



Board of Public Works and Safety

Agenda Item

Cover Sheet

MEETING DATE: May 13, 2025

- ☐ Consent Agenda Item
- ☒ New Item for Discussion
- ☐ Previously Discussed Item
- ☐ Miscellaneous

ITEM #: 7

INITIATED BY: Patrick Herrington

- ☒ Information Attached
- ☐ Verbal
- ☐ No Paperwork at Time of Packets

SERVICES AGREEMENT

This Services Agreement (hereinafter referred to as “Agreement”), entered into by and between the **City of Noblesville, Indiana, a municipal corporation** (hereinafter referred to as “City”) and **EverStream**, hereinafter referred to as “Contractor”), and its successors and assigns, is executed pursuant to the terms and conditions set forth herein. In consideration of those mutual undertakings and covenants, the parties agree as follows:

SECTION I. INTERPRETATION AND INTENT

- 1.1 The “Agreement”, as referred to herein, shall mean this Agreement executed by City and Contractor, and shall include this Services Agreement and the **Exhibit A** attached hereto, and any written supplemental agreement or modification entered into between City and Contractor, in writing, after the date of this Agreement.
- 1.2 This Agreement constitutes the entire agreement between the parties and supersedes all prior agreements, written or verbal, between City and Contractor with respect to the subject matter herein. No statements, promises or agreements whatsoever, in writing or verbal, in conflict with the terms of the Agreement have been made by City or Contractor which in any way modify, vary, alter, enlarge or invalidate any of the provisions and obligations herein stated. This Agreement may be amended and modified only in writing signed by both City and Contractor.
- 1.3 Each service shall be provisioned pursuant to an associated Service Order, **Exhibit A** (which is the Enterprise Master Services Agreement) and the Agreement. In resolving conflicts, errors, discrepancies and disputes concerning the Service Order, Exhibit A, services to be performed by Contractor or other rights or obligations of City or Contractor the document or provision thereof expressing the greater quantity, quality or scope of service or imposing the greater obligation upon Contractor and affording the greater right or remedy to City, shall govern.
- 1.4 Any interpretation applied to this Agreement, by the parties hereto, by an arbitrator, court of law, or by any other third party, shall not be made against City solely by virtue of City or City’s representatives having drafted the initial draft of the Agreement.
- 1.5 This Agreement shall include, and incorporate by reference, any provision, covenant or condition required or provided by law or by regulation of any state or federal regulatory or funding agency.

SECTION II. DUTIES OF CONTRACTOR

- 2.1 Contractor shall provide services as specified in **Exhibit A**, attached hereto and incorporated into this Agreement.

SECTION III. TERM

- 3.1 The Agreement shall commence upon the Date last signed below and continues through the later of: 1) five (5) years from such Date, or 2) upon the expiration of the last active Service Order (“Term”), unless earlier terminated as provided herein.

SECTION IV. COMPENSATION

- 4.1 Contractor proposes to furnish all labor, materials and supplies in accordance with the conditions of this Agreement necessary to complete the work as defined in the Service Order and **Exhibit A**. Compensation shall not exceed Two Hundred Thousand Dollars (\$200,000).
- 4.2 Funding for a multi-year agreement is not guaranteed. All of the City's obligations under this Agreement shall be subject to annual appropriation and shall not constitute a general obligation or indebtedness of the City.

SECTION V. GENERAL PROVISIONS

- 5.1 Independent Contractor. The parties agree that Contractor is an independent contractor as that term is commonly used and is not an employee of the City. As such, Contractor is solely responsible for all taxes and none shall be withheld from the sums paid to Contractor. Contractor acknowledges that it is not insured in any manner by City for any loss of any kind whatsoever. Contractor has no authority, express or implied, to bind or obligate City in any way.
- 5.2 Subcontracting.
Approval required. The parties agree that Contractor shall not subcontract, assign or delegate any portion of this Agreement or the services to be performed hereunder without prior written approval of City. In the event that City approves of any such subcontracting, assignment or delegation, Contractor shall remain solely responsible for managing, directing and paying the person or persons to whom such responsibilities or obligations are sublet, assigned or delegated. City shall have no obligation whatsoever toward such persons. Contractor shall take sole responsibility for the quality and quantity of any services rendered by such persons. Any consent given in accordance with this provision shall not be construed to relieve Contractor of any responsibility for performing under this Agreement.
- 5.3 Necessary Documentation. N/A
- 5.4 Records; Audit. Contractor shall maintain books, records, documents and other evidence directly pertinent to performance of services under this Agreement. Contractor shall make such materials available at its offices at all reasonable times during the Agreement period copies thereof, if requested, shall be furnished at no cost to City.
- 5.5 Ownership.
 - 5.5.1 "Works" means works of authorship fixed in any tangible medium of expression by Contractor or its officers, employees, agents or subcontractors in the course of performing the services under this Agreement and specifically created for City, including, but not limited to, computer programs, electronic art, computer generated art, notes, specifications, drawings, flow charts, memoranda,

correspondence, records, notebooks, documentation, reports and charts, regardless of the medium in which they are fixed, and all copies thereof.

- 5.5.2 All Works made or created by Contractor, either solely or jointly with City, in the course of Contractor's performance of services under this Agreement and specifically created for City shall be deemed to be works for hire and are and shall be the exclusive property of City. At City's request, Contractor will execute all documents reasonably required to confirm or perfect ownership of such Works and any corresponding copyright rights in and to such Works in City. During the performance of this Agreement, Contractor shall be responsible for loss or damage to the Works while they are in Contractor's possession or control. Any loss or damage shall be restored at Contractor's expense. City shall have free and unlimited access to the Works during the Term of the Agreement and, upon demand, shall have the right to claim and take possession of the Works and all copies. Notwithstanding the foregoing, Contractor shall be entitled to retain a set of its work papers for archival purposes only, in accordance with applicable professional standards.

5.6 Insurance.

Minimum Insurance Requirements. Prior to commencing Work, the Contractor shall purchase and maintain from insurance companies lawfully authorized to do business in Indiana policies of insurance acceptable to the City, which afford the coverages set forth below. Insurance shall be written for not less than limits of liability specified or required by law, whichever coverage is greater, and shall include coverage for Contractor's indemnification obligations contained in this Agreement. Certificates of Insurance acceptable to the City shall be given to the City prior to commencement of the Work and thereafter upon renewal or replacement of each required policy of insurance. Each policy must be endorsed to provide that the policy will not be cancelled or allowed to expire until at least thirty (30) days' prior written notice has been given to the City; provided however that such policies may be cancelled with only ten (10) days' prior notice for non-payment of premium. The required coverages and limits which Contractor is required to obtain are as follows:

A. Commercial General Liability

Limits of Liability:	\$2,000,000 General Aggregate
	\$2,000,000 Products & Completed Ops.
	\$1,000,000 Bodily Injury / Prop. Damage
	\$1,000,000 Personal / Advertising Injury
	\$1,000,000 Each Occurrence

B. Auto Liability

Limits of Liability:	\$500,000 Per Accident
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Coverage Details All owned, non-owned, & hired vehicles

C. Workers Compensation and Employer's Liability

As required by Indiana law.

