

**Net Tel One Communications Terms of Service  
for Outsourced IP Phone System Service and Managed Services**

These **Net Tel One Communications Terms of Service for Outsourced IP Phone System Services and Managed Services** (the “TOS”) are incorporated into, and constitute an essential part of, the Net Tel One Order Form(s) between you (the “Customer”) and Net Tel One Communications, a Massachusetts Corporation with its principal place of business located at 15 Braintree Hill Office Park Braintree, MA 02184 (“NTO”). **By signing any Order Form or using the Service (as hereafter defined), Customer consents to these TOS.** As used in these TOS, the term “Order Form” means each mutually agreed service order, each of which describes the service(s) to be provided by NTO to Customer pursuant to that Order Form (the “Service” or “Services”); the term “Effective Date” means the date of the first Order Form signed by Customer; the term “Term” means the stated term for a Service under any Order Form; and the term “Agreement” includes collectively these Terms of Service and each Order Form executed hereunder. NTO and Customer shall individually be referred to as a “Party” and collectively as the “Parties”.

**1. Installation, Initiation and Service.** NTO shall supply to Customer the Services and Products in each Order Form ; provided, however, NTO will only begin installation, initiation and Service after it receives the following payments and after it receives and accepts the following documents: (1) an Order Form; (2) payment of all amounts due under Section 2.1 below; and (3) appropriate Customer Address Forms, if applicable. All hardware sold by NET TEL is covered by a (30) thirty day warranty. After the first (30) thirty days manufacturer standard warranty shall apply. Unless additional service or maintenance plan is purchased through either Net Tel or the manufacturer no replacement or loaner equipment will be provided. Unless specifically stated herein all other charges will be additional. Labor is limited to the time as indicated on the order form, any additional work not specifically identified herein shall be billed at standard rates. Unless specifically stated in Proposal, all labor and material for cable connections and wiring are the responsibility of the customer. In the event SERVICER provides additional labor for installation of the same, CUSTOMER shall be billed at standard rates. If CUSTOMER chooses to enter into a Third party lease agreement using NET TEL as there agent, CUSTOMER shall remain liable to NET TEL for all services, fees and cost provided. Any and all services provided that are not identified in Order Form are billable at standard rates. Any and all service shall be performed during normal business hours, unless specifically stated on Order Form. If Customer cannot provide access to the install location(s) at an underlying service provider’s request (e.g. Verizon), a penalty (not to exceed \$200.00) may be assessed for each install location. Circuit installation charges on an Order Form include circuit installation to the building entry point. Charges for any additional inside wiring is the responsibility of the Customer and shall be paid immediately upon receiving an invoice for such charges.

**2. Service, Fees And Billing.** Customer agrees to pay all monthly recurring charges (“MRC”), installation charges, set-up charges, usage-based charges, rental fees and other charges and fees (collectively, “Service Fees”) indicated on each Order Form in the manner provided below in this Section 2.

**2.1 Service Activation Charges.** NTO will bill Customer for all estimated installation charges, set-up charges and the first full calendar month's monthly service charges (the "Activation Charges") as indicated on any Order Form upon NTO's execution of such Order Form.

**2.2 Monthly Invoices.** NTO will begin to charge the monthly service charges under any Order Form on the date on which NTO completes delivery of the Service(s) or on the date on which Customer first uses the Service, if earlier. In the event Customer delays the ability of NTO to provide the Service(s), NTO shall begin charging for said Service(s) on the date on which NTO was able to deliver the Service(s), but for the acts or omissions of the Customer. Customer will be invoiced monthly in advance for non-usage-based charges and in arrears for all usage-based charges.

**2.3 Payment.** NTO shall bill Customer for Services at the rates stated in the applicable Order Form. All fees and other charges will be due, in U.S. dollars, upon Customer's receipt of NTO's invoice. Invoiced amounts that remain unpaid after the last day of the calendar month in which the invoice for such amounts was rendered to Customer will accrue interest at a rate of one and one-half percent (1.5%) per month, or the highest rate allowed by applicable law, whichever is lower. Customer understands that NTO shall begin to requisition all equipment and begin to facilitate the provision of said services upon the Effective Date of the applicable Order Form and relies upon the execution of said Order Form for those purposes. Therefore, the initial payment is, under any circumstances, non-refundable to Customer unless NTO is unable or unwilling to provide the Services ordered in conjunction with this Agreement.

**2.4 Taxes.** All payments required by the Agreement are exclusive of applicable taxes and shipping charges. Invoices shall include all applicable federal, state and local taxes, assessments and regulatory charges of any kind. All such taxes, assessments and charges, including but not limited to all sales, use, commercial, gross receipts, privilege, surcharges, or other similar taxes, license fees, miscellaneous fees and surcharges, shall be payable by Customer. If necessary or required by law, NTO will charge all applicable prospective and retroactive taxes required by the appropriate governmental agency. Notwithstanding the foregoing, in the event of any regulatory or governmental changes ("Regulatory Activity"), NTO reserves the right, at any time and without liability, to: (i) pass through to Customer all, or a portion of, any changes or surcharges directly or indirectly related to such Regulatory Activity; (ii) modify the Service, rates (including any rate guarantees), promotions, terms and/or conditions of this Agreement in order to conform to such action; or (iii) if such Regulatory Activity materially and adversely impairs the provision of any or all Services under the Agreement, as reasonably determined by NTO, terminate the Agreement and/or any affected Service. Any contest of such taxes does not eliminate or abate the obligation to pay such taxes. Any calculation errors in assessment and/or tax rate changes requiring adjusted tax computations by NTO as necessary (potentially to a retroactive tax basis period) to accurately and properly collect taxes does not relieve Customer of its responsibility to remit tax payment(s) fully and timely. However, if Customer provides proof of its specific tax exempt status, NTO shall not charge applicable taxes due to such exemption. In that event, Customer shall supply NTO a valid and properly executed tax exemption certificate(s). In such cases the Customer remains responsible for, and agrees to pay,

any and all remaining non-exempt charges; tax exemption status validation is solely the responsibility of the Customer and NTO will not be obligated to consider or honor any retroactive tax exemption. In no case shall Customer be responsible for any income taxes levied upon NTO's (or any underlying provider's) net income. Customer agrees that its obligation to pay taxes and surcharges under this Section shall survive the expiration or early termination of the Agreement.

