

## M5 Networks, Inc. Standard Terms of Service

**Please read these Standard Terms of Service (these “Standard Terms”) carefully before signing any Order Form, since by signing any Order Form you consent to all of the terms and conditions of these Standard Terms.**

Thank you for choosing M5 Networks, Inc. (“M5 Networks”) to provide your communications services. These Standard Terms are the “Standard Terms of Service” referred to in and incorporated into each M5 Networks Order Form (each an “Order Form”). M5 Networks and Customer may enter into subsequent Order Forms, which may supersede, modify or supplement prior Order Forms.

As used in these Standard Terms, the terms “Customer” and “you” refer to any person or entity signing an Order Form; the term “Effective Date” means, as to any Customer, the date of the first Order Form signed by such Customer; the term “Service” means the transmission of data to and from M5 Networks through the network of routers, switches and communication channels owned and controlled by M5 Networks (the “Network”) together with 24 hour per day, 7 day per week connectivity to the Internet and/or voice and/or other services, as further described in these Standard Terms and as set forth in any Order Form; and the term “Agreement” includes each Order Form and these Standard Terms, together.

M5 Networks will begin installation, initiation and Service only after it receives the payment referred to in Section 1.1 below and after it receives and accepts the following items properly completed and signed by Customer or, if Customer is not an individual, Customer’s authorized representative: (1) an Order Form; (2) either (a) payment to M5 Networks of the Deposit referred to in the Order Form or (b) delivery of the Equipment Rental Guaranty referred to in the Order Form by a person acceptable to M5 Networks, as provided in the relevant Order Form(s); (3) payment of all amounts due under Section 1.1 below; (4) your Customer Local Number Portability Form and Letter of Agency; (5) your Customer Equipment Receipt and Acceptance Form(s); and (6) if the Service to be provided to you includes voice services, a Customer Address Form(s) covering all numbers for which voice services are provided. In addition, in connection with the assignment of IP addresses, you will be required to furnish M5 Networks with a signed IP Address Request Form.

**1. Service Fees And Billing.** Customer agrees to pay all Non-Recurring Charges, Monthly Service Charges and other fees and charges (collectively, “Service Fees”) indicated on the Order Form.

**1.1 Service Activation Charges.** M5 Networks will bill Customer for all “Activation Charges” (meaning

Non-Recurring Charges and first month Monthly Service Charges) as indicated on any Initial Order Form upon M5 Networks’ execution of such Order Form. M5 Networks will not commence installation, initiation or Service unless it either has received payment in full of all Activation Charges or has agreed, at its sole option, to extend credit to Customer.

**1.2 Monthly Service Charges.** M5 Networks will begin regular monthly billing for Monthly Service Charges on the date on which it completes the “set-up” of the Service (or on the date on which Customer first uses the Service, if earlier). The initial bill for Monthly Service Charges will be for the first full calendar month of Service, and the Monthly Service Charges paid as part of Activation Charges will be applied to that bill. Prorated Monthly Service Charges for any period prior to the first full calendar month of Service will be reflected on the second bill for Monthly Service Charges. All Monthly Service Charges will be billed in advance and, except as otherwise provided in the in the preceding sentence, all Monthly Service Charges for any part of a calendar month will be rounded up to and billed at monthly increments, regardless of actual activation time during such calendar month.

**1.3 Usage-Based Service Fees.** M5 Networks will bill Customer monthly for all usage-based Services used by Customer since the end of the billing period covered by the last bill for usage-based services (or since the commencement of the Service, in the case of the first bill for usage-based services).

**1.4 Payment.** All Service Fees and other charges will be due, in U.S. dollars, upon Customer’s receipt of M5 Networks’ invoice for the same. Payments that are more than thirty (30) days late will accrue interest at a rate of one and one-half percent (1-½%) per month, or the highest rate allowed by applicable law, whichever is lower. If in its judgment M5 Networks determines that Customer lacks financial resources to timely make payments on invoices rendered by M5 Networks, M5 Networks may, upon written notice to Customer, modify the payment terms so as to provide that Customer’s payment for all Service Fees and other known or anticipated charges will be made in advance.

**1.5 Taxes.** All payments required by the Agreement are exclusive of applicable taxes and shipping charges. Customer will be liable for and will pay in full all such amounts.

