

3 **AN ORDINANCE** approving a MASTER SERVICES
4 AGREEMENT benefitting the computer security infrastructure
5 utilized by the City of Fort Wayne and Allen County, for a total
6 cost of \$253,480.00; between LIFELINE DATA CENTERS,
LLC and the City of Fort Wayne, Indiana, by and through its
Purchasing Department.

7 **WHEREAS**, the City of Fort Wayne ("City"), City Utilities, and Allen County
8 jointly operate data center infrastructure to the benefit of City Utilities, City and
Allen County departments;

9 **WHEREAS**, the City, City Utilities and Allen County are moving the data center
10 infrastructure to Lifeline Data Centers, LLC in Fort Wayne, Indiana ("Lifeline");

11 **WHEREAS**, the City of Fort Wayne, City Utilities, and Allen County wish to
12 jointly contract with Lifeline and share the cost of \$253,480.00 with the following
distribution: 40% allocated to the City; 20% allocated to City Utilities; and 20%
allocated to Allen County.

13 **NOW, THEREFORE, BE IT ORDAINED BY THE COMMON COUNCIL OF THE**
14 **CITY OF FORT WAYNE, INDIANA:**

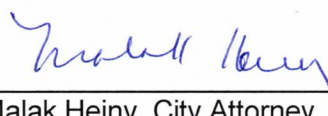
15 **SECTION 1.** That moving the City's data center infrastructure to Lifeline
16 Data Centers, LLC and to rent space at said facility for a total of cost to the City of Two
17 Hundred Fifty-Three Thousand Four Hundred Eighty and 00/100 Dollars (\$253,480.00) over
18 a thirty-six (36) month period is hereby approved in all respects.

19 **SECTION 2.** That the City is authorized and directed to take all action
necessary for the purchase of this service by and through Lifeline Data Centers, LLC.

20 **SECTION 3.** That this Ordinance shall be in full force and effect from and
21 after its passage and any and all necessary approval by the Mayor.

22 
23 _____
Council Member

24 APPROVED AS TO FORM AND LEGALITY

25 
26 _____
27 Malak Heiny, City Attorney

28
29
30

**LIFELINE DATA CENTERS, LLC
MASTER SERVICES AGREEMENT**

This Master Services Agreement (THE "AGREEMENT") BETWEEN LIFELINE DATA CENTERS, LLC ("LIFELINE") AND FORT WAYNE CITY UTILITIES ("CUSTOMER") MADE EFFECTIVE AS OF DATE INDICATED BELOW THE CUSTOMER SIGNATURE ON THE INITIAL ORDER FORM SUBMITTED BY CUSTOMER AND ACCEPTED BY LIFELINE.

I. OVERVIEW.

1.1 *General.* This Agreement states the terms and conditions by which Lifeline will deliver and Customer will receive any or all of the services provided by Lifeline, including facilities, network services, managed services and professional services. If Customer purchases any equipment from Lifeline (as indicated in the Order Form(s) described below, or later attached), the terms and conditions by which Customer purchases and Lifeline sells such equipment are stated in Addendum A attached hereto. Only this Section 1.1 and Addendum A shall apply to the purchase and sale of equipment. The specific services and/or products to be provided hereunder are identified in the Order Form(s) submitted by Customer and accepted by Lifeline and may be further described in detail in the Specification Sheets and Statements of Work attached to each Order Form, but not usually required. Each Order Form (with the attached Specification Sheet(s) and Statement(s) of Work) submitted, accepted and executed by both parties is hereby incorporated by reference into this Agreement. This Agreement is intended to cover any and all Services ordered by Customer and provided by Lifeline.

1.2 *Definitions.*

(a) "Customer Area" means that portion(s) of the Data Center(s) made available to Customer for the placement of Customer Equipment and/or Lifeline Supplied Equipment and use of the Service(s).

(b) "Customer Equipment" means the Customer's computer hardware, not including stored data, and other tangible equipment placed by Customer in the Customer Area. The Customer Equipment shall be identified on Lifeline's standard customer equipment list completed and delivered by Customer to Lifeline, as amended in writing from time to time by Customer.

(c) "Customer Registration Form" means the list that contains the names and contact information (e.g. email and telephone numbers) of Customer and the individuals authorized by Customer to enter the Data Center(s) and Customer Area, as delivered by Customer to Lifeline and amended in writing from time to time by Customer.

(d) "Customer Technology" means Customer's proprietary technology, including Customer's Internet and business operations, design, content, software tools, hardware designs, algorithms, software (in source and object forms), user interface designs, architecture, class libraries, objects and documentation (both printed and electronic), know-how, trade secrets and any related intellectual property rights throughout the world (whether owned by Customer or licensed to Customer from a third party) and also including any derivatives, improvements, enhancements or extensions of Customer Technology conceived, reduced to practice, or developed during the term of this Agreement by Customer.

(e) "Lifeline Supplied Equipment" means the computer hardware, software, cabinets, ladder rack and other tangible equipment and intangible computer code contained therein to be provided by Lifeline for use by Customer as set forth on the Order Form(s) or Statement(s) of Work.

(f) "Lifeline Technology" means Lifeline's proprietary technology, including Lifeline Services, business operations, software tools, hardware designs, algorithms, software (in source and object forms), user interface designs, architecture, class libraries, objects and documentation (both printed and electronic), network designs, know-how, trade secrets and any related intellectual property rights throughout the world (whether owned by Lifeline or licensed to Lifeline from a third party) and also including any derivatives, improvements, enhancements or extensions of Lifeline Technology conceived, reduced to practice, or developed during the term of this Agreement by either party that are not uniquely applicable to Customer or that have general applicability in the art.

(g) "Initial Term" means the minimum term for which Lifeline will provide the Service(s) or Product(s) to Customer, as stated on the Order

Form(s) or Statement(s) of Work. Except as otherwise expressly provided in this Agreement, Lifeline is obligated to provide and Customer is obligated to pay for each Service through its Initial Term and any Renewal Term.

(h) "Data Center(s)" means any of the facilities used by Lifeline to provide the Service(s).

(h1) "Material Failure" by Lifeline means any act or failure to act in a manner that is inconsistent with Lifeline's documented set of NIST Controls represented within Lifeline's audited RAR; which then causes the Customer's IT system to cease operation.

If by Customer means any act that violated its commitment to Lifeline, as referenced within the MSA and related documents.

(i) "Product" means any tangible equipment that Lifeline sells or provides to Customer as indicated on the Order Form(s) or Statement(s) of Work. Except as otherwise expressly provided in this Agreement, Lifeline is obligated to provide and Customer is obligated to pay for each Product through its Initial Term and any Renewal Term or as indicated on the Order Form(s) or Statement(s) of Work.

(j) "Professional Services" means any non-standard professional or consulting service provided by Lifeline to Customer as more fully described in a Statement of Work.

(k) "Renewal Term" means any service term following the Initial Term, as specified in Section 2.2.

(l) "Representatives" mean the individuals identified in writing on the Customer Registration Form and authorized by Customer to enter the Data Center(s) and the Customer Area.

(m) "Rules and Regulations" means the Lifeline general rules and regulations governing Customer's use of Services, including, but not limited to, online conduct, and the obligations of Customer and its Representatives in the Data Centers.

(n) "Service(s)" means the specific service(s) provided by Lifeline as described on the Order Form(s).

(o) "Service Commencement Date" means the date Lifeline will begin providing the Service(s) to Customer, as indicated in a Notice of Service Commencement delivered by Lifeline to Customer.

(p) "Service Level Warranty" is described and defined in Section 5.2 below.

(q) "Specification Sheet" means the detailed description for each Service, other than Professional Services, ordered by Customer that is attached to an Order Form(s).

(r) "Statement of Work" means the detailed description(s) of the Professional Services attached to (an) Order Form(s).

(s) "Work" means any tangible deliverable provided by Lifeline to Customer as described in the Statement of Work for any Professional Service.

2. DELIVERY OF SERVICES; TERMS; FEES.

2.1 *Delivery of Services.*

(a) *General.* By submitting an Order Form, Customer agrees to take and pay for, and, by accepting the Order Form, Lifeline agrees to provide, the Service(s) during the Initial Term and for any Renewal Term, as specified in paragraph 2.2(b) below.

