



TERMS AND CONDITIONS FOR EARTHLINK IT SERVICES

The Terms and Conditions for EarthLink IT Services ("Terms and Conditions") contain the terms and conditions that govern Customer's access to and use of the Services. Capitalized terms used without definition in the Terms and Conditions shall have the meanings provided in Section 13 (Definitions).

1. Services.

- 1.1. Generally. EarthLink Business, directly or through its Affiliate(s), will provide those services ("Services") selected by Customer on an IT Services Order Form ("Order") or Statement of Work ("SOW") executed by the parties referencing these Terms and Conditions. Customer shall access and use the Services in accordance with the Terms and Conditions, each Order and SOW and any applicable Service Schedule or Service level Agreement ("SLA") (collectively, the "Agreement"). In the event of a conflict or inconsistency between the Terms and Conditions and an Order, SOW, Service Schedule or SLA, the order of precedence shall be as follows: (i) Order; (ii) SOW; (iii) Service Schedule; SLA; and the (iv) Terms and Conditions.
- 1.2. Restrictions on Use. Customer shall use the Services only to support Customer's internal business operations and may not resell the Services, in whole or in part, to any third party. Customer is not entitled to physical access to any EarthLink Business Facility, unless EarthLink Business is providing Colocation Services to Customer and then only to the extent provided in the Service Schedule for those Services.

2. Service Levels.

- 2.1. Service Levels. Any service level objectives that apply to a particular Service shall be set forth in an SLA located at www.earthlinkbusiness.com/about-us/legal/sla.xea.
- 2.2. Service Level Credits. If EarthLink Business fails to satisfy certain service level objectives set forth in the applicable SLA ("SLA Objectives"), Customer may apply for a credit ("Service Credit") to the extent provided for in the SLA. Service Credits do not constitute a refund and will not be paid out in cash, but will appear as a credit on Customer's EarthLink Business account; provided that, Customer has purchased the affected Service, is in compliance with the Agreement (e.g. its payment obligations) and submits a written request for a Service Credit in accordance with the SLA. Customer's failure to comply with the terms of the SLA will constitute a waiver by Customer of its right to a Service Credit. Service Credits are Customer's sole and exclusive remedy under the Agreement for any Service non-conformance or defect.
- 2.3. Network Outages. EarthLink Business will notify the Customer Technical Contact prior to any planned Network outages anticipated to degrade the Services and use reasonable efforts to notify the Customer Technical Contact of any unscheduled outages (e.g. power or Network failures and natural disasters) that degrade the Services in any material respect.
- 2.4. Scheduled Maintenance. Customer acknowledges that EarthLink Business, from time to time, performs maintenance service on the Network ("Scheduled Maintenance"), which may result in a reduction in availability, or unavailability, of the Network and is excluded for purposes of measuring SLA Objectives.

3. Customer Responsibilities.

- 3.1. Compliance. Customer shall comply with any laws and regulations applicable to Customer's and any End User's use of the Services and EarthLink Business' then-current Acceptable Use Policy ("AUP") located at www.earthlinkbusiness.com/about-us/legal/acceptable-use-policy.xea.

3.2. Customer Content.

3.2.1. Customer is solely responsible for the development, content, operation, maintenance and use of Customer Content, including, without limitation, the technical operation of Customer Content (e.g. ensuring that calls made to any Service are compatible with then-current APIs for the Service), any claims relating to Customer Content and properly handling and processing notices sent to Customer, or its Affiliate, by any person or entity claiming that Customer Content violates its rights, including, but not limited to, notices based on the Digital Millennium Copyright Act.

3.2.2. Unless included as part of the Service, Customer is responsible for properly configuring and using the Services, taking any necessary steps to maintain appropriate security, protection of Customer Content while in Customer's control and during transit, which may include the use of encryption, backup and routine archiving, for rebuilding its environment in the event of the loss of Customer Content as a result of an act or omission of Customer or any Force Majeure event.

3.2.3. Without limiting Customer's obligations under this Section 3.2, EarthLink Business will implement reasonable and appropriate measures (e.g. backups) designed to help secure Customer Content in EarthLink Business' possession or control against accidental or unlawful loss, access or disclosure.

3.2.4. Customer shall fully insure Customer Content against risk of loss, including without limitation, theft, fire, water and earthquake damage, and is advised to purchase business interruption insurance to protect against lost revenue in the event of any prolonged disruption of Services.

3.3. Customer Assets. Customer is solely responsible for securing all necessary rights and for obtaining consents from applicable third parties necessary for EarthLink Business to access and use the Customer Assets to provide the Services and any other purposes contemplated by the Agreement, and for all costs and expenses associated with obtaining such rights and consents. Customer will pay all amounts due or that become due and payable pursuant to Third Party Agreements, including, but not limited to, license fees, maintenance and taxes, and for any other liabilities and obligations under Third Party Agreements. If EarthLink Business is denied such rights under any Third Party Agreement, or a Third Party Agreement is modified or terminated by Customer, resulting in increased costs of providing the Services or adversely affecting EarthLink's ability to achieve any SLA Objective, EarthLink Business may increase its charges to compensate for the additional costs and will be excused from further compliance with the affected SLA.