**2. Other Networks; Approval and Usage.** The Service includes the ability to transmit data to and beyond the Network, through other networks, public and private. Customer acknowledges that use of or presence on other networks may require approval of the authorities of such other networks and will be subject to any acceptable usage policies such other networks may establish. Customer will not hold M5

Networks responsible for, and M5 Networks will not be liable for, any failure to obtain such approval or any violation of such policies. Customer understands that M5 Networks does not own or control such other networks, and agrees that M5 Networks shall not be responsible or liable for performance (or non-performance) of or within such networks or within interconnection points between the Service and such other networks.

**3. Resale.** Customer represents that it will be the end user of the Service. Customer shall not in any way resell, license or permit or suffer any third party to use the Service without receiving M5 Networks' prior written consent.

**4. Certain Rules of Use.** Customer must at all times conform its use of the Service to M5 Networks' *Rules of Use* as M5 Networks may update the same from time to time. The current version of M5 Networks' *Rules of Use* can be found at <http://www.m5net.com/html/aup.html>. If M5 Networks is informed by government authorities or other parties of inappropriate or illegal use of M5 Networks' facilities or services (including but not limited to the Network and the Service) or other networks accessed through M5 Networks (including, in any case and without limitation, any use contrary to the Digital Millennium Copyright Act of 1998, 17 U.S.C. 512), or M5 Networks otherwise learns of such use or has reason to believe such use may be occurring, then Customer will cooperate in any resulting investigation by M5 Networks 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 inappropriate or illegal use, M5 Networks may immediately suspend the Service (including, without limitation, prior to the end of any "Term"). Further, upon notice to Customer, M5 Networks may modify or suspend the Service as necessary to comply with any law or regulation as reasonably determined by M5 Networks. 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 the Network, any other network(s), M5 Networks' premises, any equipment of M5 Networks or any other M5 Networks customer.

**5. Limited Service Level Warranty.** M5 Networks warrants that it will use its commercially reasonable efforts to minimize Excess Packet Loss and Latency, and to avoid Downtime, in each case as provided in this Section 5, and that M5 Networks will provide the following remedies to Customer for Excess Packet Loss, Latency and Downtime ("Excess Packet Loss," "Latency" and "Downtime" are defined below in this Section 5):

**5.1 Excess Packet Loss and Latency.** M5 Networks does not monitor the packet loss or

transmission latency of specific customers. M5 Networks does, however, monitor the aggregate packet loss and transmission latency within its Local Area Network and its Wide Area Network. In the event that M5 Networks discovers (either from its own efforts or after being notified by Customer) that Customer is experiencing packet loss in excess of five percent (5%) ("Excess Packet Loss") or transmission latency in excess of 120 milliseconds round-trip time based on M5 Networks' measurements ("Latency"), in either case between any two routers within the continental United States portion of the Network on average for each hour, then M5 Networks will use commercially reasonable actions to determine the source of the Excess Packet Loss or Latency and to correct the problem.

**5.2 Remedies for Excess Packet Loss and Latency.** If either Excess Packet Loss or Latency occurs and is caused by a source within the Network (and not by the Customer or Customer's equipment or by a source outside of the Network), then, if M5 Networks fails to correct the Excess Packet Loss or Latency within one (1) hour after Customer notifies M5 Networks of such Excess Packet Loss or Latency, M5 Networks will credit Customer's account five percent (5%) of one (1) month's Access Charges as shown on the applicable Order Form; if M5 Networks fails to correct the Excess Packet Loss or Latency within twenty-four (24) hours after Customer notifies M5 Networks of such Excess Packet Loss or Latency, M5 Networks will credit Customer's account twenty-five percent (25%) of one (1) month's Access Charges as shown on the applicable Order Form; and if M5 Networks fails to correct the Excess Packet Loss or Latency within one (1) week after Customer notifies M5 Networks of such Excess Packet Loss or Latency, M5 Networks will credit Customer's account one hundred percent (100%) of one (1) month's Access Charges as shown on the applicable Order Form; provided that the aggregate of such credits for failures in any one (1) twenty-four (24) hour period shall not exceed five percent (5%) of one (1) month's Access Charges as shown on the applicable Order Form; the aggregate of such credits for failures in any one (1) week period shall not exceed twenty-five percent (25%) of one (1) month's Access Charges as shown on the applicable Order Form; and the aggregate of such credits for failures in thirty (30) day period shall not exceed one (1) month's Access Charges as shown on the applicable Order Form.

