

## **TIER FOUR MASTER SERVICE AGREEMENT**

The TIER FOUR MASTER SERVICE AGREEMENT (Master Service Agreement) sets forth the legal rights and obligations of Tier Four and Customer related to Services provided by Tier Four for use by Customer.

### **Introduction**

The Service Agreement (as defined below) between Tier Four, Inc. (Tier Four) and Customer (as defined below), sets forth the legal rights and obligations of both Tier Four and Customer related to Services provided by Tier Four for use by Customer.

This Service Agreement includes a Service Order Agreements (SOA), and the Tier Four Acceptable Use Policy (AUP), both of which are incorporated here by reference.

### **Definitions**

For the purpose of this Service Agreement, the following terms have the following meanings as set forth below:

"Acceptable Use Policy or AUP" means the ACCEPTABLE USE POLICY. The AUP sets forth the purposes for which Services may be used.

"Customer" means the customer as described in the SOA.

"Late Payment" means a payment not remitted to Tier Four within 30 days after Customer receipt of invoice.

"Service Agreement" means the SOA, Master Service Agreement, AUP, and any applicable SLAs collectively.

"Services" means the services provided by Tier Four for Customer as described in this Service Agreement and detailed in the SOA.

Version 2.2

“Service Order Agreement” means an agreement signed and executed by and between Tier Four and Customer that sets forth Services to be provided by Tier Four for Customer, Payments and timing of such Payments to be made by Customer to Tier Four for Services, and any applicable Service Level Guarantees or Service Level Agreements (SLAs). Each SOA shall be deemed a separate contract between Tier Four and Customer, and shall be governed by the terms of this Service Agreement.

“Monthly Recurring Charge or MRC” consists solely of the monthly fee paid by Customer to Tier Four for Services as set forth in the SOA and excludes all other fees which might be charged to Customer. The MRC does not include any fees paid by customer to third parties, such as third-party local-loop fees, even if such fees are included on Customer’s Tier Four bill due to Tier Four convergent billing agreements with certain third parties.

“Non Recurring Charge or NRC” means one-time fees paid by Customer to Tier Four as set forth in this Service Agreement.

“Service Level Agreement or SLA” means a document that sets forth the required minimum standards that Services must meet, and defines recourse available to customer in the event that Services do not meet the required minimum standards as set forth in the SLA. If an SLA is applicable to the Service Agreement, it is included by reference in the SOA.

## **Services**

Tier Four agrees to provide Services to you subject to the terms set forth in the fully executed SOA incorporated in this Service Agreement.

## **Term**

The Initial Term for Services shall be set forth in the SOA. If no Initial Term is specified in the SOA, then the Initial Term shall be one year.

The Subsequent Term for Services shall be set forth in the SOA. If no Subsequent Term is specified in the SOA, and if neither Customer nor Tier Four cancels this agreement before the end of the Initial Term, then the Service Agreement shall automatically renew for a Subsequent Term of equal length to the Initial Term.

## **Cancellation**

Version 2.2

Customer may cancel this agreement upon 30 days written notice to Tier Four.

If Customer terminates this agreement prior to the termination date, then customer shall pay an early termination fee equal to the total amounts due under this agreement, unless otherwise stated in the SOA.

## **Rates**

The rates for Services shall be set forth in the SOA and shall be valid for the initial term.

## **Consideration**

Customer shall pay Tier Four for Services pursuant to this Service Agreement. Customer agrees to pay NRCs as set forth in this Service Agreement. Details of the NRCs can be found in the various SOAs that are incorporated in this document by reference. NRCs are non refundable.

Regular billing for Services shall begin on the Commencement Date. Thereafter, invoicing will occur monthly on the first of the month. Invoices are Due upon Receipt. Receipt will be presumed five business days following the date that the invoice is sent out. MRCs are billed in advance, however, usage and overage are billed in arrears.

Customer agrees that any additional services ordered, or changes to Services, whether verbal or in writing, will incur additional charges. Customer agrees to pay these additional charges when invoiced. Invoices not paid within thirty (30) days after receipt, will be past due and subject to the Interest Rate on Late Payments as set forth below.

## **Interest rate on all late payments**

The interest rate on all late payments of the Purchase Price made by Customer to Tier Four under this agreement shall be 24% per annum to be compounded annually.

## **Default**

If, after the Service Commencement Date, Customer fails to pay any amount required under this

Version 2.2

Service Agreement and such failure continues for fifteen (15) days after written notice to Customer, or if Customer fails to comply with any material provision of this Service Agreement, Tier Four may elect to terminate in whole or in part Customer Services and declare all charges for the remaining Term immediately due and payable.

Tier Four will send written notice to Customer of failure to pay an amount required under this Service Agreement when a payment required under this agreement becomes 60 days past due.

## **Miscellaneous**

Customer grants Tier Four the right to list Customer's name, logo, and contact information on Tier Four's website and to place a hyperlink on Tier Four's website to Customer's website (if Customer has a website) and to provide said information to potential clients of Tier Four for the purpose of reference and evaluation.

## **Indemnification of Attorneys Fees**

Should any party materially breach this agreement (including representations and warranties made to the other side), the non-breaching party shall be indemnified by the breaching party for its reasonable attorneys fees and out-of-pocket costs which in any way relate to, or were precipitated by, the breach of this contract (including the breach of representations or warranties). This provision shall not limit in any way the remedies either party may have otherwise possessed in law or equity relative to a breach of this contract. The term "out-of-pocket costs", as used in this contract, shall not include lost profits.