3.4. Passwords. Customer is solely responsible for maintaining the confidentiality and security of the access credentials (e.g. passwords) provided by EarthLink Business for Customer to access the Services, and EarthLink Business shall not be responsible, or have liability, for any loss, damage or other liability arising from Customer's failure to protect the confidentiality and security of such access credentials.

3.5. End Users. Customer is responsible and liable for all acts and omissions of its End Users and their use of Customer Content and the Services. Customer will be deemed to have taken any action that Customer permits, assists or facilitates any person or entity to take related to the Agreement, Customer Content or use of the Services. Customer shall ensure that all End Users comply with, and that the terms of Customer's agreement with each End User are consistent with, Customer's obligations under the Agreement. If Customer becomes aware of any violation by an End User of Customer's obligations under the Agreement, Customer shall immediately terminate such End User's access to Customer Content and the Services. Customer is responsible for providing customer service, if any, to End Users and EarthLink Business will not be responsible to provide any support or services to End Users unless EarthLink Business has a separate agreement with Customer, or an End User, obligating EarthLink Business to provide support or services.

4. Proprietary Rights.

4.1. Content. As between Customer and EarthLink Business, Customer or its licensors own, and shall continue to own through the Term, all right, title, and interest in and to Customer Content. Customer consents to EarthLink Business's use and disclosure of Customer Content to provide the Services or to comply with requests of governmental or regulatory bodies (e.g. subpoenas or other legal process), in which event, EarthLink Business will make reasonable efforts to provide Customer with advance notice of the disclosure (unless prohibited by law) in order for

Customer to seek a protective order or waiver of such request.

- 4.2. Adequate Rights. Customer represents and warrants to EarthLink Business that: (a) Customer or Customer's licensors own all right, title, and interest in and to Customer Content; (b) Customer has all rights in Customer Content necessary to grant the rights contemplated by the Agreement; and (c) no Customer Content, or End Users' use of such Content or the Services, will violate the Agreement or AUP.
 - 4.3. Services License. As between Customer and EarthLink Business, EarthLink Business, its Affiliates or licensors, own and reserve all right, title and interest in and to the Services and any EarthLink Business Property. During the Term, EarthLink Business grants Customer a limited, revocable, non-exclusive, non-transferable and non-sub licensable license to access and use the Services in accordance with the Agreement and use EarthLink Business Content in connection with Customer's permitted use of the Services.
 - 4.4. License Restrictions. Neither Customer nor any End User may access or use the Services in any manner, or for any purpose, other than as permitted by the Agreement, or attempt to: (a) modify, alter, tamper with, repair or create derivative works of software included in the Services; (b) reverse engineer, disassemble or decompile the Services or apply any other process or procedure to derive the source code of software included in the Services; or (c) access or use the Services in a way intended to avoid incurring agreed to fees or deceptively avoiding usage limits or quotas. All licenses granted to Customer in the Agreement are conditional on Customer's continued compliance the Agreement, and will immediately and automatically terminate if Customer fails to comply with any term or condition of the Agreement.
 - 4.5. Third Party Products. Customer acknowledges that certain Services may include products or software owned or licensed by third parties and that its receipt and use of such Services may be subject to additional licensing and other terms from such third party. Customer is solely responsible for any licensing or other requirements associated with third party products and services provided by Customer, or by a third party on Customer's behalf, and not included as a part of the Services by EarthLink Business.
 - 4.6. Suggestions. If Customer provides suggested improvements for the Services ("Suggestions"), EarthLink Business will own all right, title, and interest in and to the Suggestions (even if Customer has designated the Suggestions as confidential, and will be entitled to use the Suggestions without restriction.
 - 4.7. Changes. EarthLink Business reserves the right to alter, downgrade or discontinue the Services, or any portions thereof, from time to time or to modify or remove features or functionality related to the Services, and will use reasonable efforts to notify Customer of any material change to the Services.
5. Charges.
- 5.1. Charges. Customer shall pay the charges for the Services set forth in each Order or SOW, if applicable, (the "Charges"), which may include reasonable travel and other out-of-pocket expenses incurred by EarthLink Business in connection with the performance of the Services. Customer is responsible for and shall pay all federal, state, and local sales, use, value added, excise, duty, telecommunications or other taxes and assessments imposed upon Customer's purchase, receipt or use of the Services, excluding only taxes assessed on EarthLink Business's net income ("Taxes").
 - 5.2. Additional Charges. EarthLink Business may charge to Customer, who shall pay, any costs incurred by, or imposed upon, EarthLink Business in connection with its performance and delivery of the Services due to changes in applicable laws, rules or regulations ("Pass-Through Charges"), which will be deemed included within the Charges, regardless of whether they are set forth in an Order, which Customer acknowledges and agrees may increase if Customer exceeds certain applicable usage or consumption limitations for the Services.
 - 5.3. Payment. Customer will pay EarthLink Business the Charges and Taxes in accordance with the payment schedule set forth in each Order and SOW, if applicable, or, if no payment schedule is set forth, in advance. If EarthLink and Customer agree that Customer will pay Charges by credit or debit card, Customer hereby authorizes EarthLink Business to charge such credit or debit card to pay for any Charges and any Taxes. Customer must notify EarthLink Business of any changes to the card account (including, without limitation, applicable account number or cancellation or expiration of the account), billing address, or any information that may prohibit EarthLink Business from charging Customer's account. If Customer fails to pay any Charges and Taxes by the applicable due date, late