D. Professional/Errors & Omissions Liability

Limits of Liability \$1,000,000 Each Occurrence
\$2,000,000 Aggregate

All coverage provided above shall be endorsed to include the City as an additional insured except for the Worker's Compensation / Employer's Liability and Professional/Errors & Omissions policy.

5.7 Termination for Cause or Convenience.

- 5.7.1 If Contractor becomes insolvent, or if it refuses or fails to perform the work and services provided by this Agreement, or if it refuses to perform disputed work or services as directed pending resolution of such dispute, or if it fails to make payments to subcontractors employed by it, or if it otherwise violates or fails to perform any term, covenant or provision of this Agreement, then City may, without prejudice to any other right or remedy, terminate this Agreement in whole or in part, in writing, provided that Contractor shall be given (1) not less than ten (10) calendar days written notice of City's intent to terminate, and (2) an opportunity for consultation with City prior to termination and ten (10) days to cure. In determining the amount of final payment to be made to Contractor upon such termination for default, if any, no amount shall be allowed for anticipated profit on unperformed services or other work; furthermore, an adjustment shall be made to the extent of any additional costs incurred or reasonably foreseen by City to be incurred by reason of Contractor's default.
- 5.7.2 This Agreement may be terminated in whole or in part in writing by either party for that party's convenience; provided that the non-terminating party is given (1) not less than ten (10) calendar days written notice of the terminating party's intent to terminate and (2) an opportunity for consultation with the terminating party prior to termination.
- 5.7.3 Upon receipt of notice of termination for default or for convenience of either party, Contractor shall (1) promptly discontinue all services affected, and (2) deliver or otherwise make available to City all Works and such other information, materials or documents as may have been specifically created for City by Contractor in performing this Agreement, whether completed or in process.
- 5.7.4 If, after termination for Contractor's default, it is determined that Contractor was not in default, the termination shall be deemed to have been made for the convenience of City. In such event, adjustment of the price provided for in this Agreement shall be made as provided in Section 5.7.1 and the recovery of such price adjustment shall be Contractor's sole remedy and recovery.

- 5.7.5 Notwithstanding anything to the contrary, in the event City terminates this Agreement or any Service Order for its convenience, City shall: (a) promptly pay Contractor the full amount of the service charges that City would have been charged for the remainder of the Term; and (b) reimburse Contractor for all volume, discounts, rebates, promotions, and credits provided in anticipation of full performance of City's obligations and any unpaid portion of the installation fee set forth in the applicable Service Order(s).
- 5.8 Termination for Failure of Funding. Notwithstanding any other provision of this Agreement, if funds for the continued fulfillment of this Agreement by City are at any time insufficient or not forthcoming through failure of any entity to appropriate funds or otherwise, then City shall have the right to terminate this Agreement without penalty by giving written notice documenting the lack of funding, in which instance this Agreement shall terminate and become null and void on the last day of the fiscal period for which appropriations were received. City agrees that it will make its best efforts to obtain sufficient funds, including but not limited to, requesting in its budget for each fiscal period during the term hereof sufficient funds to meet its obligations hereunder in full.
- 5.9 Indemnification. To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the City and its board, agents and employees of any of them ("Indemnitees") from and against third party claims, damages, losses and expenses, including but not limited to attorneys' fees and court costs and other expenses, to the extent arising out of or resulting from any negligent acts, errors, or omissions of the Work. The Contractor's indemnification under this Section shall survive both final payment and the termination of this Agreement.
- 5.10 Notice. Any notice required to be sent under this Agreement shall be sent by internationally recognized overnight courier, certified mail, or other delivery method which provides confirmation of receipt and shall be directed to the persons and addresses specified below (or such other persons and/or addresses as any party may indicate by giving notice to the other party):
- | | |
|-------------------------------------|-------------------------------|
| To Contractor: | To City: |
| Everstream | City of Noblesville |
| Attn: Doug Wolfla | Attn: Adam Hedden |
| 342 Massachusetts Avenue, Suite 203 | 16 S. 10 th Street |
| Indianapolis, IN 46204 | Noblesville, IN 46060 |
| | <i>Courtesy Copy:</i> |
| | City Attorney |
| | 16 S. 10 th Street |
| | Noblesville, IN 46060 |
- 5.11 Disputes. Contractor shall carry on all work required under this Agreement and maintain the schedule for services during all disputes or disagreements with City. No work shall be delayed or postponed pending resolution of any disputes or disagreements except as

Contractor and City may otherwise agree in writing. Should Contractor fail to continue to perform its responsibilities as regards all non-disputed work without delay, any additional costs incurred by City or Contractor as a result of such failure to proceed shall be borne by Contractor, and Contractor shall make no claim against the City for such costs. City may withhold payments on disputed items pending resolution of the dispute.

- 5.12 Non-discrimination. The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, age or national origin. The Contractor will take affirmative action to ensure that applicants are employed without regard to their race, color, religion, sex, age or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
- 5.13 Conflict of Interest.
 - 5.13.1 Contractor certifies and warrants to City that neither it nor any of its officers, agents, employees, or subcontractors who will participate in the performance of any services required by this Agreement has or will have any conflict of interest, direct or indirect (as defined in IC 5-16-11-5.5) with City.
 - 5.13.2 For purposes of compliance with IC 36-1-21, Contractor certifies and warrants to City that Contractor, or a person who wholly or partially owns Contractor, is not a relative, as that term is defined by IC 36-1-21-3, of an elected official of Noblesville, Indiana.
- 5.14 Non-contingent Fees. Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees. For breach or violation of this warranty City shall have the right to annul this Agreement without liability or in its discretion to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.
- 5.15 Force Majeure. In the event that either party is unable to perform any of its obligations under this Agreement – or to enjoy any of its benefits – because of fire, explosion, power blackout, natural disaster, strike, embargo, labor disputes, war, terrorism, acts of God, acts or decrees of governmental bodies or other causes beyond such party’s reasonable control (hereinafter referred to as Force Majeure Event), the party who has been so affected shall immediately give notice to the other and shall take commercially reasonable actions to resume performance. Upon receipt of such notice, all obligations under this Agreement shall immediately be suspended except for payment obligations with respect to service already provided. If the period of nonperformance exceeds sixty (60) days from the receipt of the Force Majeure Event, the party whose ability to perform has not been so affected may, by giving written notice, terminate this Agreement.
- 5.16 Applicable Laws; Forum.

