



## Terms and Conditions

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## Terms and Conditions

This Agreement is between MegaPath and Subscriber (or "Customer") on any Order (as defined below), and sets forth general terms and conditions under which Subscriber may purchase MegaPath's services (the "Services"). The Agreement includes by reference, (i) applicable web order or written service order or quote, as submitted from time to time and accepted by MegaPath as provided herein (each an "Order" or "Service Order"), (ii) the Fee Schedule and Services Exhibit (the "Fee Schedule") posted online at <http://www.megapath.com/about/corporate-policies/>, (iii) Acceptable Use Policy, Privacy Policy and other policies as posted on MegaPath's web site at <http://www.megapath.com/about/corporate-policies/> (the "Policies"), (iv) Ancillary Rates for Voice Services (the "Ancillary Rate Schedule") posted on-line at <http://www.megapath.com/pdfs/Ancillary-Call-Rates-Business-Voice.pdf>, and (v) the service level agreements (the "SLAs"), which are posted online at [http://www.megapath.com/pdfs/service\\_level\\_assurances.pdf](http://www.megapath.com/pdfs/service_level_assurances.pdf). These documents provide: (i) terms and conditions applicable to the Services, (ii) Services ordered and the associated pricing, (iii) Early Termination Fees, miscellaneous fees and descriptions and additional terms related to specific Services (iv) MegaPath policies, (v) additional rates for voice services, and (vi) applicable service level commitments. All the above terms are made a part of this Agreement through incorporation by reference. The person accepting this Agreement represents that s/he has read and agreed to such terms and the terms of this Agreement. In the event of any inconsistency among the above referenced terms included in the Agreement, the Terms and Conditions shall govern and control. This Agreement and the Service Order need only be executed by Subscriber. MegaPath may accept or decline the Order as provided herein. MegaPath's provisioning of the Service shall indicate its acceptance of the order. Should Subscriber request countersignature of a Service Order, Subscriber must contact MegaPath, who shall then provide countersignature for Subscriber. Any terms not defined herein shall have the meaning set forth in the Fee Schedule.

### 1. Service Orders

In addition to the Services, MegaPath or its suppliers may deliver to Subscriber certain hardware in connection with the Services (collectively, "Products"). MegaPath or its suppliers may also supply software (external to or embedded in the Products) and related documentation ("Software") in connection with the Services. MegaPath shall use commercially reasonable efforts to provide the Services, associated Products and Software described in each applicable Order. By signing a service Order form, Subscriber agrees to the terms and conditions in this Agreement and all of the ancillary documents incorporated above, and authorizes MegaPath to obtain any credit information necessary and/or Subscriber proprietary network information necessary to provision the MegaPath Service and to establish Subscriber's MegaPath account. Subscriber authorizes release of said information by any and all third parties to MegaPath and its affiliates. MegaPath reserves the right, at its sole discretion, to decline new Orders and to require Subscriber to post appropriate advance deposits for new and existing Services. MegaPath may reject any Order that diverges in any respect from the Agreement or if MegaPath is technically unable to provision the Service as ordered. If there is no written service Order, MegaPath will provide the Services, Products and/or Software in accordance with the terms of the Agreement at MegaPath's then prevailing retail rates or at such other rates as to which MegaPath and Subscriber may mutually agree in writing. MegaPath and its suppliers may interrupt Services for maintenance and other operational reasons; except as provided in the Policies, Subscriber shall not be entitled to receive any compensation for such interruptions.

### 2. Use of Services, Software and Products

Subscriber shall use the Services, Products and Software in accordance with all applicable laws, rules and regulations and in accordance with the Fee Schedule and Policies. MegaPath grants to Subscriber a personal, limited, non-transferable, revocable, non-exclusive license (without the right to sublicense or create derivative works) to use the Software during the Term (defined below) solely for Subscriber's own internal use of the Services in accordance with this Agreement. Unless agreed in writing by MegaPath, Subscriber shall not resell or redistribute any