charges of the lesser of one and one-half per cent (1.5%) per month or the maximum allowable under applicable law, shall also become payable by Customer to EarthLink Business. The failure by Customer to fully pay any Charges and Taxes within five (5) days after the applicable due date will be deemed a material breach of the Agreement, and may result in suspension of the Services, in whole or in part, following issuance of a written Suspension Notice and Customer's failure to pay all outstanding amounts, not subject to an open dispute submitted pursuant to the Agreement, within the period set forth in the Suspension Notice.

5.4. Invoice Disputes. Customer will notify EarthLink Business in writing of the basis of any good faith dispute of an invoiced amount ("Dispute Notice") and pay the undisputed portion of the invoice by the payment due date, or pay the amount of the invoice in full and submit a Dispute Notice to EarthLink Business within thirty (30) days of the payment due date. Customer shall be deemed to have waived its right to dispute an invoiced amount if Customer does not submit a Dispute Notice in accordance with this Section 5.4. If an invoice dispute is resolved in favor of Customer, EarthLink Business will apply a credit in the appropriate amount to Customer's account in the next available billing cycle. If an invoice dispute is resolved in favor of EarthLink Business, Customer shall pay any unpaid amount subject to the dispute plus applicable late fees, if any, on the next billing cycle. Customer's submission of a Dispute Notice does not relieve Customer from its obligation to timely pay, in full, all undisputed amounts.

6. Term and Termination.

6.1. Term. This Agreement shall commence on the Effective Date and, unless terminated earlier pursuant to the Agreement or otherwise agreed in writing by the parties, continue until there are no Orders in effect ("Term"), at which time the Agreement will automatically terminate.

6.2. Termination for Convenience. Either party may terminate any Service or the Agreement with written notice to the other party at least (30) days before the end of the then-current Term.

6.3. Termination for Cause. Either Party may terminate the Agreement in the event of a material breach of the Agreement by the other party, if the breaching party fails to cure such breach within thirty (30) days after receiving written notice of the breach. If EarthLink Business or Customer has a good faith belief that the other party has breached the Agreement in any material respect (other than any failure to pay amounts due hereunder) it may provide written notice to the other party describing the alleged breach in reasonable detail. If the breach is material, and the other party fails to cure the breach within ten (10) calendar days after receiving such notice or, if the breach is not one that can reasonably be cured within the ten day (10) day period, proscribe a plan to cure the breach reasonably acceptable to the other party and promptly and diligently proceed according to the plan until the breach has been cured; then the non-breaching party may terminate the Agreement for cause with written notice to the other party. In addition, EarthLink Business may terminate the Agreement for cause upon Customer's failure to pay all outstanding Charges and Taxes for the Services, not subject to an open dispute submitted pursuant to the Agreement, within the period set forth in the applicable Suspension Notice. Termination of the Agreement will be in addition to, not in lieu of, any other remedies available to the terminating party.

6.4. Termination by EarthLink Business. EarthLink Business may terminate the Agreement for cause: (a) If Customer fails to pay any Charges or other amounts under the Agreement when due, and fails to cure the nonpayment within five (5) days after receipt of written notice from EarthLink Business; (b) if any act or omission by Customer or any End User results in a suspension described in Section 11.2; or (c) if EarthLink Business determines use of the Services by Customer or any End User, or EarthLink Business's provision of any of the Services to Customer or any End User has become impractical or infeasible for any legal or regulatory reason. Termination pursuant to Sections 6.3(a), 6.3(b) or 6.3(c) shall be effective immediately upon notice to Customer. EarthLink Business also may terminate the Agreement or any Order for convenience upon thirty (30) days' written notice to Customer.

6.5. Effect of Termination. Upon the effective date of termination of the Agreement or any Service, (a) EarthLink Business will immediately cease providing the terminated Service(s) and (b) Customer shall immediately cease using the terminated Service(s) and ship any EarthLink Business Property associated with the terminated Service(s) to EarthLink Business, or its designated agent, within thirty (30) days of the termination or EarthLink Business shall have the right to charge Customer the then-current fair market value of the unreturned EarthLink Business Property. After termination, EarthLink Business shall have no obligation to return Customer Content stored on EarthLink Business Equipment unless such return is a part of the Service purchased by Customer or to continue storing such Content beyond the period prescribed for the Service. In addition, all payment obligations of Customer under the Agreement will immediately become due. If EarthLink Business terminates the Agreement pursuant to Section 6.2 or Sections

6.3(a), 6.3(b) or 6.3(c), all Charges and associated Taxes to be paid over the remaining term of all Orders shall be accelerated and will immediately become due.