- 5.16.1 Contractor agrees to comply with all applicable federal, state and local laws, rules, regulations or ordinances, and all provisions required thereby to be included in this Agreement are hereby incorporated by reference. This includes, but is not limited to, the Federal Civil Rights Act of 1964 and, if applicable, the Drug-Free Workplace Act of 1988. The enactment of any state or federal statute or the promulgation of regulations thereunder after execution of this Agreement shall be reviewed by City and Contractor to determine whether the provisions of the Agreement require formal modification.
- 5.16.2 This Agreement shall be construed in accordance with the laws of the State of Indiana, and by all applicable Municipal Ordinance or Codes of the City of Noblesville, County of Hamilton. Suit, if any, shall be brought in the State of Indiana, County of Hamilton.
- 5.17 Waiver. City's delay or inaction in pursuing its remedies set forth in this Agreement, or available by law, shall not operate as a waiver of any of City's rights or remedies.
- 5.18 Severability. If any provision of this Agreement is held to be invalid, illegal, or unenforceable by a court of competent jurisdiction, the provision shall be stricken, and all other provisions of this Agreement which can operate independently of such stricken provisions shall continue in full force and effect.
- 5.19 Attorneys' Fees. Each party shall be liable to the other party for reasonable attorneys' fees incurred in connection with any damages arising from the negligent or wrongful act or omission of such party.
- 5.20 Successors and Assigns. City and Contractor each binds itself and its partners, successors, executors, administrators and assigns to the other party of this Agreement and to the partners, successors, executors, administrators and assigns of such other party, in respect to all covenants of this Agreement; except as otherwise provided herein, Contractor shall not assign, sublet or transfer its interest in this Agreement without the written consent of City. Nothing herein shall be construed as creating any personal liability on the part of any officer or agent of City or the Contractor.
- 5.21 Authority to Bind Contractor. Notwithstanding anything in this Agreement to the contrary, the signatory for Contractor represents that he/she has been duly authorized to execute agreements on behalf of Contractor and has obtained all necessary or applicable approval from the home office of Contractor to make this Agreement fully binding upon Contractor when his/her signature is affixed and accepted by City.
- 5.22 Debarment and Suspension
- 5.22.1 Contractor certifies, by entering into this Agreement, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from or ineligible for participation in any Federal assistance program by any Federal department or agency, or by any department, agency or political subdivision of the State of Indiana. The term "principal" for purposes of this Agreement means an officer, director, owner,

partner, key employee, or other person with primary management or supervisory responsibilities, or a person who has a critical influence on or substantive control over the operations of Contractor.

- 5.22.2 Contractor certifies, by entering into this Agreement, that it does not engage in investment activities in Iran as more particularly described in IC 5-22-16.5.
- 5.22.3 Contractor shall provide immediate written notice to City if, at any time after entering into this Agreement, Contractor learns that its certifications were erroneous when submitted, or Contractor is debarred, suspended, proposed for debarment, declared ineligible, has been included on a list or received notice of intent to include on a list created pursuant to IC 5-22-16.5, voluntarily excluded from or becomes ineligible for participation in any Federal assistance program. Any such event shall be cause for termination of this Agreement as provided herein.
- 5.22.4 Contractor shall not subcontract with any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in any Federal assistance programs by any Federal department or agency, or by any department, agency or political subdivision of the State of Indiana.
- 5.23 Compliance With E-Verify Program. Pursuant to IC 22-5-1.7, Contractor shall enroll in and verify the work eligibility status of all newly hired employees of Contractor through the E-Verify Program (“Program”). Contractor is not required to verify the work eligibility status of all newly hired employees through the Program if the Program no longer exists.
 - 5.23.1 Contractor and its subcontractors shall not knowingly employ or contract with an unauthorized alien or retain an employee or contract with a person that Contractor or its subcontractor subsequently learns is an unauthorized alien. If Contractor violates this Section 5.23, City shall require Contractor to remedy the violation not later than thirty (30) days after City notifies Contractor. If Contractor fails to remedy the violation within the thirty (30) day period, City shall terminate the contract for breach of contract. If City terminates the contract, Contractor shall, in addition to any other contractual remedies, be liable to City for actual damages. There is a rebuttable presumption that Contractor did not knowingly employ an unauthorized alien if Contractor verified the work eligibility status of the employee through the Program.
 - 5.23.2 If Contractor employs or contracts with an unauthorized alien but City determines that terminating the contract would be detrimental to the public interest or public property, City may allow the contract to remain in effect until City procures a new contractor.
 - 5.23.3 Contractor shall, prior to performing any work, require each subcontractor to certify to Contractor that the subcontractor does not knowingly employ or contract with an unauthorized alien and has enrolled in the Program. Contractor shall maintain on file a certification from each subcontractor throughout the duration of the Project. If Contractor determines that a subcontractor is in

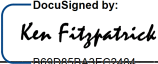
violation of this Section 5.23, Contractor may terminate its contract with the subcontractor for such violation.

5.23.4 Pursuant to IC 22-5-1.7 a fully executed affidavit affirming that the business entity does not knowingly employ an unauthorized alien and confirming Contractors enrollment in the Program, unless the Program no longer exists, shall be filed with City prior to the execution of this Agreement. This Agreement shall not be deemed fully executed until such affidavit is filed with the City.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the dates subscribed below.

Everstream

 (“Contractor”)

By:  _____
Ken Fitzpatrick
Printed: _____
Title: CEO _____

Date: 5/7/2025

Approved by the Board of Public Works and Safety of the City of Noblesville this _____
day of _____ 202_.

JACK MARTIN, PRESIDENT

JOHN DITSLEAR, MEMBER

LAURIE DYER, MEMBER

ROBERT J. ELMER, MEMBER

RICK L. TAYLOR, MEMBER

ATTEST:

EVELYN L. LEES, CLERK
CITY OF NOBLESVILLE, INDIANA

E-Verify Affidavit

Pursuant to Indiana Code 22-5-1.7-11, the Contractor entering into a contract with the City is required to enroll in and verify the work eligibility status of all its newly hired employees through the E-Verify program . The Contractor is not required to verify the work eligibility status of all its newly hired employees through the E-Verify program if the E-Verify program no longer exists.

The undersigned, on behalf of the Contractor, being first duly sworn, deposes and states that the Contractor does not knowingly employ an unauthorized alien. The undersigned further affirms that, prior to entering into its contract with the City, the undersigned Contractor will enroll in and agrees to verify the work eligibility status of all its newly hired employees through the E-Verify program.