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cable or voice Services purchased from MegaPath (including via wi-fi hotspots). In addition, Subscriber shall not copy, modify, resell or redistribute the Software or the Products, create or recreate the source code for the Products or any Software, or re-engineer, reverse engineer, decompile, disassemble or attempt in any way to disable, deactivate or render ineffective the password protection in the Products or any Software. Some software necessary to fully utilize the full functionality of the Services may require Subscriber to accept additional terms and conditions required by the third-party providers of such software (including “Click-Thru” or “Shrink-Wrap” terms). Subscriber agrees to comply with any such additional terms and conditions required for the Service. MegaPath is not responsible for the configuration of, or internal equipment for, Subscriber’s personal computer that may be necessary to make Subscriber’s computer or systems compatible with the Services or Products. If Subscriber has opted to provide its own equipment, Subscriber will be solely responsible for procuring any firmware licenses and/or updates, and MegaPath shall have no obligation to provide such firmware licenses or upgrades. If, at any time after execution of a Service Order, Subscriber causes a delay in Service installation or port dates, Subscriber shall be responsible for any additional cost and fees incurred by MegaPath or Subscriber as a result of this delay.

### 3. Fees and Prices

Subscriber shall pay for all Services and Products that MegaPath furnishes to Subscriber. The relevant Service Order or the Fee Schedule specifies the one-time, recurring and optional prices and associated fees that Subscriber shall pay for each Service during the Service Term; *provided however*, that such fees do not include taxes or other surcharges and shipping fees. Subscriber understands that not all charges may be stated in a Service Order; for a description of these additional charges, please see the Fee Schedule.

Prices are fixed for the Initial Service Term. MegaPath may modify the prices or fees at any time for Services in their Renewal Service Term (defined below) upon thirty (30) days’ notice to Subscriber; *provided, however*, if Subscriber does not agree to accept the new pricing, Subscriber may terminate the affected Services without penalty within thirty (30) days of the date of such notice. Any continued use of the Services thirty (30) days after the notice date shall be deemed acceptance of the new pricing. In addition, MegaPath reserves the right to increase the price charged to Subscriber, and/or make material changes to this Terms and Conditions document, at any time for Services in their Initial Service Term or Renewal Service Term if any of the prices charged to MegaPath by any of its suppliers increase, effective thirty (30) days following notice to Subscriber. However, for Cloud Hosting Services, if at any time MegaPath’s Cloud Hosting provider increases pricing, MegaPath may increase the pricing for Subscriber for such Service up to fifteen percent (15%) with or without notice and Subscriber shall not have a right to terminate the Service except by paying the applicable Early Termination Fee.

### 4. Invoicing

MegaPath shall bill Subscriber in arrears for non-recurring, usage and pro-rata usage based monthly charges (if any) and shall bill Subscriber in advance for the monthly recurring fees for the Services. MegaPath will charge Subscriber for all one-time installation and equipment fees, miscellaneous fees and for initial monthly recurring charges at the rates shown in the Service Order or Fee Schedule as applicable. All payments are due in US Dollars within thirty (30) days of the invoice date, unless superseded by the terms of a Service description in the Fee Schedule or a Service Order (“Due Date”). Subscriber’s obligation to begin paying for the Services (“Billing Start Date”) will generally start on the date upon which MegaPath has provisioned the Service to Subscriber. Please see the applicable Service description in the Fee Schedule for a description of the Billing Start Date for that Service. Monthly service charges, upgrades/downgrades, move orders and other charges related to service changes are pro-rated for the month in which they take place. Subscriber is responsible for submitting and collecting mail-in rebates associated with



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any Order (if applicable), which may not be used to offset any initial upfront or other charges, including but not limited to charges for hardware and installation.