**5.3 Remedies for Inability to Access Communications.** M5 Networks will use commercially reasonable efforts to avoid those situations in which Customer is unable to transmit and receive information from the Network ("Downtime"). In cases of Downtime in which M5 Networks fails to provide Network access for more than one (1) continuous hour, M5 Networks will credit Customer's account for such Downtime according to the following schedule: for Downtime

in excess of (1) continuous hour but not exceeding twenty-four (24) continuous hours, the credit shall be five percent (5%) of one (1) month's Access Charges as shown on the applicable Order Form; for Downtime in excess of twenty-four (24) continuous hours but not exceeding one (1) continuous week, the credit shall be twenty-five percent (25%) of one (1) month's Access Charges as shown on the applicable Order Form; and for Downtime in excess of one (1) continuous week the credit shall be one hundred percent (100%) of one (1) month's Access Charges as shown on the applicable Order Form; provided that the aggregate of such credits for failures in any one (1) twenty-four (24) hour period shall not exceed five percent (5%) of one (1) month's Access Charges as shown on the applicable Order Form; the aggregate of such credits for failures in any one (1) week period shall not exceed twenty-five percent (25%) of one (1) month's Access Charges as shown on the applicable Order Form; and the aggregate of such credits for failures in thirty (30) day period shall not exceed one (1) month's Access Charges as shown on the applicable Order Form. For purposes of the foregoing, "unable to transmit and receive information" shall mean sustained packet loss in excess of fifty percent (50%) based on M5 Networks' measurements.

**5.4 Customer Must Request Credit.** In order to receive a credit under this Section 5, Customer must notify M5 Networks within three (3) business days after the time Customer becomes eligible to receive such credit. In the event that Customer gives such notice after such than three (3) business day period, Customer's right to receive a credit will be forfeit with respect to the period prior to three (3) business days before Customer gives such notice.

**5.5 Maintenance.** M5 reserves the right to perform maintenance on the Network and the Service from 2am to 6am New York City time. M5 Networks will use commercially reasonable actions to minimize the scope of Downtime during such maintenance periods, but will not be required to provide any credit under this Section 5 with respect to Excess Packet Loss, Latency or Downtime caused by maintenance occurring during such maintenance periods.

**5.6 Limitation on Remedies.** If Customer is entitled to multiple credits under this Section 5 for any period, such credits shall not in any event be cumulative and Customer shall receive only one credit for such period. SECTIONS 5.2 AND 5.3 ABOVE SET FORTH CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR ANY FAILURE BY M5 NETWORKS TO PROVIDE SERVICE OR ADEQUATE SERVICE LEVELS, INCLUDING BUT NOT LIMITED TO ANY OUTAGES OR NETWORK CONGESTION. M5 Networks' blocking of data communications that are in contravention of its *Rules of Use* shall not be deemed to be a failure of M5 Networks to provide Service or adequate Service levels under the Agreement or to entitle

Customer to any remedies. Excess Packet Loss, Latency or Downtime during any scheduled maintenance periods referred to in Section 5.5 shall not be deemed to be a failure of M5 Networks to provide Service or adequate Service Levels under the Agreement or to entitle Customer to any remedies.

**5.7 No Other Warranty.** EXCEPT FOR THE EXPRESS WARRANTY SET FORTH ABOVE IN THIS SECTION 5, THE SERVICE IS PROVIDED ON AN "AS IS" BASIS, AND CUSTOMER'S USE OF THE SERVICE IS AT CUSTOMER'S OWN RISK. EXCEPT FOR THE EXPRESS WARRANTY SET FORTH ABOVE IN THIS SECTION 5, M5 NETWORKS DOES MAKE, AND HEREBY DISCLAIMS, ANY AND ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OR TITLE, AND ANY WARRANTY ARISING FROM ANY COURSE OF DEALING, USAGE OR TRADE PRACTICE; AND, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, M5 NETWORKS DOES NOT WARRANT THAT THE SERVICE WILL BE UNINTERRUPTED, ERROR-FREE, OR COMPLETELY SECURE.