**2.5 Rates.** The rates applicable to the Services shall be set forth in the Order Form, or, if not set forth in the Order Form, shall be based on the Pricing Schedule available through NTO's website at [www.nettelone.com](http://www.nettelone.com). The rates set forth in the Order Form and/or in the Price Schedule at the time of the execution of the Order Form shall be valid for the initial Term of the Order Form. After the initial Term of an Order Form, NTO may revise its rates.

**2.6 Failure to Make a Payment.** If within its sole discretion NTO determines that Customer lacks financial resources to timely make payments on invoices rendered by NTO, NTO may, upon written notice to Customer, modify the payment terms set forth in the Agreement so as to provide that Customer's payment for all Service Fees and other known or anticipated charges will be made in advance. If, at any point after the invoice due date, Customer has failed to pay any sums due and outstanding, then NTO may give Customer written notification that Customer has committed a material breach of these TOS due to non-payment. Said notification will be provided five (5) days prior to Service suspension or termination. Customer must pay all outstanding charges, within said notice period, to avoid suspension or termination of Service. In its sole discretion, NTO may: (i) change payment terms, billing cycle, and/or payment due date; (ii) demand immediate payment by wire or other means and discontinue Service(s) without notice should NTO determine Customer's Services exceed their approved level of credit; or (iii) immediately block Customer's Service(s) if Customer refuses to make any requested payments. In addition, in the event of Customer's material breach of the TOS due to nonpayment, there shall be a \$50.00 late fee applied to each and every invoice for which there is a default. Charges for returned, stopped payment and/or non-sufficient funds via check or direct deposit payment will be assessed a returned check fee of \$25.00 per returned check fee. The foregoing charges shall be deemed service charges and not the only remedies for breach of these TOS. Additional remedies for breach of these TOS by Customer are applicable.

**2.7 Credit Review and Security Deposit.** NTO reserves the right to withhold initiation of full implementation of Services under the TOS pending initial satisfactory credit review and approval thereof which may be conditioned upon terms specified by NTO including, but not limited to, security for payments due hereunder in the form of a cash deposit via wire transfer, guarantee, irrevocable letter of credit from a financial institution, or other forms of security acceptable to NTO, in its sole discretion. In instances where Customer is required to provide NTO with security in the form of a cash deposit, the cash deposit shall bear interest at the rate for telephone security deposits set by the Public Utility/Service Commission in the state where Customer is headquartered. If Customer expects a need for additional Services, it must make appropriate adjustments to the amount of its cash deposit, if so required by NTO. Upon request by NTO at any time, Customer agrees to provide financial statements or other indications of

financial circumstances. As may be determined by NTO, in its sole discretion at any time, if the financial circumstances or payment history of Customer is, or becomes unacceptable, NTO may require a new or increased deposit, guarantee or irrevocable letter of credit at NTO's discretion, to secure Customer's payments for the remainder of the Term and such deposit, guarantee or irrevocable letter of credit shall be provided within five (5) days of written request. Failure of Customer to provide the requested security pursuant to these TOS shall constitute a breach of these TOS and NTO may suspend or terminate Services until such time as the required security is received.

**2.8 Resumption of Service.** If Customer requests that Service be restored after a suspension or termination, NTO has the sole and absolute discretion to restore such Service and may condition restoration upon satisfaction of such conditions as NTO determines, in its sole discretion, to be necessary for its protection, including requiring Customer to pay a reconnection fee of One Hundred dollars(\$100) for each Service location being reinstated, requiring Customer to execute a new Order Form, pay all past due invoices in full, pass NTO's credit approval and/or make advance payments. New nonrecurring charges also may apply to restore Service. Any such monies required for restoration of such Service shall be due and paid before NTO is required to reinstate Service at the Service location.

**3. Other Networks; Approval and Usage.** The Service includes the ability to transmit data through third party networks, public and private. Customer acknowledges that use of or presence on third party networks may require approval of the owners or operators of such third party networks and will be subject to any acceptable usage policies such third party networks may establish. NTO will not be liable for any failure to obtain such approval or any violation by Customer of such policies. Customer understands that NTO does not own or control third party networks, and agrees that NTO shall not be responsible or liable for the performance or nonperformance of third party networks or within interconnection points between the Service and third party networks.

#### **4. Term.**

**4.1 Term of the Agreement.** The Agreement will be in effect from the Date that services are started until the last month of the term as defined by the Order Form, or for as long as Customer takes service from NTO, whichever date is later (the "Term"). Notwithstanding any other provision of this Section 4.1, NTO may elect in its sole discretion to terminate these TOS and any or all outstanding Order Form(s) upon providing Customer with written notice of such election. In such event, the effective date of termination shall be thirty (30) days from the date of such notice.

**4.2 Term of Services Requested in Order Form.** Following the term specified on the Order Form (the "Initial Service Term"), then with respect to said Services furnished under such Order Form the Order Form shall automatically renew for consecutive additional periods of one (1) year (each, a "Renewal Service Term") unless terminated by either Party in writing at least sixty (60) days prior to the expiration of the Initial Term or the Renewal Term then in effect (as

applicable). The Initial Service Term and any applicable Renewal Service Term(s) shall hereafter be referred to collectively as the "Service Term". If no Term is specified in the applicable Order Form, then either Party may terminate the Service(s) furnished under such Order Form by giving the other Party sixty (60) days prior written notice to such effect. The automatic renewal provision of this Section 4 shall not apply to any lease of Equipment, as hereafter defined, (if any) under this Agreement.

