



**GENERAL CONDITIONS OF MAINTENANCE AND MANAGED SERVICES.** The undersigned Customer agrees that these General Conditions of Maintenance and Managed Services (the "**Agreement**") will govern the purchase of certain Services (defined below) by Customer from Avaya Inc. ("**Avaya**").

### 1. ORDER, PROVISION AND SCOPE OF SERVICES

1.1 **Order and Provision of Services.** In return for the payment of the fees specified in the order, Avaya will provide the services options for Supported Products or Supported Systems at Supported Sites, as described further in this Agreement and the SAS ("**Services**"). In the event of a conflict between the SAS and this Agreement, the terms of this Agreement will control. The "**Service Agreement Supplement**" or "**SAS**" is the Avaya Service Agreement Supplement then current as of the date of Avaya's acceptance of an order for Services and available to Customer upon request. Where the parties have executed a **statement of work** describing specific Services, the SAS includes the statement of work. "**Supported Products**" are: (i) hardware or software products identified in the order; and (ii) Added Products (defined in Section 1.8). Supported Products may include non-Avaya products to the extent they are specified in the order. "**Supported Systems**" are a group of products or networks specified in the order. "**Supported Sites**" are locations specified in the order. Where Avaya provides Supported Products or Supported Systems for Customer's use as part of the Services, these, including replacement parts for them, are referred to as "**Avaya Equipment.**" Orders are subject to acceptance by Avaya. Avaya may accept an order by beginning to perform the Services. Terms and conditions contained in Customer purchase orders or other Customer documents will have no effect.

1.2 **Monitoring.** Avaya may electronically monitor Supported Products and Supported Systems for the following purposes: (i) remote diagnostics and corrective actions; (ii) to determine system configuration and applicable charges; (iii) to verify compliance with applicable software license terms and restrictions; (iv) to assess Customer needs for additional products or Services; (v) as otherwise provided in the SAS.

1.3 **Error Correction.** Some Services options may include correction of Errors. An "**Error**" means a failure of a Supported Product to conform in all material respects to the manufacturer's specifications that were currently applicable when the Supported Product was purchased or licensed.

1.4 **Help Line Support.** Where the selected Services option includes help line support, Avaya will provide it in accordance with the coverage option (service hours, target response intervals, etc.) that Customer has selected.

1.5 **Updates.** Where the selected Services option includes the provision of Updates, Avaya will make Updates available to Customer as the manufacturer makes them generally available to its other customers. An "**Update**" is a change in software that typically provides maintenance correction only. It typically is designated as a change in the digit to the right of the second decimal point (e.g. n.y.[z]). Avaya will provide Updates via a website, email or post mail, at Avaya's option. Updates may be remotely installed by Avaya or delivered to Customer for self-installation.

1.6 **End of Support.** Avaya may discontinue or limit the scope of Services for Supported Products that Avaya or the third party manufacturer has declared "end of life," "end of service," "end of support," "manufacture discontinue" or similar designation ("**End of Support**"). Customer may access Avaya's user support website ([www.support.avaya.com](http://www.support.avaya.com)) for End of Support notifications. Avaya targets posting of End of Support notifications for Avaya-manufactured Products at least six (6) months in advance of the End of Support date. End of Support will be effective as of the effective date of the End of Support notice. Avaya also may provide End of Support notices by email to email addresses that Customer has registered with Avaya. If Services are discontinued for a Supported Product, it will be removed from the order and rates will be adjusted accordingly. For certain products subject to End of Support, Avaya may continue to offer a limited set of Services ("**Extended Support**"). Where Avaya has chosen to do this, the description of Extended Support available and fees will be available at the time of Avaya's notice. These notices will communicate information such as Extended Support eligibility, extended support alerts related to parts shortages, and end of Services coverage eligibility (including Extended Support).

1.7 **Replacement Hardware.** Replacement hardware provided as part of Services may be new, factory reconditioned, refurbished, re-manufactured or functionally equivalent. It will be furnished only on an exchange basis. Returned hardware that has been replaced by Avaya, whether Avaya Equipment or otherwise, will become Avaya's property.

1.8 **Added Products.** If Customer acquires additional products of the same type and manufacturer(s) as the existing Supported Products ("**Added Products**") and locates them with existing Supported Products at a Supported Site, the Added Products will be added to the order automatically at Avaya's then current fees as of the date the Added Products are first co-located and for the remainder of the term. Added Products purchased from a party other than the manufacturer or an authorized reseller are subject to certification by Avaya at Avaya's then current certification rates. If Added Products fail certification, Avaya may choose not to add them to the Supported Products.