(b) *Delivery of Supplemental Services.* The purpose of this provision is to enable Lifeline to provide Customer with certain limited services and equipment needed by Customer on a "one-off" or emergency basis ("Supplemental Services") where such services are not included within the scope of the Services as described in the Specification Sheets and/or Statement(s) of Work. Supplemental Service may include, as an example, a

request from Customer to Lifeline via telephone that Lifeline immediately replace a problem Customer server with a Lifeline server for a temporary period of time. Lifeline shall notify Customer of the fees for any Supplemental Services requested by Customer and obtain Customer's approval prior to providing such services. In the event Lifeline reasonably determines that Supplemental Services are required on an emergency basis, Lifeline may provide such services without the consent of Customer, thereafter provide notice of the services to Customer and bill Customer a reasonable fee for such services. Customer agrees to pay Lifeline the fees charged by Lifeline for Supplemental Services. Customer will be charged for Supplemental Services in the invoice issued the month following delivery of the services. Lifeline will use commercially reasonable efforts to provide Supplemental Services, provided that Lifeline has no obligation to determine the need for or provide Supplemental Services. All Supplemental Services provided pursuant to this paragraph 2.1(b) are provided on an "as-is" basis and exclude warranties of any kind, whether express or implied.

2.2 Term.

(a) *Term Commencement.* The Initial Term for each Service will commence on the Service Commencement Date indicated in the Notice of Service Commencement delivered by Lifeline to Customer when Lifeline begins providing each Service to Customer. Notice may be in the form of email, verbal conversation, or formal letter.

(b) *Renewal Term(s).* The term for Each Service will continue and renew automatically for additional terms equal to the Initial Term ("Renewal Term") unless Customer notifies Lifeline in writing at least sixty (60) days prior to the end of the Initial Term or a Renewal Term, as applicable, that it has elected to terminate such Service(s), in which case such Service(s) shall terminate at the end of such term. Each Renewal Term will also automatically continue and renew for additional terms equal to the Initial Term unless Customer notifies Lifeline in writing at least sixty (60) days prior to the end of any Renewal Term, as applicable, that it has elected to terminate such Service(s), in which case such Service(s) shall terminate at the end of such term. Lifeline is not obligated to provide Customer with advance notice of the expiration of the Initial Term or any Renewal Term. The termination of any particular Service will not affect the term of any other Service(s) or Customer's obligations to pay for any fees associated with any other Service(s) that are not terminated in accordance with this section. Notwithstanding the foregoing, Lifeline may change or increase the prices it charges Customer for any Service at any time after the Initial Term effective sixty (60) days after providing notice to Customer.

2.3 *Regulatory Amendment.* Lifeline may unilaterally amend this Agreement to comply with applicable regulatory requirements required under law. Upon Lifeline's notification of such changes, Lifeline will provide notice to Customer. If such regulatory amendment materially affects the position of either party or renders it illegal for a party to continue to perform under this Agreement in a manner consistent with the parties' intent, then the parties shall negotiate further amendments to this Agreement as necessary to correct any inequities, to the greatest extent possible.

3. FEES AND PAYMENT TERMS.

3.1 *Fees and Expenses.* Customer will pay all fees according to the prices and terms listed in the Order Form(s). The prices listed in the Order Form(s) will remain in effect during the Initial Term indicated in the Order Form(s) and will continue thereafter during any Renewal Term(s), unless modified in accordance with Section 2.2. Customer also agrees to reimburse Lifeline for actual out-of-pocket reasonable expenses incurred in providing Professional Services, if any, to Customer.

3.2 *Payment Terms.* On the Service Commencement Date for each Service, Customer will be billed an amount equal to all non-recurring charges indicated in the Order Form and the monthly recurring charges for the first month of the term. Monthly recurring charges for all other months will be billed in advance of the provision of Services. All other charges for Services received and expenses incurred for Professional Services during a month (e.g., bandwidth usage fees, travel expenses) will be billed at the end of the month in which the Services were provided. Payment for all fees is due upon receipt of each Lifeline invoice. All payments will be made in the United States in U.S. dollars. All fees associated with electronic payments will be paid by Customer.

3.3 *Late Payments.* Any payment not received within thirty (30) days of the invoice date will, at the sole discretion of Lifeline, accrue interest at a rate of one and one-half percent (1 1/2%) per month, or the highest rate allowed

by applicable law, whichever is lower. If Customer is delinquent in its payments, Lifeline may, upon written notice to Customer, modify the payment terms to require full payment before the provision of all Services and Lifeline Supplied Equipment or require other assurances to secure Customer's payment obligations hereunder. If Customer is delinquent for more than thirty (30) days, then Lifeline may discontinue all Services. This action in no way relieves Customer of any obligation to Lifeline as governed by this Agreement.

3.4 *Taxes.* Customer is an Indiana Municipality and therefore exempt from all state taxes.

4. TERMINATION.

4.1 *Termination For Cause.* Either party may terminate this Agreement if: (i) the other party breaches any material term or condition of this Agreement and fails to cure such breach within thirty (30) days after receipt of written notice of the same, except in the case of failure to pay fees, which must be cured within thirty (30) days after receipt of written notice from Lifeline and in accord with paragraph 3.3; (ii) the other party becomes the subject of a voluntary petition in bankruptcy or any voluntary proceeding relating to insolvency, receivership, liquidation, or assignment for the benefit of creditors; or (iii) the other party becomes the subject of an involuntary petition in bankruptcy or any involuntary proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of creditors, if such petition or proceeding is not dismissed within sixty (60) days of filing. Customer may also terminate this Agreement in accordance with the terms set forth in paragraph 6.2(f) ("Termination Option For Chronic Problems") of this Agreement.

4.2 *Early Termination.* Lifeline has established the prices it charges Customer under this Agreement based, in part, on Customer's promise to utilize and pay for the Services through the expiration of the entire Initial Term and any Renewal Term(s). If Lifeline terminates this Agreement or any Order Form due to Customer's default, or if Customer terminates this Agreement or any Service at any time prior to the expiration of the Initial Term or any Renewal Term for convenience, then Customer shall pay an Early Termination Fee to Lifeline. The amount of the Early Termination Fee shall be equal to the number of months remaining in the Initial Term or any Renewal Term from the date on which the applicable Service(s) is terminated or disconnected through the end of the applicable Initial Term or Renewal Term, multiplied by the monthly recurring charges for each Service that is terminated; plus all costs Lifeline incurs in terminating or disconnecting the Service. Customer agrees that the amount of the Early Termination Fee is a genuine estimate of Lifeline's actual damages resulting from an early termination of Services, and therefore for the sake of efficiency, economy and convenience, the Early Termination Fee set forth herein constitutes liquidated damages, is reasonable, and is not intended as a penalty or to be punitive in nature.

4.3 *Effect of Termination.* Upon the effective date of termination of any Service, including the early termination of any Service, or this Agreement:

- (a) Lifeline will immediately cease providing the Service(s);
- (b) any and all payment obligations of Customer under this Agreement for Service(s) provided through the date of termination will immediately become due;
- (c) any Early Termination Fee(s) shall become due and owing within 10 days of termination or disconnection of the Services;
- (d) within thirty (30) days of termination of this Agreement, each party will return all Confidential Information of the other party in its possession and will not make or retain any copies of such Confidential Information except as required to comply with any applicable legal or accounting record keeping requirement; and
- (e) within five (5) days after making timely payment for all amounts due and owing under this Agreement, including any Early Termination Fees, Customer shall (i) remove from the Data Center all Customer Equipment (excluding any Lifeline Supplied Equipment) and any other Customer property; (ii) deliver or make available all Lifeline Supplied Equipment to an authorized representative of Lifeline, and (iii) return the Customer Area to Lifeline in the same condition as it was on the Service Commencement Date for the Customer Area, normal wear and tear excepted. If Customer does not remove the Customer Equipment and its other property within such five-day

period, Lifeline will have the option to (i) move any and all such property to secure storage and charge Customer for the cost of such removal and storage, and/or (ii) liquidate the property in any reasonable manner.

4.4. *Customer Equipment as Security.* In the event that Customer fails to timely pay Lifeline all amounts due and owing under this Agreement, including any Early Termination Fees, Customer agrees that Lifeline (i) shall have a valid and enforceable security interest and lien on and against all Customer Equipment (ii) may restrict Customer's physical access to the Customer Area, Customer Equipment, and Lifeline Supplied Equipment; and/or (iii) take possession of and relocate any Customer Equipment and store it, at Customer's expense, until all amounts due and owing under this Agreement are paid in full or Lifeline's security interest and lien granted herein are fully satisfied, all without being liable to prosecution or for damages.