**4.3 Term of Additional Services Requested by Customer.** In any case in which a Service Term is specified in an Order Form, if Customer shall order additional services under such Order Form the Service Term for such additional Services shall end on the later to occur of (a) the expiration date of the Service Term of the Service first furnished to Customer under such Order Form or (b) one (1) year from the date on which NTO accepts the order for the additional Services. In any case in which no Service Term is specified in an Order Form and in which Customer shall order additional services under such Order Form, then, subject to Section 5.6 below, either Party may terminate any of such additional Services by giving the other Party sixty (60) days written notice to such effect.

## **5. Termination.**

**5.1 For Nonpayment.** All invoices rendered by NTO shall be due upon receipt. If any payment required to be made by Customer shall not be made within thirty (30) days after the due date (or by such other time as the relevant Order Form may provide), NTO may disconnect or disable all Service to Customer. In any such event, NTO shall have the right, within its sole discretion, (a) to decide whether or not to reconnect or re-enable the Service upon Customer's payment of all past due amounts (including, without limitation, any interest that may be payable) and in the event that NTO shall agree to reconnect or re- enable the Service, to require the payment of a reconnection fee for so doing, or (b) to terminate the Agreement.

**5.2 Unacceptable Use; Bankruptcy.** NTO may suspend or terminate any or all Services to Customer and terminate the Agreement as to any or all Order Forms between Customer and NTO immediately and without written notice to Customer for violation of the Rules of Use or if Customer becomes the subject of a voluntary petition in bankruptcy or any voluntary proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of creditors or becomes the subject of an involuntary petition in bankruptcy or any involuntary proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of creditors, if such involuntary petition or proceeding is not dismissed within sixty (60) days of filing. Customer is specifically prohibited from transmitting any communications where the intention of the message, or its transmission or distribution, would violate any federal, state, or local law, code, regulation or ordinance. NTO reserves the right to terminate the Service of Customer if Customer uses the Services and equipment in violation of any such law or violates and provision of the Net Tel One Communications Authorized Use Policy available at [www.nettelone.com](http://www.nettelone.com). Customer is prohibited from transmitting any communication where its distribution would likely be illegal, unsolicited unwanted or offensive to the recipient or for any fraudulent data transmitted using the Services. "Bulk Messaging", "Phishing", or "Spamming"

or transmission of any unwanted, or unsolicited email, is expressly prohibited under this Agreement. Use of the NTO connection in violation of any of the above mentioned or other like manners may result in immediate, unilateral cancellation of Service by NTO. Such event will constitute a material breach of the Agreement by Customer, require immediate payment of any past due payment amounts, and entitle NTO to seek recovery for damages.

**5.3 For Cause.** NTO may terminate the Agreement in the event of a breach by Customer of any term, provision or condition of the Agreement and fails to cure such breach within thirty (30) days after receipt of written notice of the same (provided such right to notice and time to cure shall not be applicable to the circumstances referred to in Sections 5.1 and 5.2 above). In the event of any such termination by NTO, NTO will disconnect or disable all Service to Customer (including, without limitation, as furnished under all Order Forms between NTO and Customer).

**5.4 No Effect on NTO's Right to Terminate Service that is not for Term.** Sections 5.1, 5.2 and 5.3 of these Terms and Conditions shall be applicable to both situations in which the Order Form provides for a Service Term and those in which the Order Form does not provide for a Service Term.

**5.5 No Liability for Termination.** Except for amounts payable under the Agreement (including, without limitation, under Sections 5.6 and 5.7 below), neither Party will be liable to the other Party for any termination of the Agreement in accordance with its terms.

**5.6 Effect of Termination.** In the event that NTO terminates under Section 5.1, 5.2 and/or 5.3 of these TOS any Service as to which a Service Term commitment shall be in effect, then Customer shall immediately pay to NTO, as liquidated damages, one hundred percent (100%) of the sum of the monthly service charges and Equipment rental fees (in each case calculated at the rate in effect at the time of such termination) payable under the relevant Order Form(s) through the end of such Service Term. NTO and Customer acknowledge and agree that such liquidated damages constitute a reasonable estimate of the damages that would accrue to NTO in the event that Customer were to terminate the Service or any Services before the end of any applicable Service Term and do not constitute a penalty. In the event that NTO terminates under Section 5.1, 5.2 and/or 5.3 of these TOS any Service as to which no Service Term shall be in effect, then Customer shall immediately pay to NTO, as liquidated damages, fifty percent (50%) of the sum of monthly service charges and Equipment rental fees (in each case calculated at the rate in effect at the time of such termination) payable through the period ending ninety (90) days after such termination. NTO and Customer acknowledge and agree that such liquidated damages constitute a reasonable estimate of the damages that would accrue to NTO in the event that Customer were to terminate the Service or any Services under such circumstances and do not constitute a penalty. In the event of any expiration or termination of the Service Term of any Order Form, Customer shall immediately return to NTO all Equipment rented under such Order Form.

**5.7 Liquidated Damages Payable in the Event that an Order is Cancelled Prior to Delivery of Service.** In the event that Customer shall cancel all or any part of the Services under any Order

Form(s) with the result that any T-1 line(s) shall be cancelled prior to installation of such T-1 line(s), then anything in Section 5.6 above to the contrary notwithstanding, Customer shall, simultaneously with such cancellation, pay NTO, as liquidated damages, the sum of Five Hundred Dollars (\$500) for each T-1 line that is cancelled. NTO and Customer acknowledge and agree that such liquidated damages constitute a reasonable estimate of the damages that would accrue to NTO in the event that Customer were to cancel all or any part of the order under any Order Form(s) with such result that any T-1 lines shall be cancelled and do not constitute a penalty.