**5.8 Disclaimer of Third Party Actions and Control.** M5 NETWORKS DOES NOT AND CANNOT CONTROL THE FLOW OF DATA BETWEEN M5 NETWORKS' NETWORK AND OTHER NETWORKS. SUCH FLOW DEPENDS IN LARGE PART ON THE PERFORMANCE OF NETWORKS AND SERVICES PROVIDED OR CONTROLLED BY THIRD PARTIES. AT TIMES, ACTIONS OR INACTIONS CAUSED BY THESE THIRD PARTIES CAN PRODUCE SITUATIONS IN WHICH M5 NETWORKS CUSTOMERS' CONNECTIONS TO NETWORKS OTHER THAN M5 NETWORKS' NETWORK MAY BE IMPAIRED OR DISRUPTED. ALTHOUGH M5 NETWORKS WILL USE COMMERCIALY REASONABLE EFFORTS TO REMEDY AND AVOID SUCH EVENTS, M5 NETWORKS CANNOT GUARANTEE THAT THEY WILL NOT OCCUR. THEREFORE, WITHOUT LIMITING THE GENERALITY OF SECTION 5.7 ABOVE, M5 NETWORKS DISCLAIMS ANY AND ALL LIABILITY RESULTING FROM OR RELATED TO SUCH EVENTS.

## **6. Limitations of Liability.**

**6.1 Exclusions of Certain Damages.** EXCEPT AS EXPRESSLY SET FORTH ABOVE IN SECTIONS 5.2, 5.3 AND 5.4, UNDER NO CIRCUMSTANCES, AND UNDER NO LEGAL THEORY, WHETHER CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR ANY OTHER THEORY WHATSOEVER, SHALL M5 NETWORKS BE LIABLE FOR ANY DAMAGES CUSTOMER MAY SUFFER FROM OR IN CONNECTION WITH

CUSTOMER'S USE OF, OR INABILITY TO USE, M5 NETWORKS' 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 M5 NETWORKS HAS BEEN ADVISED OF, OR IS AWARE OF, THE POSSIBILITY OF SUCH DAMAGES.

**6.2 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 ABOVE IN SECTION 5 AND IN SECTION 6.1 MAY NOT APPLY TO YOU. IF SUCH EXCLUSIONS ARE HELD INAPPLICABLE OR UNENFORCEABLE FOR ANY REASON, THEN M5 NETWORKS' MAXIMUM LIABILITY TO YOU FOR ANY TYPE OF DAMAGES FOR ALL CLAIMS ARISING FROM THE USE OF, OR ANY FAILURE OF M5 NETWORKS WITH RESPECT TO, M5 NETWORKS' NETWORK OR EQUIPMENT, OR THE SERVICE SHALL BE LIMITED TO THE AMOUNT OF CREDITS PROVIDED FOR ABOVE IN SECTION 5 PLUS, IN ADDITION, THE AMOUNT OF MONTHLY SERVICE CHARGES PAID BY CUSTOMER TO M5 NETWORKS HEREUNDER FOR THE TWELVE (12) MONTH PERIOD PRIOR TO THE OCCURRENCE OF THE EVENT GIVING RISE TO SUCH LIABILITY.

## **7. Customer's Indemnification of, and Other Responsibility to, M5 Networks.**

**7.1 Indemnification.** Customer hereby indemnifies and holds M5 Networks and its directors, officers, employees, agents, affiliates and customers (collectively, the "Covered Entities") harmless from and against any and all claims, actions, demands, damages, costs, losses, liabilities or expenses arising directly or indirectly from any wrongful or improper use of the Service, the Network, any other network, or any equipment used in connection with the Service, the Network or any other network by Customer or its agents, employees, contractors, invitees or licensees, or from any breach by Customer of any provision of the Agreement (and including, without limitation, any of the same arising as a result of any infringement or misappropriation of any intellectual property rights, defamation, libel, slander, obscenity, pornography, or violation of the rights of privacy or publicity, spamming, any other

offensive, harassing or illegal conduct or any violation of the *Rules of Use*), 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) and such indemnity to cover, without limitation, claims of bodily injury and property damage.

**7.2 Notification.** M5 Networks will provide Customer with written notice of each instance of which it becomes aware that could reasonably be expected to give rise to claim for indemnification under Section 7.1 above; provided, however, that no failure on the part of M5 Networks to give any such notice shall relieve Customer of any of its obligations under Section 7.1 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 M5 Networks claims indemnity, provided that Customer's selection of counsel to represent M5 Networks shall be subject to M5 Networks' right to approve the same, such approval not to be unreasonably withheld.