(Contractor): Everstream

By (Written Signature): 

(Printed Name): Ken Fitzpatrick

(Title): CEO

Important - Notary Signature and Seal Required in the Space Below

STATE OF _____

SS:

COUNTY OF _____

Subscribed and sworn to before me this _____ day of _____,
20 ____.

My commission expires: _____ (Signed) _____

a. Residing in _____ County, State of _____

Exhibit A

ENTERPRISE MASTER SERVICES AGREEMENT

This Enterprise Master Services Agreement (“MSA”), effective the date of the last signature below (the “Effective Date”), is entered into by and between **Everstream Solutions LLC**, an Ohio limited liability company, with a principal place of business at 1228 Euclid Ave., Suite 250, Cleveland, Ohio 44115 on behalf of itself and its affiliate, Everstream GLC Holding Company LLC, (collectively “Everstream”), and **Subscriber** as described in the signature page below. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Everstream and Subscriber (collectively, the “Parties” or each individually a “Party”) agree as follows:

1. MSA

This MSA, together with any associated amendments, attachments or addendums (“Addendums”), Service Orders (defined below), hereby constitute the entire agreement (“Agreement”) by and between Everstream and Subscriber for the telecommunications facility or product provided or licensed by Everstream (“Services”).

2. SERVICE ORDERS AND SERVICE ACCEPTANCE

- a. Subject to the Agreement, Everstream shall provide Subscriber with the Services as detailed in an order form entered into by the Parties (“Service Order”).
- b. The “Service Acceptance Date” for each Service purchased by Subscriber will be the earliest of: 1) the date on which Everstream informs Subscriber that the Service is ready for use; 2) the date Subscriber first uses the Service, or 3) the date on which the Subscriber provides notice of acceptance of the Services.
- c. At Everstream’s option, Services may be provided by either Everstream or its Affiliate. The Everstream Network (defined below) may also include leased fiber, Everstream Indefeasible Rights of Use (“IRU”) and leased fiber optic Services. The term “Affiliate(s)” as used hereunder shall mean, with respect to either Party, any entity controlled by, in control of, or under common control with such Party.

3. INVOICING AND PAYMENT

- a. Invoicing of Services shall begin on the Service Acceptance Date, unless Subscriber notifies Everstream of a Defect in the Service in writing within five (5) days of the date that Everstream notifies Subscriber that the Service is ready. A “Defect” exists if the Service fails to perform materially in accordance with its

technical specifications. In such instance where the five-day notice of a Defect is provided, invoicing will commence immediately upon Everstream's provision of notice that the Service is ready after curing such Defect. Upon receipt of notice of a Defect, Everstream and Subscriber shall work cooperatively to promptly remedy such Defect under the terms and conditions of this Agreement. If the Service Acceptance Date is delayed as a result of any failure, act or omission of Subscriber, Everstream will give Subscriber written notice to cure such failure within five (5) days. If Subscriber fails to cure within such period, the Service Acceptance Date will be deemed to be the end of such five (5) day period.

- b. For each Service, Subscriber shall pay Everstream all recurring and non-recurring charges, fees and taxes, (collectively the "Service Charges") as set forth in the associated Service Order including mutually agreed upon Service Charges incurred prior to the Service Acceptance Date, in accordance with the following payment Terms: recurring Service Charges shall be billed to Subscriber on a monthly basis commencing upon the Service Acceptance Date and are payable within thirty (30) days after the date appearing on the invoice. Non-recurring Service Charges shall be billed to Subscriber upon completion of the associated work or other frequency as determined by Everstream and are payable within thirty (30) days after the date appearing on the invoice. All payments hereunder will be in U.S. dollars by electronic wire transfer to the bank account designated by Everstream from time to time or by company check. Subscriber must bring any billing error to Everstream's attention within thirty (30) days after the date appearing on the applicable invoice or Subscriber waives its right to a refund or credit associated with such billing error. Everstream shall not defer any charges while Subscriber awaits reimbursement, subsidy, discount or credit from any third-party or government entity, and Subscriber shall have the obligation to pay all charges regardless of the status of any such reimbursement, subsidy, discount or credit. Everstream shall have the right to increase Service Charges for each Service after the Renewal Service Term for such Service upon thirty (30) days' written notice to Subscriber.
- c. Subscriber's failure to pay any Service Charge when due constitutes a material breach. In the event of such breach by Subscriber, and subject to the cure provisions of Section 5, Subscriber shall immediately make full payment of all amounts that Everstream would have been entitled to receive hereunder for the remainder of the then-current Term as well as all costs incurred by Everstream to procure and maintain the applicable Service. If Subscriber cancels a Service Order prior to the Service Acceptance Date or fails to timely respond to communications from Everstream as set forth in Section 9.f., then Subscriber will pay Everstream a cancellation charge equal to the sum of: (1) for "off-net" Service, third party termination charges for the cancelled Service; (2) for "on-

net” Service, one month’s monthly recurring charges for the cancelled Service; (3) the non-recurring charges for the cancelled Service; and (4) Everstream’s actual and verified out-of-pocket costs (if any) plus twenty percent (20%) incurred in constructing facilities necessary for Service delivery. Everstream may charge a late fee for any amounts which are not paid when due. The late fee shall be the greater of one and one-half percent (1.5%) per month or the highest rate chargeable by law. Subscriber shall also be responsible for all costs, including reasonable attorneys’ fees associated with collection of past due amounts. If, at any time, Everstream has concern about security or timeliness of payments, it may suspend the Services and/or the rights granted hereunder upon advance written notice to Subscriber until receipt of payment or establishment of a letter of credit or other arrangement securing payment.

- d. Billing of a new or additionally added circuit begins upon the Service Acceptance Date.
- e. Service Credit. In the event of a network outage or disruption that is caused in whole or in part by Subscriber, Subscriber shall not be entitled to receive a credit. In all other cases, excepting maintenance or upgrade Services scheduled with Subscriber and those pursuant to “Force Majeure,” Subscriber is entitled to receive a credit against the amount invoiced for Services provided during the month in which the network outage occurred provided that Subscriber is current on all payments due to Everstream. Credits are available on a per-outage basis (prorated on a monthly basis) in any given calendar month. These service credits are the sole remedy available to Subscriber for service disruption, outage, or suspension of any kind whatsoever is described in the table below:

Instance of Network Outage	Credit Against the Appropriate Month’s Service
< 1 Hour	0%
1 Hour to < 8 Hours	25%
>= 8 Hours	50%

Network outage service credit requests shall be submitted electronically or in writing to Subscriber’s assigned Client Relationship Manager (“CRM”) or other person designated by Everstream.

