



Professional Services Terms & Conditions

These Professional Services Terms and Conditions (0115v1) ("Terms") govern the SOW (defined below) referencing these Terms and the performance of Services (defined below) by Visual Networks Operations, Inc. ("Visual") under the SOW for the client ("Client") that is party to the SOW.

1. Definitions.

"Deliverables" means the deliverables specified in the SOW.

"Services" means the products and services specified in the SOW that Visual shall deliver or perform for Client. Services includes without limitation the Deliverables.

"SOW" means the written agreement between Visual (or Visual's affiliate) and Client that references these Terms. SOW includes these Terms.

2. Performance of the Services.

2.1 Visual shall provide the Services in accordance with the SOW.

2.2 Visual shall: (i) keep Client advised of the progress of the Services and the status of pending Deliverables, and (ii) permit Client to review the work of personnel performing Services and preparing Deliverables.

2.3 If Visual elects to use subcontractor(s), consultants or other third parties under this Agreement or a particular SOW, Visual shall execute an agreement with such parties which requires compliance with the substance of the terms of the SOW (including these Terms) under which work is subcontracted.

3. Confidentiality.

3.1 For purposes of the SOW, "Confidential Information" shall mean any and all proprietary and confidential information of one party (the "Disclosing Party") and obtained by the other party (the "Receiving Party") in connection with the SOW, whether prior to or during the term of the SOW and whether in written, electronic, oral or other form, tangible or intangible. The Receiving Party shall take all necessary and appropriate steps to ensure that the confidentiality of such Confidential Information is maintained and that such Confidential Information is protected from unauthorized disclosure and use. The Receiving Party shall exercise at least the same degree of care, but no less than a reasonable degree of care, with respect to maintaining the confidentiality of Confidential Information that it exercises to maintain the confidentiality of its own confidential and proprietary information of like importance.

The Receiving Party shall only use and permit the use of Confidential Information in connection with its performance under the SOW and the permitted uses specified in the SOW and shall not otherwise use or permit the use of such Confidential Information.

3.2 The obligations of the Receiving Party hereunder shall not apply to information or material, whether or not identified as Confidential Information, which: (a) is in the public domain; (b) was in the Receiving Party's possession (as evidenced by its written records) at the time of disclosure by the Disclosing Party, and that was not acquired, directly or indirectly, from the Disclosing Party and was not obtained in breach of any obligations of confidentiality; (c) resulted from the Receiving Party's own research and development or its business operations (demonstrable by its written documents), independent of any use of the Confidential Information of the Disclosing Party; or (d) the Receiving Party is legally required to disclose, but only to the extent and for the purposes of such legal requirement.

3.3 Each party acknowledges that any unauthorized use or disclosure of Confidential Information will cause the Disclosing Party irreparable damage that cannot be remedied in monetary damages in an action at law. In the event of any such unauthorized use or disclosure, the Disclosing Party shall be entitled to immediate injunctive relief in addition to any other legal or equitable remedies.

4. Limited Warranties; Disclaimer.

4.1 Visual warrants to Client as follows:

(a) Visual's performance of the Services does not materially violate any applicable federal, state or local laws; and

(b) Visual's performance of the Services is consistent with industry standards reasonably applied to the performance of such work and is performed by qualified individuals with suitable experience and skill to perform such Services.

4.2 EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION 4, VISUAL AND ITS AFFILIATES AND THIRD PARTY PROVIDERS HEREBY DISCLAIM ALL REPRESENTATIONS

AND WARRANTIES OF ANY KIND IN CONNECTION WITH THE SERVICES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, INFRINGEMENT AND QUIET ENJOYMENT AND THE SERVICES ARE PROVIDED "AS IS" AND "AS AVAILABLE."