**6. Service Levels.** NTO will use commercially reasonable efforts to minimize service disruptions and outages. In the event of service disruptions or outages, Customer's sole and exclusive remedy, and NTO sole obligation, shall be to provide credits for the applicable Service in Accordance with the Service Level Agreement set forth on NTO's website at [www.nettelone.com](http://www.nettelone.com) NTO may update the same from time to time and any such changes shall be effective on the date posted on the website.

**7. 911 Policy.** Customer acknowledges and agrees that NTO will provide the Services in accordance with, and Customer's use of the Services shall be subject to, the 911 Policy posted on NTO's website at [www.nettelone.com](http://www.nettelone.com). NTO may update the same from time to time.

**8. Rental of Equipment.** If so indicated on any Order Form, NTO shall rent certain equipment to Customer. Such rented equipment shall be listed on the Order Form and/or on any Customer Equipment Receipt and Acceptance Form signed by or on behalf of Customer (such rented equipment the "Equipment"). Any such rental shall be subject to the terms and conditions set forth in the Equipment Rental Policy posted on NTO's website at [www.nettelone.com](http://www.nettelone.com).

## **9. Confidential Information.**

**9.1 Confidentiality.** Each Party (a "Receiving Party") acknowledges that it will have access to certain confidential information of the other Party (the "Disclosing Party") concerning the Disclosing Party's business, plans, customers, technology, and products ("Confidential Information", which term shall include the terms and conditions of the Agreement and of any other document or instrument delivered pursuant to or in connection with the Agreement). Confidential Information will also include, but not be limited to, each Party's proprietary software and customer information. Each Party agrees that, except as expressly permitted by the Agreement, it will not use in any way (for its own account or the account of any third party), disclose to any third party (except as required by law or to that party's attorneys, accountants and other advisors as reasonably necessary), any of the Disclosing Party's Confidential Information and will take reasonable precautions to protect the confidentiality of such Confidential Information. Information will not be deemed to be Confidential Information hereunder if such information: (i) is known to the Receiving Party prior to receipt from the Disclosing Party directly or indirectly from a source other than one having an obligation of confidentiality to the Disclosing Party that is known to the Receiving Party; (ii) becomes known (independently of disclosure by the Disclosing Party) to the Receiving Party directly or indirectly

from a source other than one having an obligation of confidentiality to the Disclosing Party that is known to the Receiving Party; (iii) becomes publicly known or otherwise ceases to be secret or confidential, except through a breach of the Agreement by the Receiving Party; (iv) is independently developed by the Receiving Party; or (v) is required to be released by law, regulation or court order, provided that the Receiving Party provides prompt written notice to the Disclosing Party of such impending release, and the Releasing Party cooperates fully with the Disclosing Party (at the Disclosing Party's sole expense) to minimize such release.

**9.2 Privacy Policy.** Customer acknowledges and agrees that NTO will provide the Services in accordance with the Privacy Policy posted on NTO's website at <http://nettelone.com/about>

**10. Resale.** Customer represents and warrants that it will be the end user of the Service. Customer shall not in any way resell, license or permit any third party to use the Service without receiving NTO's prior written consent, which consent may be withheld in NTO's sole discretion.

**11. Certain Rules of Use.** Customer must at all times comply with NTO's Rules of Use as NTO may update the same from time to time. The current version of NTO's Rules of Use can be found at [www.nettelone.com](http://www.nettelone.com). If NTO receives notice of Customer's violation of the Rules of Use or illegal use of NTO's Services, facilities, network or third party networks accessed through NTO's network (including, in any case and without limitation, any use contrary to the Digital Millennium Copyright Act of 1998, 17 U.S.C. 512), or NTO otherwise learns of such use or has reason to believe such use may be occurring, then Customer will cooperate in any resulting investigation by NTO or government authorities. Any government determinations will be binding on Customer. If Customer fails to cooperate with any such investigation or determination, or fails to immediately rectify any violation of the Rules of Use or illegal use, NTO may immediately suspend the Service (including, without limitation, prior to the end of any Service Term). Further, upon notice to Customer, NTO may modify or suspend the Service as necessary to comply with any law or regulation as reasonably determined by NTO. Under no circumstances will Customer take any actions in connection with its use of the Service that could result in any harm or damage to NTO's network, any third party network(s), NTO's premises, any equipment of NTO or any other NTO customer.

## **12. Limitations and Exclusions of Warranties and Liability.**

**12.1 Exclusions of Certain Damages.** EXCEPT FOR THE PAYMENT OF SERVICE LEVEL CREDITS IN ACCORDANCE WITH THE TERMS OF A SERVICE LEVEL AGREEMENT APPLICABLE TO A SERVICE, TO THE FULLEST EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES, AND UNDER NO LEGAL THEORY, WHETHER CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR ANY OTHER THEORY WHATSOEVER, SHALL NTO BE LIABLE FOR ANY DAMAGES CUSTOMER MAY SUFFER FROM OR IN CONNECTION WITH CUSTOMER'S USE OF, OR INABILITY TO USE, NTO'S NETWORK OR EQUIPMENT, OR THE SERVICE, INCLUDING DAMAGES RESULTING FROM LOSS OR THEFT OF DATA, TRANSMISSION DELAYS OR FAILURES, SERVICE INTERRUPTIONS, UNAUTHORIZED ACCESS OR DAMAGE TO RECORDS, SOFTWARE PROGRAMS OR OTHER



INFORMATION OR PROPERTY OR FOR ANY LOSS OF PROFITS, COST OF COVER, OR ANY OTHER SPECIAL, INCIDENTAL, CONSEQUENTIAL, INDIRECT OR PUNITIVE DAMAGES, HOWEVER CAUSED. THIS LIMITATION WILL APPLY EVEN IF NTO HAS BEEN ADVISED OF, OR IS AWARE OF, THE POSSIBILITY OF SUCH DAMAGES.