7. Warranties.

- 7.1. Customer. Customer represents and warrants that at all times during the Term: (a) the Customer Assets, and their use, shall not infringe or misappropriate any third-party patent, copyright, trademark or trade secret; (b) Customer shall not interfere with EarthLink Business' performance of the Services; (c) Customer will keep all Customer Equipment located at an EarthLink Business Facility in good operating condition; and (d) Customer will not interfere with any EarthLink Business security measures. Customer acknowledges and agrees that EarthLink Business is not responsible for how the Service is used by Customer or any End User.
- 7.2. Disclaimer of Warranties. EXCEPT AS OTHERWISE SET FORTH IN THE AGREEMENT, EARTHLINK BUSINESS AND ITS AFFILIATES MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE REGARDING THE DESIGN, CONDITION, QUALITY, CAPACITY OR OTHER ASPECT OF ANY SERVICE PROVIDED UNDER THIS AGREEMENT, OR ANY COMPONENT THEREOF, INCLUDING, BUT NOT LIMITED TO, SYSTEMS, SOFTWARE, PERSONNEL, PROGRAMMING ASSISTANCE OR CONSULTATION PROVIDED AS PART OF SUCH SERVICES, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR FREE OR FREE OF HARMFUL COMPONENTS, OR THAT ANY CONTENT, INCLUDING CUSTOMER CONTENT, WILL BE SECURE OR NOT LOST OR DAMAGED. EXCEPT TO THE EXTENT PROHIBITED BY LAW, EARTHLINK BUSINESS AND ITS AFFILIATES AND LICENSORS DISCLAIM ALL WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, QUALITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OR QUIET ENJOYMENT AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING OR USAGE OF TRADE.
- 7.3. Disclaimer of Actions Caused by and/or Under the Control of Third Parties. EarthLink Business does not, and cannot, control software, products and services or the flow of data and other Content and communications provided or controlled, in whole or in part, by third parties. At times, the actions or inactions of third parties may impair or disrupt Services provided by EarthLink Business, and EarthLink Business does not guarantee that such events will not occur. Accordingly, EarthLink Business, its suppliers and its subcontractors, if any, disclaim any and all liability resulting from or related to such events to the extent not otherwise specifically provided for in the Agreement.
- 7.4. Customer Decisions. As part of the Services, EarthLink Business may provide Customer with recommendations, advice or information concerning Customer's information technology infrastructure, information security measures, and other matters relating to Customer's information technology operations. Such recommendations, advice or information are intended to assist Customer in connection with its business operations, but should not be viewed as prescriptive or authoritative and Customer is responsible for making independent decisions about which recommendations, advice or information to accept, use and implement within its organization, if any, and for the specific implementation of such recommendations, advice or information. EarthLink Business has no liability for Customer's decisions concerning which recommendations, advice or information to accept, use or implement, if any, or for Customer's implementation of such recommendations, advice or information.

8. Confidentiality.

- 8.1. "Confidential Information" means information provided by one party to the other in connection with the Agreement that: (a) is marked "Confidential," "Proprietary," or bears a marking of like import, or that the disclosing party states in writing at the time of disclosure to, or receipt by, the receiving party is confidential or proprietary; (b) if disclosed orally, is identified as such in writing at the time of disclosure or within ten (10) days after disclosure; or (c) the receiving party should reasonably have understood to be confidential based on the nature of the information or the circumstances of disclosure.
- 8.2. The receiving party agrees to hold Confidential Information of the disclosing party in trust and confidence for the disclosing party and not to disclose such Confidential Information to any third party. The receiving party agrees not to use the Confidential Information of the disclosing party except in connection with the performance of its obligations or to exercise its rights pursuant to the Agreement. The receiving party agrees to limit access to the Confidential Information of the other party to the receiving party's employees and contractors who have a legitimate need to know the information in accordance with the Agreement and are subject to written obligations of confidentiality as to the Confidential Information that are no less stringent than those provided in the Agreement. Information shall not be considered "Confidential Information" to the extent that such information: (a) is already

known to the receiving party free of any restriction at the time it is received from the disclosing party; (b) is subsequently learned from an independent third party (excluding any EarthLink Business Affiliate) free of any restriction and without breach of the Agreement or any agreement with such third party; (c) becomes publicly available through no wrongful act of the receiving party; or (d) is independently developed by the receiving party without reference to any Confidential Information. If the receiving party is required to disclose Confidential Information pursuant to a requirement of law, then the receiving party shall provide the disclosing party with timely prior notice of such requirement, if legally permissible. In order to comply with applicable laws, rules and regulations, to protect EarthLink Business systems and customers, or to ensure the integrity and operation of EarthLink Business systems, EarthLink Business may access and disclose any information it considers necessary or appropriate, including, without limitation, user profile information (i.e., name, e-mail address, etc.), IP addressing and traffic information, usage history, and Customer Content residing on EarthLink Business servers and systems. EarthLink Business also reserves the right to report any activity that it suspects violates a law or regulation to appropriate governmental authorities or other appropriate parties.

