

## METASWITCH STANDARD CUSTOMER TERMS AND CONDITIONS

**IMPORTANT:** These Metaswitch Standard Customer Terms and Conditions and the Agreement (as defined below) into which they are incorporated govern your (the “Customer”) purchase and license of the Products and Services (as defined below) set forth in the Quotation from Metaswitch Networks Ltd., or, if applicable to any particular transaction, any of its subsidiaries or affiliates (“Metaswitch”).

### (1) ACKNOWLEDGEMENT AND ACCEPTANCE, ORDER OF PRECEDENCE

1.1 The offer described in the Quotation is expressly conditioned on acceptance by Customer of the terms and conditions of this Agreement. Any additional, conflicting or differing terms or conditions contained in a PO or other document of Customer not signed in writing by an authorized representative of Metaswitch shall be deemed to be a material alteration of this Agreement, and any such proposed terms and conditions are hereby objected to by Metaswitch and shall be void. Any terms and conditions in Customer’s PO or any of Customer’s other documents not signed in writing by an authorized representative of Metaswitch which purport to reject some or all of the terms and conditions of this Agreement by virtue of standard form language shall not be sufficient objection. Metaswitch’s failure to object to provisions in Customer’s PO or any of Customer’s other documents or other communications from Customer shall not constitute a waiver by Metaswitch of the terms and conditions of this Agreement or an acceptance by Metaswitch of any such provisions.

1.2 **Ordering.** These Metaswitch Standard Customer Terms and Conditions do not, by themselves, obligate either party to buy or sell any Product or Service. If Customer would like to purchase Products or Services, it must have an authorized representative sign the Quotation or submit a PO to Metaswitch accepting the offer set forth in the Quotation.

1.3 **Agreement.** A binding contract shall be formed between the Customer and Metaswitch on the earlier of (i) the date Customer signs the Quotation; (ii) the date on which Customer submits a PO to Metaswitch accepting the offer set forth in the Quotation; (iii) acceptance of delivery of the Products or Services or any portion thereof by the Customer; and (iv) the date on which Customer first downloads, installs or uses the Software (the “Effective Date”), and which contract (the “Agreement”) shall consist of:

- (a) these Metaswitch Standard Customer Terms and Conditions;
- (b) the Metaswitch and Third Party Product Schedule at the time this Agreement is formed, as at [www.metaswitch.com/legal/standard-terms-and-conditions](http://www.metaswitch.com/legal/standard-terms-and-conditions) (the “Product Schedule”);
- (c) the Quotation provided by Metaswitch to Customer; and
- (d) subject to Section 1.1, the PO issued by Customer accepting the offer set forth in the Quotation.

1.4 **Order of Precedence.** In the event of an inconsistency between the documents that make up this Agreement, the order of precedence is as follows with the first document having the highest precedence:

- (a) the Product Schedule at the time this Agreement is formed
- (b) these Metaswitch Standard Customer Terms and Conditions;
- (c) the Quotation provided by Metaswitch to Customer; and
- (d) subject to Section 1.1, the PO issued by Customer accepting the offer set forth in the Quotation.

1.5 **Changes.** Except as otherwise provided herein, this Agreement may not be amended, modified or supplemented, except in a writing signed by an authorized representative of each of Metaswitch and Customer.

### (2) DEFINITIONS

2.1 “Affiliate(s)” with respect to any specified entity, means any other entity controlling, controlled by or under common control with such entity.

2.2 “Documentation” means the product documentation accompanying the Metaswitch Hardware and Metaswitch Software including that available at <https://communities.metaswitch.com/community/support/manuals>, as it may be updated from time to time.

2.3 “Confidential Information” means all confidential information, however recorded or preserved, whether oral or written, disclosed by a party or its Affiliates, or their respective Representatives, that is marked or designated as confidential or proprietary or would be regarded by a reasonable business person as confidential, including without limitation information regarding the Products, Documentation and Services, business or product strategy, affairs, plans, market opportunities, operations, employees, prospects, customers, suppliers, trade secrets, know-how, intellectual property, patents and any provisional patents or applications therefor, and current and future products, including but not limited to any ideas, concepts; opinions; data; schedules; road-maps, pricing; software; specifications; designs; product information; information and

techniques of a technical, operating, cost, process, business or programming nature; and any documents or record-bearing media which disclose such information or techniques, and any third party confidential information included with or incorporated in any information provided by the disclosing party.

