovery of additional or unforeseen requirements, support responsibilities and/or additions of technology components, including, but not limited to, software licenses, server hardware, network equipment and allocations of CPU, memory and disk space.

8. **Service Cancellation.** Except as set forth in Section 3.1 above or in any applicable Supplemental Terms and Conditions, Customer Experience guide, or other applicable addendum that may apply to such Service(s), in the event this Agreement is terminated by Customer following its execution by Customer but prior to the Service Commencement Date, Customer will be charged a service cancellation fee in an amount equal to (i) one (1) month's MRC's for such service multiplied by six (6), plus (ii) the NRC for such Service (whether or not such charge was originally waived), and (iii) any direct costs incurred by EarthLink Business as a result of the service cancellation (including any expedite fees and any cancellation or early termination fees imposed on EarthLink Business by any underlying service provider that was contracted with to deliver such Service) ("**Cancellation Fee**").

9. **Service Termination.** Except as set forth in Sections 3.1, 3.2, 5.1, 5.2 and 5.3 above, or in any applicable tariff, Supplemental Terms and Conditions, Customer Experience guide, or other applicable addendum that may apply to such Service(s), for each Service terminated by Customer after its Service Commencement Date, but before the end of its then-current Service Term, or if EarthLink Business disconnects the Service as a result of a default by Customer, Customer will be assessed an early termination fee ("**ETF**"). Unless otherwise set forth in the applicable tariff, the ETF for each Service terminated by Customer before the end of its then-current Service Term will be an amount equal to the one (1) month's MRC for the Service being terminated multiplied by the number of months remaining in the Service Term, plus any previously provided promotional credits and any expenses incurred by EarthLink Business, if and where applicable, to discontinue any third party services or circuits used in providing the Service, if and where applicable, and any NRC waived by EarthLink Business to establish such Service(s). Because damages resulting from early termination would be difficult to determine, the parties agree that the foregoing is a reasonable approximation of such damage and shall be considered a liquidated damage and not a penalty.

9.1 Written Notice of termination **must be received by EarthLink Business** at least thirty (30) days prior to the termination becoming effective, and may be submitted by mail, registered, or certified mail, return receipt requested to **Customer Care, 2150 Holmgren Way, Green Bay, WI 54304**; or by email with confirmed receipt by EarthLink Business, to [customercare@earthlinkbusiness.com](mailto:customercare@earthlinkbusiness.com); or by facsimile transmission, with confirmed receipt by EarthLink Business, to **1-877-747-1253**. Customer shall notify EarthLink Business in writing if the Customer contact person is changed. EarthLink Business reserves the right to reject any Customer termination request received from any person other than the designated Customer contact person.

9.2 Customer further acknowledges that it shall be solely responsible for payment of any charges or termination liability levied by Customer's equipment vendor or underlying facility provider associated with any special construction or equipment needed to provide facilities into Customer's premises or the cancellation thereof.

**10. Indemnification.** Customer, to the fullest extent provided by law, shall defend, hold harmless and indemnify EarthLink Business and its directors, officers, employees, agents, stockholders and affiliates (collectively, Indemnified Parties) from and against all claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, fines and governmental assessments, judgments, costs and expenses (including, without limitation, reasonable attorney's fees and costs), whether or not involving a third party claim, which arise out of, relate to or result from (1) any breach of any representation or warranty of Customer contained in this Agreement, (2) any breach of any covenant or other obligation or duty of Customer under this Agreement or under applicable law, (3) any alleged or actual claims and damages for physical property damage, personal injury or wrongful death resulting from a defect in or failure to provide any Service or Customer's breach of the Agreement, (4) any violation of the AUP by Customer or Customer's end users or contractors, (5) any loss or unauthorized disclosure of any information deemed to be confidential or proprietary to EarthLink, (6) any claims, demands, suits or causes of action alleging that the Customer has infringed or misappropriated any patent, copyright, trademark, trade secret or other proprietary right; (7) any claims resulting from electronic commerce conducted through Customer's account and the placement or transmission of any message, information, software, audio files or other materials on the Internet; (8) any dispute between Customer and any end user; (9) any damage or destruction to any EarthLink Business facility, EarthLink Business property or equipment of third Parties caused by Customer, any end user or any customer equipment; or (10) any tax imposed upon Customer's purchase, receipt or use of the Services.