5. Ownership; License.

5.1 As between Visual and its third party providers, on the one hand, and Client, on the other, Client acknowledges that Visual and its third party providers own and retain all right, title and interest in and to the Services. Visual hereby grants to Client a non-exclusive non-transferable license: (a) to the extent that the Deliverables (or any part thereof) are intended for use in connection with software or technology that Visual licenses to Client, to use the Deliverables (or the applicable parts thereof) for the same purpose and subject to the terms of license and restrictions of use from Visual to Client that are applicable to such software or technology ("Related License") or (b) to the extent that the Deliverables (or any part thereof) are not intended for use in connection with software or technology that Visual licenses to Client, to use the Deliverables (or the applicable parts thereof) for its internal business purposes. Client shall not use the Services except as specified in this Section 5. Without limiting the foregoing, Client shall not: (a) disassemble, decompile or otherwise reverse engineer any of the Services or otherwise attempt to learn the source code, structure, algorithms or ideas underlying the Services; (b) copy, alter or modify any of the Services (other than a reasonable number of copies for Client's backup and disaster recovery purposes); (c) attempt to disable any security devices, access codes (e.g., codes that require keys to enable functionality) or other codes incorporated in any of the Services; (d) unless permitted under the Related License, provide the Services to any third party or use the Services to provide a service bureau, time sharing or other similar product or service to any third party; or (e) cause or permit any other person to do any of the foregoing.

6. Fees.

6.1 Client shall pay to Visual the amounts and fees set forth in the SOW.

6.2 Unless otherwise specified in the SOW, Client shall reimburse Visual for all actual and reasonable out-of-pocket expenses incurred during the course of the SOW, including travel to

and from Client's facilities, lodging, meals, telephone and shipping.

6.3 All payments shall be due within 30 days after receipt of Visual's invoice. Any amounts payable to Visual that are not paid when due shall bear interest, compounded monthly, at the lesser of (i) one and one-half percent (1½%) per month, or (ii) the maximum rate permitted by law.

6.4 Sales, use, value added, excise, gross receipts, property or any other taxes or charges, however designated or levied, are not included in any price. Client shall pay any and all taxes resulting from the SOW (except for any tax assessed upon Visual's net income).

7. Termination.

7.1 The term of the SOW shall commence as of the effective date of the SOW and shall continue in full force and effect until the completion of the Services contemplated by the SOW.

7.2 Either party may terminate the SOW at any time with or without cause by providing to the other party 90 days prior written notice of termination.

7.3 Either party may terminate the SOW if the other party has materially breached its obligations under the SOW and fails to correct the breach within 30 days after the non-defaulting party provides to the defaulting party notice of the breach.

7.4 If either party shall (a) be adjudged bankrupt, make a general assignment for the benefit of its creditors or become insolvent and a receiver shall therefor be appointed; or (b) contemplate or reasonably expect the occurrence of any event referred to in this subsection; then in each case, the party shall give the other party notice of such occurrence as soon as is legally permissible. If such occurrence or proposed occurrence is unacceptable to the party receiving such notice, the party may immediately terminate the SOW by providing to the other party written notice of termination.

7.5 The provisions of Sections 1, 3, 4, 5, 8, 9, 10 and 11 shall survive any expiration or termination of the SOW.

8. Indemnification.

8.1 Subject to Visual's obligations under Section 8.2, Client shall indemnify, defend and hold harmless Visual from and against any and all Losses in connection with a third party claim that any of the Services infringe any patent, trade secret, copyright, trademark or other intellectual property or proprietary rights.

8.2 With respect to any software ("Delivered Software") developed and delivered by Visual to

Client under the SOW and licensed by Visual to Client hereunder, Visual represents to Client that either: (a) the Delivered Software constitutes an original work of authorship developed by or on behalf of Visual for Client or (b) the Delivered Software does not infringe the copyright rights of any third party. Visual shall indemnify, defend and hold harmless Client from and against any and all Losses in connection with a third party claim that the representations set forth in this Section 8.2 are inaccurate.

8.3 Each indemnified party shall promptly notifying the indemnifying party in writing of any claim, suit or proceeding for which the indemnifying party may be obligated under this Section 8, cooperating with, assisting and providing information to the indemnifying party as reasonably required by the indemnifying party and granting the indemnifying party the exclusive right to defend or settle such claim, suit or proceeding.