**7.3 Customer Responsible for Damage to M5 Networks' Equipment, etc.** Customer shall be responsible and liable for any damage to or destruction of the Network, any of M5 Networks' premises, or any real or personal property (including, without limitation, equipment or servers) of M5 Networks caused by Customer or its agents, employees, contractors, invitees or licensees.

**8. Reliance on Disclaimer, Liability Limitations and Indemnification Obligations.** Customer acknowledges that M5 Networks has set its prices and entered into the Agreement and the terms set forth in any Order Form in reliance upon the limitations and exclusions of liability, the disclaimers of warranties and damages and Customer's indemnity obligations set forth herein, and that the same form an essential basis of the bargain between the parties. The parties agree that the limitations and exclusions of liability and disclaimers specified in the Agreement will survive and apply even if the Agreement is found to have failed of its essential purpose.

**9. Customer to Provide Accurate Information on each Customer Address Form (applicable if Customer is receiving voice services).** CUSTOMER ACKNOWLEDGES THAT IT UNDERSTANDS THAT THE INFORMATION THAT CUSTOMER PROVIDES ON EACH CUSTOMER ADDRESS FORM MUST BE ACCURATE AND COMPLETE, AS SUCH INFORMATION WILL BE USED TO IDENTIFY THE ADDRESS TO WHICH POLICE, FIREFIGHTERS, EMERGENCY MEDICAL AND AMBULANCE SERVICES AND

OTHER EMERGENCY PERSONNEL AND SERVICES WILL BE SENT IN RESPONSE TO ANY "911" OR OTHER EMERGENCY TELEPHONE CALL MADE FROM ANY TELEPHONE NUMBER INDICATED ON SUCH CUSTOMER ADDRESS FORM. CUSTOMER REPRESENTS THAT THE INFORMATION THAT IT FURNISHES ON EACH CUSTOMER ADDRESS FORM WILL BE ACCURATE AND COMPLETE, AND CUSTOMER UNDERTAKES TO UPDATE SUCH INFORMATION SO AT ALL TIMES WHEN M5 NETWORKS IS FURNISHING VOICE SERVICES TO CUSTOMER SUCH INFORMATION SHALL BE ACCURATE AND COMPLETE. WITHOUT LIMITING ANY OTHER PROVISION IN THE AGREEMENT PROVIDING FOR INDEMNITY BY CUSTOMER, CUSTOMER SHALL BEAR ALL LIABILITY FOR ANY PERSONAL INJURY OR DEATH, OR INJURY TO PROPERTY, RESULTING FROM ANY FAILURE BY CUSTOMER TO FURNISH ACCURATE AND COMPLETE INFORMATION ON EACH CUSTOMER ADDRESS FORM OR TO UPDATE SUCH INFORMATION AS PROVIDED IN THE PRECEDING SENTENCE. CUSTOMER ACKNOWLEDGES THAT IT IS CUSTOMER'S RESPONSIBILITY TO KEEP THE INFORMATION ON EACH CUSTOMER ADDRESS FORM CURRENT, AND THAT CUSTOMER MUST PROVIDE M5 NETWORKS WITH UPDATED INFORMATION AT LEAST FIFTEEN (15) DAYS **PRIOR TO ANY CHANGE IN ANY INFORMATION ON ANY CUSTOMER ADDRESS FORM.**

**10. Rental of Equipment.** If so indicated on any Order Form, M5 Networks is renting certain equipment to Customer, such equipment being listed on such Order Form and/or on any Customer Equipment Receipt and Acceptance Form signed on behalf of Customer (such equipment the "Equipment"). Any such rental shall be upon the following terms and conditions:

(a) The monthly rental charges for the rental of any Equipment shall be as set forth on the relevant Order Form(s) under the heading "Equipment Charges."

(b) Customer acknowledges and agrees that all Equipment shall at all times be the sole property of M5 Networks and not of Customer, and Customer shall not remove (or permit anyone else to remove) from any such Equipment any notice indicating that such equipment is the property of M5 Networks.

(c) Customer agrees to use the Equipment solely in connection with the Service and otherwise solely in the manner for which the Equipment is intended to be used. If Customer is not fully familiar with the use of any Equipment, prior to use Customer will contact M5 Networks' customer service for instructions.