### 5. Payment Default

If Subscriber has not paid its invoice by the Due Date or if Subscriber files for insolvency protection of any sort (a "Payment Default"), MegaPath may take any combination of the following actions: (i) suspend the unpaid Services; (ii) require a cash deposit or standby letter of credit; (iii) stop taking new orders for additional Services; and/ or (iv) terminate the unpaid Services or the Agreement for breach in which event Subscriber will, in addition to amounts owed MegaPath, be responsible for all applicable early termination fees, as defined in the applicable Service Exhibits and Fee Schedule ("Early Termination Fees"). For all payments (including unpaid Regulatory Surcharges) not made by the Due Date, MegaPath may charge Subscriber interest on overdue amounts at the lesser of (i) the interest rate set forth in the Fee Schedule or (ii) the maximum interest charges permitted under applicable law. Subscriber will be responsible to MegaPath for any expenses (including collection costs, reasonable attorneys' fees and court costs) that MegaPath incurs to collect overdue charges. Subscriber shall pay an additional charge for each returned check or other rejected payment. If MegaPath elects to reinstate any Service that has been suspended in accordance with this Section, MegaPath may charge Subscriber a reinstatement fee. The fees and charges described in this Section can be found in the Fee Schedule.

### 6. Right to Dispute

Subscriber may dispute any or all of an invoice by providing notice to MegaPath within sixty (60) days from the invoice date on which the disputed charge appears; *provided, however*, that any disputed amounts remain due and payable according to the payment terms described in this Agreement. If Subscriber fails to pay the disputed charges in accordance with the payment terms of this Agreement, MegaPath may, without further notice, exercise any of its rights for a Payment Default as described above. If MegaPath does not receive written notification of Subscriber dispute within such sixty (60) day period, Subscriber agrees that MegaPath is entitled to all of the charges set forth in the invoice and that Subscriber has waived any right to dispute such charges for any reason. MegaPath will attempt to respond to any dispute within ten (10) days of receipt of valid notice with its determination of the validity of the dispute and, if an adjustment to the disputed invoice is required, MegaPath shall use good faith efforts to make any applicable adjustments to Subscriber's invoice within the following two billing periods. Subscriber must provide all supporting documentation that MegaPath may reasonably request for all disputes. Acceptance of late or partial payments (even if marked "Paid in Full" or with other such verbiage) shall not waive any of MegaPath's rights to collect the full amount of Subscriber's charges for the Service.

### 7. Taxes and Surcharges

The Services and Products may be subject to a combination of federal, state and local taxes or surcharges. MegaPath may add line items to your monthly invoice for specific applicable local, state and federal taxes that it collects and remits to governmental entities in connection with your services and for certain other variable expenses MegaPath incurs as a result of local, state and federal regulation, including its payments to governmental entities and agents and to underlying network service providers and its internal costs of compliance associated with taxes and regulatory fees and programs, including but not limited to, state disability access and universal service programs; franchise fees; FCC and state regulatory fees; rights-of-way fees; charges from the FCC's numbering plan and local number portability administrator; and utility, gross receipts, CST, telecommunications, excise or other taxes not recovered by MegaPath through a separate line item ("Regulatory Surcharge"). Because these expenses fluctuate, MegaPath charges separate monthly Regulatory Surcharge(s) to recover these costs rather than include them in its



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base rates. Subscriber agrees to pay all invoiced Regulatory Surcharges even if any such amount is not itself a tax or fee required by the government.

### 8. Term and Termination

The initial minimum term for each Service is set forth in the Service Order or applicable Service description in the Fee Schedule (each an "Initial Service Term"). The start date for the Initial Service Term of each Service varies by the type of Service but is generally the Billing Start Date; please see the applicable Service description in the Fee Schedule for a description of when each Service's Initial Service Term begins. After the end of a Service's Initial Service Term or Renewal Service Term (defined below), unless Subscriber provides notification in accordance with the Fee Schedule and Services Exhibit of its intention not to renew or cancel the Agreement at least thirty (30) days, but no more than forty-five (45) days, prior to the end of the Initial Service Term or the then-current Renewal Service Term, or unless otherwise noted in the Fee Schedule, the Services will automatically renew for subsequent terms of the same length as the Initial Service Term (each such renewal, a "Renewal Service Term"). All such Renewal Service Terms together with the Initial Service Term will be referred to as the "Term". MegaPath can terminate this Agreement or any Service for any reason at the end of a Service's Initial Service Term or Renewal Service Term (defined below) by providing at least thirty (30) days' notice. MegaPath can terminate this Agreement or any Service for cause at any time, including during the Initial Service Term, if (a) Subscriber is in Payment Default or (b) MegaPath determines that Subscriber has violated a material provision of this Agreement including any exhibits, schedules or attachments thereto such as the then-current Acceptable Use Policy; or (c) MegaPath determines that Subscriber has resold or redistributed cable or voice Services or otherwise transferred the Services, Software and/or Products in violation of the Agreement (each a termination "For Breach"). In the event that MegaPath terminates For Breach, Subscriber shall pay, in addition to any amounts owed MegaPath through the month of termination, the applicable Early Termination Fee. If Subscriber elects to terminate any Service prior to the expiration of the Term, other than in accordance with the SLAs or as provided for in this Section 8, Subscriber will pay the Early Termination Fees for that Service. Subscriber and MegaPath agree that an Early Termination Fee is not a penalty but serves as an accurate approximation of the damages to MegaPath that result from the termination before the end of its Initial Service Term. MegaPath's termination policy and process is set forth in the Fee Schedule.

