



**VIA Networks USA**  
**Terms and Conditions of Service: Updated 2009**

**1. The service**

- 1.1 VIA NET.WORKS USA, Inc. ("VIA NET.WORKS") will provide you, the Customer, with those services described in the Order Form (the "Service" or "Services"). The Services will be provided according to these Terms and Conditions, the Order Form, and the Service Description (and any attachments to the Service Description). Except as set forth in the next sentence, in the event of any conflict between either of the Order Form or the Service Level Agreement, on the one hand, and the Terms and Conditions, on the other hand, the Order Form or the Service Level Agreement, as the case may be, shall prevail or control. Notwithstanding the foregoing, the terms of Section 8, 10 and 12 of the Terms and Conditions shall control in all cases, including in the event of any conflict with the Order Form or the Service Level Agreement.
- 1.2 You must provide all information requested in the Order Form in order that we may provide the Service. We may refuse to provide any of the Services requested until that information is provided.

**2. Provision of the service**

- 2.1 We will use commercially reasonable efforts to provide the Services by the date(s) you request.
- 2.2 You understand that the Internet is a world-wide system of independent inter-connected networks and computers. We control only those systems that are on our network. We cannot guarantee fault free service. We do not warrant or guarantee the technical quality of the connections to national or international networks supporting the Service and of any other terminal equipment, computer program and of any other systems that are not under our direct control. However, we shall use commercially reasonable efforts to ensure that the Service is available for your use and we will repair any reported faults on our computer systems as soon as reasonably possible. All other repairs will be based on the Service Level Agreement
- 2.3 You use the Internet at your own risk and agree that you are subject to and will comply with all applicable laws during your use and use by your guests, employees, officers, directors and agents.
- 2.4 You agree that we have no control over the content of the information transmitted or made available on the Internet. We do not guarantee that any particular content will be available at any given time and, except with regard to security services you may buy from VIA NET.WORKS and then only to the extent described in the related Service Description, we make no guarantee regarding the security of the Internet generally or specifically. We further assume no responsibility for any information, software, services or other materials you obtain by using the Internet.
- 2.5 You must provide a proper, effective and appropriate connection with a telecommunications provider in order to use the Services. You must pay for all telecommunications charges and

comply with all rules and regulations established by the telecommunications provider in connection with your use of the Service.

- 2.6 Other than software, hardware and installation services that we provide in connection with the Service, it is your sole responsibility to make sure that you have the necessary and appropriate software, operating systems, equipment and facilities to use the Service, as may be described in the Service Description.
- 2.7 You must ensure that any software or equipment connected to or used with the Service must be connected and used according to any instructions, safety or security procedures applicable to the use of that software or equipment.
- 2.8 VIA NET.WORKS reserves the right to review the technical specification of the Service periodically. Any proposed change has to be submitted in writing to the technical contact listed on the Order Form for acceptance.
- 2.9 You understand that we will provide the Service using a multi-user shared server unless agreed in the applicable Order Form or Service Description. There may be occasions where use of the Service may be affected by access of other users.

### **3. Use of personal information**

- 3.1 You agree that we (or any of our subsidiaries or affiliates, also referred to as our "Group companies") may process personal information (including contact details) which you provide to us in the Order Form or that we learn or receive from you in connection with your use of the Services. We may process this personal information in order to administer the Contract and for purposes directly connected to the Services and your business relationship with us, including (by way of example only), for the purpose of notifying you (whether by mail, telephone or email), of new or additional products or services provided by us, our Group companies and selected third parties. We may not disclose personal information to selected third parties for marketing purposes without first obtaining your prior written consent.
- 3.2 You may contact us at any time at [marketing@vianetworks.net](mailto:marketing@vianetworks.net) to instruct us to stop using or disclosing personal data for direct marketing purposes.
- 3.3 If we collect personal information in connection with this Contract, we will treat and use the information in compliance with the provisions of all relevant data protection laws, including, if applicable, your right to access the personal data and to request at any time any amendment or corrections thereto.

### **4. Charges and payment for the Service**

- 4.1 You agree to pay all Charges, fees and other costs relating to the Services and at the time or times as set out in the Order Form, without set-off, deduction discount, charge-back or other reduction for any reason whatsoever, including any claim you believe you may have against us, provided that we promptly provide you with any relevant service level credits pursuant to the Service Level Agreement, a true and correct copy of which is attached hereto. However, amounts which you in good faith are disputing will be payable upon resolution of such dispute, provided that the interest described in the next sentence will accrue from the original due date on all such disputed amounts which are determined to be

payable by you upon resolution of such dispute. You agree to pay interest of 1.5% per month on all amounts which you fail to pay within thirty (30) days of the due date or the maximum amount permitted by law, whichever is lower.