1.9 **General Limitations.** Unless the SAS provides otherwise, Avaya will provide software Services only for the unaltered current release of the software and the prior release. The following items are included in the Services only if the SAS specifically includes them: (i) support of user-defined applications; (ii) support of Supported Products that have been modified by a party other than Avaya (except for installation of standard, self-installed Updates provided by the manufacturer); (iii) making corrections to user-defined reports; (iv) data recovery services; (v) services associated with relocation of Supported Products; (v) correction of Errors arising from causes external to the Supported Products (such as power failures or surges); and (vi) Services for Supported Products that have been misused, used in breach of their license restrictions, improperly installed or configured, or that have had their serial numbers altered, defaced or deleted.

2. **INVOICING AND PAYMENT.** Avaya will invoice Customer for Services monthly or quarterly in advance unless another payment option is specified in the order. Payment of invoices is due within thirty (30) days from the date of Avaya's invoice. Customer will pay all bank charges, taxes, duties, levies and other costs and commissions associated with any wire transfer or other means of payment. Any overdue payments will be subject to a late payment charge of one and one-half percent (1.5%) per month or the maximum rate allowed by applicable law, whichever is less. Unless Customer provides Avaya with a tax exemption certificate, Customer is solely responsible for paying all required taxes, (including, but not limited to, property, sales, use or excise taxes with respect to the provision of Avaya Equipment) except for any income tax assessed upon Avaya.

### 3. CUSTOMER RESPONSIBILITIES

3.1 **General.** Customer will cooperate with Avaya as reasonably necessary for Avaya's performance of its obligations, including things such as: (i) providing Avaya with full, free and safe access to its facilities; (ii) providing telephone numbers, network addresses and passwords necessary for remote access; and (iii) providing interface information for Supported Products and necessary third party consents and licenses to access them. All items will be provided by Customer at Customer's expense. If Avaya provides an Update or other new release of software as part of the Services, Customer will implement it promptly.

3.2 **Provision of Supported Products and Systems.** Except for Avaya Equipment or Avaya hosted facilities identified in the SAS, Customer will provide all Supported Products, Supported Systems and Supported Sites. Customer continuously represents and warrants that: (i) Customer is either the owner of, or is authorized to access and use, each of them; and (ii) Avaya, its suppliers, and subcontractors are authorized to do the same to the extent necessary to provide the Services in a timely manner.

3.3 **Moves of Supported Products.** Customer will notify Avaya in advance before moving Supported Products. Only Avaya may move Avaya Equipment. Avaya may charge additional amounts to recover additional costs in providing the Services as a result of moved Supported Products.

3.4 **Vendor Management.** Where Avaya is to instruct or request products or services on Customer's behalf from third party vendors under Customer's



supply contracts with the third party vendors ("**Vendor Management**"), Customer will provide Avaya upon request a letter of agency or similar document, in form reasonably satisfactory to Avaya, permitting Avaya to perform the Vendor Management. Where the third party vendor's consent is required for Avaya to be able to perform Vendor Management in a timely manner, Customer will obtain the written consent of the vendor and provide Avaya a copy of it upon request.

3.5 **Third Party Hosting.** In the event one or more network address(es) to be monitored by Avaya are associated with systems owned, managed, and/or hosted by a third party service provider ("**Host**"), Customer will: (i) notify Avaya of the Host prior to commencement of the Services; (ii) obtain the Host's advance written consent for Avaya to perform the Services on the Host's computer systems and provide Avaya with a copy of the consent upon request; and (iii) facilitate necessary communications between Avaya and the Host in connection with the Services.

3.6 **Access to Personal Data.** Where Customer instructs Avaya to access personal data of any employee, customer or other individual contained in any Supported Product or Supported System, or to provide Customer or a third party identified by Customer with access, Customer will indemnify Avaya and its officers, directors, employees, subcontractors and affiliates against, and hold each of them harmless from, any and all liabilities, costs, damages, judgments and expenses (including reasonable attorney's fees and costs) arising out of Avaya accessing or providing access in accordance with Customer's instructions.

3.7 **Avaya Equipment.** Customer will not remove any identification tags or other markings on Avaya Equipment. Customer will keep Avaya Equipment free and clear of all levies, liens and encumbrances arising by or through Customer or arising in connection with the location of Avaya Equipment at a Supported Site, and consents to the filing of informational financing statements by the owner of the Avaya Equipment to give notice of ownership. Customer will, at its own expense, maintain insurance against loss, theft, destruction or damage to Avaya Equipment (each, a "Loss") for the full replacement value of the Avaya Equipment, will provide evidence of this insurance upon request, and will notify Avaya promptly in writing of any Loss. Within thirty (30) days after the termination or expiration of the order, Customer will: (i) cease use of all Avaya Equipment (including backup copies of software); and (ii) deliver it at no cost to a location in the United States designated by Avaya, in the same condition as when originally delivered (reasonable wear and tear excepted).