4. TERM

The MSA shall commence upon the Effective Date and continues through the later of: 1) five (5) years from the Effective Date, or 2) upon the expiration of the last active Service Order ("Term"), unless earlier terminated as provided herein. The term for each Service begins on the Service Acceptance Date and expires upon the end of the service term specified in the applicable Service Order ("Service Term"), unless earlier terminated as provided herein. Unless otherwise specified in the Service Order, if the Subscriber continues to receive Services after the expiration of the Service Term, then the Services shall auto-renew for successive twelve (12) month periods under the same Service Order terms and conditions ("Renewal Service Term"); however, each Party has the right to terminate the Services at the end of a Service Term or Renewal Service Term by providing the other Party written notice of such termination at least ninety (90) days prior to the end of such Service Term or Renewal Service Term. At least ninety (90) days prior to expiration of the Service Term or Renewal Service Term, Subscriber may elect to extend the Service Term on a month-to-month basis at then-current Everstream rates for the respective Service(s) without any discounts.

5. TERMINATION

- a. Everstream may terminate any and all Services in the event (i) Subscriber fails to timely and fully make any payment required hereunder, and such failure to pay is not cured within five (5) business days after written notice thereof.
- b. Either Party may terminate the Agreement or a Service Order: (a) upon thirty (30) days written notice, or five (5) business days in the event of non-payment of Service Charges, to the other Party of the other Party's material breach of the Agreement or associated Service Order, provided that such material breach is not cured within such thirty (30) day or such five (5) business day period; (b) immediately, in the event that the other Party liquidates, is adjudicated as bankrupt, makes an assignment for the benefit of creditors, invokes any provision of law for general relief from its debtors, initiates any proceeding seeking general protection from its creditors, or is removed or delisted from a trading exchange (individually a "Bankruptcy Event"); (c) in the event that, after entering into a Service Order, a site survey is conducted and it is determined that the construction costs shall require an increase; or (d) upon at least ninety (90) days written notice to the other Party before the end of an Initial Term or Renewal Term. In the event that Subscriber fails to comply with any applicable laws or regulations or the Terms of the Agreement, upon thirty (30) days' written notice, Everstream may suspend or terminate any applicable Service in whole or in part without further notice, provided that such failure is not cured within such thirty (30) day period.
- c. Upon the termination or expiration of the Agreement, including all associated Service Orders: (a) Everstream's obligations under the Agreement shall immediately cease; (b) Subscriber shall promptly pay all amounts due and owing

to Everstream for Service(s) delivered prior to the date of termination or expiration, and any commercially reasonable deinstallation fees, if any; (c) Subscriber shall promptly cease all use of any software or hardware provided by Everstream under the Agreement, and shall return such software or hardware to Everstream; and (d) Subscriber shall return to Everstream or permit Everstream to remove, in Everstream's discretion, the Everstream Equipment in the same condition as when received, ordinary wear and tear excepted. Subscriber shall reimburse Everstream for the reasonable and documented costs of the repair or replacement, at Everstream's discretion, of any Everstream Equipment not returned in accordance with these terms.

- d. Notwithstanding anything to the contrary, in the event this MSA or any associated Service Order terminates for any reason other than as permitted under this Agreement, Subscriber shall, at Everstream's discretion: (a) promptly pay Everstream the full amount of the Service Charges that Subscriber would have been charged for the remainder of the Initial Term or the then-current Renewal Term; and (b) reimburse Everstream for all volume, Term or other discounts, rebates, promotions, and credits provided in anticipation of full performance of Subscriber's obligations and any unpaid portion of the installation fee set forth in the applicable Service Order(s).

6. SERVICE & EQUIPMENT INSTALLATION; ACCESS; UNDERLYING RIGHTS

- a. Subscriber shall ensure that it and each Subscriber customer or user, which uses the Service (each, an "End User"), shall obtain and maintain throughout the Term, such consents (including without limitation landlord and landowner consents) as are necessary to timely permit, and shall timely permit, Everstream personnel to install, deliver, operate and maintain the Services and Everstream Equipment (as defined herein) at Subscriber's and any Subscriber End User's facilities. Subscriber shall permit Everstream access to the Subscriber and End User facilities as needed to install, inspect, configure, upgrade, maintain or remove the Everstream Equipment and other Service components collocated at Subscriber's or an End User's facilities. Subscriber shall make and maintain throughout the Term all reasonable preparations necessary to permit the installation, maintenance and operation of the Service and any Everstream Equipment as specified by Everstream and that is required to provide the Services. Subscriber shall not charge Everstream, and shall ensure that Everstream does not incur, any fees or expenses whatsoever in connection with Subscriber's provision of space, power, or access in areas under the control of Subscriber (whether as owner or tenant) or otherwise in connection with Subscriber's performance of its obligations pursuant to this Agreement; and shall

be solely responsible for any such fees or expenses charged by a Subscriber End User.

- b. Subscriber, at its own expense, shall secure throughout the Term any access rights, consents, easements, leases, licenses or other agreements necessary to allow Everstream to install, deliver, operate and maintain the Services and Everstream Equipment (as defined herein). Such access rights shall grant to Everstream the right, without the requirement of notice, to access such premises twenty-four (24) hours a day, seven (7) days a week to install, maintain, repair, replace and remove any and all equipment, cables or other devices Everstream deems necessary to provide the Service. In the event that any necessary Underlying Rights (defined below) are unable to be practicably acquired without Everstream incurring additional costs, and unless Subscriber bears the costs of obtaining such Underlying Rights, Everstream may, at its option, complete installations to the extent feasible without such required Underlying Rights or cancel the applicable Service Order and shall incur no liability to Subscriber hereunder. Everstream shall not be deemed to be in breach of this Agreement for its failure to meet any anticipated Service installation or delivery date if such failure is caused, in whole or in part, by (i) a Force Majeure Event, or (ii) failure to obtain, or delay in obtaining, any required Underlying Rights. "Underlying Rights" means any and all agreements, licenses, conduit use agreements, pole attachment agreements, leases, easements, access rights, rights-of-way, franchises, permits, governmental and regulatory approvals and authorizations, and other rights, consents, and approvals that are necessary to construct, install, maintain, operate, and repair the Everstream Network (defined below) and/or for Everstream to provide a Service. Without limiting the foregoing, Underlying Rights include agreements for Off-Net Services (defined below) that are necessary for Everstream to provide a Service. The Everstream Network or On-Net means Everstream's fiber optic cable network and associated optical and electronic equipment used to deliver the Service, whether owned, operated, leased, or otherwise obtained by Everstream.
- c. Provided that Subscriber properly performs all necessary Site preparation and provides Everstream with all required consents, Everstream shall use commercially reasonable efforts to install the Service in accordance with the latter of the service start date requested on a Service Order.