**11. WARRANTY DISCLAIMER AND LIMITATION OF LIABILITY.** EXCEPT AS MAY BE SET FORTH IN AN APPLICABLE SLA, EARTHLINK BUSINESS DISCLAIMS ALL WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND MAKE NO REPRESENTATIONS OR WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY, ARISING OUT OF ANY COURSE OF DEALING OR USAGE OF TRADE, REGARDING THE DESIGN, CONDITION, QUALITY, CAPACITY OR OTHER ASPECT OF ANY SERVICES, OR ANY COMPONENT THEREOF, INCLUDING, BUT NOT LIMITED TO, SYSTEMS, SOFTWARE, PERSONNEL, PROGRAMMING ASSISTANCE OR CONSULTATION PROVIDED AS PART OF THE SERVICES, THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR FREE OR FREE OF HARMFUL COMPONENTS, THAT ANY CONTENT, INCLUDING CUSTOMER CONTENT, WILL BE SECURE OR NOT LOST OR DAMAGED, AND, TO THE EXTENT NOT PROHIBITED BY LAW, NON-INFRINGEMENT. SERVICE CREDITS UNDER THE APPLICABLE SLA WILL BE THE EXCLUSIVE REMEDY FOR ANY SERVICE DEFECT, SERVICE OUTAGE OR OTHER SLA VIOLATION. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, BUSINESS INTERRUPTION OR LOSS OF PRIVACY) ARISING FROM OR RELATED TO THE AGREEMENT, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND REGARDLESS OF WHETHER SUCH DAMAGES ARE ASSERTED ON THE BASIS OF CONTRACT, TORT STRICT LIABILITY OR BASIS IN LAW.

11.1 IN NO EVENT SHALL EARTHLINK BUSINESS BE LIABLE FOR DAMAGES GREATER THAN THE SUM TOTAL OF PAYMENTS MADE BY CUSTOMER TO EARTHLINK BUSINESS DURING THE THREE (3) MONTHS IMMEDIATELY PRECEDING THE EVENT FOR WHICH DAMAGES ARE CLAIMED.

**11.2 Disclaimer of Actions Caused by and/or Under the Control of Third Parties.** EarthLink Business does not control software, products and services or the flow of data and other Content and communications provided or controlled, in whole or in part, by third Parties. At times, the actions or inactions of third Parties may impair or disrupt the Services and EarthLink Business does not guarantee that such events will not occur. Accordingly, EarthLink Business and its Affiliates disclaim all liability resulting from or related to such third Party risks to the extent not otherwise specifically provided in the Agreement.

**11.3 Disclaimer of Emergency 9-1-1 Services.** IF CUSTOMER USES VoIP (VOICE over INTERNET PROTOCOL)-BASED PHONES, CUSTOMER IS ADVISED THAT EMERGENCY 9-1-1 SERVICE MAY NOT FUNCTION OR BE AVAILABLE TO CUSTOMER WITH THE LOSS OF ELECTRICAL POWER OR IF THE BROADBAND CONNECTION IS NOT OPERATIONAL. EMERGENCY 9-1-1 SERVICE WILL NOT BE AVAILABLE AT ANY REMOTE LOCATION IF INTERNAL USERS ARE ALLOWED TO USE THEIR VoIP-BASED PHONES REMOTELY. CUSTOMER'S SIGNATURE ON THE AGREEMENT WILL BE CUSTOMER'S ACKNOWLEDGMENT THAT EARTHLINK BUSINESS HAS ADVISED CUSTOMER OF THESE LIMITATIONS AND THAT CUSTOMER ACCEPTS THE SERVICES WITH THESE LIMITATIONS. EARTHLINK BUSINESS

WILL ALSO PROVIDE LABELS TO CUSTOMER THAT ALERT USERS TO THE LIMITATIONS. THE FEDERAL COMMUNICATIONS COMMISSION RECOMMENDS THAT CUSTOMER PLACE THESE LABELS ON OR NEAR THE TELEPHONE AND OTHER EQUIPMENT ASSOCIATED WITH CUSTOMER'S VoIP-BASED PHONES. Customer shall execute and return to EarthLink Business the 911 and E911 Notice and Disclosure upon execution of the applicable AFS. A copy of the 911 and E911 Notice and disclosure can be found on the EarthLink Business Website.

**11.4 Customer.** Customer represents and warrants that: (a) the Customer Assets and their use will not infringe or misappropriate any third-Party patent, copyright, trademark or trade secret; (b) Customer will not interfere with EarthLink Business' performance of the Agreement; (c) Customer will keep Customer Equipment located at an EarthLink Business Facility in good operating condition; and (d) Customer will not interfere with any EarthLink Business security measures. Customer acknowledges and agrees that EarthLink Business is not responsible for how the Services are used by Customer or its End Users.