### 9. Warranty

MEGAPATH WARRANTS THAT THE SERVICES WILL BE PERFORMED IN A PROFESSIONAL MANNER, PURSUANT TO GENERALLY ACCEPTED INDUSTRY STANDARDS AND PRACTICES FOR SIMILAR SERVICES, AND MEGAPATH FURTHER WARRANTS THAT SERVICES SHALL CONFORM WITH THE SLAS; PROVIDED, HOWEVER, THAT SUBSCRIBER UNDERSTANDS AND AGREES THAT ITS SOLE AND EXCLUSIVE REMEDY FOR ANY ISSUE OR CLAIM RELATED TO THE PERFORMANCE OR NON-PERFORMANCE OF THE SERVICES AND PRODUCTS SHALL BE FOR MEGAPATH TO PROVIDE SUBSCRIBER WITH THE CREDITS AND REMEDIES PURSUANT TO THE TERMS OF THE SLAS, IF ANY. **EXCEPT FOR THE FOREGOING, MEGAPATH PROVIDES ALL SERVICES, SOFTWARE AND PRODUCTS ON AN "AS IS" BASIS, AND SUBSCRIBER'S USE OF THE SERVICES AND PRODUCTS IS AT ITS OWN RISK. MEGAPATH DOES NOT MAKE AND EXPLICITLY DISCLAIMS, ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT AND TITLE, AS WELL AS ANY WARRANTIES THAT MAY ARISE FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE. MEGAPATH DOES NOT WARRANT THAT THE SERVICES OR SOFTWARE WILL BE ERROR FREE, UNINTERRUPTED OR SECURE FROM THIRD-PARTY ATTACKS. THE PRECEDING DISCLAIMERS INCLUDE AN EXPRESS ACKNOWLEDGMENT BY SUBSCRIBER THAT, AMONG OTHER THINGS, MEGAPATH**





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**DOES NOT MAKE ANY PROMISE TO SUBSCRIBER THAT: (1) THE SERVICES OR PRODUCTS ARE FIT TO BE SOLD; (2) THE SERVICES OR PRODUCTS ARE FREE FROM DEFECTS; (3) THE SERVICES OR PRODUCTS WILL PERFORM IN ANY SPECIFIC MANNER, AT A PARTICULAR SPEED, OR TO ANY PARTICULAR STANDARD; (4) MANAGED OR OTHER SECURITY SERVICES WILL PROVIDE ANY PARTICULAR LEVEL OF PROTECTION FOR SUBSCRIBER'S COMPUTERS, NETWORKS OR SYSTEMS; (5) HOSTED SERVICES WILL MEET ANY PARTICULAR LEVEL OF SECURITY, RELIABILITY OR COMPLIANCE, OR (6) THE SERVICES OR PRODUCTS CAN BE USED FOR A SPECIFIC PURPOSE. THE FEE SCHEDULE MAY CONTAIN AN ADDITIONAL PRODUCT WARRANTY RELATED TO PURCHASED HARDWARE.**