**4. TITLE AND RISK OF LOSS TO EQUIPMENT.** Title to Avaya Equipment, whether new or replacement Avaya Equipment, will remain with Avaya or its suppliers and will not pass to Customer. Title to other Avaya-installed replacement hardware provided as part of Services will pass to Customer when installed. Title to all other hardware provided as part of Services will pass to Customer when it arrives at the Supported Site. Avaya may, without notice to Customer, assign, pledge, transfer or otherwise convey any or all of Avaya's right, title and interest in Avaya Equipment. Customer will bear the risk of loss, theft, destruction or damage to Avaya Equipment except for losses caused by Avaya.

**5. SOFTWARE LICENSE.** Where Services include provision of patches, Updates or feature upgrades for Supported Products ("**New Software**"), New Software will be provided subject to the license grant and restrictions contained in the original agreement under which Customer licensed the original software from Avaya. Where there is no existing license from Avaya, New Software will be provided subject to the manufacturer's then current license terms and restrictions for the New Software. New Software may include components provided by third party suppliers that are subject to their own end user license agreements. Customer may install and use these components in accordance with the terms and conditions of the "shrinkwrap" or "clickwrap" end user license agreement accompanying them.

**6. CONFIDENTIAL INFORMATION.** "**Confidential Information**" means either party's business and/or technical information, any pricing and discounts and any other information or data, regardless of whether in tangible, electronic or other form if it is marked or otherwise identified as confidential in writing. Information communicated verbally will qualify as Confidential Information if designated as confidential or proprietary at the time of disclosure and summarized in writing within thirty (30) days after verbal disclosure. Confidential Information does not include materials or information that: (i) is generally known by third parties as a result of no act or omission of the receiving party; (ii) subsequent to its disclosure was lawfully received from a third party having the right to disseminate the information and without restriction on disclosure; (iii) was already known by the receiving party prior to receiving it from the other party and was not received from a third party in breach of that third party's obligations of confidentiality; (iv) was independently developed by the receiving party without use of Confidential Information of the disclosing party; or (v) is required to be disclosed by court order or other lawful government action or as required by law, but only to the extent ordered, and provided that the receiving party promptly notifies the disclosing party of the pending disclosure in writing so that the disclosing party may attempt to obtain a protective order. In the event of a potential disclosure in the case of subsection (v) above, the receiving party will provide reasonable assistance to the disclosing party where the disclosing party attempts to obtain a protective order. Each party will protect the secrecy of all Confidential Information received from the other party with the same degree of care as it uses to protect its own Confidential Information, but in no event with less than a reasonable degree of care. Neither party will use or disclose the other party's Confidential Information except as permitted in this Section or for the purpose of performing obligations under this Agreement. The confidentiality obligations of each party will survive expiration or termination of the Agreement. Upon termination of the Agreement, each party will cease all use of the other party's Confidential Information and will promptly return, or at the other party's request destroy, all Confidential Information in tangible form and all copies of Confidential Information in that party's possession or under its control, and will destroy all copies of Confidential Information on its computers, disks and other digital storage devices. Upon request, a party will certify in writing its compliance with this Section.

**7. WARRANTIES.** Avaya warrants to Customer that Services will be carried out in a professional and workmanlike manner by qualified personnel. If the Services have not been so performed and Customer notifies Avaya in writing in reasonable detail within thirty (30) days after the performance of the Services, then Avaya will, at its option, re-perform the Services, correct the deficiencies or render a prorated refund based on the original charge for the deficient Services. The warranty remedies expressly provided in this Agreement will be Customer's sole and exclusive remedies for warranty claims. EXCEPT AS REFERENCED AND LIMITED IN THIS SECTION, NEITHER AVAYA NOR ITS LICENSORS OR SUPPLIERS MAKES ANY OTHER EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES WITH RESPECT TO THE SERVICES. IN PARTICULAR, THERE IS NO WARRANTY THAT ALL SECURITY THREATS AND VULNERABILITIES WILL BE DETECTED OR THAT SERVICES WILL RENDER A SUPPORTED PRODUCT OR SUPPORTED SYSTEM SAFE FROM SECURITY BREACHES. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, AVAYA DISCLAIMS ALL IMPLIED OR STATUTORY WARRANTIES, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.