**11.5 Customer Decisions.** As part of the Services, EarthLink Business may provide Customer with recommendations, advice or information concerning Customer's information technology infrastructure and security measures, and other matters relating to Customer's information technology operations. Such recommendations, advice or information are intended to assist Customer with its business operations, but should not be viewed as prescriptive or authoritative and Customer is responsible for making independent decisions about which recommendations, advice or information to accept, use and implement and their implementation. EarthLink Business is not liable for Customer's decisions concerning which recommendations, advice or information to accept, use or implement or their implementation.

**12. Force Majeure.** EarthLink Business shall not be liable for any delay or failure of performance in connection with the provision of the Services to the extent that such failure or delay is caused by Acts of God, acts of civil or military authority, government regulations, embargoes, epidemics, war, terrorist acts, cyber-attacks, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, strikes, power blackouts, cable cuts, volcanic action, other major environmental disturbances, unusually severe weather conditions, inability to secure products or services of other persons or transportation facilities, labor disruptions, or acts or omissions of transportation common carriers or other causes beyond the reasonable control of EarthLink Business. If any force majeure event occurs, EarthLink Business shall give reasonable notice to the Customer and take reasonable steps to correct the excuse of performance condition. For the duration of any force majeure event, the duties of EarthLink Business under the Agreement shall be abated and shall resume without liability thereafter. Should the force majeure event continue for a period of more than sixty (60) days, either Party shall have the right to terminate the affected Service(s).

**13. Relationship of the Parties.** The Parties shall perform all of their duties under the Agreement as independent contractors or independent parties and shall discharge their contractual obligations at their own risk, subject, however, to the terms and conditions thereof. The relationship between the Parties shall not be deemed to be that of an agent and principal, partners, or joint venturers, and nothing contained in the Agreement shall be deemed to constitute a partnership or agency agreement between them for any purposes, including, but not limited to, tax purposes.

**14. Press Release and Authorized Use of Name.** Neither Party may use the other Party's trade-marks, service marks or trade names ("**Marks**") or otherwise refer to the other Party in any marketing, promotional or advertising materials or activities, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed. Each Party's Marks are proprietary to such Party and nothing in the Agreement constitutes the grant of a general license for their use. Upon termination of the Agreement or delivery of written notice by a Party, all rights of the other Party to use such Party's Marks shall expire.

**15. Notices.** Except as otherwise provided herein, any notice required to be given in writing shall be in English and sent by electronic mail ("email"), facsimile transmission ("fax"), or U.S. mail. Notice to EarthLink Business shall be sent to: EarthLink Business, 330 Monroe Ave, Rochester, NY 14607 to the attention of Legal Department, or if by fax to (877) 852-2287, with copy to Office of the CEO 330 Monroe Ave, Rochester, NY 14607. Notice to Customer shall be sent to the address or email or fax number provided by Customer on the first page of the Agreement. All notices and other communications required or permitted under the Agreement shall be in writing and shall be deemed to have been delivered to the other Party's notice address specified in the Agreement in the absence of evidence of earlier delivery: (a) on the delivery date, if delivered by hand; (b) the next business day after being deposited for delivery with a recognized overnight courier; (c) on the date received, if sent by facsimile with evidence of successful completion; or (d) three (3) business days after deposit in the mail. Either Party may change the notice address to which future notices or other communications shall be sent by providing notice.

**16. Governing Law, Jurisdiction, Venue and Limitation of Action.** The Agreement will be interpreted and enforced in accordance with the law of the State of New York, U.S.A., without regard to its conflicts of law rules. THE PARTIES AGREE THAT NEITHER THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT OR ANY VERSION THEREOF, ADOPTED BY ANY STATE, IN ANY FORM, NOR THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, WILL APPLY TO THE AGREEMENT. Any action or proceeding arising from or relating to the Agreement, including, but not limited to, its interpretation or enforcement, claims of fraudulent inducement or rescission, will be brought exclusively in the state or federal courts located within Monroe County, New York. The Parties consent to the jurisdiction of such courts in such actions or proceedings and waive all objections or defenses of lack of personal jurisdiction or improper venue. EACH PARTY IRREVOCABLY WAIVES ALL RIGHTS TO TRIAL BY JURY IN ANY LITIGATION, ACTION, LEGAL PROCEEDING, CROSS-CLAIM OR COUNTERCLAIM IN ANY COURT, WHETHER BASED ON CONTRACT, TORT OR OTHERWISE, ARISING OUT OF OR RELATING TO THE AGREEMENT OR ITS NEGOTIATION, EXECUTION, PERFORMANCE, VALIDITY, INTERPRETATION, ENFORCEMENT OR COLLECTION. The prevailing Party in any action or proceeding arising out of the Agreement will be entitled to recover its related expenses and fees, including attorney's fees. Unless otherwise set forth herein, any dispute arising under this Agreement shall be brought within two (2) years of the date of such dispute.