(d) Customer agrees to use the Equipment solely at the address of Customer set forth of the

Order Form(s) and not to remove any Equipment from such address; provided, that this restriction shall not apply to any Equipment furnished to Customer for use in connection with the Remote User Service (as defined in Section 15.1 below).

(e) Upon any expiration or termination of the Agreement, all Equipment shall be returned to M5 Networks, and Customer shall permit M5 Networks to enter upon the premises of Customer to remove the Equipment. Promptly after the Equipment has been returned to M5 Networks and M5 Networks has determined that all of the Equipment has been returned and that no Equipment has been damaged (beyond normal wear and tear) or destroyed, M5 Networks will return to Customer any equipment deposit then held by M5 Networks with respect to such Equipment. If any Equipment has been damaged (beyond normal wear and tear), destroyed or lost, M5 Networks may withhold from such deposit such amount as may be equal to the replacement cost of such Equipment, as provided in subsection (f) of this Section 10 (provided that if such deposit is insufficient to pay the full amount of the replacement costs payable with respect to such damage, destruction or loss, such deposit shall not constitute the limit of Customer's liability for such damage, destruction or loss).

(f) Customer agrees to pay M5 Networks an amount equal to the Replacement Cost (as defined below) of any Equipment that is destroyed, damaged (beyond normal wear and tear) or lost (whether as a result of theft or otherwise). The term "Replacement Cost" shall mean, with reference to any Equipment, the "Replacement Cost" of such Equipment as indicated on the Schedule of Equipment Replacement Costs attached to these Standard Terms as Exhibit A and incorporated by reference into these Standard Terms, plus any applicable taxes. Payment of such amount by Customer to M5 Networks is due immediately upon Customer's receipt of an invoice therefor from M5 Networks. Payments that are more than thirty (30) days late will accrue interest at a rate of one and one-half percent (1-½%) per month, or the highest rate allowed by applicable law, whichever is lower.

(g) Nothing in the Agreement shall modify, amend or limit in any respect any of M5 Networks' rights under any guaranty of any of Customer's obligations under this Section 10.

**11. Confidential Information.** Each party acknowledges that it will have access to certain confidential information of the other party concerning the other 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 in 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 other 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.

**12. Term.** The Agreement will be effective beginning on the Effective Date. If a "Term" is specified in any Order Form(s), then the Agreement shall expire on the last day of such Term, unless earlier terminated as provided in these Standard Terms (including, without limitation, in Section 13 hereof); and if no "Term" is so specified, then either party may terminate the Agreement by giving the other party ninety (90) days' written notice to such effect. Customer will remain responsible for any and all Service Fees incurred after it gives such notice. Use of any Service after the end of the Term specified on the Order Form under which such Service was provided will constitute Customer's acceptance of M5 Networks' then current standard terms of service and M5 Networks' fee rates as then in effect, and shall be terminable as provided in the immediately preceding sentence.

### **13. Termination.**

**13.1 For Nonpayment.** All invoices rendered by M5 Networks shall be due upon receipt. If any payment required to be made by Customer shall not be made by fifteen (15) days after the due date for the same (or by such other time as the relevant Order Form may provide), M5 Networks may disable the Service. To re-enable the Service, M5 Networks will require a reconnection fee. If any

payment required to be made by Customer shall not be made by thirty (30) days after its due date (or by such other time, if any, as the relevant Order Form may provide), M5 Networks may terminate the Service permanently and may terminate the Agreement. M5 shall not be required to give Customer any notice of any failure to make payment. Except as otherwise provided in the Agreement, termination shall not affect Customer's obligations under the Agreement.

**13.2 Unacceptable Use; Bankruptcy.** M5 Networks may terminate the Agreement immediately upon 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 petition or proceeding is not dismissed within sixty (60) days of filing.

**13.3 For Cause.** Either party may terminate the Agreement if the other party materially breaches any term or condition of the Agreement and fails to cure such breach within thirty (30) days after receipt of written notice of the same (except as otherwise provided in Sections 13.1 and 13.2).

**13.4 No Effect on M5 Networks' Right to Terminate Service that is not for Specified Term.** Sections 13.1, 13.2 and 13.3 cover only those situations in which the Order Form provides for a specified Term, and nothing in Section 13.1, 13.2 or 13.3 shall affect in any manner any right of M5 Networks or Customer to terminate any Service for which the Order Form does not provide for a specified Term (which circumstances are provided for in Section 12 of these Standard Terms).