4.5. *Survival.* The following provisions will survive any expiration or termination of the Agreement: Sections 3, 4.1, 4.2, 4.4, 6.5, 7.6(d), 9, 10 and 11 (excluding 11.2).

4.6. *Basis of the Bargain; Failure of Essential Purpose.* The parties acknowledge that Lifeline has set its prices and entered into this Agreement in reliance upon Customer's promise to pay all fees required by this Agreement, and the limitations of liability and disclaimers of warranties and damages set forth herein, and that the same form an essential basis of the bargain between the parties.

5. CONFIDENTIAL INFORMATION; INTELLECTUAL PROPERTY OWNERSHIP; LICENSE GRANTS.

5.1 Confidential Information.

(a) *Nondisclosure of Confidential Information.* Each party acknowledges that it will have access to certain confidential information of the other party concerning the other party's business, plans, customers, technology, and products, and other information held in confidence by the other party ("*Confidential Information*"). Confidential Information will include all information in tangible or intangible form that is marked or designated as confidential or that, under the circumstances of its disclosure, should be considered confidential. Confidential Information will also include, but not be limited to, Lifeline Technology, Customer Technology, and the terms and conditions of this Agreement. Each party agrees that it will not use in any way, for its own account or the account of any third party, except as expressly permitted by, or required to achieve the purposes of, this Agreement, nor disclose to any third party (except as required by law or to that party's attorneys, accountants and other advisors as reasonably necessary), any of the other party's Confidential Information and will take reasonable precautions to protect the confidentiality of such information, at least as stringent as it takes to protect its own Confidential Information.

(b) *Exceptions.* Information will not be deemed Confidential Information hereunder if such information: (i) is known to the receiving party prior to receipt from the disclosing party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party; (ii) becomes known (independently of disclosure by the disclosing party) to the receiving party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party; (iii) becomes publicly known or otherwise ceases to be secret or confidential, except through a breach of this Agreement by the receiving party; or (iv) is independently developed by the receiving party. The receiving party may disclose Confidential Information pursuant to the requirements of a governmental agency or by operation of law, provided that it gives the disclosing party reasonable prior written notice sufficient to permit the disclosing party to contest such disclosure.

5.2 Intellectual Property.

(a) *Ownership.* Except for the rights expressly granted herein and the assignment expressly made in paragraph 5.4(a), this Agreement does not transfer from Lifeline to Customer any Lifeline Technology, and all right, title and interest in and to Lifeline Technology will remain solely with Lifeline. Except for the rights expressly granted herein, this Agreement does not transfer from Customer to Lifeline any Customer Technology, and all right, title and interest in and to Customer Technology will remain solely with Customer. Lifeline and Customer each agrees that it will not, directly or indirectly, reverse engineer, decompile, disassemble or otherwise attempt to derive source code or other trade secrets from the other party.

(b) *General Skills and Knowledge.* Notwithstanding anything to the contrary in this Agreement, Lifeline will not be prohibited or enjoined at any time by Customer from utilizing any skills or knowledge of a general nature acquired during the course of providing the Services, including, without limitation, information publicly known or available or that could reasonably be acquired in similar work performed for another customer of Lifeline.

5.3 License Grants.

(a) *By Lifeline.* Lifeline hereby grants to Client a nonexclusive, royalty-free license, during the term of this Agreement, to use the Lifeline Technology solely for purposes of using the Service(s). Customer shall have no right to use the Lifeline Technology for any purpose other than using the Service(s).

(b) *By Customer.* Customer agrees that if, in the course of performing the Service(s), it is necessary for Lifeline to access Customer Equipment and use Customer Technology, Lifeline is hereby granted and shall have a nonexclusive, royalty-free license, during the term of this Agreement, to use the Customer Technology solely for the purposes of delivering the Service(s) to Customer. Lifeline shall have no right to use the Customer Technology for any purpose other than providing the Service(s).

5.4 Professional Services; Assignments and License.

(a) *Assignment of Work.* Effective at the time Lifeline receives full and final payment for the Professional Service, Lifeline grants to Customer a non-exclusive, non-transferable, royalty free, perpetual license to all intellectual property rights, in the Work, provided, however, that such assignment does not include the Lifeline Technology.

(b) *License Grant.* Commencing at the time Lifeline receives full and final payment for the Work, Lifeline grants to Customer a non-exclusive, non-transferable, royalty free, perpetual license to use the Lifeline Technology incorporated into the Work solely in connection with the use of the Work as a whole. To the extent that Customer or its employees or contractors participate in the creation or development of Lifeline Technology, Customer, on behalf of itself and its employees and contractors, hereby assigns to Lifeline all right, title and interest, including all intellectual property rights in, the Lifeline Technology.

6. LIFELINE REPRESENTATIONS AND WARRANTIES.

6.1 *Authority and Performance of Lifeline.* Lifeline represents and warrants that (i) it has the legal right to enter into this Agreement and perform its obligations hereunder, and (ii) the performance of its obligations and delivery of the Services to Customer will not violate any applicable U.S. laws or regulations, including OSHA requirements, or cause a breach of any agreements with any third parties. In the event of a breach of the warranties set forth in this paragraph 6.1, Customer's sole remedy is termination pursuant to Section 4 of the Agreement.

6.2 *Service Level Warranty.* In the event that Customer experiences any of the service performance issues defined in this Section 6.2 as a result of Lifeline's failure to provide network or facility services, Lifeline will, upon Customer's request in accordance with paragraph 6.2(d) below, credit Customer's account as described below (the "*Service Level Warranty*"). The Service Level Warranty shall not apply to any services other than network and facility electrical power services, and, shall not apply to performance issues (i) caused by factors outside of Lifeline's reasonable control; (ii) that resulted from any actions or inactions of Customer or any third parties; or (iii) that resulted from Customer's equipment and/or third party equipment (not within the sole control of Lifeline); or involve Internet destinations unreachable due to Router Block Lists (RBL) and other such services.

(a) *Service Warranty Definitions.* For purposes of this Agreement, the following definitions shall apply only to the Services (not including Professional Services).

(i) "*Downtime*" shall mean sustained packet loss in excess of fifty percent (50%) within Lifeline's U.S. network for five (5) consecutive minutes or more due to the failure of Lifeline to provide Service(s) for such period. Downtime shall not include any packet loss or network unavailability during Lifeline's scheduled maintenance of the Data Centers, network and Service(s), as described in the Rules and Regulations. Nor shall Downtime include any amount of time taken by Customer to reconfigure equipment and/or software into full production status. Downtime may also mean the loss of electrical power provided by Lifeline due to an

event such as the loss of utility power or equipment malfunction directly in Lifeline's control. Under no circumstances does the loss of electrical power provided by Lifeline extend beyond the receptacle installed by Lifeline into the Customer's Equipment.

(ii) "Downtime Unit" shall mean one (1) minute of qualified Downtime.

(iii) "Excess Latency" shall mean transmission latency in excess of one hundred fifty (150) milliseconds round trip time between any two points within Lifeline's U.S. network.

(iv) "Excess Packet Loss" shall mean packet loss in excess of one percent (1%) between any two points within Lifeline's U.S. network.

(v) "Performance Problem" shall mean Excess Packet Loss and/or Excess Latency, due to issues involving Lifeline's direct control.

(vi) "Service Credit" shall mean an amount equal to the pro-rata monthly recurring connectivity charges (i.e., all monthly recurring network-related charges, all monthly colocation related charges) for one (1) minute of Service.

(b) *Downtime Periods.* In the event Customer experiences Downtime, Customer shall be eligible to receive from Lifeline a Service Credit for each Downtime Unit. For example, if Customer experiences six Downtime Units, it shall be eligible to receive six Service Credits.

(c) *Performance Problem; Packet Loss and Latency.* In the event that Lifeline discovers or is notified by Customer that Customer is experiencing a Performance Problem, Lifeline will take all actions necessary to determine the source of the Performance Problem.