**17. Business Associate Terms.**

**17.1 Relationship of the Parties.** Pursuant to Section 6.6 of these Terms and Conditions, Customer has informed EarthLink Business that it is considered a "Covered Entity" or a "Business Associate" under HIPAA and that Customer Content includes Protected Health Information ("PHI"). Because Customer Content includes PHI, EarthLink Business is a Business Associate under HIPAA and the Health Insurance Technology for Economic and Clinical Health Act (Public Law 111-5) and associated agency regulations and guidance (the "HITECH Act"). This Section 17 sets forth the provisions required to protect PHI that may be included in Customer Content in accordance with HIPAA, the HITECH Act and other federal and state privacy and security laws and regulations (collectively, "Applicable Law") and to facilitate Customer's and EarthLink Business' compliance efforts under Applicable Law.

**17.2 Defined Terms.** For the purposes of this Section 16, unless otherwise indicated below or elsewhere in the Agreement, all capitalized terms will have the meanings provided in 45 C.F.R 160.103 and 164.501.

**17.3 Obligations of EarthLink Business.**

**17.3.1 Limits on Use and Disclosure.** Except as otherwise limited in the Agreement, EarthLink Business may use or disclose PHI to perform functions, activities, or services for, or on behalf of Customer as specified in the Agreement and as permitted or required by applicable law and regulations. Except as otherwise limited in the Agreement, EarthLink Business may also:

17.3.1.1 Use PHI for the proper management and administration of EarthLink Business or to carry out the legal responsibilities of EarthLink Business; and

17.3.1.2 Disclose PHI for the proper management and administration of EarthLink Business, provided that disclosures are required by law, or EarthLink Business obtains reasonable assurances from the person to whom the information is disclosed that the information will remain confidential and be used or further disclosed only as required by law or for the purpose for which it was disclosed to the person, and that the person will notify EarthLink Business of any instances of which it is aware in which the confidentiality of the information may have been breached.

**17.3.2 Minimum Necessary.** Any use or disclosure of the PHI will be limited to the minimum PHI necessary for the permitted purpose and restricted to those employees, subcontractors or agents subject to an obligation of confidentiality with EarthLink Business that is as protective of the PHI as permitted and/or required by Applicable Law. EarthLink Business agrees to make uses, disclosures and requests for PHI consistent with EarthLink Business's minimum necessary policies and procedures. EarthLink Business will comply with any guidance issued by the Secretary regarding compliance with the minimum necessary standard.

**17.3.3 Safeguards.** EarthLink Business will implement and maintain the reasonable and appropriate administrative, physical and technical safeguards selected by Customer in the AFS and required by Applicable Law. EarthLink Business will also develop and implement policies and procedures and maintain documentation of such policies and procedures to assure compliance with applicable provisions of the Privacy Rule and the Security Rule.

17.3.4 **Reports of Unauthorized Access, Use or Disclosure.** EarthLink Business will report in writing to Customer, without unreasonable delay, (i) any use or disclosure of PHI that is not authorized by the Agreement including, but not limited to, Security Incidents, and (ii) any Breach of Unsecured PHI. EarthLink Business will deliver such notice no later than thirty (30) days after the date on which EarthLink Business (or any member of EarthLink Business' workforce or agent of EarthLink Business except the person(s) responsible for the Breach) became aware, or in the exercise of reasonable diligence should have become aware, of such unauthorized use or disclosure or Breach. Notice of any unauthorized use or disclosure or Breach will, if known, (i) describe the event resulting in the unauthorized use or disclosure or Breach; (ii) describe the types of PHI that were involved in the unauthorized use or disclosure or Breach; and (iii) describe what EarthLink Business is doing to investigate, mitigate losses arising from and protect against any further unauthorized use or disclosure or Breach. EarthLink Business will maintain all documentation associated with the investigation of a potential unauthorized use or disclosure or Breach, including any information influencing EarthLink Business's position that the use or disclosure was or was not a Breach and any exceptions applied to the use or disclosure. On request, EarthLink Business will provide Customer with the documentation of the unauthorized use or disclosure or Breach. The Parties acknowledge and agree that this section constitutes notice by EarthLink Business to Customer of the ongoing existence and occurrence of attempted but Unsuccessful Security Incidents for which no additional notice to Customer will be required.