**12.2 Disclaimer of Third Party Actions and Control.** NTO DOES NOT AND CANNOT CONTROL THE FLOW OF DATA BETWEEN NTO'S NETWORK AND THIRD PARTY NETWORKS. SUCH FLOW DEPENDS IN LARGE PART ON THE PERFORMANCE OF THIRD PARTY NETWORKS AND SERVICES PROVIDED OR CONTROLLED BY THIRD PARTIES. AT TIMES, ACTIONS OR INACTIONS CAUSED BY THESE THIRD PARTIES CAN PRODUCE SITUATIONS IN WHICH NTO CUSTOMERS' CONNECTIONS TO THIRD PARTY NETWORKS MAY BE IMPAIRED OR DISRUPTED. ALTHOUGH NTO WILL USE COMMERCIALY REASONABLE EFFORTS TO REMEDY AND AVOID SUCH EVENTS, NTO CANNOT GUARANTEE THAT THEY WILL NOT OCCUR. THEREFORE, WITHOUT LIMITING THE GENERALITY OF SECTION 12.1 ABOVE, NTO DISCLAIMS ANY AND ALL LIABILITY RESULTING FROM OR RELATED TO THE PERFORMANCE, NONPERFORMANCE OR INCORRECT PERFORMANCE OF THIRD PARTY NETWORKS.

**12.3 No Warranty.** CUSTOMER ACKNOWLEDGES AND AGREES THAT THE SERVICE IS PROVIDED ON AN "AS IS, AS AVAILABLE" BASIS, AND CUSTOMER'S USE OF THE SERVICE IS AT CUSTOMER'S SOLE RISK. NTO MAKES NO, AND HEREBY DISCLAIMS, ANY AND ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, WITH REGARD TO THE SERVICE(S), EQUIPMENT AND/OR NETWORK PROVIDED BY NTO, PROVIDED UNDER THIS AGREEMENT AND SPECIFICALLY DISCLAIMS ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OF TITLE, AND ANY WARRANTY ARISING FROM ANY COURSE OF DEALING, USAGE OR TRADE PRACTICE. NTO DOES NOT WARRANT THAT THE SERVICE WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT THE SERVICE WILL MEET CUSTOMER'S REQUIREMENTS OR THAT THE SERVICE WILL PREVENT UNAUTHORIZED ACCESS BY THIRD PARTIES. NTO EXERCISES NO CONTROL OVER, AND HEREBY DISCLAIMS ANY RESPONSIBILITY FOR, THE ACCURACY AND QUALITY OF ANY DATA OR CONTENT TRANSMITTED WITH THE USE OF THE SERVICE. CUSTOMER ACKNOWLEDGES AND AGREES THAT NTO DOES NOT OWN THE UNDERLYING TELECOMMUNICATIONS CIRCUIT, FACILITIES OR EQUIPMENT UTILIZED TO PROVIDE THE SERVICES AND IS ONLY RESPONSIBLE FOR THE PERFORMANCE OR NON-PERFORMANCE THEREOF TO THE EXTENT OUTLINED IN NTO'S SLA. CUSTOMER HEREBY EXPRESSLY ASSUMES THE RISK OF ITS USE OF ANY INFORMATION TRANSMITTED VIA THE SERVICE.

**12.4 Maximum Liability.** BECAUSE SOME STATES OR OTHER JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES OR OF LIABILITY FOR SPECIAL, INCIDENTAL, CONSEQUENTIAL, INDIRECT OR PUNITIVE DAMAGES, SOME OR ALL OF THE EXCLUSIONS SET FORTH IN THE AGREEMENT MAY NOT APPLY TO YOU. IF ANY OF SUCH EXCLUSIONS ARE HELD INAPPLICABLE OR UNENFORCEABLE FOR ANY REASON, THEN NTO'S MAXIMUM CUMULATIVE LIABILITY TO YOU FOR ANY TYPE OF DAMAGES FOR ALL CLAIMS ARISING FROM THIS AGREEMENT SHALL BE LIMITED TO THE AMOUNT OF MONTHLY SERVICE CHARGES PAID OR

PAYABLE BY CUSTOMER TO NTO UNDER THIS AGREEMENT FOR THE TWELVE (12) MONTH PERIOD PRIOR TO THE OCCURRENCE OF THE EVENT GIVING RISE TO SUCH LIABILITY.

### **13. Indemnities by NTO and Customer; Responsibility of Customer for NTO's Equipment.**

**13.1 NTO's Indemnification of Customer.** NTO shall indemnify, defend and hold harmless Customer and Customer's directors, officers, shareholders, members, employees and agents, and their respective heirs, successors and assigns, from and against any and all claims, actions, demands, damages, costs, losses, liabilities and expenses arising from damage to tangible personal property located at, or from injury to or the death of any person occurring at, Customer's premises that result from any negligent or willful acts or omissions of NTO or of any agent, employee or contractor of NTO that occur in the course of the performance of any Service installation or maintenance work at the Customer's premises, such indemnity and hold harmless to include, without limitation, the obligation to provide all costs of defense (including, without limitation, reasonable attorneys' fees and expenses).