(i) *Time to Discover Source of Performance Problem; Notification of Customer.* Within two (2) hours of discovering or receiving notice of the Performance Problem, Lifeline will determine whether the source of the Performance Problem is limited to the Customer Equipment or the Lifeline equipment connecting the Customer Equipment to the Lifeline Network, if the Performance problem is of a network nature. Should the Performance Problem be of an electrical power nature, then Lifeline will determine whether the problem is limited to the Customer Equipment or Lifeline equipment connecting electrical power to the Customer Equipment. If Lifeline determines that the Customer Equipment and Lifeline connection are not the source of the Performance Problem, Lifeline will use best efforts to determine the source of the Performance Problem within an additional two (2) hour period. In any event, Lifeline will notify Customer of the source of the Performance Problem within sixty (60) minutes of identifying the source.

(ii) *Remedy of Packet Loss and Latency.* If the source of the network Performance Problem is within the sole control of Lifeline, Lifeline will remedy the network Performance Problem within two (2) hours of determining the source of the network Performance Problem. If the source of and remedy to the network Performance Problem reside outside of the Lifeline Network or WAN connections, Lifeline will use commercially reasonable efforts to notify the party(ies) responsible for the source of the network Performance Problem and cooperate with it (them) to resolve such problem as soon as possible.

(iii) *Failure to Determine Source and/or Remedy.* In the event that Lifeline is the sole source of the network or electrical power Performance Problem and is unable to remedy such Performance Problem within the time period described in subsection above, Lifeline will deliver a Service Credit to Customer for each one (1) hour period in excess of the time periods for identification and resolution described above.

(d) *Customer Must Request Service Credit.* In order to receive any of the Service Credits described in this Section 6.2, Customer must notify Lifeline within thirty (30) days from the time Customer becomes eligible to receive a Service Credit. Failure to comply with this requirement will forfeit Customer's right to receive a Service Credit.

(e) *Remedies Shall Not Be Cumulative; Maximum Service Credit.* The aggregate maximum number of Service Credits to be issued by Lifeline to Customer for any and all Downtime periods and Performance Problems that occur in a single calendar month shall not exceed forty-three thousand two hundred (43,200) Service Credits. A Service Credit shall be issued in the Lifeline invoice in the month following the Downtime or Performance Problem, unless the Service Credit is due in Customer's final month of Service. In such case, a refund for the dollar value of the Service Credit will be mailed to Customer. Customer shall also be eligible to receive a pro-rata refund for (i) Downtime periods and Performance Problems for which

Customer does not receive a Service Credit and (ii) any Services Lifeline does not deliver to Customer for which Customer has paid.

(f) *Termination Option for Chronic Problems.* Customer may terminate this Agreement for cause and without penalty by notifying Lifeline within thirty (30) days following the end of a calendar month in the event either of the following occurs: (i) Customer experiences more than four hundred eighty (480) Downtime periods resulting from three (3) or more nonconsecutive Downtime events during the calendar month; or (ii) Customer experiences more than twenty-four (24) consecutive hours of Downtime due to any single event. Such termination will be effective thirty (30) days after receipt of such notice by Lifeline.

(g) THE SERVICE LEVEL WARRANTY SET FORTH IN THIS SECTION 6.2 SHALL ONLY APPLY TO THE NETWORK AND FACILITIES ELECTRICAL POWER SERVICE(S) PROVIDED BY LIFELINE AND, DOES NOT APPLY TO (I) ANY PROFESSIONAL SERVICES; (II) ANY SUPPLEMENTAL SERVICES; AND (III) ANY SERVICE(S) THAT EXPRESSLY EXCLUDE THIS SERVICE LEVEL WARRANTY (AS STATED IN THE SPECIFICATION SHEETS FOR SUCH SERVICES). THIS SECTION 6.2 STATES CUSTOMER'S SOLE AND EXCLUSIVE REMEDY FOR ANY FAILURE BY LIFELINE TO PROVIDE SERVICE(S).

6.3 *Service Performance Warranty.* Lifeline warrants that it will perform the Services in a manner consistent with industry standards reasonably applicable to the performance thereof.

6.4 *Selection of Lifeline Supplied Equipment; Manufacturer Warranty.* Customer acknowledges that it has selected the Lifeline Supplied Equipment and disclaims any statements made by Lifeline. Except with respect to any express warranties for Service(s) related to Lifeline Supplied Equipment, Customer acknowledges and agrees that its use and possession of the Lifeline Supplied Equipment by Customer shall be subject to and controlled by the terms of any manufacturer's or, if appropriate, supplier's warranty, and Customer agrees to look solely to the manufacturer or, if appropriate, supplier with respect to all mechanical, service and other claims, and the right to enforce all warranties made by said manufacturer are hereby, to the extent Lifeline has the right, assigned to Customer solely for the Initial Term.

6.5 *No Other Warranty.* EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN THIS SECTION 6, THE SERVICES ARE PROVIDED ON AN "AS IS" BASIS, AND CUSTOMER'S USE OF THE SERVICES IS AT ITS OWN RISK. LIFELINE DOES NOT MAKE, AND HEREBY DISCLAIMS, ANY AND ALL OTHER EXPRESS AND/OR IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT AND TITLE, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE. LIFELINE DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR-FREE, OR COMPLETELY SECURE.

6.6 *Disclaimer of Actions Caused by and/or Under the Control of Third Parties.* LIFELINE DOES NOT AND CANNOT CONTROL THE FLOW OF DATA TO OR FROM LIFELINE'S NETWORK AND OTHER PORTIONS OF THE INTERNET. SUCH FLOW DEPENDS IN LARGE PART ON THE PERFORMANCE OF INTERNET SERVICES PROVIDED OR CONTROLLED BY THIRD PARTIES. AT TIMES, ACTIONS OR INACTIONS OF SUCH THIRD PARTIES CAN IMPAIR OR DISRUPT CUSTOMER'S CONNECTIONS TO THE INTERNET (OR PORTIONS THEREOF). ALTHOUGH LIFELINE WILL USE COMMERCIALY REASONABLE EFFORTS TO TAKE ALL ACTIONS IT DEEMS APPROPRIATE TO REMEDY AND AVOID SUCH EVENTS, LIFELINE CANNOT GUARANTEE THAT SUCH EVENTS WILL NOT OCCUR. ACCORDINGLY, LIFELINE DISCLAIMS ANY AND ALL LIABILITY RESULTING FROM OR RELATED TO SUCH EVENTS.

6.7 *Disclaimer of Service Interruption Caused by Computer Viruses and DDOS.* Lifeline cannot control the introduction of viruses on to the Internet or into Customer Equipment or Lifeline Supplied Equipment. Lifeline cannot control malicious attacks from third parties, known as Denial of Service attacks (DOS, or DDOS). Although Lifeline will use commercially reasonable efforts to protect against computer virus infestation and DDOS attacks, Lifeline cannot guarantee that such events will not occur. Accordingly, Lifeline disclaims any and all liability resulting from or related to such events.

6.8 *Disclaimer of Service Interruption Caused by Acts of God.* Lifeline does not and cannot control Acts of God, such as severe weather events and other unforeseen circumstances. Customer assumes all risks associated with such events.

7. CUSTOMER OBLIGATIONS.

7.1 Warranties of Customer.

(a) *General.* Customer represents and warrants that (i) it has the legal right and authority, and will continue to own or maintain the legal right and authority, during the term of this Agreement, to place and use any Customer Equipment as contemplated under this Agreement; (ii) the performance of its obligations and use of the Services (by Customer, its customers and users) will not violate any applicable laws, regulations or the Rules and Regulations or cause a breach of any agreements with any third parties or unreasonably interfere with other Lifeline customers' use of Lifeline services, and (iii) all equipment, materials and other tangible items placed by Customer at Data Centers will be used in compliance with all applicable manufacturer specifications.

(b) *Breach of Warranties.* In the event of any breach of any of the foregoing warranties, in addition to any other remedies available at law or in equity, Lifeline will have the right, in its sole reasonable discretion, to suspend immediately any related Services if deemed reasonably necessary by Lifeline to prevent any harm to Lifeline and its business. Lifeline will provide notice and opportunity to cure if practicable depending on the nature of the breach. Once cured, Lifeline will promptly restore the Service(s).