7. SUPPORT, MAINTENANCE AND UPGRADES

- a. Everstream shall use commercially reasonable efforts to maintain all Everstream owned, operated, or leased equipment, including as applicable, any cabling, conduit, risers, routers, or any related equipment (collectively, "Everstream Equipment"), on Everstream's side of the Demarcation Points used by

Everstream to provide the Service. Everstream Equipment and Services on Subscriber's side of the Demarcation Points, as well as any other Subscriber-provided equipment, are the responsibility of Subscriber. Everstream shall provide a toll-free telephone number and email address, and/or portal to its Network Operations Center ("NOC") for inquiries and remote problem support for the Service. All such Subscriber support shall be provided only to Subscriber's designated personnel, as mutually agreed upon by Everstream and Subscriber. Subscriber is responsible for all communications and interfaces with its End Users. In no event shall Everstream be responsible for providing support for any network, equipment or software not provided and installed by Everstream or for issues or problems beyond its control. Notwithstanding anything to the contrary in the foregoing, Everstream shall use commercially reasonable efforts to restore any fiber cable cuts on the Everstream Network and shall keep Subscriber reasonably advised of such restoration progress. Subscriber shall provide routine operational Service support for Everstream Equipment and Service components collocated at Subscriber's or an End User's facility, including without limitation by performing reboots, as requested by Everstream.

- b. EMERGENCY MAINTENANCE. Everstream may perform emergency maintenance in its reasonable discretion, with or without prior notice to Subscriber, to preserve to overall integrity of the Everstream Network, or as soon as reasonably practicable if the emergency maintenance will materially and adversely impact a Service.
- c. Everstream maintains the right to upgrade, modify, or enhance the Everstream Equipment, including related firmware, and the associated Service. Everstream also maintains the right to take any action that Everstream deems appropriate to protect the Service and the Everstream Equipment (defined below).

8. DESCRIPTION OF BASIC SERVICES; NOC

- a. The Services provided by Everstream to Subscriber are:
 - i. Design and Installation. Assistance in the design, selection and installation of the connection between the Subscriber network and the Everstream Network.
 - ii. Equipment Selection and Acquisition. Acquisition, installation, maintenance and operation of Everstream Equipment on the Everstream Network at the Subscriber site(s), if required.
 - iii. Maximum Bandwidth. The maximum bandwidth shall be set forth in the Service Order.

b. NETWORK OPERATIONS SUPPORT.

- i. Network Operations Center. Everstream shall use commercially reasonable efforts to provide the NOC services seven (7) days a week, twenty-four (24) hours a day, excluding scheduled maintenance, required repair and events beyond Everstream’s reasonable control. Subscriber will use best efforts to comply with reasonable procedures established from time to time by Everstream to best assure the ability of Everstream to diagnose, maintain and correct disruptions in network Services. A detailed description of Everstream’s operations support, procedures and related matters is available upon request to the NOC.
- ii. Core NOC Functions. NOC Functions include the following: (i) open Service Tickets on all events, alarms and report trouble items; (ii) Conduct fault investigation and identifications; (iii) implement network repair and service restoration, including maintenance and upgrades; (iv) provision of remote logical service reconfiguration; (v) dispatch field technical service to Subscriber locations as requested; (vi) monitor and report on network status and Subscriber connectivity status; and (vii) maintain the Service Levels outlined in the tables below:

NETWORK PERFORMANCE SERVICE LEVELS		
NETWORK UPTIME	Basic Service Level Agreement (“SLA”) uptime is defined as the percentage of time Subscriber has service as measured over the course of a month. Planned or emergency maintenance events are not factored into the Service uptime calculation. Everstream calculates network uptime during a calendar month as follows: ((total minutes of availability in month)/(total min in month)) * 100.	
	SLA Network uptime for managed Ethernet, MPLS, VPN and Internet Service Delivery.	99.99%
	Basic SLA for Fiber Services (Everstream IRU and leased fiber optic Services).	99.90%
MEAN TIME TO REPAIR	Mean Time to Repair (“MTTR”) SLAs are based upon the amount of time it takes to restore Services measured from the time a NOC service request ticket (“Ticket”) is received by Everstream to the time the Ticket is closed. MTTR times vary based on whether the problem being addressed physically resides on the Everstream Network or on a third-party provider/Subscriber network (“Off-Net”).	
	Everstream On-Net Services.	Four (4) Hrs.

Everstream Off-Net Services.	Six (6) Hrs.
Fiber Services (Everstream On-Net Only IRU).	Eight (8) Hrs.
Note: Force Majeure Events are not subject to Everstream's MTTR SLA.	

- c. **OWNERSHIP OF CONNECTION.** Any Connection from the Everstream Network up to the connection point as provided under the Service Order ("Demarcation Point") becomes part of the Everstream Network upon installation. Subscriber has no ownership interest in the connection up to the Demarcation Point
- d. **EQUIPMENT RECOMMENDATION.** Subscriber agrees to employ commercially reasonable efforts to house Everstream-provided Equipment in accordance with any Environmental recommendations" as provided by Everstream. This includes the provisioning of power and space for Equipment needed to operate connection at Subscriber site(s) to Everstream Network. Subscriber will provide sufficient space for Everstream to install equipment to support the Services. Space will include sufficient power and environmental conditioning to support Everstream Equipment. Subscriber may provide backup power or an uninterruptable power supply ("UPS") or may contract with Everstream separately for UPS.

9. **SUBSCRIBER OBLIGATIONS**

- a. Subscriber's use of the Service (including all content transmitted via the Service) shall comply with all applicable laws and regulations and the terms of this Agreement. Subscriber shall not resell or redistribute (whether for a fee or otherwise) the Service(s), or any portion thereof, or make any use of the Service other than for Subscriber's internal business purposes, unless otherwise agreed in writing by Everstream. Subscriber shall require that its End Users' use of the Service, if any, shall comply with all applicable laws and regulations and Terms of this Agreement. Upon reasonable notice to Subscriber, Everstream may audit Subscriber's use of the "Service Bandwidth" to ensure Subscriber's compliance with the terms of the Agreement and any related Service Order.
- b. Subscriber will designate one of Subscriber's routers/switches from which Subscriber's fiber will connect to the Everstream Network.
- c. Subscriber is responsible for the installation, maintenance, and repair of Subscriber-premise fiber between the Demarcation Point and the Subscriber's

switch or router. Everstream will have no obligation to install, maintain, or repair Subscriber equipment.