8.3. The parties hereby acknowledge and agree that in the event of a breach, or threatened breach, of this Section 8, the disclosing party may have no adequate remedy at law and, accordingly, shall be entitled to seek injunctive relief without any requirement of a bond or proving damages; provided, however, that no specification of a particular legal or equitable remedy shall be construed as a waiver, prohibition or limitation of any legal or equitable remedies in the event of a breach of this Section.

9. Indemnification. Customer agrees to indemnify and hold harmless EarthLink Business, its Affiliates, and their respective officers, directors, agents, employees and contractors, ("EarthLink Indemnitees") from and against any and all damages, losses, costs, expenses, liabilities, fines and governmental assessments, judgments and awards of every nature, including reasonable attorneys' fees and costs, arising from or relating to: (a) injuries to any person(s) and/or property due to Customer's use of the Services and/or the Space; (b) any violation of the Agreement by Customer; (c) any violation of the AUP by Customer or Customer's End Users; (d) any claims, demands, suits or causes of action alleging that the Customer Assets, any portion thereof, or the use of any of the foregoing, infringe or misappropriate any third party patent, copyright, trademark, trade secret or other proprietary right; (e) claims of third parties relating to the use of the Services through Customer's account, including without limitation liabilities resulting from electronic commerce conducted through Customer's account and the placement or transmission of any message, information, software, audio files or other materials on the Internet; (f) a dispute between Customer and any End User; (g) any damage or destruction to any EarthLink Business Facility, EarthLink Business Property or equipment of third parties caused by Customer, any End User or any Customer Equipment; (h) any Tax imposed upon Customer's purchase, receipt or use of the Services; or (i) legal process from governmental authorities requiring access to or the production of Customer Content. Customer will defend the EarthLink Indemnitees, at Customer's expense, from and against any claims, demands, suits and causes of action arising from or relating to (a), (b), (c), (d), (e), (f), (g) or (h) (each, a "Claim"). EarthLink Business will provide prompt notice of any Claim; provided, however, that Customer will not be excused from its indemnification or defense obligations except to the extent Customer is prejudiced in its defense of the Claim by the delay. EarthLink Business may participate in the defense of any Claim at its expense. Customer shall not settle, dismiss or compromise any such claim without the prior consent of EarthLink Business.

10. Limitation of Liability.

10.1. EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, THE MAXIMUM LIABILITY OF EARTHLINK BUSINESS AND ITS AFFILIATES UNDER THIS AGREEMENT SHALL BE LIMITED IN THE AGGREGATE TO THE AMOUNT OF THE CHARGES PAID BY CUSTOMER FOR EARTHLINK IT SERVICES PROVIDED TO CUSTOMER DURING THE SIXTY (60) DAYS IMMEDIATELY PRECEDING THE ACT OR OMISSION GIVING RISE TO THE CLAIM OR DISPUTE.

10.2. IN NO EVENT WILL EARTHLINK BUSINESS OR ITS AFFILIATES BE LIABLE FOR ANY INCIDENTAL, PUNITIVE, INDIRECT OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST REVENUE AND PROFITS, REPLACEMENT GOODS, LOSS OF DATA, TECHNOLOGY, RIGHTS OR SERVICES OR THE INTERRUPTION OR LOSS OF USE OF SERVICE OR EQUIPMENT, EVEN IF ADVISED OF SUCH POSSIBILITY, WHETHER ARISING UNDER CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE.

10.3. No action or proceeding, regardless of form, arising out of, or related to, the Agreement may be brought by or on behalf of Customer more than one (1) year after the cause of such action accrued.

11. Enforcement.

11.1. Investigation of Violations. EarthLink Business may investigate any actual or suspected violation of the Agreement and take any action that it deems appropriate and reasonable under the circumstance to protect its or its Affiliates' systems, facilities and customers or third parties. EarthLink Business reserves the right to monitor Customer's use of the Services, including, without limitation, through license keys, remotely or other similar measures, to confirm compliance with the Agreement (including the AUP).

11.2. Suspension.

11.2.1. EarthLink Business may immediately suspend Customer's, or any End User's, right to access or use all, or any portion, of the Services, with or without advance notice to Customer, if it determines:

11.2.1.1. Customer's or an End User's use of the Services: (a) poses a security risk to the Services, EarthLink Business its Affiliates or any third party; (b) may adversely impact the Services, systems or Content of another EarthLink Business customer; or (c) may subject EarthLink Business, its Affiliates, or any third party to liability;

11.2.1.2. Customer or any End User is in breach of the Agreement, including, without limitation, any payment delinquency not paid in full before the date specified in any Suspension Notice; or

11.2.1.3. Customer has ceased to operate in the ordinary course, made an assignment for the benefit of creditors or similar disposition of its assets, or become the subject of any bankruptcy, reorganization, liquidation, dissolution or similar proceeding.