**8. LIMITATION OF LIABILITY.** IN NO EVENT WILL EITHER PARTY OR ITS RESPECTIVE LICENSORS OR SUPPLIERS HAVE ANY LIABILITY FOR ANY INCIDENTAL, SPECIAL, STATUTORY, INDIRECT OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS OR REVENUE, LOSS OR CORRUPTION OF DATA, TOLL FRAUD, COST OF COVER, OR SUBSTITUTE GOODS OR PERFORMANCE. THE LIABILITY OF EITHER PARTY FOR ANY CLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT WILL NOT EXCEED AN AMOUNT EQUAL TO THE AGGREGATE TOTAL AMOUNT OF ALL FEES PAID OR PAYABLE UNDER THIS AGREEMENT IN THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRECEDING THE DATE OF THE EVENT GIVING RISE TO THE CLAIM. THE LIMITATIONS OF LIABILITY IN THIS SECTION WILL APPLY TO ANY DAMAGES, HOWEVER CAUSED, AND ON ANY THEORY OF LIABILITY, WHETHER FOR BREACH OF CONTRACT, TORT (INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE), OR OTHERWISE, AND REGARDLESS OF WHETHER THE LIMITED REMEDIES AVAILABLE TO THE PARTIES FAIL OF THEIR ESSENTIAL PURPOSE. HOWEVER, THEY WILL NOT APPLY IN CASES OF WILLFUL MISCONDUCT, PERSONAL INJURY OR BREACHES OF AVAYA'S LICENSE RESTRICTIONS. THE LIMITATIONS OF LIABILITY IN THIS SECTION ALSO WILL APPLY TO ANY LIABILITY OF DIRECTORS,



OFFICERS, EMPLOYEES, AGENTS AND SUPPLIERS.

**9. GOVERNING LAW AND DISPUTE RESOLUTION. Governing Law.** The Agreement and any disputes arising out of or relating to the Agreement ("Disputes") will be governed by the laws of the state where the Customer resides, excluding conflict of law principles.

**10. TERM AND TERMINATION.** This Agreement will be effective from the date Avaya accepts the order unless terminated earlier in accordance with this Section. Unless a different term is defined in the order, Avaya will provide Services for an initial term of one (1) year. Services will be renewed automatically for successive one (1) year terms applying the then most similar current generally available support plan offering and then current rates, unless either party gives the other written notice of its intent not to renew at least thirty (30) days prior to the expiration of the applicable initial or renewal term. Unless otherwise specified in a statement of work, Customer may terminate Services in whole or in part upon thirty (30) days written notice subject to the following cancellation fees:

Within 30 days after commencement of a renewal term	No charge
During the applicable warranty period for the Supported Product – Services not commenced (maintenance services only)	6 months
Any other time	Lesser of 12 months or the remaining term

Either party may terminate this Agreement by written notice to the other party effective immediately upon receipt if the other party fails to cure any material breach of this Agreement within a thirty (30) day period after having received a written notice from the non-breaching party detailing the breach and requesting the breach be cured.

**11. MISCELLANEOUS.** Avaya may assign some or all of this Agreement to any of its affiliated entities or to any entity to which Avaya may sell, transfer, convey, assign or lease all or substantially all of the assets used in connection with it. Avaya may subcontract any or all of its obligations, but will retain responsibility for them. Neither party will be liable for any delay or failure in performance to the extent the delay or failure is caused by events beyond the party's reasonable control, such as fire, flood, act of God, explosion, war or the engagement of hostilities, strike, embargo, labor dispute, government requirement, civil disturbances, civil or military authority, and inability to secure materials or transportation facilities. The failure of either party to assert any of its rights under this Agreement is not a waiver by that party of its right later to enforce this Agreement in accordance with its terms. This Agreement constitutes the entire understanding of the parties with respect to its subject matter and will supersede all previous and contemporaneous communications, representations or understandings, either oral or written, between them relating to that subject matter. It will not be contradicted or supplemented by any prior course of dealing between the parties. All notices under this Agreement and any modifications or amendments to this Agreement must be in writing.

**MODIFICATIONS TO THIS AGREEMENT** — The parties have agreed to alter the text of this Agreement as provided in the following paragraph(s). Any other modifications or amendments to the Agreement or to any order must be in writing and signed by each party.

**M 1. NON-APPROPRIATION OF FUNDS**

Add a new Section 12 entitled "Non-Appropriation of Funds" that reads as follows:

"In the event that (1) funds are not appropriated and are not otherwise available for any fiscal period following the Customer's current fiscal year ("subsequent fiscal year") or the acquisition of services and functions which are the same as or similar to those for which the products provided or installed under this Agreement was acquired, (2) such non-appropriation has not resulted from any act or failure to act by the insert name of entity, and (3) Customer has exhausted all funds legally available for payment under the Agreement and no other legal procedure shall exist whereby payment thereunder can be made to Avaya, then Customer may terminate this Agreement as of the last day for which funds were appropriated or otherwise made available by giving sixty (60) days prior written notice of termination to Avaya. Termination of this Agreement pursuant to this Section is not a default by Customer. Upon such termination, Customer shall be released from Customer obligation to make all future payments and shall not be liable for cancellation or termination charges."

**CUSTOMER: City Of Costa Mesa**

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

**Name:** \_\_\_\_\_

**Title:** \_\_\_\_\_

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