**13.2 Customer's Indemnification of NTO.** Customer shall indemnify, defend and hold harmless NTO and NTO's directors, officers, shareholders, members, employees and agents, and their respective heirs, successors and assigns, from and against any and all claims, actions, demands, damages, costs, losses, liabilities and expenses ("Claims") arising from (a) any harm to any person occurring at Customer's premises and resulting from any negligent or willful acts or omissions of Customer, of any agent, employee or contractor of Customer or of any licensee or invitee of Customer, (b) any breach of any representation, warranty, covenant or agreement of Customer in the Agreement (including, without limitation, in Section 7 of these TOS) or (c) any use of the Service, NTO's network or any third party network in violation of applicable law or the Rules of Use (the Claims to include, in the case of clause (b) and/or clause (c) of this sentence and without limitation, any Claims arising under the Digital Millennium Copyright Act or arising as a result of any infringement or misappropriation of any intellectual property rights). The indemnification obligation set forth in this Section 13.2 shall include the obligation to pay all costs of defense (including, without limitation, reasonable attorneys' fees and expenses). Nothing in this Section 13.2 shall be deemed to reduce the scope of or otherwise limit any other indemnification by Customer provided for in these TOS.

**13.3 Notification.** Customer will provide NTO with written notice of each instance of which Customer becomes aware that could reasonably be expected to give rise to claim for indemnification under Section 13.1 above; provided, however, that no failure on the part of Customer to give any such notice shall relieve NTO of any of its obligations under Section 13.1 above unless, and then only to the extent that, such failure to give notice shall impair NTO's ability to successfully defend the matter in question. NTO may elect to control the defense of any matter in respect of which Customer claims indemnity. NTO will provide Customer with written notice of each instance of which NTO becomes aware that could reasonably be expected to give rise to claim for indemnification under Section 13.2 above; provided, however, that no failure on the part of NTO to give any such notice shall relieve Customer of any of its obligations under Section 13.2 above unless, and then only to the extent that, such failure to

give notice shall impair Customer's ability to successfully defend the matter in question. Customer may elect to control the defense of any matter in respect of which NTO claims indemnity.

**13.4 Customer Responsible for Damage to NTO's Equipment, etc.** Customer shall be solely responsible and liable to NTO for, and shall upon the request of NTO pay NTO for, any damage to or destruction of NTO's network, any of NTO's premises, or any real or personal property (including, without limitation, equipment or servers) of NTO caused by any Customer User.

**14. Reliance on Disclaimers, Exclusions, Liability Limitations and Customer's Indemnity Obligations.** Customer acknowledges that NTO has set its prices and entered into the Agreement in reliance upon (a) the limitations, exclusions and disclaimers of NTO's liability and warranties and of Customer's damages provided for in these TOS and (b) Customer's indemnity obligations provided for in these TOS, and that the same form an essential basis of the bargain between the Parties. The Parties agree that such limitations, exclusions, and disclaimers and such indemnification obligations will survive the termination of the Agreement and will apply even if the Agreement is found to have failed of its essential purpose.

#### **15. Miscellaneous Provisions.**

**15.1 Force Majeure.** Except for Customer's obligation to pay money to NTO under the terms of this Agreement, neither Party will be liable for any failure or delay in its performance under the Agreement, or for credits under Section 6.2 above, due to any cause beyond its reasonable control, including but not limited to Acts of God, accidents, fire, flood, explosion, vandalism, fiber optic cable cut, storm or other similar catastrophes, any law, order, regulation, direction, action or request of the United States government, or of any other government, including state and local governments having jurisdiction over either of the Parties, or of any department, agency, commission, court, bureau, corporation or other instrumentality of any one or more said governments, or of any civil or military authority, national emergencies; insurrections; riots; wars; or embargos, provided that the delayed Party (a) gives the other Party prompt notice of such cause and (b) uses reasonable commercial efforts to correct promptly such failure or delay in performance.

**15.2 No Lease.** Except as otherwise provided in Section 8 of these TOS, the Agreement is a services agreement and is not intended to and will not constitute a lease of any real or personal property. In particular, Customer acknowledges and agrees that Customer has not been granted any interest whatsoever (leasehold or otherwise) in any premises, real or personal property, equipment or servers of NTO or in any personal property or server space leased by NTO (except for the license referred to in Section 8 of these Terms of Service), and Customer has no rights as a tenant or otherwise under any real property or landlord/tenant laws, regulations, or ordinances.

**15.3 Marketing.** Notwithstanding the provisions of Section 9 above, Customer agrees that NTO may refer to Customer as a customer of NTO and describe Customer's business in NTO's

marketing materials and website (but NTO agrees that without Customer's written consent NTO shall not display any trademark, service mark and/or logo of Customer in such materials or on NTO's website). In addition, notwithstanding the provisions of Section 9 above, NTO may compile and release information regarding Customer and its use of the Service on an anonymous basis as part of a customer profile or similar report or analysis.

**15.4 Government Regulations.** Customer will not use NTO's network or the Service to export, re-export, transfer, or make available, whether directly or indirectly, any regulated item or information to anyone outside the U.S. without first complying with all export control laws and regulations which may be imposed by the U.S. Government and any country or organization of nations to whose jurisdiction Customer is subject.

**15.5 Assignment.** NTO may freely transfer, assign or otherwise manner encumber this Agreement and its rights and obligations hereunder. Customer may not assign its rights or delegate its duties under the Agreement either in whole or in part without the prior written consent of NTO, which consent may be withheld in NTO's sole discretion, except to a party that acquires all or substantially all of Customer's assets as part of a corporate merger or acquisition. Any attempted assignment or delegation without such consent will be void. The Agreement will bind and inure to the benefit of each Party's successors and permitted assigns (and will in addition inure to the benefit of each person or entity specified in any other part of the Agreement as a person or entity to the benefit of whom or which the Agreement shall inure).