**13.5 No Liability for Termination.** Neither party will be liable to the other or any termination of the Agreement in accordance with its terms; provided, however, that 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.

**13.6 Effect of Termination.** Upon the expiration or termination of the Agreement, M5 Networks will immediately cease providing the Service and, subject to the next sentence, any and all payment obligations of Customer under the Agreement will immediately become due and payable. In the event that M5 exercises its rights under Section 13.1, 13.2 and/or 13.3 to terminate the Agreement in any case in which a "Term" is specified on any Order Form, then, unless M5 shall then be in material breach of the Agreement (or shall have theretofore chronically been in material breach of the Agreement), Customer shall pay seventy percent

(70%) of the Monthly Service Charges payable through the end of such Term as liquidated damages. M5 Networks and Customer acknowledge and agree that such liquidated damages constitute a reasonable estimate of the damages that would accrue to M5 Networks in the event that Customer were to terminate the Service before the end of any applicable Term and do not constitute a penalty.

**13.7 Survival.** The following provisions of these Standard Terms will survive any expiration or termination of the Agreement: Sections 5.6 through 5.8, 6, 7, 8, 9, 10, 11, 13.5, 13.6, this 13.7, 14 and 15.

#### **14. Miscellaneous Provisions.**

**14.1 Force Majeure.** Except for the obligation to pay money, neither party will be liable for any failure or delay in its performance under the Agreement, or for credits under Section 5, due to any cause beyond its reasonable control, including any act of war, act of God, earthquake, flood, embargo, riot, sabotage, terrorist attack, labor shortage or dispute, governmental act or failure of any third-party service or network, 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.

**14.2 No Lease.** Except as otherwise provided in Section 10 hereof, 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 M5 Networks or in any personal property or server space leased by M5 Networks (except for the license referred to in Section 10 hereof), and Customer has no rights as a tenant or otherwise under any real property or landlord/tenant laws, regulations, or ordinances.

**14.3 Marketing.** Notwithstanding the provisions of Section 11 above, Customer agrees that M5 Networks may refer to Customer as a customer of M5 Networks (and in connection with such reference display any trade name, trademark, service mark and/or logo of Customer), and may describe Customer's Business, in M5 Networks' marketing materials and web site. In addition, notwithstanding the provisions of Section 11 above, M5 Networks 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.

**14.4 Government Regulations.** Customer will not use the 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.

**14.5 Assignment.** 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 M5 Networks, 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.

**14.6 Notices.** Any notice or communication required or permitted to be given hereunder may be delivered personally (including by a recognized overnight courier service), sent by confirmed fax, or mailed by registered or certified mail, return receipt requested, postage prepaid, in each case to the address 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. Any notice will be deemed to have been given as of the date it is delivered, personally or by fax, or five (5) days after having been mailed as provided above.

**14.7 Choice of Law and Arbitration.** The Agreement will be governed by and construed in accordance with the laws of the State of New York, 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 14.7 (the provisions contained in this Section 14.7 controlling in the event of any conflict between this Section 14.7 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 at the offices of the AAA in the Borough of Manhattan, City of New York. Any final decision or award from arbitration under this Section 14.7 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 14.7. As part of any arbitration conducted under this Section 14.7, 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 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 14.7 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 14.7, 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 14.7 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 14.7 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.

**14.8 Entire Agreement.** The Agreement and M5 Networks' *Rules of Use* represent the complete agreement and understanding of the parties with respect to the subject matter hereof, and supersede 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 both parties. Both parties represent and warrant that they have full corporate power and authority to execute and deliver each Order Form and to perform their obligations under the Agreement and that each person whose signature appears on any Order Form is duly authorized to execute such Order Form on behalf of the respective party. Should any terms of any the Agreement be declared void or unenforceable by any arbitrator or court of competent jurisdiction, such terms will be amended to achieve as nearly as possible the same economic effect as the original terms and the remainder of such the Agreement will remain in full force and effect.

## **15. Remote User Service**

**15.1 Scope of this Section 15.** This Section 15 governs the use of the Service from any location other than the Customer's address as set forth on the Order Form(s) (any such other location a "Remote Location"). This Section 15 is applicable only if Customer has ordered "Remote User Service," an optional enhancement to the Service that permits use from a Remote Location.