### **10. Limitation on Liability**

NEITHER PARTY (NOR MEGAPATH'S SUPPLIERS) WILL BE LIABLE UNDER ANY CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, EXEMPLARY, PUNITIVE OR SPECIAL DAMAGES OF ANY NATURE, OR FOR ANY LOST REVENUES, LOST PROFITS OR LOSS OF BUSINESS OR POTENTIAL BUSINESS OR DATA OR SERVICES, LOSS OF GOODWILL, WORK STOPPAGE, IN EACH CASE WHETHER OR NOT SUCH LOSSES WERE FORESEEABLE BY SUCH PARTY. EVEN IF MEGAPATH IS INFORMED OF THE POSSIBILITY OF SUCH DAMAGES, IN NO EVENT WILL MEGAPATH OR ITS SUPPLIERS' CUMULATIVE LIABILITY EXCEED: (A) FOR CLAIMS RELATING TO THE FAILURE OF A SERVICE THAT PROVIDES REMEDIES UNDER SLA'S, AS LIQUIDATED DAMAGES AND NOT AS A PENALTY, ANY AMOUNTS EXCEEDING THREE (3) MONTHS OF THE MONTHLY RECURRING CHARGES FOR THAT SERVICE (WHICH AMOUNT SHALL BE THE EXCLUSIVE REMEDY); OR, (B) FOR CLAIMS NOT RELATING TO THE FAILURE OF A SERVICE THAT PROVIDES REMEDIES UNDER SLA'S, THE FEES PAID BY SUBSCRIBER TO MEGAPATH FOR THE SERVICES OVER THE PREVIOUS SIX (6) MONTHS; OR, (C) FOR SOFTWARE AND PRODUCTS, AN AGGREGATE OF \$100.00; OR, (D) FOR CLOUD SERVICES (OR HOSTED SERVICES) THE RIGHT TO CANCEL THE SERVICE WITHOUT INCURRING AN EARLY TERMINATION FEE. IN ADDITION AND NOT IN LIMITATION OF ANY OTHER DISCLAIMER OR LIMITATION OF LIABILITY CONTAINED IN THE AGREEMENT, MEGAPATH AND ITS SUPPLIERS WILL NOT BE RESPONSIBLE FOR ANY DAMAGES, LOSSES, EXPENSES OR COSTS THAT SUBSCRIBER SUFFERS AS A RESULT OF THE SERVICES, SOFTWARE OR PRODUCTS, INCLUDING BUT NOT LIMITED TO: (I) ANY INTERRUPTION OR FAILURE OF THE SERVICES, SOFTWARE OR PRODUCTS; (II) THE DOWNLOADING OR USE OF ANY INFORMATION, DATA, SOFTWARE OR MATERIALS OBTAINED VIA THE SERVICES OR FROM THE INTERNET; (III) ANY FAILURE TO COMPLETE A TRANSACTION ON THE INTERNET OR WHILE USING THE SERVICES; (IV) ANY LOSS OF EMAIL, BACKUP OR DATA (WHETHER BEING TRANSMITTED ACROSS MEGAPATH'S NETWORK, SUBSCRIBER'S NETWORK OR BEING STORED, BACKED-UP, OR PROCESSED VIA ONE OF THE HOSTED PRODUCTS OR MEGAPATH'S COLOCATION, MANAGED OR API SERVICES; (V) ANY INTERRUPTION OR FAILURE OF A THIRD PARTY'S SERVICES, SOFTWARE, EQUIPMENT OR NETWORK; (VI) ANY UNAUTHORIZED USE OF, OR MODIFICATION TO, THE PRODUCTS, SOFTWARE OR SERVICES OR THE COMBINATION OF THE PRODUCTS, SOFTWARE AND/OR SERVICES WITH OTHER SERVICES OR PRODUCTS; (VII) VIRUSES, WORMS, TROJAN HORSES OR OTHER NOXIOUS DATA OR SOFTWARE; (VIII) FAILURE OF DATA STORAGE, SERVER ACCESS OR EMAIL INCLUDING, BUT NOT LIMITED TO, SENDING OR RECEIVING EMAILS, BLACKLISTING, SPOOFING AND OTHER FAILURES OF SERVICE DUE TO SIMILAR ACTIONS OF SUBSCRIBER OR OTHER MEGAPATH CUSTOMERS; OR (IX) ANY UNAUTHORIZED ACCESS, ALTERATION, THEFT OR DESTRUCTION TO SUBSCRIBER'S DATA, PERSONAL INFORMATION, COMPUTERS, NETWORK, PHONE SYSTEM, EMAIL SYSTEMS, DATA BACKUP SYSTEMS, SERVERS OR VIRTUAL SERVERS, PROGRAMS OR WEBSITES. SUBSCRIBER SPECIFICALLY