- 4.2 All Charges are exclusive of value-added taxes (VAT) and any other similar sales taxes, duties or levies imposed on VIA NET.WORKS by law which will be added to the Charges payable.
- 4.3 You agree that we may increase the monthly or annual charges (refer to Order Form for process and payment schedule) upon providing you written notice if your bandwidth utilization reaches a level that exceeds what has been defined in your services agreement. VIA will make every reasonable effort to consult with you before any changes to charges are applied.

## **5. Customer undertakings in connection with the use of the Service**

- 5.1 You agree not to use and not to let any other person use the Services or any part of the Services to store, reproduce, transmit, communicate or receive any material, data, images or information, which is: a) in breach of any law or regulation, code of practice or acceptable use policy; b) abusive, indecent, defamatory, obscene, pornographic or menacing or related to areas of national security; or c) in breach of confidence, copyright or other intellectual property rights, privacy or any other rights of any third party, under applicable laws of any country or any international treaty, (any of which may be referred to below as "Offending Materials").
- 5.2 You further agree that, in connection with any of the Services provided under this Contract, you will not: a) directly or indirectly, use the Services or any part of the Services to provide any form of service generally associated with an Internet service provider, or otherwise in competition with VIA NET.WORKS; b) resell the Services in whole or in part to any third party, unless you have entered into a reseller agreement with us; c) infringe any of our, or a third party's, intellectual property rights or other proprietary rights party involving software, programs and any other property supplied by us for the use of the Service; d) use the Service for any unlawful purpose or cause any nuisance through use of the Service or allow others to do so, including the delivery or transmission of unsolicited e-mail, also known as "Spam"; e) repair, modify or tamper with our network or insert any programs, data or information in our network, which may, in any way, affect the Service, cause any damage to third parties or be deemed unlawful.
- 5.3 You further agree that you will observe (a) the acceptable use policy rules established and amended by us from time to time in relation to the use of the Service and provided to you in writing or e-mail, including those displayed on our web-site at <http://vianetworks.net/aup.html>, and (b) all instructions we provide in writing in relation to the use of the Service that we believe are necessary for reasons of health, safety or the quality of any telecommunications service provided by us.
- 5.4 Certain information transmitted or displayed using the Internet may be illegal and you may be liable in this country or in foreign countries for accessing such information. You acknowledge that under the applicable national or international laws or regulations, VIA NET.WORKS may, under certain circumstances, such as the initiation of a criminal investigation, be required to provide to legally authorized entities access to information we maintain about you and Services you use and decoding keys of information belonging to

you. In all such cases, we will not be liable for any damages resulting from our provision of such information or decoding keys to such authorized entities.

## **6. Proprietary Rights and License of VIA NET.WORKS and Third Party Software**

- 6.1 If, as a part of the Service, we provide you software, whether owned by us or a third party, you agree that the ownership of and all intellectual property rights in the software shall remain vested in the owner.
- 6.2 You will have a limited non-exclusive non-transferable license to use the software solely in connection with the Service. The terms and conditions of this license are contained in the end user license agreement that is included with the software. Any other use of or dealing with such software is strictly prohibited.
- 6.3 Client will maintain ownership off all content and third party applications provided by the client. VIA Networks will not be responsible for licensing compliance of any third party software provided by the client
- 6.4 If service is suspended or terminated for any reason outlined in these terms and conditions, VIA Networks will have no responsibility to provide access to content or third party applications stored on VIA Networks servers provided as part of the contracted service