11.2.2. If EarthLink Business suspends Customer's access to, or use of, all or any portion of the Services:

11.2.2.1. Customer remains responsible for: (a) all Charges, Taxes and other amounts that Customer incurred, or is responsible for, through the date of suspension; and (b) any costs and expenses EarthLink Business incurs to other suppliers in connection with Customer's account following suspension through the later of: (i) the date on which EarthLink is able to cancel any associated commitments with its suppliers or (ii) completion of the Order.

11.2.2.2. Customer remains responsible for any applicable fees and charges for any Services to which Customer continues to have access, applicable data storage fees and charges and fees and charges for in-process tasks completed after the date of suspension;

11.2.2.3. Customer is not eligible for Service Credits during suspension periods; and

11.2.2.4. EarthLink Business will not erase any Customer Content as a result of Customer's suspension, except as specified elsewhere in the Agreement.

11.2.3. EarthLink Business's right to suspend Customer's, or any End User's, right to access or use the Services is in addition to its right to terminate the Agreement pursuant to Section 6.

11.3. Customer Content. EarthLink Business reserves the right, at its discretion, to restrict or remove from its servers any Customer Content that violates the Agreement or applicable law, or is otherwise objectionable; however, EarthLink Business is not obligated to monitor or exert control over Customer Content made available or distributed through the Services, and if corrective action is taken EarthLink Business shall not be obligated to refund any fees paid in advance by Customer for the affected Service.

12. Disputes.

12.1. Negotiation. At the written request of either party, the parties will attempt to resolve any dispute, controversy or claim arising out of, or related to, the Agreement ("Dispute") through informal means. Each party will designate a senior management representative, who will provide each other with such non-privileged information about the Dispute as he or she deems appropriate and negotiate in good faith in an effort to resolve the Dispute without the necessity of filing a formal proceeding. The parties agree not to commence any formal proceeding with respect to a Dispute until either (a) the designated representatives conclude that resolution through continued negotiation does

not appear likely or (b) sixty (60) calendar days have passed since the initial request to negotiate was made; except that, either party may file earlier (x) to avoid the expiration of any applicable limitations period, (y) to preserve a superior position with respect to other creditors or (z) to seek appropriate injunctive or other interim or provisional relief.

- 12.2. **Arbitration.** Except as otherwise provided in the Agreement or agreed in writing by the parties, any Dispute that cannot be resolved through the informal process of Section 12.1, shall, upon application by either party, be resolved through final and binding arbitration by one (1) arbitrator in accordance with Commercial Arbitration Rules of the American Arbitration Association ("AAA") then in effect, with the arbitration to be conducted in Atlanta, Georgia or such other location agreed to in writing by the parties. The Federal Arbitration Act, 9 U.S.C. 1, *et seq.* (the "FAA"), not state law, shall govern the interpretation and enforcement of this agreement to arbitrate and whether a Dispute is subject to arbitration. The arbitrator will have no authority to award damages excluded by law, the FAA or the Agreement and may only award injunctive relief to the extent necessary to provide the relief warranted by the Dispute. Unless cost-shifting is otherwise permitted by law or the Agreement, each party will bear their own costs and expenses, and all administrative expenses (including the arbitrator's fees) shall be split equally between the parties. This agreement to arbitrate is intended to be broadly interpreted, except as otherwise described below, to include Disputes based in contract, tort, statute, fraud or any other legal theory.
- 12.3. **Court Actions.** This arbitration provision shall be grounds for dismissal of any court action or proceeding commenced by either party regarding any Dispute; except, for actions or proceedings: (i) to compel a party to comply with the Dispute resolution and arbitration procedures set forth in the Agreement; (ii) to enforce an arbitration award resulting from a Dispute under the Agreement; (iii) to enforce its rights under Sections 8 (Confidentiality) and 9 (Indemnification) of the Agreement; (iv) related to either party's intellectual property rights, including, without limitation, Customer Assets and EarthLink Business Property and Content; or (v) to recover past due Charges or Taxes owed by Customer, with Customer being responsible for the costs of collection. Notwithstanding the foregoing, either party has the right to seek any appropriate injunctive or other interim or provisional relief, which will not be deemed to be a breach of this arbitration provision or waiver of the right to have the Dispute resolved through arbitration.
- 12.4. **CLASS ACTIONS. CUSTOMER AND EARTHLINK BUSINESS EACH WAIVE THE RIGHT TO PARTICIPATE IN A CLASS ACTION WITH RESPECT TO THIS AGREEMENT, OR ANY SERVICES, REGARDLESS OF WHETHER OTHERWISE PROVIDED FOR IN THE AAA PROCEDURES OR RULES. THE PARTIES AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN AN INDIVIDUAL CAPACITY AND NOT AS A CLASS PLAINTIFF OR MEMBER, EITHER IN A PUTATIVE CLASS OR REPRESENTATIVE PROCEEDING. The arbitrator shall not have the authority to determine the enforceability of this provision, and, unless the parties agree otherwise in writing, may not consolidate the claims of either party and any third party, and may not otherwise preside over any form of a representative or collective proceeding with respect to the Agreement or any Services.**
- 12.5. **Confidentiality of Disputes.** The parties shall keep confidential, and not disclose to any person, except as required by law or pursuant to the requirements of Section 8 of the Agreement, the existence of any Dispute, the referral of such Dispute to arbitration or the status or resolution thereof.
13. **Governing Law and Jurisdiction.** This Agreement shall be interpreted and enforced in accordance with the law of the State of Georgia, United States of America, without regard to its conflicts of law rules. THE PARTIES AGREE THAT NEITHER THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT OR ANY VERSION THEREOF, ADOPTED BY ANY STATE, IN ANY FORM, NOR THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, SHALL APPLY TO THIS AGREEMENT. Any action or proceeding arising from or relating to the Agreement, including, but not limited to, the interpretation or enforcement of the Agreement, claims of fraudulent inducement or seeking rescission of the Agreement, shall be brought exclusively in the state or federal courts located within Fulton County, Georgia. The parties consent to the jurisdiction of such courts in such actions or proceedings and agree to waive all objections or defenses of lack of personal jurisdiction or improper venue and not to bring such actions or proceedings in any other court. EACH PARTY HERETO IRREVOCABLY WAIVES ALL RIGHTS TO TRIAL BY JURY IN ANY LITIGATION, ACTION, LEGAL PROCEEDING, CROSS-CLAIM OR COUNTERCLAIM IN ANY COURT (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ITS VALIDITY, PERFORMANCE, INTERPRETATION, ENFORCEMENT OR COLLECTION, OR IN THE NEGOTIATION, EXECUTION, PERFORMANCE OR ENFORCEMENT OF THE AGREEMENT.