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ACKNOWLEDGES THAT THE CLOUD SERVICES (ALSO CALLED HOSTED SERVICES) ARE PROVIDED BY ONE OR MORE SUPPLIERS, AND THAT MEGAPATH IS SIMPLY RESELLING THE SERVICE. THEREFORE, SUBSCRIBER ACKNOWLEDGES AND AGREES THAT MEGAPATH'S SOLE LIABILITY WITH RESPECT TO SUCH SERVICES SHALL BE AS SET FORTH ABOVE. SUBSCRIBER ACKNOWLEDGES THAT MEGAPATH HAS ENTERED INTO THIS AGREEMENT AND HAS SET ITS PRICES IN PART IN RELIANCE ON THESE LIABILITY AND REMEDY LIMITS, AND THAT THEY FORM AN ESSENTIAL BASIS OF THE BARGAIN BETWEEN THE PARTIES. Subscriber must bring any claim relating to the Agreement within six (6) months after any termination or expiration of the Agreement and Subscriber waives any right to claims arising after such six month time period.

### 11. Indemnification

Subscriber hereby agrees to defend, indemnify and hold MegaPath, its affiliates, directors, officers, employees and contractors harmless from any and all third party claims, liabilities, losses, damages, expenses, or causes of action, including, without limitation, reasonable legal fees and expenses (collectively, "Losses") arising from or in connection with: (i) Subscriber's resale or redistribution of any Software, Product or Service to any end-user via any method whether permitted or prohibited by the terms of this Agreement; (ii) Subscriber's illegal use of, or any misuse of any Product, Software or Services in violation of this Agreement or any additional terms and conditions associated with the Product, Software or Services, laws, rules or regulations (including any and all such illegal use or misuse by Subscriber's employees, agents, and contractors); (iii) bodily injuries (including death) to any person, damage to any property, real or personal (public or private) occurring on Subscriber's premises unless directly caused by MegaPath; and (iv) any gross negligence or willful misconduct of Subscriber.

### 12. Copyright, Trademark & Unauthorized Use

All Services, Software, information, documents and materials on MegaPath's website(s) or provided to Subscriber in connection with the Services, Software or Products offered hereunder are protected by trademark, copyright, patent and other intellectual property laws and international treaty provisions. All websites, corporate names, service marks, trademarks, trade names, logos and domain names (collectively "marks") of MegaPath and/or its suppliers are and shall remain the exclusive property of MegaPath and/or its suppliers and nothing in this Agreement shall grant Subscriber the right or license to use any of such marks. Subscriber shall not remove, erase, tamper with or fail to preserve any copyright, trademark, or other proprietary notice printed or stamped on, affixed to, or encoded or recorded in the Products or any Software.

### 13. Confidentiality

Each party acknowledges that it will have access to certain confidential information of the other party concerning the other party's business, plans, Subscribers, technology, and products, including these terms and conditions of this Agreement ("Confidential Information"). Confidential Information will include, but not be limited to, each party's proprietary software and Subscriber information. Each party agrees that it will not use in any way, for its own account or the account of any third party, except as expressly permitted by this Agreement, nor 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 other party's Confidential Information and will take reasonable precautions to protect the confidentiality of such information. Information will not be deemed 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; (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; (iii) becomes publicly known or otherwise ceases to be secret or confidential, except through a breach of this Agreement by the receiving party; (iv) is independently developed by the receiving party; or (v) is



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required to be released by law or regulation, provided that the receiving party provide prompt written notice to the disclosing party of such impending release, and the releasing party cooperate fully with the disclosing party to minimize such release. MegaPath acknowledges that, during the course of this Agreement, it may receive on Subscriber's behalf or be entrusted with data concerning website traffic, visitors, and usage (including, but not limited to, personally identifying information). MegaPath agrees that such data is Confidential Information which is owned exclusively by Subscriber and MegaPath agrees that it will not use such Confidential Information for any purpose except the performance of this Agreement and the amendments hereto, and that it will not disclose any such Confidential Information to any third party unless such disclosure is authorized in writing by Subscriber.