9. **Limitation of Liability.**

IN NO EVENT SHALL THE TOTAL AGGREGATE LIABILITY OF EITHER PARTY OR ITS AFFILIATES OR THIRD PARTY PROVIDERS IN CONNECTION WITH THE SOW, UNDER ANY THEORIES OF ACTION WHATSOEVER OR IN ANY FORUMS, EXCEED THE TOTAL AMOUNT OF FEES PAID OR PAYABLE BY CLIENT TO VISUAL UNDER THE SOW. IN NO EVENT SHALL EITHER PARTY OR ITS AFFILIATES OR THIRD PARTY PROVIDERS IN CONNECTION WITH THE SOW BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES OF ANY KIND (INCLUDING LOSS OF PROFITS, LOSS OF BUSINESS, LOSS OF USE OR DATA AND INTERRUPTION OF BUSINESS), WHETHER BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE), WARRANTY, GUARANTEE OR ANY OTHER LEGAL OR EQUITABLE GROUNDS, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE LIMITATIONS SET FORTH IN THIS SECTION 9 SHALL NOT APPLY TO THE CONFIDENTIALITY OBLIGATIONS SET FORTH IN SECTION 3 OR THE INDEMNIFICATION OBLIGATIONS SET FORTH IN SECTION 8.

10. **Insurance.**

At all times during the performance of Services under any SOW, Visual agrees to maintain the following minimum levels of insurance: (i) Workmen's Compensation Insurance in the amount of \$100,000; (ii) Comprehensive General Liability Insurance in the amount of \$200,000 per

person and \$500,000 per occurrence; (iii) Comprehensive Automobile Liability Insurance for bodily injury and property damage in the amount of \$200,000 per person and \$500,000 per occurrence for bodily injury and \$20,000 per occurrence for property damage.

11. **Miscellaneous.**

11.1 **Counterparts; Entire Agreement; Amendments.** The SOW may be executed in counterparts and, when so executed, it shall constitute one instrument. Counterparts shall be effective if transmitted electronically by facsimile. The SOW is the complete agreement between the parties concerning the subject matter thereof and supersedes any oral communications between the parties. These Terms and the SOW do not supersede or have any other effect any written agreement between the parties unless the SOW expressly contemplates such effect. The SOW may be amended, supplemented or modified only by a writing signed by both parties, except that Visual may make minor modifications to the SOW specifications if such modifications do not materially and adversely affect the Services.

11.2 **Choice of Law; Venue.** The SOW shall be governed by, and construed in accordance with, the laws of the State of Maryland, without regard to choice of law rules. The sole jurisdiction and venue for any litigation arising from or relating to the SOW shall be an appropriate federal or state court located in Montgomery County, Maryland.

11.3 **Binding Effect; Assignment.** The SOW shall be binding upon, and inure to the benefit of, the parties and their respective successors and assigns. Neither party may assign the SOW or any of its rights, privileges, duties or obligations under the SOW without the prior written consent of the other party.

11.4 **Relationship of the Parties.** The parties to the SOW are independent contractors and nothing in the SOW shall be construed as creating an employment relationship, joint venture, partnership, agency or fiduciary relationship between the parties.

11.5 **No Third Party Beneficiaries.** Nothing expressed or referred to in the SOW shall be construed to give any person or entity other than the parties to the SOW any legal or equitable right, remedy, or claim under or with respect to the SOW or any provision of the SOW. The SOW and all of its provisions and conditions are for the sole and exclusive benefit of the parties to the SOW.

11.6 **Severability; Waiver.** If any provision of the SOW is invalid or unenforceable in any circumstances, its application in any other

circumstances and the remaining provisions of the SOW shall not be affected thereby. No waiver of any provision of the SOW, or any rights or obligations of either party under the SOW, shall be effective, except pursuant to a written instrument signed by the party or parties waiving compliance, and any such waiver will be effective only in the specific instance and for the specific purpose stated in such writing.

11.7 **Force Majeure.** If the performance of the respective obligations of either party under the SOW shall be prevented or interfered with by reason of any event or occurrence not within the reasonable control of the party, then that party shall not be liable to the other for its failure to perform such obligations and such failure shall not constitute a breach of the SOW.

11.8 **Notices.** All notices provided under the SOW shall be in writing and shall be deemed

effective: (a) when delivered personally, (b) one business day after deposit with a commercial overnight carrier specifying next day delivery, with verification of receipt or (c) three business days after having been sent by registered or certified mail, with verification of receipt. All communications shall be sent to the respective addresses set forth in the SOW (or, if not specified, to the party's headquarters address) or such other addresses as a party may designate in compliance with this provision. Notices to Visual shall be sent to:

Attn: General Counsel
Visual Networks Operations, Inc.
2092 Gaither Road
Rockville, MD 20850