7.2 *Compliance with Law and Rules and Regulations.* Customer agrees that it will use the Service(s) only for lawful purposes and in accordance with this Agreement. Customer will comply at all times with all applicable laws and regulations and the Rules and Regulations, as updated by Lifeline from time to time. The Rules and Regulations are incorporated herein and made a part hereof by this reference. Lifeline may change the Rules and Regulations upon fifteen (15) days' notice to Customer, which notice may be provided by email notification and posting such new Rules and Regulations at the Lifeline web site www.lifelinedatacenters.com. Customer agrees that it has received, read and understands the current version of the Rules and Regulations. The Rules and Regulations contain restrictions on Customer's and Customer's users' online conduct (including prohibitions against unsolicited commercial email) and contain financial penalties for violations of such restrictions. Customer agrees to comply with such restrictions and, in the event of a failure to comply, Customer agrees to pay the financial penalties in accordance with the Rules and Regulations. Customer acknowledges that Lifeline exercises no control whatsoever over the content of the information passing through Customer's site(s) and that it is the sole responsibility of Customer to ensure that the information it and its users transmit and receive complies with all applicable laws and regulations and the Rules and Regulations.

7.3 *Access and Security.* Except with the advanced written consent of Lifeline, Customer's access to the Data Centers will be limited solely to the Representatives. Representatives may only access the Customer Area and are prohibited from accessing other areas of the Data Center(s) unless accompanied by an authorized Lifeline representative.

7.4 *Restrictions on Use of Services.* In an effort to combat illegal activity, Customer shall not, without the prior written consent of Lifeline (which may be withheld in its sole discretion), resell the Services to any third parties or connect Customer Equipment directly to anything other than the Lifeline network, equipment and facilities. Furthermore, in the event Customer does resell the Services, Customer is fully liable for all actions performed by Customer's customer.

7.5 *Relocation of Customer Equipment.* In the event that it becomes necessary to relocate the Customer Equipment to another Customer Area or Data Center operated by Lifeline, Customer will cooperate in good faith with Lifeline to facilitate such relocation, provided that such relocation is based on reasonable business needs of Lifeline (including the needs of other Lifeline customers), the expansion of the space requirements of Customer or otherwise. Lifeline shall be solely responsible for any costs and expenses incurred by Lifeline in connection with any such relocation and will use commercially reasonable efforts, in cooperation with Customer, to minimize and avoid any interruption to the Services.

7.6 Lifeline Supplied Equipment.

(a) *Delivery and Term.* On or prior to the Service Commencement Date, Lifeline shall deliver to Customer, at the designated Customer Area, the Lifeline Supplied Equipment. Customer shall have the right to use the Lifeline Supplied Equipment for the Initial Term set forth in the Order Form and any additional period agreed to in writing by Lifeline. Customer shall not remove any Lifeline Supplied Equipment from the Customer Area(s) without the prior written consent of Lifeline.

(b) *Title.* The Lifeline Supplied Equipment shall always remain the personal property of Lifeline. Customer shall have no right or interest in or to the Lifeline Supplied Equipment except as provided in this Agreement and the applicable Order Form and shall hold the Lifeline Supplied Equipment subject and subordinate to the rights of Lifeline. Customer agrees to execute UCC financing statements as and when requested by Lifeline for Lifeline Supplied Equipment and hereby appoints Lifeline as its attorney-in-fact to execute such financing statements on behalf of Customer. Customer will, at its own expense, keep the Lifeline Supplied Equipment free and clear from any liens or encumbrances of any kind (except any caused by Lifeline) and will indemnify and hold Lifeline harmless from and against any loss or expense caused by Customer's failure to do so. Customer shall give Lifeline immediate written notice of any attachment or judicial process affecting the Lifeline Supplied Equipment or Lifeline's ownership. Customer will not remove, alter or destroy any labels on the Lifeline Supplied Equipment stating that it is the property of Lifeline and shall allow the inspection of the Lifeline Supplied Equipment at any time. Any amounts paid by Customer for Lifeline Supplied Equipment shall not be considered payment towards any purchase of the Lifeline Supplied Equipment, but rather are payments for the use of Lifeline Supplied Equipment during the Initial Term or any Renewal Term of the applicable Order Form.

(c) *Use, Maintenance and Repair.* Customer will, at its own expense, keep the Lifeline Supplied Equipment in good repair, appearance and condition, other than normal wear and tear, and, if not included in the Services, shall obtain, pay for and keep in effect through the Initial Term a hardware and software maintenance agreement with the manufacturer or other party acceptable to Lifeline. All parts furnished in connection with such repair and maintenance shall be manufacturer authorized parts and shall immediately become components of the Lifeline Supplied Equipment and the property of Lifeline. Customer shall use the Lifeline Supplied Equipment in compliance with the manufacturer's or supplier's suggested guidelines.

(d) *Upgrades and Additions.* Customer may affix or install any accessory, addition, upgrade, equipment or device on to the Lifeline Supplied Equipment (other than electronic data) ("Additions") provided that such Additions (i) can be removed without causing material damage to the Lifeline Supplied Equipment; (ii) do not reduce the value of the Lifeline Supplied Equipment and (iii) are obtained from or approved in writing by Lifeline and are not subject to the interest of any third party other than Lifeline. Any other Additions may not be installed without Lifeline's prior written consent. At the end of the Initial Term or Renewal Term, Customer shall remove any Additions which (i) were not provided by Lifeline and (ii) are readily removable without causing material damage or impairment of the intended function, use, or value of the Lifeline Supplied Equipment, and restore the Lifeline Supplied Equipment to its original configuration. Any Additions, which are not so removable, will become the property of Lifeline (lien free).

8. INSURANCE.

8.1 *Lifeline Minimum Levels.* Lifeline agrees to keep in full force and effect during the term of this Agreement: (i) comprehensive general liability insurance in an amount not less than \$2 million per occurrence for bodily injury and property damage and (ii) workers' compensation insurance in an amount not less than that required by applicable law. Lifeline agrees that it will ensure and be solely responsible for ensuring that its contractors and subcontractors maintain insurance coverage at levels no less than those required by applicable law and customary in Lifeline's and its agents' industries.

8.2 *Customer Minimum Levels.* In order to provide customers with physical access to facilities operated by Lifeline and equipment owned by third parties, Lifeline is required by its insurers to ensure that each Lifeline customer maintains adequate insurance coverage. Customer agrees to keep in full force and effect during the term of this Agreement: (i) comprehensive general liability insurance in an amount not less than \$2 million per occurrence for bodily injury and property damage and (ii) workers' compensation insurance in an amount not less than that required by applicable law. Customer agrees that it will ensure and be solely responsible for ensuring that its agents (including contractors and subcontractors) maintain insurance coverage at levels no less than those required by applicable law and customary in Customer's and its agents' industries. Notwithstanding any other provision of this Section, the Customer may satisfy the insurance obligations hereunder by a self-funded program. The Customer shall furnish Lifeline with a certificate or other written evidence to be provided all or part of its coverage under the self-insurance program.

8.3 *Certificates of Insurance; Naming Lifeline as an Additional Insured.* Intentionally deleted.

9. LIMITATIONS OF LIABILITY.

9.1 *Personal Injury.* CUSTOMER, EACH REPRESENTATIVE, AND ANY OTHER PERSON VISITING A DATA CENTER DOES SO AT ITS OWN RISK. LIFELINE ASSUMES NO LIABILITY WHATSOEVER FOR ANY HARM TO SUCH PERSONS RESULTING FROM ANY CAUSE OTHER THAN THE NEGLIGENCE OR WILLFUL MISCONDUCT OF LIFELINE.

9.2 *Damage to Customer Equipment.* LIFELINE ASSUMES NO LIABILITY FOR ANY DAMAGE TO, OR LOSS OF, ANY CUSTOMER EQUIPMENT RESULTING FROM ANY CAUSE OTHER THAN THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF LIFELINE. TO THE EXTENT LIFELINE IS LIABLE FOR ANY DAMAGE TO, OR LOSS OF, CUSTOMER EQUIPMENT FOR ANY REASON, SUCH LIABILITY WILL BE LIMITED SOLELY TO THE THEN-CURRENT REPLACEMENT VALUE OF THE CUSTOMER EQUIPMENT, EXCLUDING LOST DATA, SOFTWARE AND FIRMWARE.