### **14. AUP and Privacy Policy**

Subscriber will comply with (and will ensure that all users of the Service comply with) MegaPath's Acceptable Use and Privacy policies. MegaPath may suspend or cancel the Services if Subscriber (or anyone that uses Subscriber's Services) violates either policy. In most cases, MegaPath will endeavor to notify Subscriber of such violations before taking such action, but MegaPath may act without such notice and without liability to prevent harm or damage to MegaPath's, Subscriber's or a third-party's property, networks or systems. Subscriber further acknowledges that MegaPath may amend the Policies from time to time without notice, and Subscriber is responsible for compliance with the current versions of the Policies.

### **15. Force Majeure**

MegaPath shall not be liable for any performance delay or failure, loss, or damage due to fire, explosion, power blackout, earthquake, flood, the elements, strike, embargo, labor disputes, acts of civil or military authority, acts of God, acts, omissions, or failures of carriers, communications services, acts of regulatory or governmental authorities, unforeseen circumstances or other causes beyond MegaPath's reasonable control.

### **16. Independent Contractor**

The parties agree that they are independent contractors and that this Agreement and relations between the parties hereby established do not constitute a joint venture, agency or contract of employment between them, or any other similar relationship. Neither party has the right or authority to create an obligation or responsibility on behalf of the other.

### **17. Assignment**

Subscriber may not assign or transfer this Agreement, in whole or part, without MegaPath's consent, which consent shall be at MegaPath's sole discretion; any such assignment or transfer shall be void. MegaPath is free to assign any of its rights or to delegate any of its duties hereunder to any affiliate or to any third party as part of a sale of all or substantially all of its assets or stock or as part of a merger. MegaPath may subcontract the performance of certain services to third parties.

### **18. Governing Law and Consent to Jurisdiction**

This Agreement shall be construed in accordance with and governed by the internal laws of the State of California without giving effect to its conflicts of law provisions. Subscriber consents to the exclusive jurisdiction of Santa Clara County, CA.

### **19. Arbitration**

Any disputes arising from the interpretation of or performance of this Agreement or any Attachments shall be submitted for binding, expedited arbitration in Santa Clara County, California, before a single arbitrator agreed upon by the parties. If the parties cannot agree, the arbitrator will be selected by JAMS, the AAA or another dispute resolution organization that the parties agree on. In the event that the parties still fail to agree, the arbitrator shall be selected by





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JAMS. Such arbitration shall be in accordance with the then current Commercial Arbitration Rules of the American Arbitration Association (“AAA”). Notwithstanding, the arbitrator shall schedule a pre-arbitration hearing (“Hearing”) to resolve procedural matters, arrange for the exchange of information, obtain stipulations and narrow issues. The arbitrator’s ruling at the Hearing shall be final and binding on all parties. The parties to the arbitration shall be entitled to discovery in accordance with the California Code of Civil Procedure Section 1283.05.

### 20. Notices

Notices to Subscriber may be sent to the facsimile number, email address or physical address listed on the Order or to any contact information subsequently provided to MegaPath. Subscriber consents to receiving all notices hereunder through electronic means. All notices to MegaPath must be in writing and must be sent to MegaPath Corporation, ATTN: Subscriber Billing Department, 6800 Koll Center Parkway, Suite 200, Pleasanton, CA, 94566, or (ii) by email to [customercare@MegaPath.com](mailto:customercare@MegaPath.com).