**15.6 Notices.** Unless otherwise set forth herein, all notices, demands, consents, requests, approvals or other communication which either Party is required or desires to give or make upon or to the other Party ("Notices") shall be in writing and will be effective when sent, if hand delivered or faxed (with confirmation of receipt); on the next business day if sent by a generally recognized overnight delivery service (subject to confirmation from the service); or on the date received if sent by United States certified or registered mail, return receipt requested. Such Notices will be sent to the addresses or fax number (as appropriate) of the receiving Party indicated on the Order Form, or at such other address or to such other fax number as either Party may provide to the other by written notice. Customer acknowledges that it is Customer's sole responsibility to supply immediate notice to NTO if Customer changes any of its contact information. If at any time Customer's name or billing information changes from that which is set forth above, Customer shall have five (5) days to inform NTO of such changes in accordance with the Notice provisions set forth in the Agreement.

**15.7 Choice of Law and Arbitration.** The Agreement will be governed by, construed under and enforced in accordance with the laws of the State of Massachusetts, excluding its conflict of laws principles. Each Party agrees to submit any and all disputes concerning the Agreement (except for collection of amounts due from Customer hereunder) to binding arbitration under one (1) neutral, independent and impartial arbitrator in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("AAA") and the provisions contained in this Section 15.7 (the provisions contained in this Section 15.7 controlling in the event of any conflict between this Section 15.7 and such Commercial Arbitration Rules). The decision and

any award resulting from such arbitration shall be final and binding. The place of arbitration will be held in Massachusetts. Any final decision or award from arbitration under this Section 15.7 will be in writing and reasoned. The arbitrator may award attorney's fees and costs of arbitration to the prevailing Party as determined by the arbitrator with wide discretion considering both (i) which Party bettered its position most by the outcome of the Arbitration, and (ii) that the Parties intended that all limitations on liability would be enforced by the arbitrator. Except for attorney's fees and costs of arbitration as the arbitrator may award as provided in the previous sentence, each Party will bear its own costs and expenses incurred in connection with any arbitration under this Section 15.7. As part of any arbitration conducted under this Section 15.7, each Party may: (i) request from the other Party documents and other materials relevant to the dispute and likely to bear on the issues in such dispute, (ii) conduct no more than five (5) oral depositions each of which will be limited to a maximum of seven (7) hours in testimony, and (iii) propound to the other Party no more than thirty (30) written interrogatories, answers to which the other Party will give under oath. All the dispute resolution proceedings contemplated in this Section 15.7 will be as confidential and private as permitted by law. The Parties will not disclose the existence, content or results of any proceedings conducted in accordance with this Section 15.7, and materials submitted in connection with such proceedings will not be admissible in any other proceeding, provided that the confidentiality provision set forth in this sentence shall not prohibit either Party from making a petition to vacate or enforce an arbitration award or from making disclosures required by law. The Parties agree that any decision or award resulting from proceedings in accordance with this Section 15.7 shall have no preclusive effect in any other matter involving third parties. All applicable statutes of limitation and defenses based upon the passage of time will be tolled while the procedures specified in this Section 15.7 are pending. The Parties will take such action, if any, required to effectuate such tolling. The arbitration shall be governed by the United States Arbitration Act and judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction.

**15.8 Entire Agreement.** The Agreement and NTO's Rules of Use represent the complete agreement and understanding of the Parties with respect to the subject matter hereof and supersede, to the extent of any conflict, any other agreement or understanding, written or oral, between the parties with respect to the subject matter hereof. The Agreement may be modified only through a written instrument signed by or on behalf of both Parties.

**15.9 Survival.** The following provisions of these Terms of Service will survive any expiration or termination of the Agreement: Sections 9, 12, 13, 14 and 15. Neither the expiration or termination of the Agreement will extinguish any claims or obligations arising under the Agreement prior to (or with respect to the period prior to) such expiration or termination (whether or not the provision(s) giving rise to such obligations are enumerated above in this Section 15.9).

**15.10 Electronic Documents.** Any references in the Agreement to any forms, documents, policies or instruments shall be deemed to refer to the same in both paper and electronic form.

**15.11 References to “Expiration” of the Agreement or any Order Form.** Any reference in these TOS to the “expiration” of the Agreement or any Order Form shall refer to the expiration of the same following the delivery of a nonrenewal notice under Section 4 of these Terms of Service.

**15.12 Severability.** In the event any provision of this Agreement conflicts with the law under which this Agreement is to be construed or if any such provision is held invalid, illegal or unenforceable by a court with jurisdiction over the Parties to this Agreement, such provision shall be deemed to be restated to reflect as nearly as possible the original intention of the Parties in accordance with the applicable law, and the remainder of this Agreement shall remain in full force and effect. The illegality or unenforceability of any provision of this Agreement does not affect the legality or enforceability of any other provision or portion of this Agreement.

**15.13 CPNI.** NTO acknowledges that it has a duty, and Customer has a right, under federal and/or state law to protect the confidentiality of Customer's proprietary network information (“CPNI”). Such CPNI includes information about the Services purchased by Customer from NTO, Customer account activity (for example, telephone numbers) and charges incurred by Customer. With Customer’s consent, NTO may use this information for marketing purposes to offer Customer the full range of products and services available from NTO that may be different from the type of Services Customer currently buys from NTO. In addition to DSL and other dedicated internet services, NTO and NTO affiliate’s offer other services, including voice, collocation, hardware (by sale or lease) and managed services. A more complete description of NTO’s product and service offerings is availablean NTO account manager. NTO may also share Customer information with its affiliates, agents and partners to offer the services and products described above. NTO requires Customer’s consent for NTO and its affiliates, agents and partners to use this information to offer the services and products described above. By signing the Order Form(s) and taking no further action, Customer gives NTO Customer’s consent to use and disclose Customer CPNI as described above. Customer may refuse CPNI consent by signing the Order Form(s) but then notifying NTO in writing of Customer’s decision to withhold Customer’s consent. Customer’s consent or refusal to consent will remain valid until Customer otherwise advises NTO. Customer’s decision to approve or disapprove use or disclosure of Customer CPNI as described in this Section 15.13 will not affect NTO’s provision of Service to Customer. A more complete description of NTO’s CPNI Policy is set forth at the contents of which are hereby incorporated herein as if copied herein verbatim.