9.3 *LIMITATION ON AMOUNT OF DAMAGES.* WITH RESPECT TO ALL CLAIMS ARISING OUT OF, UNDER OR IN CONNECTION WITH AN ORDER FORM OR A STATEMENT OF WORK FOR PROFESSIONAL SERVICES, LIFELINE'S LIABILITY WILL NOT EXCEED, IN THE AGGREGATE, AN AMOUNT EQUAL TO THE CHARGES ACTUALLY PAID BY CUSTOMER TO LIFELINE UNDER SUCH ORDER FORM OR STATEMENT OF WORK FOR PROFESSIONAL SERVICES, AS THE CASE MAY BE, DURING THE SIX MONTHS PRIOR TO THE FIRST EVENT ON WHICH SUCH CLAIM IS BASED. WITH RESPECT TO ALL CLAIMS ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT, LIFELINE'S LIABILITY WILL NOT EXCEED, IN THE AGGREGATE, AN AMOUNT EQUAL TO THE CHARGES ACTUALLY PAID BY CUSTOMER TO LIFELINE UNDER THIS AGREEMENT DURING THE SIX MONTHS PRIOR TO THE FIRST EVENT ON WHICH SUCH CLAIM IS BASED.

9.4 *LIMITATION ON TYPES OF DAMAGES.* EXCEPT FOR A BREACH OF SECTION 5.1 ("CONFIDENTIAL INFORMATION") OF THIS AGREEMENT, IN NO EVENT WILL EITHER PARTY BE LIABLE OR RESPONSIBLE TO THE OTHER FOR ANY TYPE OF INCIDENTAL, PUNITIVE, INDIRECT OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST REVENUE, LOST PROFITS, REPLACEMENT GOODS, LOSS OF TECHNOLOGY, RIGHTS OR SERVICES, LOSS OF DATA, OR INTERRUPTION OR LOSS OF USE OF SERVICE OR EQUIPMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER ARISING UNDER THEORY OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE.

10. INDEMNIFICATION.

10.1 *Indemnification.* Each party will indemnify, defend and hold the other harmless from and against any and all costs, liabilities, losses, and expenses (including, but not limited to, reasonable attorneys' fees) (collectively, "Losses") resulting from any claim, suit, action, or proceeding (each, an "Action") brought by any third party against the other or its affiliates alleging (i) the infringement or misappropriation of any intellectual property right relating to the delivery or use of the Service(s) (but excluding any infringement contributorily caused by the other party); (ii) personal injury caused by the negligence or willful misconduct of the other party; and (iii) any violation of or failure to comply with the Rules and Regulations. Customer will indemnify, defend and hold Lifeline, its affiliates and customers harmless from and against any and all Losses resulting from or arising out of any Action brought against Lifeline, its affiliates or customers alleging any damage or destruction to the Customer Area, the Data Centers, Lifeline equipment or other customer equipment caused by Customer, its Representative(s) or designs.

10.2 *Notice.* Each party's indemnification obligations hereunder shall be subject to (i) receiving prompt written notice of the existence of any Action; (ii) being able to, at its option, control the defense of such Action; (iii) permitting the indemnified party to participate in the defense of any Action; and (iv) receiving full cooperation of the indemnified party in the defense thereof.

10.3 *Waiver of Subrogation.* The parties hereby waive all rights against each other and against the agents and employees of the other for damages covered by any property and/or liability insurance held by a party.

11. MISCELLANEOUS PROVISIONS.

11.1 *Force Majeure.* Except for the obligation to make payments, neither party will be liable for any failure or delay in its performance under this Agreement due to any cause beyond its reasonable control, including acts of

war, terrorism, acts of God, earthquake, flood, tornado, embargo, riot, sabotage, labor shortage or dispute, governmental act or failure of the Internet (not resulting from the actions or inactions of Lifeline or Customer), provided that the party delayed by a force majeure event: (a) gives the other party prompt notice of such cause, and (b) uses its reasonable commercial efforts to promptly correct such failure or delay in performance.

11.2 *No Lease; Agreement Subordinate to Master Lease.* This Agreement is a services agreement and is not intended to and will not constitute a lease of any real property. Customer acknowledges and agrees that (i) it has been granted only a license to occupy the Customer Area and use the Data Centers and any equipment provided by Lifeline in accordance with this Agreement; (ii) Customer has not been granted any real property interest in the Customer Space or Data Centers; (iii) Customer has no rights as a tenant or otherwise under any real property or landlord/tenant laws, regulations, or ordinances; and (iv) this Agreement, to the extent it involves the use of space leased by Lifeline, shall be subordinate to any lease between Lifeline and its landlord(s).

11.3 *Marketing.* Customer agrees that during the term of this Agreement Lifeline may publicly refer to Customer, orally and in writing, as a Customer of Lifeline. Any other reference to Customer by Lifeline requires the written consent of Customer.

11.4 *Government Regulations.* Customer will not export, re-export, transfer, or make available, whether directly or indirectly, any regulated item or information to anyone outside the U.S. in connection with this Agreement without first complying with all export control laws and regulations which may be imposed by the U.S. Government and any country or organization of nations within whose jurisdiction Customer operates or does business.

11.5 *Non-Solicitation.* During the Term of this Agreement and continuing through the first anniversary of the termination of this Agreement, Customer agrees that it will not, and will ensure that its affiliates do not, directly or indirectly, solicit or attempt to solicit for employment any persons employed by Lifeline or contracted by Lifeline to provide Services to Customer.

11.6 *No Third Party Beneficiaries.* Lifeline and Customer agree that, except as otherwise expressly provided in this Agreement, there shall be no third party beneficiaries to this Agreement, including but not limited to the insurance providers for either party or the customers of Customer.

11.7 *Governing Law; Dispute Resolution.* This Agreement is made under and will be governed by and construed in accordance with the laws of the State of Indiana (except that body of law controlling conflicts of law) and specifically excluding from application to this Agreement that law known as the United Nations Convention on the International Sale of Goods.

11.8 *Severability; Waiver.* In the event any provision of this Agreement is held by a tribunal of competent jurisdiction to be contrary to the law, the remaining provisions of this Agreement will remain in full force and effect. The waiver of any breach or default of this Agreement will not constitute a waiver of any subsequent breach or default, and will not act to amend or negate the rights of the waiving party.

11.9 *Assignment.* Customer may assign this Agreement in whole as part of a corporate reorganization, consolidation, merger, or sale of substantially all of its assets. Customer may not otherwise assign its rights or delegate its duties under this Agreement either in whole or in part without the prior written consent of Lifeline, and any attempted assignment or delegation without such consent will be void. Lifeline may assign this Agreement in whole or part. Lifeline also may delegate the performance of certain Services to third parties, including Lifeline's wholly owned subsidiaries, provided Lifeline controls the delivery of such Services to Customer and remains responsible to Customer for the delivery of such Services. This Agreement will bind and inure to the benefit of each party's successors and permitted assigns.

11.10 *Notice.* Any notice or communication required or permitted to be given hereunder may be delivered by hand, deposited with an overnight courier, sent by email, confirmed facsimile, or mailed by registered or certified mail, return receipt requested, postage prepaid, in each case to the address of the receiving party as listed on the Order Form or at such other address as may hereafter be furnished in writing by either party to the other party. Such notice will be deemed to have been given as of the date it is delivered, mailed, emailed, faxed or sent, whichever is earlier.

11.11 *Relationship of Parties.* Lifeline and Customer are independent contractors and this Agreement will not establish any relationship of

partnership, joint venture, employment, franchise or agency between Lifeline and Customer. Neither Lifeline nor Customer will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent, except as otherwise expressly provided herein.

11.12. *Entire Agreement; Counterparts; Originals.* This Agreement, including all documents incorporated herein by reference, constitutes the complete and exclusive agreement between the parties with respect to the subject matter hereof, and supersedes and replaces any and all prior or contemporaneous discussions, negotiations, understandings and agreements, written and oral, regarding such subject matter. Any additional or different terms in any purchase order or other response by Customer shall be deemed objected to by Lifeline without need of further notice of objection, and shall be of no effect or in any way binding upon Lifeline. This Agreement may be executed in two or more counterparts, each of which will be deemed an original, but all of which together shall constitute one and the same instrument. Once signed, any reproduction of this Agreement made by reliable means (e.g., photocopy, facsimile) is considered an original. This Agreement may be changed only by a written document physically signed by authorized representatives of Lifeline and Customer in accordance with this Section 11.12. For purposes of this Agreement, the term "written" means anything reduced to a tangible form by a party, including a printed or hand written document, e-mail or other electronic format.

11.13. *Mutually Negotiated Agreement.* The Parties acknowledge and agree that this Agreement is the result of negotiations between them, and no party shall be deemed the drafter of this Agreement. The language of all parts of the Agreement shall in all cases be constructed as a whole, according to its fair meaning, and not strictly for or against any party. The Parties each acknowledge they have had the benefit of counsel of their choosing regarding the interpretation and effect of this Agreement.