### 21. Entire Agreement and Amendments

This Agreement including the Terms and Conditions, Orders, Policies, Fee Schedule and SLAs entered into or incorporated herein by reference constitute the entire and exclusive agreement between MegaPath and Subscriber with respect to the subject matter of this Agreement, and the Agreement supersedes any prior agreements, promises, offers, communications, representations, statements, negotiations, understandings, or proposals, oral or written between Subscriber and MegaPath, any related entity or any of their respective employees, contractors or agents with respect to any services or products offered by MegaPath. Subscriber acknowledges and agrees that Subscriber has not relied upon any statement, promise or representation by MegaPath, any related entity or any of their respective employees, contractors or agents, including those relating to the performance, pricing, specifications or other aspects of any service or product offered by MegaPath and not expressly set forth in this Agreement. Except as set forth in the Agreement, the Agreement can only be modified, amended or waived through a writing signed by an authorized employee of each party or by notice from MegaPath as described below if by MegaPath. MegaPath reserves the right to change the Ancillary Rate Schedule, the SLAs, the Fee Schedule or any of the Policies upon notice to Subscriber. MegaPath further reserves the right to alter, change or eliminate Services, Products or Software or to change or eliminate areas where MegaPath provides Services upon thirty days prior written notice to Subscriber.

### 22. Survival

Any accrued rights to payment, any remedies, and all sections of this Agreement that by their nature would survive including without limitation, indemnification, remedies, warranty disclaimers and limits of liability, shall survive any expiration or termination of this Agreement.

### 23. Severability

If any provision of this Agreement is held to be invalid or unenforceable under any circumstances, it shall be enforced to the maximum extent permissible so as to give effect to the intent of the parties and its application in any other circumstances and the remaining provisions of this Agreement shall not be affected.

### 24. Waiver

Failure by either party to insist upon strict and complete performance of any or all terms or conditions contained in the Agreement shall not constitute nor be construed as a waiver of that party’s right to enforce such provision or any other provision.

### 25. Counterparts

This Agreement and the Service Order need only be executed by Subscriber. MegaPath may accept or decline the Order as provided herein. MegaPath’s provisioning of the Service shall



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indicate its acceptance of the order. If MegaPath elects to sign any Order, then it may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one Agreement. Facsimile signatures and electronic signatures (including electronically transmitted signed documents) shall be accepted and treated the same as an original.

### **26. Subscriber Premises Equipment**

In order to facilitate configuration of equipment and ensure its compatibility with MegaPath's network, MegaPath reserves the right to require Subscriber, as a condition to receiving Service, to use customer premises equipment ("CPE") supplied by MegaPath. Such CPE may be purchased by Subscriber or MegaPath may rent the CPE to Subscriber at MegaPath's option. If Subscriber purchases the CPE, title shall remain with MegaPath until Subscriber has paid the full purchase price associated with such CPE (as indicated on the Service Order). There is a warranty for purchased CPE and the relevant warranty information is set forth in the Fee Schedule located at [http://www.MegaPath.com/pdfs/fee\\_schedule.pdf](http://www.MegaPath.com/pdfs/fee_schedule.pdf) and any relevant warranty disclaimers are set forth in Section 9 hereof. Subscriber shall bear the cost of any loss or damage to the CPE from any cause whatsoever, until the purchase price is paid in full. If MegaPath agrees to rent the CPE to Subscriber (as indicated on the Service Order), then MegaPath shall retain title to the CPE and Subscriber agrees to use reasonable care in maintaining the CPE while in Subscriber's possession. Upon the expiration or termination of the Services, rented CPE shall be returned to MegaPath by Subscriber (and at Subscriber's expense) in good condition, reasonable wear and tear excepted. If Subscriber fails to return the CPE to MegaPath within thirty (30) days of termination of the Services, Subscriber shall be charged the then current-list price for the CPE. If Subscriber is renting the CPE, then during the Initial Service Term or any Renewal Service Term, MegaPath agrees to provide replacement of rented CPE to Subscriber at no additional cost to Subscriber unless such replacement is necessitated by Subscriber's negligence.

### **27. Personal Abuse**

Personal threats, sexual harassment, profanity and vulgarities of any sort directed toward MegaPath personnel are a violation and grounds for termination of this Agreement and if terminated under this provision, Subscriber shall be responsible for payment of Early Termination Fees.