- d. Subscriber will assign an operational and technical contact person to coordinate with Everstream regarding Services being provided under this Agreement.
- e. Subscriber shall ensure that all Everstream Equipment at Subscriber's and Subscriber's End Users' facilities remains free and clear of all liens and encumbrances, and Subscriber shall be responsible for loss or damage to the Everstream Equipment while at Subscriber's or an End User's facilities. Subscriber is responsible for ensuring that any Subscriber equipment used in connection with the Services is protected from fraudulent or unauthorized access. In addition, Subscriber is responsible for: (a) all content that is viewed, stored, or transmitted via the Service; and (b) all third-party charges incurred for merchandise and services accessed via the Service, if any. Subscriber shall conform its equipment and software, and ensure that each End User conforms its equipment and software, to the technical specifications for the Service provided by Everstream. Promptly upon notice from Everstream, Subscriber shall eliminate any hazard, interference or Service obstruction that any such Subscriber equipment is causing or may cause as reasonably determined by Everstream. Everstream may, at its sole option, suspend Service if any Subscriber equipment does not comply with the provisions herein.
- f. Subscriber shall promptly respond in full and in writing to all communications from Everstream, but in no event later than one (1) business day of receiving such communication. Subscriber's failure to timely respond to each such communication will subject Subscriber to Section 3.c.

10. TAXES

- a. Subscriber shall pay all federal, state, and local taxes, government fees, charges, surcharges or similar exactions imposed on the Services and/or products that are the subject of the Agreement, including but not limited to state and local sales and use taxes, international, excise, sales, value added, consumption, gross receipts, access, franchise and other taxes, fees, assessments, duties and surcharges (including, without limitation, any universal service fund surcharge), telecommunications taxes, federal and state universal service fund fees and/or state and local regulatory fees to the extent applicable. Subscriber is not responsible for taxes derived from Everstream's income.
- b. Subscriber acknowledges that currently, and from time to time, there is uncertainty about the regulatory classification and/or treatment of some of the Services and, consequently, uncertainty about what fees, taxes and surcharges are due from Everstream and/or its Subscribers. Subscriber agrees that

Everstream has the right to determine, in its sole discretion, which fees, taxes and surcharges are due and to collect and remit them to the relevant governmental authorities, and/or to pay and pass them through to Subscriber. Subscriber hereby waives any claims it may have regarding Everstream's collection or remittance of such fees, taxes and surcharges. If Subscriber believes it is exempt from Taxes, Subscriber shall provide Everstream with a legally valid and duly executed exemption certificate or any other information with respect to such exemption as Everstream may require. If any such exemption is ruled invalid by the tax or governmental authority for any reason, and Everstream has honored such claim of exemption, Subscriber shall reimburse Everstream for any Tax, surcharge, fee, or other liability, including without limitation any penalties and interest, arising from or in connection with such invalid claim of exemption.

11. PROPRIETARY RIGHTS AND CONFIDENTIALITY

- a. All materials including, but not limited to, any Everstream Equipment including related firmware, software, data and information provided by Everstream, and any documentation, data, know-how, methodologies or processes including, but not limited to, all copyrights, trademarks, patents, trade secrets, any other proprietary rights inherent therein and appurtenant thereto, used by Everstream to provide the Service (collectively "Everstream Materials") shall remain the sole and exclusive property of Everstream. Nothing herein is intended to convey any right or ownership interest to Subscriber or any other person or entity in or to such Everstream Materials. Subscriber shall acquire no interest in the Everstream Materials by virtue of its use or the payments provided for under this Agreement. Subscriber may use the Everstream Materials solely for Subscriber's use of the Service during any applicable Service Term or Renewal Service Term and the same may not be transferred by Subscriber to any other person, corporation or entity except as permitted herein. Subscriber may not alter, misuse, remove, disassemble, decompile, reverse engineer, reproduce, modify or distribute the Everstream Materials, in whole or in part, or use them for the benefit of any third party. All rights in the Everstream Materials not expressly granted to Subscriber in the Agreement are reserved to Everstream.
- b. The Parties acknowledge that Confidential Information may be disclosed from one Party to the other. "Confidential Information" means any and all information or data disclosed by or on behalf of a Party (the "Disclosing Party") to the other Party (the "Recipient") related to this Agreement, that has or could have commercial value or other utility in the business in which Disclosing Party is engaged, regardless of the form or means of delivery, and regardless of whether the information or data has been indicated as being Confidential Information.

Confidential Information includes but is not limited to all project plans, schedules, Everstream Materials, drawings including CAD drawings, designs, and any related documents or materials, whether in paper, electronic, or oral form, which is received by the Receiving Party from the Disclosing Party or its Authorized Representative or Affiliate.

- c. Excluded from Confidential Information is information or data which is: (i) specifically excluded from being Confidential Information in writing by the Disclosing Party (ii) publicly known at the time of disclosure or subsequently becomes publicly known through no fault of the Receiving Party; (iii) discovered or created by the Receiving Party before disclosure by Disclosing Party; (iv) learned by the Receiving Party through legitimate means other than from the Disclosing Party or Disclosing Party's representatives; or (v) is authorized for disclosure by Receiving Party with Disclosing Party's prior written approval.
- d. Receiving Party shall hold and maintain Confidential Information in strictest confidence for the sole and exclusive benefit of Disclosing Party and restrict access to Confidential Information to its employees, contractors, vendors, and third parties as is reasonably required and shall require those persons to sign nondisclosure restrictions at least as protective as those in this Agreement. Upon written request from Disclosing Party, Receiving Party shall immediately return any Confidential Information.
- e. The provisions of this Section 11 survive the termination of this MSA, and shall remain in effect until (i) the information or data no longer qualifies as Confidential Information, or (ii) Disclosing Party releases Receiving Party in writing of its duty to protect the Confidential Information, or (iii) whichever occurs first.
- f. The Parties agree that a violation, or impending violation, of this Section 11 would cause irreparable injury to Disclosing Party for which it would have no adequate remedy at law, and agree that the Disclosing Party shall be entitled to immediate injunctive relief or any other equitable relief to remedy or prevent any breach or threatened breach of this MSA, in addition to any other rights and remedies available to it and that any cost or expenses incurred by the prevailing Party.

12. INDEMNIFICATION

Each Party agrees to defend, indemnify and hold harmless the other Party, its Affiliates, as well as the other Party's respective officers, directors, employees and agents, from and against any third-party claims, losses, liabilities, damages, costs and expenses, including reasonable attorneys' and other professional fees, to the extent arising out of or relating to: (a) the unlawful or non-permitted use of the Service; (b) personal injury or property damage to the

extent caused by the negligence or willful misconduct of the indemnifying Party or its employees or agents.