11.14. *Interpretation of Conflicting Terms.* In the event of a conflict between or among the terms in this Agreement, the Order Form(s), the Specification Sheet(s), the Statement(s) of Work, and any other document made a part hereof, the documents shall control in the following order: the

Agreement, Order Form with the latest date, the Statement of Work, Specification Sheets, and other documents.

11.15. *Energy Price Increases.* In the event Lifeline experiences energy price increases, then it reserves the right to pass those cost through to Customer.

11.16. *Personal Jurisdiction and Forum.* All questions or controversies arising out of or in any way relating to any this Agreement, any Order Form, Statement of Work, or other documents that is part of this Agreement, or any other aspect of the relationship between Lifeline and Customer shall be submitted to the courts of the State of Indiana having subject matter jurisdiction, and the parties submit themselves and waive any objection to the personal jurisdiction of all such Federal District Courts and/or Indiana courts, as the case may be. Customer further agrees that venue for any legal action brought by either party shall be proper in Allen, Hamilton or Marion County and Customer waives any right to challenge venue in either such county.



11.17. *Attorney Fees.* Each Party shall pay their own attorney fees, in seeking enforcement of any right or obligation provided in the Agreement.

11.18. *Waiver of Jury Trial.* Customer hereby waives any right to a trial by jury in any legal action involving the parties.

11.19. *Limitation of Actions.* Customer agrees that any claim or cause of action it may hereafter have against Lifeline shall be brought and commenced within one year of the expiration or termination of this Agreement. Customer waives its right to bring any claims or causes of action in any court, whether based in tort or contract, against Lifeline beyond one year after the expiration or termination of this Agreement.

11.20. *Rights Cumulative.* The rights and remedies herein are cumulative and not exclusive of other rights and remedies which may be granted or provided by law, and nothing herein contained shall be construed to preclude or in any way prohibit Lifeline from instituting and otherwise prosecuting to judgment a lawsuit in any court of competent jurisdiction to effect the collection of any sums due it or to enforce any right or remedy arising hereunder or otherwise.

Authorized representatives of Customer and Lifeline have read the foregoing and all documents incorporated therein and agree and accept such terms effective as of the date first above written.

CUSTOMER	LIFELINE DATA CENTERS, LLC
Signature: 	Signature:  <small>Richard L Banta CN = Richard L Banta email = rbanta@ldc.net C = US O = Lifeline Data Centers, LLC 2021.03.25 11:06:55 -0400</small>
Print Name: STEVE GILLETTE	Print Name: Richard L Banta
Title: PUR. DIR	Title: President of the Managing Member
Date: 3/18/21	Date: 03/25/2021

This Agreement incorporates the following documents:

- Order Form(s)
- Addendum A - Equipment Purchase Terms and Conditions (if applicable)

ADDENDUM A

EQUIPMENT PURCHASE TERMS AND CONDITIONS

1. SHIPPING AND HANDLING. All equipment purchased by Customer (the "Equipment") is provided FOB Indianapolis, Indiana. Shipment will be made as specified by Customer and Customer is solely responsible for all expenses in connection with the delivery of the Equipment. The Equipment will be deemed accepted by Customer upon receipt.

THE EQUIPMENT AND SUPERSEDE ALL PREVIOUS AGREEMENTS, PROMISES OR REPRESENTATIONS, ORAL OR WRITTEN.

2. PURCHASE PRICE AND TAXES. Customer shall pay to Lifeline the purchase price set forth in the applicable Order Form ("Purchase Price") for each item of Equipment. Customer hereby grants and Lifeline reserves a purchase money security interest in the Equipment and the proceeds thereof as a security for its obligations hereunder until payment of the full Purchase Price to Lifeline. The Purchase Price is due and payable prior to delivery of the Equipment. Customer shall pay all taxes and other governmental charges assessed in connection with the rental, use or possession of the Equipment including, without limitation, any and all sales and/or use taxes and personal property taxes (other than taxes on Lifeline's net income).

3. TITLE. Customer shall acquire title to the Equipment upon full payment of the purchase price(s) set forth herein. Notwithstanding the foregoing, Lifeline and any licensor of rights to Lifeline shall retain title to and rights in the intellectual property (whether or not subject to patent or copyright) and content contained in the materials supplied under the terms of this Agreement.

4. SELECTION OF EQUIPMENT; MANUFACTURER WARRANTY. Customer acknowledges that is has selected the Equipment and disclaims any statements made by Lifeline. Customer acknowledges and agrees that use and possession of the Equipment by Customer shall be subject to and controlled by the terms of any manufacturer's or, if appropriate, supplier's warranty, and Customer agrees to look solely to the manufacturer or, if appropriate, supplier with respect to all mechanical, service and other claims, and the right to enforce all warranties made by said manufacturer are hereby, to the extent Lifeline has the right, assigned to Customer. THE FOREGOING WARRANTY IS THE EXCLUSIVE WARRANTY AND IS IN LIEU OF ANY ORAL REPRESENTATION AND ALL OTHER WARRANTIES AND DAMAGES, WHETHER EXPRESSED, IMPLIED OR STATUTORY. LIFELINE HAS NOT MADE NOR DOES MAKE ANY OTHER WARRANTIES OF ANY KIND, EXPRESSED OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, OR OF NONINFRINGEMENT OF THIRD PARTY RIGHTS AND AS TO LIFELINE AND ITS ASSIGNEES, CUSTOMER PURCHASES THE EQUIPMENT "AS IS".

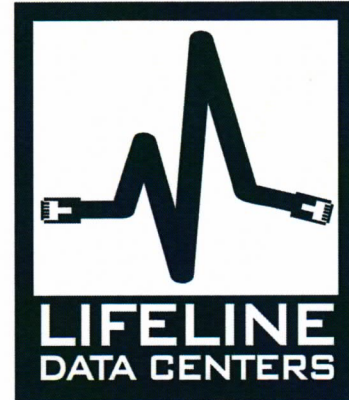
5. LIMITATION OF LIABILITY. Lifeline's entire liability for any damages which may arise hereunder, for any cause whatsoever, and regardless of the form of action, whether in contract or in tort, including Lifeline's negligence, or otherwise, shall be limited to the Purchase Price paid by Customer for the Equipment. IN NO EVENT WILL LIFELINE BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, OR FOR ANY LOSS OF BUSINESS OR PROSPECTIVE BUSINESS OPPORTUNITIES, PROFITS, SAVINGS, INFORMATION, USE OR OTHER COMMERCIAL OR ECONOMIC LOSS, EVEN IF LIFELINE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

6. GOVERNING LAW; DISPUTE RESOLUTION. This Agreement is made under and will be governed by and construed in accordance with the laws of the State of Indiana (except that body of law controlling conflicts of law) and specifically excluding from application to this Agreement that law known as the United Nations Convention on the International Sale of Goods. Any controversy, claim, or dispute arising under or relating to this Agreement, including the existence, validity, interpretation, performance, termination or breach thereof, the parties to this Agreement hereby consent to jurisdiction and venue in the courts of the state of Indiana.

7. MISCELLANEOUS. THE ABOVE TERMS AND CONDITIONS ARE THE ONLY TERMS AND CONDITIONS UPON WHICH LIFELINE IS WILLING TO SELL

**LIFELINE DATA CENTERS
ORDER FORM**

Customer Name:	FORT WAYNE CITY UTILITIES
Billing Address:	200 E BERRY STREET FORT WAYNE, IN 46802
Correspondence Address:	200 E BERRY STREET FORT WAYNE, IN 46802
Form Date:	SEPTEMBER 7, 2023
Form Number:	783
Installation Site(s):	7601 S ANTHONY BLVD FORT WAYNE, IN 46816
Type of Service:	NEW
Original Service Agreement Date:	DECEMBER 1, 2023
Initial Term:	36 MONTHS



Services	Brief Description *	Qty	Unit Price Monthly	Extended Non-Recurring Fees	Extended Monthly Fees
Facility					
	<i>Equipment Rack Fee</i>	6	\$800	\$0	\$4,800
	<i>Additional Equipment Racks</i>	0	\$800	\$700	\$0
	<i>Caged Space Fee (100 square feet) with enclosed top</i>	4	\$400	\$13,680	\$1,600
	<i>Additional Caged Space Fee (100 square feet) with enclosed top</i>	0	\$400	\$0	\$0
	<i>Electronic Card Access on Cage</i>	1	\$0	\$2,200	\$0
	<i>Compliance Fee</i>	1	\$200	\$0	\$200
	<i>Additional Electrical Fees¹</i>		TBD		
	Total:			\$15,880	\$6,600

* More detailed descriptions of the Services are contained in the specification sheets and/or Statement of Work for each service, which are incorporated herein by this reference.