## **7. Web Hosting Services**

- 7.1 If you are using our Web Hosting Service, we may, at any time and from time to time, at our sole option, monitor and inspect your website relating to the Web Hosting Service. If we find or become aware that you may be in breach of Section 5.1(B), we may without prior written notice take any one or more of the following actions: a) remove the Offending Materials; b) suspend or permanently disable the Web Hosting Service or any part of it; or c) terminate the Contract for breach. If we find or become aware that you are in breach of Section 5.1(A) or (C), we may, with prior written notice take any one or more of the following actions: a) remove the Offending Materials; b) suspend or permanently disable the Web Hosting Service or any part of it; or c) terminate the Contract for breach.
- 7.2 VIA NET.WORKS is not responsible for any material, data, images or information transmitted, used, communicated, passed over or received, through or on the Web Hosting Service. In particular, we do not warrant the quality or accuracy of such material, data, images or information and we assume no liability if they contain any Offending Materials. Your use of such material, data, images and information is solely at your own risk and is subject to all applicable laws, regulations, and codes of practice, as well as all acceptable use policies provided by us to you in writing.
- 7.3 You will, at your own expense, obtain all necessary content, including any materials, data, images, or information necessary for your use of the Service and you will be responsible for ensuring that any and all content you place on your website complies at all times with the requirements of this Contract.
- 7.4 Full backups are made on a schedule outlined in your Service Level Agreement, however, no Guarantees are made of any kind, either expressed or implied, as to the integrity of the data backed up. Backups are made for server restoration purposes only. It is the clients' responsibility to maintain local copies of their web content and any information on their account including but not limited to clients website, email, databases, mailing lists, and archives. If data loss occurs due to negligence of client in securing their account or by an action of the client, VIA Net.Works will attempt to recover the data from the most recent archive for a \$50.00 fee.

## 8. Indemnification by the Customer

- 8.1 Subject to the limitations of Section 12 hereof, you, the Customer, shall indemnify and hold harmless VIA NET.WORKS and all its subsidiaries and affiliates against any and all liability, loss, damage and expenses (including legal expenses) (excluding consequential and indirect loss, loss of revenue profits, data, contracts, goodwill and anticipated savings) (all of which are referred to as "Damages") resulting from third-party claims arising directly from (i) your gross negligence or willful misconduct, including that of your employees, agents or sub-contractors, other persons you authorize to use the Services, or persons who use or access the Services without authorization (each, a "User"), (ii) any breach by you of any of the terms of the Contract, or (iii) any content maintained, stored or transmitted by you or any User in connection with the Services provided to you by VIA NET.WORKS. You are liable for the actions of all Users, including the failure by any User to perform or observe the terms and conditions of this Contract.
- 8.2 Subject to the limitations of Section 12 hereof, we, VIA Net.Works, shall indemnify and hold harmless you, the Customer, and all your subsidiaries and affiliates against any and all liability, loss, damage and expenses (including legal expenses) (excluding consequential and indirect loss, loss of revenue profits, data, contracts, goodwill and anticipated savings) (all of which are referred to as "Damages") resulting from third-party claims arising directly from (i) our gross negligence or willful misconduct, including that of our employees, agents or sub-contractors, (ii) any breach by us of any of the terms of the Contract, or (iii) any intellectual property infringement of software provided by us to you.
- 8.3 Each party's obligation to indemnify shall survive the expiration or termination of this Agreement by either party for any reason. If any third party (i.e. any person or entity other than any of you, us, our respective subsidiaries or affiliates, or their respective employees, agents or representatives) notifies any party entitled to indemnification under this Section 8 (the "Indemnified Party") with respect to any matter (a "Third Party Claim") that may give rise to a claim for indemnification against any party (the "Indemnifying Party") under this Section 8, then the Indemnified Party shall within 30 days after the date on which the Indemnified Party first became aware of such matter giving rise to such claim for indemnification for a Third Party Claim notify the Indemnifying Party thereof in writing; provided, however, that failure or delay of the Indemnified Party to give such notice of any such Third Party Claim shall not release, waive or otherwise affect the Indemnifying Party's obligations with respect thereto except to the extent that the Indemnifying Party can reasonably demonstrate loss or prejudice as a result of such failure or delay. The Indemnifying Party shall conduct the defense in any such third party action arising as described herein with counsel reasonably acceptable to the Indemnified Party, who shall cooperate with such defense. The Indemnified Party will not permit a default or consent to the entry of any judgment on or enter into any settlement or compromise with respect to the Third Party Claim without the prior written consent of the Indemnifying Party (not to be unreasonably withheld or delayed, provided that it shall not be unreasonable to withhold or delay such consent if the claimant (or claimants) and such party do not provide as part of such settlement or compromise or judgment to such other party an unqualified release to any liability or Damages to such claimant (or claimants) and such party in respect of the applicable Third Party Claim). The Parties shall make appropriate adjustments for insurance coverage and tax benefits in determining Damages for purposes of this Section 8. If the Indemnifying Party makes any payment on any Third Party Claim, the Indemnifying Party shall be subrogated, to the extent of such payment, to all rights and remedies of the Indemnified Party to any insurance benefits or other claims of the Indemnified Party with respect to such Third Party Claim.