13. DISCLAIMER OF WARRANTY

UNLESS OTHERWISE EXPRESSLY SPECIFIED IN THIS AGREEMENT, EVERSTREAM MAKES NO WARRANTIES, EXPRESS OR IMPLIED, AS TO ANY SERVICE PROVISIONED HEREIN. EVERSTREAM SPECIFICALLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR TITLE OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS OR ANY WARRANTY ARISING BY USAGE OF TRADE, COURSE OF DEALING OR COURSE OF PERFORMANCE, AS WELL AS ANY WARRANTIES REGARDING THE PERFORMANCE OR INTEROPERABILITY OF THE SERVICE IN CONNECTION WITH ANY SUBSCRIBER EQUIPMENT AND EXCEPT AS SPECIFICALLY SET FORTH IN THE Agreement, THE SERVICE, Everstream Equipment, AND Everstream Materials ARE PROVIDED "AS IS." EXCEPT AS SET FORTH IN THE Agreement AND SUBJECT TO ANY SLA, Everstream DOES NOT WARRANT THAT ANY SERVICE OR EQUIPMENT PROVIDED BY Everstream SHALL PERFORM AT A PARTICULAR SPEED, BANDWIDTH OR THROUGHPUT RATE. EVERSTREAM EXERCISES NO CONTROL OVER AND HAS NO RESPONSIBILITY WHATSOEVER FOR THE CONTENT TRANSMITTED OR ACCESSIBLE THROUGH THE SERVICE, AND EVERSTREAM EXPRESSLY DISCLAIMS ANY RESPONSIBILITY FOR SUCH CONTENT. SUBSCRIBER USES THE SERVICE AT ITS OWN RISK.

14. LIMITATION OF LIABILITY

- a. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY, AN END USER OR ANY THIRD-PARTY FOR ANY INCIDENTAL, INDIRECT, CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES ARISING OUT OF OR RELATING TO THE Agreement, REGARDLESS OF WHETHER EITHER Party HAD BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. both everstream and subscriber's AGGREGATE LIABILITY FOR ANY REASON AND ALL CAUSES OF ACTION ARISING OUT OF OR RELATING TO THE Agreement (INCLUDING, BUT NOT LIMITED TO, CONTRACT, TORT (INCLUDING NEGLIGENCE) AND STRICT PRODUCT LIABILITY) SHALL BE LIMITED TO THE FEES PAID OR OWED BY SUBSCRIBER UNDER THE SERVICE ORDER THAT IS THE SUBJECT MATTER OF THE CLAIM IN THE twelve (12) MONTHS PRECEDING THE DATE THE CLAIM ARISES. EXCEPT FOR SERVICE CREDITS SET FORTH HEREIN, IN NO EVENT SHALL Everstream's AFFILIATES OR SUPPLIERS HAVE ANY LIABILITY TO SUBSCRIBER UNDER THE Agreement. Everstream SHALL NOT BE RESPONSIBLE FOR ANY LOSSES OR DAMAGES ARISING AS A RESULT OF THE UNAVAILABILITY OF THE SERVICE, INCLUDING THE INABILITY TO REACH EMERGENCY SERVICES, THE INABILITY TO CONTACT A SECURITY SYSTEM OR REMOTE MEDICAL OR OTHER MONITORING SERVICE PROVIDER OR ANY FAILURE OR FAULT RELATING TO SUBSCRIBER EQUIPMENT, FACILITIES OR SERVICES.

15. FORCE MAJEURE

Notwithstanding anything to the contrary, and with the exception of payments, a Party shall have no liability to the other due to circumstances beyond its control, including, but not limited to, acts of God, terrorism, flood, fiber cuts, natural disaster, regulation or governmental acts, fire, civil disturbance, weather, or any unauthorized access to or destruction or modification of the Service, in whole or in part (each a "Force Majeure Event").

16. ORDER OF PRECEDENCE AND CONFLICTS

Each Service shall be provisioned pursuant to an associated Service Order and the MSA. If documents referred to in this Agreement conflict with one another (including conflicting contract expiration dates), any such conflicts will be rectified in the following order: (a) Service Order, (b) applicable Addendum to the Agreement; and then (c) MSA.

17. GOVERNING LAW AND JURISDICTION; JURY TRIAL WAIVER; PREVAILING PARTY

This Agreement shall be governed by and construed in accordance with applicable U.S. federal law and the laws of the State of Ohio, without regard to conflict of law principles. Each Party consents to the exclusive jurisdiction and venue of the U.S. federal and Ohio state courts located in Cleveland, OH, in connection with any dispute arising out of or in connection with this Agreement and/or its subject matter. Any claim that Subscriber wishes to assert under the Agreement must be initiated no later than one (1) year after the date the claim arose. The Parties waive any rights to trial by jury, whether in tort, contract, or otherwise, between the Parties arising out of this Agreement or the transactions related thereto. In the event of a lawsuit arising under, construing, or related to this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs.

18. ASSIGNMENT

Subscriber may not assign the Agreement or any associated Service Order without the prior written consent of Everstream, except to a party that acquires all or substantially all of Subscriber's assets and agrees to fulfill Subscriber's obligations herein. Everstream may assign its rights and obligations under the Agreement including, without limitation, in whole or in part, without the prior written approval of or notice to Subscriber.

19. GENERAL

- a. No waiver of any right hereunder, or breach of, this Agreement will be effective unless in writing and signed by an authorized representative of the Party against whom the waiver is sought to be enforced.
- b. There are no third-party beneficiaries to the Agreement. The Parties to the Agreement are independent contractors.

- c. Except as expressly provided herein (e.g., Service Credits), the rights of Everstream and Subscriber hereunder are cumulative, and no exercise or enforcement by either Party hereto of any right or remedy hereunder will preclude the exercise or enforcement by such Party of any right or remedy hereunder or any right or remedy to which it is entitled by law or in equity.
- d. In the event that any portion of the Agreement is held to be invalid or unenforceable, the invalid or unenforceable portion shall be construed in accordance with applicable law as nearly as possible to reflect the original intentions of the Parties set forth in the Agreement and the remainder of the Agreement shall remain in full force and effect.
- e. The Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. Facsimile and electronic signatures will be deemed to be original signatures.
- f. Notwithstanding anything to the contrary, termination of this Agreement and/or a Service Order shall not affect either Party's accrued rights under this Agreement or the survival of any provision of this Agreement which is expressly or by implication are intended to survive on or after that termination.
- g. Each Party shall comply with all laws, ordinances, rules and regulations in its performance under the Agreement.
- h. The Agreement sets forth the entire agreement between the Parties with respect to the subject matter hereof and supersedes all previous written or oral agreements or representations between the Parties with respect to such subject matter.