**15.2 Unavailability of 911 to Users of Remote User Service.** Customer hereby acknowledges to M5 (and to each other person and entity referred to in Section 15.6 below) that Customer fully understands that when the Service is used from a remote Location it is not possible to call or otherwise access or reach any 911 emergency services.

**15.3 Waiver by Customer for Remote User.** Customer hereby waives any and all claims (including, without limitation, any and all claims for indemnification) that Customer may or might at any time have against M5 (or against any other person or entity referred to in Section 15.6 below) arising from, out of or in connection with the inability of Customer or of any other person or persons to use the Service to call or otherwise access or reach 911 emergency services from a Remote Location or by means of the Remote User Service or from any of the telephones furnished by M5 for use in connection with the Remote User Service.

**15.4 Acknowledgement and Waiver Form.** Customer hereby agrees that it shall immediately obtain from each if its current and future employees and temporary contract employees using the Remote User Service a duly signed Agreement, Acknowledgment and Waiver in the form attached hereto as Exhibit B (which Customer hereby acknowledges that Customer has reviewed) and that Customer shall immediately deliver each such duly signed Agreement, Acknowledgment and Waiver to M5.

**15.5 Indemnification by Customer for Remote User Service.** Customer hereby agrees to indemnify and hold each of M5 and each other person or entity referred to in Section 15.6 below harmless from and against any and all judgments, injuries, penalties, damages, losses, obligations, liabilities, claims, actions, causes of action, encumbrances, costs, expenses (including, without limitation, reasonable attorneys' fees and expert witness fees) suffered, sustained, incurred or required to be paid by M5 or any such other person or entity, arising out of or in connection with the inability of Customer or of any other person or persons to call or otherwise access or reach 911 emergency services from a Remote Location by means of the Service or from any of the telephones furnished by M5 for use in connection with the Remote User Service.

**15.6 Beneficiaries.** The agreements, acknowledgments, waivers and indemnities of Customer in this Section 15 shall be with, to and in favor of, and shall inure to the benefit of, M5 and each of M5's present and future officers, directors, shareholders, employees, agents, successors, assigns, subsidiaries and affiliates.

**Exhibit A**

**Schedule of Equipment Replacement Costs**

**Item Description and Replacement Cost**

Cisco 2600 Series Router - \$2,500.00

Cisco 1000 Series Router - \$1,500.00

Cisco 7960 IP Phone - \$400.00

Cisco 7910 IP Phone - \$275.00

Power Cube for Cisco IP Phone - \$40.00

Power Cord for Cisco IP Phone - \$10.00

VocalData IP-30 Phone - \$400.00

8 Port 10/100 Switch - \$150.00

12 Port 10/100 Switch - \$300.00

16 Port 10/100 Switch - \$500.00

**Exhibit B**

**AGREEMENT, ACKNOWLEDGMENT AND WAIVER**

The undersigned hereby acknowledges to M5 Networks, Inc., the supplier of telephones and telephone service to \_\_\_\_\_ (“Customer”) for use by the undersigned at the undersigned’s home or at any other location(s) away from Customer’s offices (and to each other person and entity referred to in the next paragraph), that the undersigned fully understands that neither such telephones nor such telephone service can be used to call or otherwise access or reach any 911 emergency services. The undersigned also hereby waives any and all claims (including, without limitation, any and all claims for indemnification) that the undersigned may or might at any time have against M5 Networks, Inc. (or against any other person and entity referred to in the next paragraph) arising from, out of or in connection with the inability of the undersigned or of any other person or persons to call or otherwise access or reach 911 emergency services from the telephones or by means of the telephone service referred to in the preceding sentence.

The agreements, acknowledgments and waivers of the undersigned in this instrument shall be with, to and in favor of, and shall inure to the benefit of, M5 Networks, Inc. and each of its present and future officers, directors, shareholders, employees, agents, successors, assigns, subsidiaries and affiliates.

This instrument shall be governed by and construed in accordance with the substantive laws of the State of New York.

The undersigned acknowledges that it has received good, valuable and sufficient consideration for making the agreements, acknowledgments and waivers set forth in this instrument.

Signature: \_\_\_\_\_

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

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