## **9. Rights of Non-business Customer**

- 9.1 The following provisions shall apply if you are subscribing to the Service for your non-business-related use: You represent and warrant that you are at least 18 years of age and an individual using the Service for the purposes set out in the Order Form.

## **10.Suspension of the Service and Force Majeure**

- 10.1 Without prejudice to our right to terminate the Contract under the applicable provisions, we reserve the right to suspend any of the Services (a) if you breach any of your obligations under the Contract and fail to correct the breach within fourteen (14) business days notice by us, or (b) immediately, upon written notice, if after receiving a complaint from a third-party that you are using the Services to store, maintain or transmit any Offending Materials, or if we receive a notice from a governmental authority that you may be using the Services in violation of any law in the applicable jurisdiction, or if you are engaging in any action which is in violation of any provision of Sections 5.1 or 5.2 above. All notification of breach will be sent by certified mail to the Primary Contact listed in the Order Form.
- 10.2 If after suspension of a Service, we receive written confirmation that a third-party complaint has been resolved, we may reinstate the Service.
- 10.3 We may also suspend the Services for operational reasons such as repair, maintenance or improvement of the network by providing at least seven (7) days prior notice and complying with the Service Level Agreement, unless such notice is impracticable in the case of an emergency or a Force Majeure event. Such operational reasons shall not exceed the amount of time set forth in the Service Level Agreement.
- 10.4 If either party is unable to perform any obligation under this Contract because of a matter beyond the reasonable control of the party ("Force Majeure") such as lightning, flood, exceptionally severe weather, fire, explosion, war, civil disorder, industrial disputes (whether or not involving either of the party's employees), or acts of local or central Government or other competent authorities, or act or omission of suppliers, including but not limited to an act or omission of telecommunication suppliers utilized by us, neither party will have liability to the other for that failure to perform.
- 10.5 If any event of Force Majeure continues for more than ten (10) days either of us may terminate the Contract after providing written notice of the intent to

## **11.Duration and termination**

- 11.1 The term of the Contract shall be as noted in the Order Form. If no end date is noted, this Contract shall continue for a period of one year and be automatically renewed for successive one year periods unless (a) either party notifies the other in writing at least 45 days before the end of the year or (b) either of us terminate the Contract as permitted by these Terms and Conditions.
- 11.2 VIA NET.WORKS may terminate this Contract if you breach any of the provisions of this Contract in any material respect (any non-payment will be deemed material). With respect to payments, we may terminate immediately and without notice if you fail to pay any Charge or costs owed within sixty (60) business days of the date the payment is due. For any other breach, we may terminate the Contract if you fail to correct or remedy such breach within fifteen (15) business days of written notice of such breach.

- 11.3 You may terminate this Contract if we breach any of our obligations in any material respect and fail to correct and remedy such breach within ten (10) business days of receiving written notice from you describing the breach. After expiration of the initial agreement you may terminate this Contract at your convenience with no penalties with 60 days notice. We will continue to provide the same SLAs during the 60-day period.
- 11.4 If we terminate this Contract during the period of the initial agreement, all amounts due under the Contract shall immediately become due and payable in full, even though our obligations to render the Services to you will terminate. If you terminate this Contract in accordance with this Section 11, we will reimburse you a pro-rata rebate of any pre-paid Charges, other than set-up fees and charges, based on the proportion of the Contract term remaining. Otherwise, we will have no liability to you for such termination. If we terminate the Contract, we reserve the right to seek other remedies we may have under this Contract and at law.