14. Definitions. The following definitions apply to the corresponding capitalized terms used herein without definition:

“Affiliate” means an entity that controls, is controlled by or is under common control with a designated person. For purposes of the definition, “control” means ownership of at least fifty (50%) percent of the voting stock or other voting ownership interest in an entity, on an as-converted basis; or the right under contract to direct the management and affairs of an entity.

“API” means application programming interface, which is a particular set of rules and specifications software programs can follow to communicate with each other.

“Availability” has the meaning provided in the applicable Service Schedule.

“Content” means software, including machine images, data, text, audio, video, images or other content.

“Customer Assets” means the Customer Content, Equipment and Software, and Third Party Agreements.

“Customer Content” means Content that Customer or any End User: (a) runs on the Services; (b) causes to interface with the Services; or (c) uploads to the Services under Customer’s account or otherwise transfers, processes, uses or stores in connection with Customer’s account.

“Customer Equipment” means the computers, peripheral devices, storage media, cabling, connectors and other equipment, including, but not limited to, modems, routers and Network termination boxes used by Customer and provided for use by EarthLink Business to perform and deliver the Services and to fulfill its obligations hereunder.

“Customer Software” means all software owned, licensed or used by Customer and provided for use by EarthLink Business to provide the Services, which may include software installed on or embedded in Customer Equipment.

“EarthLink Business Content” means Content that EarthLink Business or its Affiliates makes available in connection with the Services to allow access to and use of the Services, including, but not limited to, WSDLs, documentation, sample code and other related technology, of EarthLink Business or its Affiliates, or any Content of their third party licensor’s, but does not include the Services.

“EarthLink Business Property” means all equipment, software programs, tools, intellectual property rights and information owned or licensed by EarthLink Business, including EarthLink Business Content.

“End User” means any individual or entity that directly or indirectly through another user: (a) accesses or uses Customer Content; or (b) otherwise accesses or uses the Services under Customer’s account.

“Facility” means an EarthLink Business data center from which the Services, including the Space, are provided.

“Network” means the collection of interconnected computers and devices at an EarthLink Business Facility that EarthLink Business uses to perform the applicable Services.

“Services” means those Services described in a Service Schedule located at www.earthlinkbusiness.com/about-us/legal/it-services-schedules.xea, and set forth on an Order signed by the Customer, excluding Professional and Managed Security Services.

“Space” means the portion of the EarthLink Business Facility identified on the Order for Services under the Colocation Services Schedule.

“Statement of Work” means a statement of work entered into by the parties referencing the Agreement and additionally describing the Services (e.g. work to be delivered, schedules and payment terms, among other things).

“Third Party Agreements” means those contractual, leasing and licensing arrangements to which Customer is a party and pursuant to which Customer receives third party products, hardware, software or services for which EarthLink Business has undertaken management or administrative responsibility hereunder.