CUSTOMER'S INITIALS _____

**LIFELINE DATA CENTERS
ORDER FORM**

Lifeline agrees to establish with the Initial Term of this Agreement, a 10x50 Caged Space for the Customer, but only charge Customer for a traditional 10x50 Caged Space, until Customer begins to utilize the final 10x10 Caged Space area. The Customer shall pay for this space with a monthly Caged Space Fee and on an Equipment Rack by Equipment Rack basis. Each Additional Equipment Rack installed by the Customer will cause the Extended Monthly Fee to increase by an amount equal to the Unit Price Monthly as indicated above for Additional Equipment Racks. This increase to the Extended Monthly Fee will be permanent for the remainder of the Term and subsequent Renewal Terms. The Customer is responsible for providing their own Racks and Power Distribution Units (PDUs) unless explicitly specified as a separate line item from the Equipment Rack Fee.

¹Additional Electric Fees will be determined in the following manner: Each Equipment Rack Fee will include 0 kW/hr of conditioned electricity. The total amount of Additional Electric Fees will be calculated each month by adding the total power used by Customer and then subtracting that number from total power allocated to the respective Equipment Rack. The total number of additional kW/hr's will then be computed in the following formula to determine that month's Additional Electric Fee:

$$\text{kW/hr} * 24 * (365.25/12) * \text{RATE} = \text{Additional Electric Fee}$$

Lifeline's kW/hr fee RATE for conditioned electric is \$0.19 per kW/hr. This fee will fluctuate, up or down, directly with Indiana Michigan Power Company kW/hr charges.

All other services such as system setup, load balancing, managed services and redundant facilities will be quoted on a per case basis.

*** More detailed descriptions of the Services are contained in the specification sheets and/or Statement of Work for each service, which are incorporated herein by this reference.**

CUSTOMER'S INITIALS _____

**LIFELINE DATA CENTERS
ORDER FORM**

ORDER FORM TERMS AND CONDITIONS:

- (1) Customer hereby orders and Lifeline Data Centers, LLC (Lifeline) agrees to provide the Services described in this Order Form.
- (2) The Customer representative signing below hereby acknowledges and agrees that in the event that the Customer does not issue a purchase order prior to the Requested Service Date, this Order shall serve as Customer's purchase order. Customer further acknowledges that any additional or conflicting terms and conditions contained in Customer's purchase order shall not be applicable to the Services to be provided hereunder, even if Lifeline uses such purchase order for invoicing purposes.
- (3) This Order Form will bind neither Customer nor Lifeline until an authorized representative of each party has signed the Order Form.
- (4) Changes or modifications to this Order Form will not be accepted.

THERE ARE SIGNIFICANT ADDITIONAL TERMS AND CONDITIONS, WARRANTY DISCLAIMERS AND LIABILITY LIMITATIONS CONTAINED IN THE SERVICES AGREEMENT (EITHER THE MASTER SERVICES AGREEMENT, DATA CENTER SERVICES AGREEMENT AND/OR PROFESSIONAL SERVICES AGREEMENT) BETWEEN CUSTOMER AND LIFELINE. THERE ARE ALSO DETAILED DESCRIPTIONS OF EACH SERVICE, AND SPECIFIC TERMS APPLICABLE TO EACH SERVICE, CONTAINED IN THE SPECIFICATION SHEETS AND/OR STATEMENTS OF WORK FOR EACH SERVICE.

DO NOT SIGN THIS ORDER FORM BEFORE YOU HAVE READ ALL OF THE PROVISIONS OF THE SERVICES AGREEMENT AND THE SPECIFICATION SHEETS AND/OR STATEMENT OF WORK. YOUR SIGNATURE BELOW INDICATES THAT YOU HAVE READ THE SERVICES AGREEMENT AND THE SPECIFICATION SHEETS AND/OR STATEMENTS OF WORK AND AGREE TO BE BOUND BY THEIR PROVISIONS.

CUSTOMER	LIFELINE DATA CENTERS, LLC
Signature:	Signature:
Print Name:	Print Name:
Title:	Title:
Date:	Date:

* More detailed descriptions of the Services are contained in the specification sheets and/or Statement of Work for each service, which are incorporated herein by this reference.

CUSTOMER'S INITIALS _____

Interoffice Memo

Date: November 1, 2023
To: Common Council Members
From: Joseph Welch, City Utilities, Deputy Director, Chief Information Officer
RE: Moving data center infrastructure

Members of City Council:

As part of a computer security and resilience initiative, Civil City, City Utilities and Allen County are moving data center infrastructure to Lifeline Data Centers in Fort Wayne, Indiana.

This ordinance approves the funding for a 36-month contract totaling \$253,480.00.

CC: BOW
Justin Brugger
Kumar Menon
Jill Helfrich
Chrono
File

BILL NO. S-23-11-04

REPORT OF COMMITTEE ON FINANCE

November 28, 2023

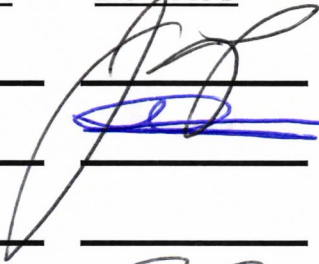



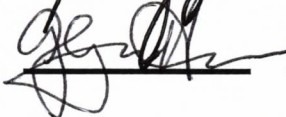
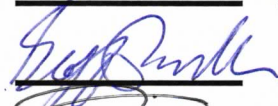

Geoff Paddock Chair

Jason Arp Co-Chair


All Council Members

An Ordinance approving a Master Services Agreement benefitting the computer security infrastructure utilized by the City of Fort Wayne and Allen County, for a total cost of \$253,480.00 between Lifeline Data Centers, LLC and the City of Fort Wayne, Indiana, by and through its Purchasing Department

COMMITTEE ON REGULATIONS HAVE HAD SAID Ordinance under consideration and beg leave to report back to the Common Council that said Ordinance

<u>COUNCIL MEMBER</u>	<u>DO PASS</u>	<u>DO NOT PASS</u>	<u>ABSTAIN</u>
ARP			
CHAMBERS			
DIDIER			
ENSLEY			
FREISTROFFER			
HINES			
JEHL			
PADDOCK			
TUCKER			

**LANA R. KEESLING
CITY CLERK**



Public Hearing Date: N/A

Read the first time in full and on motion by Councilperson Paddock.

Read the second time by title and referred to the Finance Committee.

Read the third time in full and on motion by Councilperson Paddock, placed on passage by the following vote:

<u>TOTAL VOTES</u>	<u>AYES</u>	<u>NAYS</u>	<u>ABSTAINED</u>	<u>ABSENT</u>
ARP	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
CHAMBERS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
DIDIER	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
ENSLEY	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
FREISTROFFER	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
HINES	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
JEHL	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
PADDOCK	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
TUCKER	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

DATED: November 28, 2023




 LANA R. KEESLING, CITY CLERK

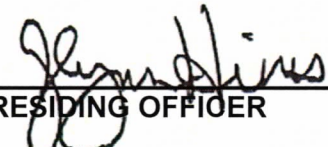
Passed and adopted by the Common Council of the City of Fort Wayne, Indiana, as

Resolution No. S-23-11-04 on the 28th day of November, 2023

ATTEST:



 LANA R. KEESLING
 CITY CLERK



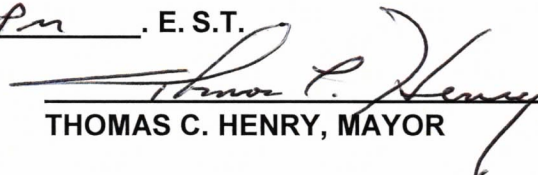
 PRESIDING OFFICER

Presented by me to the Mayor of the City of Fort Wayne, Indiana, on the 29th of November 2023, at the hour of 2:15 o'clock P.M. E.S.T.



 LANA R. KEESLING, CITY CLERK

Approved and signed by me this 1~~st~~ day of December 2023, at the hour of 4:30 o'clock PM E. S.T.



 THOMAS C. HENRY, MAYOR