## **12.Warranties and limitation of liability**

- 12.1 At all times, You shall bear full risk of loss and damage to your web site and all of Your web site content. You are entirely responsible for maintaining the confidentiality of Your password and account information. You agree that you are solely responsible for all Your and end user acts, omissions and use under and charges incurred with Your account or password or in connection with the Site or any of Your web site content displayed, linked, transmitted through or stored on the Server. You shall be responsible for undertaking measures to: (i) prevent any loss or damage to your web site content; (ii) maintain independent, additional archival and backup copies of Your web site content; (iii) ensure the security, confidentiality and integrity of all your web site content transmitted through or stored on VIA Net.Works servers; and (iv) ensure the confidentiality of Your password. VIA Net.Works USA's servers and dedicated services are not an archive. VIA Net.Works USA shall have no liability to You or any other person for loss, damage or destruction of any of Your content unless, and only to the extent, directly and solely related to our failure to perform as required hereunder, subject to the limitations of Section 12. You shall at all times use the Services as a conventional and/or traditional web site. You shall not use the Service in any way that impairs the functioning or operation of VIA Net.Works USA's Services or equipment.
- 12.2 All warranties, conditions, undertakings or terms, express or implied, written or oral, statutory or otherwise, in respect of the Service are excluded to the fullest extent permitted by law, except as expressly provided in the Contract.
- 12.3 You acknowledge that the Charges are determined and we would not be willing to provide the Services except on the basis of the exclusions from and limitations of liability contained in the Contract. You expressly agree that these exclusions and limitations are commercially reasonable.
- 12.4 You agree that, to the fullest extent permitted by law and except as noted in this Section 12, your sole and exclusive remedy against us for any claim, whether arising out of contract, tort, misrepresentation or otherwise, will be to terminate this Contract and receive a pro-rata payment of the pre-paid Charges as noted under Section 11.4 above and seek indemnification under Section 8.2 above for intellectual property infringement as described therein.
- 12.5 You further agree that in no event shall our liability under this Contract, including with respect to any event or series of events or connected events arising out of or relating to this

Contract, exceed in aggregate the total monthly charges which you paid us under this Contract.

- 12.6 NOTWITHSTANDING ANY OTHER TERM OR PROVISION OF THIS CONTRACT, INCLUDING ANY OTHER PORTION OF THIS SECTION 12, IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, SPECIAL, EXEMPLARY OR INDIRECT DAMAGES OR EXPENSES (INCLUDING, WITHOUT LIMITATION, LOST PROFITS OR OTHER ECONOMIC LOSS, LOST REIMBURSEMENTS, LOST DATA, OR LOST SAVINGS), EVEN IF SUCH PARTY WAS ADVISED OF THE POSSIBILITY OF THE OCCURRENCE OF SUCH DAMAGES. Except as noted in this Section 12, you have waived any claim against us and we will have no liability for any losses you may incur as a result of any delay, failure or error in the transmission of information or interruptions or deterioration of the quality of the Service other than the right to seek remedy under the credit schedule set forth in the Service Level Agreement.
- 12.7 We acknowledge that nothing in this Section 12 will limit our liability to you for fraudulent misrepresentation or death or personal (physical) injury resulting from our negligence, or the negligence of anyone for whom we are vicariously liable under the law. However, this is not intended to provide you with a right or remedy which you would not otherwise have.
- 12.8 This Section 12 shall survive the termination of the whole or a part of the Contract.

### **13. Dispute resolution**

- 13.1 Each party agrees that before it resorts to any third party relief (including the courts) it will attempt to resolve the dispute by notifying the other party by electronic mail or registered post of its complaint. Each party will review any such complaint it receives and notify the other party in writing of its findings or position within 30 days following the receipt of the other party's notice.

### **14. Governing law and jurisdiction**

- 14.1 The Contract, which includes these Terms and Conditions, the Order Form and the SLA (together with any Attachments to the Order Form), shall be governed by the laws of the State of Georgia. You agree to submit any and all disputes arising out of or relating to the Contract to the exclusive jurisdiction of the courts of the state of Georgia. You further agree to not request removal of any dispute arising out of or relating to the Contract to the federal courts. Each party involved in any dispute will be responsible for its own costs and fees.

## **15. Changes to the contract**

- 15.1 VIA reserves the right to make modifications, changes or amendments to the terms and conditions of the Contract in order to comply with any law or regulation or other requirement applicable to or imposed upon VIA NET.WORKS by any governmental authority.

## **16. Miscellaneous**

- 16.1 If any provision of the Contract is held to be unenforceable, illegal or void in whole or in part the remaining portions of the Contract shall remain in full force and effect.
- 16.2 Any notices under this Contract shall be sent to the addresses shown on the Order Form.
- 16.3 No party may assign this Contract, or assign any of its rights or delegate any of its obligations under this Contract, without the prior written consent of the other party, which consent may be withheld in its sole discretion. Notwithstanding the foregoing, each party may, at its discretion, assign this Contract and all of its rights and obligations under this Contract to any of its affiliates or to any company that acquires all or substantially all of its business or assets.
- 16.4 The Contract between you and us shall consist of these Terms and Conditions, the Order Form, and the Service Description (and any Attachments to the Service Description), all of which together shall form the entire agreement between the parties. The Contract may not be modified in any respect except in writing and signed by both parties other than as provided in Section 15. No course of trade or custom shall change the terms of this Contract.