15. General Terms.

- 15.1. Assignment. EarthLink Business may assign the Agreement to any Affiliate or in connection with the sale of all or substantially all of its assets or a majority share of its ownership interests. Customer may not assign or transfer the Agreement or any rights under the Agreement, or delegate any obligations, including by operation of law, without prior written consent from EarthLink Business, which consent will not be unreasonably withheld, and any attempted assignment or delegation without such consent will be void. This Agreement will be binding upon and inure to the benefit of the parties' successors and permitted assigns.
- 15.2. Amendment; No Waiver. This Agreement may not be amended or modified except in a writing signed by the party to be charged, except as provided in Section 3.1 (Compliance) and Section 4.7 (Changes to the Services). Customer acknowledges and agrees that Customer's electronic signature shall be deemed a signature for purposes of this Section. The failure of either party to insist upon strict performance of any of the provisions contained in the Agreement shall not constitute a waiver of its rights as set forth in the Agreement, at law or in equity. No waiver of any breach of any provision of the Agreement will constitute a waiver of any prior, concurrent or subsequent breach of the same provision or any other provision hereof.
- 15.3. Construction Rules. If any provision of the Agreement is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired, and such provision will be deemed to be restated to reflect the original intentions of the parties as nearly as possible in accordance with applicable law. The headings of Sections of the Agreement are for convenience only and shall not affect the meaning or interpretation of the Agreement in any way. This Agreement may be executed in multiple counterparts, each of which will be deemed an original and all of which taken together will constitute one instrument. The parties acknowledge and agree that the Agreement will not be construed in favor of or against either party solely on the basis of a party's drafting or participation in the drafting of any portion of the Agreement.
- 15.4. Independent Contractors. The parties shall act at all times as independent contractors, and nothing contained herein shall be construed to create the relationship of principal and agent or employer and employee, or a joint venture or partnership, between EarthLink Business and Customer.
- 15.5. Force Majeure. EarthLink Business will not be liable for any failure or delay due to causes beyond its reasonable control including, without limitation, domain name server issues outside of its direct control, telecommunication issues, failure of third party software, interruptions in, or failures of, the Internet, electrical failures, labor conditions or strikes, riots, insurrection, fires, flood, storm, explosions, acts of God, war, terrorism, governmental action, earthquakes or material shortages ("Force Majeure Event").
- 15.6. Marketing. Customer agrees that it shall not, without prior written consent from EarthLink Business in each instance, use in advertising, publicity or otherwise, the name, or any trade name, trademark or simulation thereof, of EarthLink Business or its Affiliate(s). Notwithstanding anything contrary contained in Section 8 (Confidentiality), the parties agree that during the Term of the Agreement, EarthLink Business may disclose to third parties that Customer is a customer of EarthLink Business and Customer may disclose that EarthLink Business is a vendor of Customer.
- 15.7. U.S. Government Rights. The Services are provided to the U.S. Government as "commercial items," "commercial computer software," "commercial computer software documentation" and "technical data" with the same rights and restrictions that generally apply to the Services. If Customer is using the Services on behalf of the U.S. Government and these terms fail to meet the U.S. Government's needs or are inconsistent with federal law, Customer will immediately discontinue its use of the Services. "Commercial item," "commercial computer software," "commercial computer software documentation" and "technical data" are defined in the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement.
- 15.8. Import and Export Compliance. Each party will comply with all applicable import, re-import, export, and re-export control laws and regulations, including the Export Administration Regulations, the International Traffic in Arms Regulations, and country-specific economic sanctions programs implemented by the Office of Foreign Assets Control. Customer is responsible for its compliance related to the manner in which it uses the Services, including transfer and processing of Customer Content and its provision to End Users.
- 15.9. Notices. Any notice required or permitted by the Agreement shall be in writing and transmitted by electronic mail,

nationally-recognized delivery service, personal service or certified mail, return receipt requested, to Customer at the address set forth in the Order and to EarthLink Business at: EarthLink Business, Attn: Legal Dept., IT Services, 1375 Peachtree Street, Atlanta, GA 30309. Either party may change its contact information for notices under the Agreement through timely written notice to the other party.

- 15.10. Non-Exclusive Agreement. Under no circumstances shall the Agreement be construed or interpreted to be an exclusive agreement for performance of the Services and EarthLink Business and its Affiliates are free to provide and deliver identical or substantially similar services to another customer or any third party.
- 15.11. Non-Solicitation. During the Term of the Agreement, and for two (2) years following its termination, neither party shall, or attempt to, solicit or induce an employee of the other to leave that employment, or participate or assist in the hiring of such employee for itself, or otherwise, without the consent of the other party. For purposes of this Section 14.12, (i) any person or entity introduced to a party in the course of performing services under the Agreement will be deemed to be an employee of the introducing party and (ii) Internet or general advertisements will not be considered a solicitation or inducement for employment.
- 15.12. Third Party Beneficiaries. This Agreement is entered into only between, and may only be enforced by, EarthLink Business and Customer, and shall not be deemed to create any rights in any third parties.
- 15.13. Survival. Sections 5 (Charges), 6.4 (Effect of Termination), 7 (Warranties), 8 (Confidentiality), 9 (Indemnification), 10 (Limitation of Liability), 13 (Definitions) and 14 (General Terms) shall survive the termination or expiration of the Agreement for any reason.
- 15.14. Entire Agreement. This Agreement is an integrated agreement and contains the entire agreement and understanding between the parties regarding its subject matter. All prior or contemporaneous promises, representations, agreements and communications regarding the subject matter of the Agreement are merged into and superseded by the Agreement.