## **Integration**

This Service Agreement, including the attachments mentioned in the body as incorporated by reference, sets forth the entire agreement between the Parties with regard to the subject matter hereof. All prior agreements, representations and warranties, express or implied, oral or written, with respect to the subject matter hereof, are hereby superseded by this agreement. This is an integrated agreement.

## **Severability**

In the event any provision of this Agreement is deemed to be void, invalid, or unenforceable, that

Version 2.2

provision shall be severed from the remainder of this Agreement so as not to cause the invalidity or unenforceability of the remainder of this Agreement. All remaining provisions of this Agreement shall then continue in full force and effect. If any provision shall be deemed invalid due to its scope or breadth, such provision shall be deemed valid to the extent of the scope and breadth permitted by law.

## **Modification**

Except as otherwise provided in this document, this agreement may be modified, superseded, or voided only upon the written and signed agreement of the Parties. Further, the physical destruction or loss of this document shall not be construed as a modification or termination of the agreement contained herein.

## **Governing Law**

This Agreement shall be interpreted under, and governed by, the laws of the state of Utah.

## **Exclusive Jurisdiction for Suit in Case of Breach**

The Parties, by entering into this agreement, submit to jurisdiction in Utah County, Utah for adjudication of any disputes and/or claims between the parties under this agreement. Furthermore, the parties hereby agree that the courts of Utah County, Utah shall have exclusive jurisdiction over any disputes between the parties relative to this agreement, whether said disputes sounds in contract, tort, or other areas of the law.

## **Limitations of Liability**

For purposes of all indemnity obligations, exclusive remedies and limitations of liability set forth in this Agreement, Tier Four shall be defined as Tier Four, its affiliates, its subsidiaries, and its and their employees, directors, officers, agents, representatives, subcontractors, interconnection service providers and suppliers; Customer shall be defined as Customer, its affiliates, and its and their employees, directors, officers, agents and representatives; and Damages will refer collectively to all injury, damage, liability, loss, penalty, interest and expense incurred.

Customer and Tier Four will make every commercially reasonable effort to ensure that neither party incurs Damages as a result of actions or inactions of the other party. Nevertheless:

EITHER PARTY'S ENTIRE LIABILITY, AND THE OTHER PARTY'S EXCLUSIVE REMEDIES, FOR ANY DAMAGES CAUSED BY ANY SERVICE DEFECT OR FAILURE, OR FOR OTHER CLAIMS ARISING IN CONNECTION WITH ANY SERVICE OR PERFORMANCE OR NON-PERFORMANCE OF OBLIGATIONS UNDER THIS AGREEMENT SHALL BE:

FOR BODILY INJURY OR DEATH TO ANY PERSON OR REAL OR TANGIBLE PROPERTY DAMAGE NEGLIGENTLY CAUSED A PARTY, OR FOR ANY DAMAGES ARISING FROM THE WILLFUL MISCONDUCT OF PARTY OR FROM A BREACH OF THE PROVISIONS OF THIS SERVICE AGREEMENT, THE OTHER PARTY'S RIGHT TO PROVEN DIRECT DAMAGES.

FOR ALL OTHER DAMAGES OTHER THAN THOSE SET FORTH ABOVE AND NOT EXCLUDED UNDER THIS AGREEMENT, EACH PARTY'S LIABILITY SHALL BE LIMITED TO PROVEN DIRECT DAMAGES NOT TO EXCEED IN THE AGGREGATE DURING ANY TWELVE (12) MONTH PERIOD AN AMOUNT EQUAL TO THE TOTAL NET PAYMENTS PAYABLE BY CUSTOMER FOR THE AFFECTED SERVICE DURING THE ONE (1) MONTH PRECEDING THE MONTH IN WHICH THE DAMAGE OCCURRED. THIS DOES NOT LIMIT CUSTOMER'S RESPONSIBILITY FOR THE PAYMENT OF ANY AND ALL PROPERLY DUE CHARGES UNDER THIS AGREEMENT.

IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE, RELIANCE OR SPECIAL DAMAGES, INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, ADVANTAGE, SAVINGS OR REVENUES OF ANY KIND OR INCREASED COST OF OPERATIONS, WHETHER OR NOT EITHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

TIER FOUR ALSO SHALL NOT BE LIABLE FOR ANY DAMAGES ARISING OUT OF OR RELATING TO: INTEROPERABILITY, INTERACTION, ACCESS OR INTERCONNECTION PROBLEMS WITH APPLICATIONS, EQUIPMENT, SERVICES, CONTENT OR NETWORKS NOT PROVIDED BY TIER FOUR; SERVICE INTERRUPTIONS OR LOST OR ALTERED MESSAGES OR TRANSMISSIONS (EXCEPT TO THE EXTENT CREDIT ALLOWANCES ARE SPECIFIED IN RELEVANT SERVICE LEVEL AGREEMENTS); OR UNAUTHORIZED ACCESS TO OR THEFT, ALTERATION, LOSS OR DESTRUCTION OF YOUR, USERS' OR THIRD PARTIES' APPLICATIONS, CONTENT, DATA, PROGRAMS, INFORMATION, NETWORKS OR SYSTEMS.

The limitations of liability set forth in this Section shall apply: regardless of the form of action, whether in contract, tort, strict liability, equity or otherwise; and whether or not damages were foreseeable. These limitations of liability shall survive failure of any exclusive remedies

Version 2.2  
provided in this Agreement.

## **Acknowledgments**

Each party acknowledges that he or she has had an adequate opportunity to read and study this Service Agreement, to consider it, to consult with attorneys if he or she has so desired.

Customer agrees that it is contracting for Services with Tier Four. Customer further agrees to be bound by the terms and conditions set forth in this Service Agreement.