17.3.5 **Mitigation Procedures.** In the event of any improper use and/or disclosure of PHI, EarthLink Business will work, and where practicable Customer will work cooperatively with EarthLink Business, to implement procedures for mitigating the harmful effects of such improper use and/or disclosure.

17.3.6 **Accounting of Disclosures.** Upon request from Customer, EarthLink Business will provide Customer with a list of all vendors to whom PHI may have been disclosed during the previous six (6) years or such shorter period as indicated in the request. This list of disclosures will be made available to Customer within the time frame and in the manner permitted and/or required by Applicable Law or as otherwise agreed by the Parties in writing. In the event the request for an accounting is delivered by an Individual directly to EarthLink Business, EarthLink Business will forward such request to Customer. It will be Customer's responsibility to prepare and deliver any such accounting requested.

17.3.7 **Access to and Amendment of PHI.** EarthLink Business does not maintain a Designated Record Set for or on behalf of Customer. In the event a request for access or amendment is delivered directly to EarthLink Business by an Individual, EarthLink Business will forward such request to Customer. Customer will be solely responsible for responding to such requests.

17.3.7 **De-Identification.** EarthLink Business may not de-identify any PHI.

17.3.8 **Subcontractors.** EarthLink Business will enter into a Business Associate Agreement with any subcontractor to whom it provides PHI to ensure that such subcontractor agrees to the same restrictions and conditions that apply through this Agreement to EarthLink Business.

17.3.9 **Availability of Books and Records.** EarthLink Business agrees to make its internal practices, books and records relating to its uses or disclosures of the PHI available to Customer, or, if directed in writing, the Secretary for purposes of determining compliance with Applicable Law, subject to attorney-client and other applicable privileges.

#### 17.4 **Obligations of Customer.**

17.4.1 **Compliance with Applicable Law.** Customer is responsible for its data security and compliance with Applicable Law including, but not limited to: (i) encrypting any PHI prior to making such PHI part of the Customer Content, and such encryption must be done in accordance with guidelines for the encryption of ePHI promulgated by the U.S. Department of Health & Human Services, as such guidance may be amended from time to time; (ii) making exact replicable copies of all PHI; (iii) ensuring that the SLAs for the Services meet the Customer's needs to access PHI during a disaster and, if such SLAs are not sufficient, taking any steps that Customer deems necessary to ensure that all PHI is available during a disaster; and (iv) deploying anti-virus software protect Customer's PHI from malicious software.

17.4.2 **Maintenance of PHI.** Customer is responsible for creating, amending or maintaining the PHI in a Designated Record Set.

17.4.3 **Individual Rights Requests.** Customer is responsible for responding to all requests from individuals for access to or

amendment of PHI and any requests for an accounting of disclosures.

**17.4.4 Permissions.** Customer agrees to provide EarthLink Business with timely written notice of any changes in, or revocation of, permission by an Individual to use or disclose the PHI, if such change affects EarthLink Business's rights or obligations with respect to the PHI.

**17.4.5 Restrictions.** Customer agrees to provide EarthLink Business with timely written notice of any restriction on the use or disclosure of the PHI agreed to by Customer, in accordance with 45 C.F.R. §164.522, to the extent such restriction affects EarthLink Business' rights or obligations with respect to the PHI.

**17.5 Physical System Access.** If Customer has access to any EarthLink Business Facility because EarthLink Business is providing Colocation Services, Customer must provide to EarthLink Business a written listing of those employees, agents, or contractors of Customer who may physically access the EarthLink Business Property on which Customer maintains or through which Customer transmits PHI (the "EarthLink Business Storage Assets"). Any changes to the listing must be provided to EarthLink Business by Customer in writing. EarthLink Business retains the right to deny physical access to the EarthLink Business Storage Assets to any individual if Customer has not included such individual on the listing to be provided to EarthLink Business pursuant to this Section.