**15.14 Tariffs.** The Agreement incorporates by reference the terms of each Tariff to the extent Customer subscribes to Services provided by NTO which are covered by any applicable Tariff. The Agreement may be superseded by a Tariff filed with the appropriate regulatory agency, which Tariff may contain such modifications of the provisions of the Agreement as NTO deems appropriate. NTO may modify its Tariffs from time to time in accordance with law and thereby affect Services furnished to Customer hereunder, except that the terms and conditions of the Agreement shall supplement, to the extent not inconsistent, Tariff terms and conditions. If any of NTO's applicable Tariffs are cancelled during the Term of the Agreement, such cancelled Tariff(s) will be deemed to be incorporated by reference into the Agreement on

the effective date of cancellation, as supplemented by any non-inconsistent product descriptions, definitions, prices and other terms and conditions or similar document posted by NTO on a NTO website accessible by Customer, such as and may be modified by NTO from time to time and thereby affect the previously tariffed Service furnished to Customer.

**15.15 Porting Numbers/Services.** Customer agrees not to port its telephone numbers or Services to another telecommunications service provider without the express written consent of NTO, which such consent shall not be unreasonably withheld, conditioned, denied or delayed throughout the Term. If Customer ports its telephone numbers or Services without the express written consent of NTO, this shall be considered a material breach of the Agreement by Customer. Port out or disconnect requests will incur a thirty dollar (\$30) per number charge.

**15.16 Software Ownership.** Customer shall have no ownership rights in any and all software provided or furnished by NTO under this Agreement. No right is granted for Customer to replicate, produce, copy, alter, distribute, rent, lease, lend, supply or market said software, and/or de-compile, disassemble or reverse-engineer the same. Any attempt by Customer to replicate, produce, copy, alter or distribute the software provided by NTO shall be deemed a breach of this Agreement.

**15.17 Recording of Calls.** NTO hereby puts Customer on notice that any calls between Customer and NTO personnel may be recorded for quality assurance and other commercially reasonable purpose. Customer hereby acknowledges and agrees that such calls may be recorded.

**15.18 Compliance With Law.** In conjunction with the Agreement, each Party shall at all times comply with all applicable federal, state, and local statutes, ordinances, regulations and orders of any commission or other government body.

**15.19 Binding.** This Agreement shall be binding on the Parties hereto and their respective personal and legal representatives, successors, and permitted assigns.

**15.20 Representations.** Each Party represents and warrants that (a) it has the full right and authority to enter into this Agreement, (b) it is a business entity duly organized under the laws of its jurisdiction, (c) that there are no actions, suits, or proceedings, pending or threatened against it that would materially impair its performance under this Agreement, (d) it complies with all applicable federal, state and local laws and regulations, rulings and orders of governmental agencies, including but not limited to the Communication Act of 1934 as amended by the Telecommunications Act of 1996, as amended, the Rules and Regulations of the Federal Communications Commission, and state public utility or service commissions, and (e) it has obtained, and will maintain all certifications and other authorizations necessary for Customer to use the Services, and for NTO to provide the Services.

**15.21 No Right To Intellectual Property.** The Agreement confers no right to use the name, service marks, trademarks, copyrights, or patents of either Party except as expressly provided

herein. Neither Party shall take any action, which would compromise the registered copyrights or service marks of the other.

**15.22 No Third Party Beneficiaries.** The Agreement is being executed for the sole and exclusive benefit of the Parties hereto and is not for the benefit of any third parties. The execution hereof shall not create any obligations or confer any rights on any person or entity other than the Parties hereto.

**15.23 Relationship of Parties.** Neither the Agreement nor the provision of Service hereunder shall be deemed to create any joint venture, partnership or agency between NTO and Customer; the Parties are independent contractors and shall not be deemed to have any other relationship. Neither Party, nor any agent or representative of either Party, shall have, or hold itself out as having, the power or authority to bind or create liability for the other Party by its intentional or negligent act and no claimed act of authority shall have any binding effect.

**15.24 Attorneys Fees and Costs.** In the event NTO seeks to enforce any of the terms or conditions of this Agreement or protect any of its rights or privileges hereunder, either informally or through formal legal action, Customer shall be liable for all costs incurred by NTO as a result thereof, including but not limited to reasonable attorney's fees and court costs (if applicable).

**15.25 Waiver.** The delay or failure of a Party to enforce or insist upon compliance with any of the terms or conditions of this Agreement or to exercise any remedy provided herein, the waiver of any term or condition of this Agreement, or the granting of an extension of any time for performance shall not constitute the permanent waiver of any term, condition or remedy of or under this Agreement, and this Agreement and each of its provisions shall remain at all times in full force and effect unless and until modified as provided herein.

**15.26 Modifications.** Unless otherwise provided in this Agreement, no modification, amendment or other change may be made to this Agreement or any part thereof unless reduced to writing and executed by authorized representatives of both Parties.

**15.27 Survival.** Any obligations of the Parties relating to confidentiality, limitations on liability and indemnification shall survive termination of this Agreement.

**15.28 Headings.** All Section headings and captions used in the Agreement are purely for convenience and shall not affect the interpretation of the Agreement.