**17.6 Non-Physical Access.** To the extent EarthLink Business provides, allows or controls remote or other non-physical access to any EarthLink Business Property on which Customer maintains or transmits PHI (the "Remote Access"), Customer must provide to EarthLink Business a written listing of those employees, agents, or contractors of Customer who may be permitted Remote Access. Any changes to the listing must be provided to EarthLink Business by Customer in writing. EarthLink Business retains the right to deny Remote Access to any individual if Customer has not included such individual on the listing provided to EarthLink Business pursuant to this Section.

**17.7 Risk Assessment.** Customer acknowledges and agrees that (a) it is solely responsible for Customer's compliance with HIPAA; (b) it has conducted an assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of PHI; (c) it has determined that the Services are sufficient for Customer's purposes and Customer's compliance with HIPAA; and (d) EarthLink Business is not responsible for determining whether any items or services provided by EarthLink Business are sufficient for Customer's compliance with HIPAA.

**17.8 Effect of Termination.** Notwithstanding anything herein to the contrary, upon termination of the Agreement, EarthLink Business will return or destroy the PHI, unless required otherwise by Applicable Law. If return or destruction of the PHI is not feasible, EarthLink Business will extend the protections of this Section until the PHI can be returned or destroyed. If EarthLink Business elects to destroy the PHI, it will certify destruction upon Customer's written request.

**17.9 Miscellaneous Terms.** Any ambiguity in this Section will be resolved in favor of a meaning that permits Customer and EarthLink Business to comply with Applicable Law. Any and all references in this Section to a statute or regulation mean the section as in effect or as amended. The Parties agree that if Applicable Law changes, this Section will be deemed to incorporate such changes as necessary for EarthLink Business and Customer to operate in compliance with the amended or modified requirements of Applicable Law.

**18. CUSTOMER PROPRIETARY NETWORK INFORMATION NOTICE AND AUTHORIZATION.** EarthLink Business, its affiliates and its successors-in-interest are committed to protecting the confidentiality of your telecommunications service information. This information is known as Customer Proprietary Network Information ("CPNI"). Under federal law, you have a right and we have a duty to protect the confidentiality of your CPNI.

CPNI is information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by you and that is made available to us solely by virtue of our carrier-customer relationship. It includes information contained in your bills pertaining to the telecommunications services we provide to you but does not include information derived from non-telecommunications services we provide to you.

In order to better serve your communications needs and to develop, identify, offer and provide you with advanced communications-related products and services, including some that may be different from the class of service we already provide to you, we may access and use your CPNI and share it with our affiliates, agents, partners, vendors, contractors and their subsidiaries. By signing this AFS, either manually or by e-signature, you consent to our access, use and sharing of CPNI as described above. This consent is valid until revoked by you.

To limit or revoke consent at any time, you must use one of the following methods: (1) completing the opt out form at [www.earthlinkbusiness.com/optout](http://www.earthlinkbusiness.com/optout); (2) contact Customer Service at (855) EL-Care-1 (or (3) notify us in writing at EarthLink Business, 2150 Holmgren Way, Green Bay, WI 54304. You must provide the following information: (i) your name; (ii) service billing address; (iii) ten-digit telephone number(s); and (iv) service account number. If we do not hear from you within 30 days of signing this AFS, we will assume you do not wish to opt-out. Your decision will not affect the provision of services you receive from EarthLink Business.

**19. Assignment.** Neither this Agreement, nor any right or interest hereunder, may be assigned or otherwise transferred by Customer without the prior written consent of EarthLink Business, which consent shall not be unreasonably withheld, conditioned or delayed. This Agreement will be binding on and inure to the benefit of the Parties, their respective successors and permitted assigns.

**20. Partial Invalidity.** If any term, clause, provision, covenant or condition contained in the Agreement is adjudicated to be illegal or unenforceable, all other terms, clauses, provisions, covenants or conditions of the Agreement shall remain in force and effect, and the term, clause, provision, covenant or condition held illegal or unenforceable shall remain in effect as far as possible in accordance with the intention of the Parties.

**21. Entire Agreement.** This Agreement (including all incorporated documents) constitutes the entire agreement and understanding of the Parties with respect to its subject matter and supersedes all prior agreements and understandings of the Parties, whether oral or written, concerning such subject matter. Except as set forth in this Agreement, neither Party nor its agents has made any express or implied representation or warranty with respect to the Agreement or its subject matter; accordingly, neither Party will be bound by nor liable for any such representation, promise or inducement made by the other Party or its agents that is not stated in the Agreement. This Agreement may be modified, supplemented, or amended only by a written instrument signed by the Parties.