2.4 “EULA” means the end user license agreement that applies to the use of Metaswitch Software by a Subscriber as set forth in the Product Schedule.

2.5 “Issuing Country” is one of Australia, Canada, Japan, New Zealand, South Korea, United Kingdom, U.S. or any member of the E.U.

2.6 “Metaswitch Hardware” is the Metaswitch-branded physical hardware that is purchased by Customer as set forth in the Quotation, which excludes all Third Party Hardware.

2.7 “Metaswitch Services” means the Metaswitch Support Services and the Metaswitch Professional Services.

2.8 “Metaswitch Software” means the Metaswitch-developed software to which Customer purchases a license as set forth in the Quotation, which excludes all Open Source Software and Third Party Software.

2.9 “Open Source Software” means software made available under an open source software license that meets the definition of “open source” promulgated by the open source initiative, available online at [www.opensource.org/osd.html](http://www.opensource.org/osd.html).

2.10 “Metaswitch Managed Services” are the Metaswitch managed services that are purchased by Customer as set forth in the Quotation. The Metaswitch Managed Services are described in the Product Schedule.

2.11 “Metaswitch Professional Services” are the Metaswitch professional services that are purchased by Customer as set forth in the Quotation. The Metaswitch Professional Services are described in the PS Definition.

2.12 “Metaswitch Support Services” means Metaswitch’s maintenance and support services as described in the SLA.

2.13 “Products” means the Metaswitch Hardware, Metaswitch Software, Third Party Software and Third Party Hardware.

2.14 “Product Specifications” means the specifications for the Product as set forth in the applicable Documentation.

2.15 “PS Definition” means the then current version of Metaswitch Professional Services Definition (document VPM-831).

2.16 “PO” means a purchase order issued by Customer for the purchase of Products and Services that accepts the Metaswitch offer described in the Quotation and is subject to the terms and conditions of this Agreement.

2.17 “Qualified Hardware” means the hardware platforms identified by Metaswitch in the applicable Documentation as qualified for use with specific Metaswitch Software.

2.18 “Quotation” is the quotation or proposal provided by Metaswitch to Customer.

2.19 “Representatives” of a party mean its officers, directors, employees, contractors, representatives and advisors.

2.20 “Services” means the Metaswitch Managed Services, the Metaswitch Support Services, the Metaswitch Professional Services and the Third Party Services.

2.21 “SLA” means the then current version of Metaswitch Support Service Level Agreement (document VPM-339).

2.22 “Software” means the Metaswitch Software and Third Party Software.

2.23 “Subscriber” means any customer, subscriber or other end user of Customer who is licensed to use the Software.

2.24 “Third Party Hardware” means the hardware that is not identified as Metaswitch Hardware that is purchased by Customer as set forth in the Quotation.

2.25 “Third Party Products” means the Third Party Hardware and Third Party Software.

2.26 “Third Party Services” are support and professional services provided by a third-party supplier or licensor of Metaswitch that are purchased by Customer as set forth in the Quotation.

2.27 “Third Party Software” is software developed by a Third Party for which Customer purchases a license as set forth in the Quotation provided by Metaswitch. Additional terms applicable to such Third Party Software are set forth in the Product Schedule.

2.28 “Warranty Period” means the period of warranty provided by Metaswitch which is (a) one (1) year from the date of delivery for Metaswitch Hardware; (b) ninety (90) days from the date of delivery for Metaswitch Software (excluding upgrades and updates), unless Customer purchases Metaswitch Professional Services – installation service at the time of ordering such Software in which case such period shall be ninety (90) days from the date of installation of Metaswitch

Software, but not longer than 180 days from the date of Software delivery; (c) ninety (90) days from the date of delivery for Metaswitch Professional Services; and (d) the greater of ninety (90) days from the date of delivery and the remaining applicable Warranty Period for Metaswitch Hardware that is repaired or replaced under the warranty set forth in Section (7).

### (3) DELIVERY, HARDWARE

3.1 Risk and Title. Metaswitch shall retain title and ownership interest in Metaswitch Hardware and Third Party Hardware until Customer's final payment for the hardware. Metaswitch will deliver all Metaswitch Hardware and Third Party Hardware FCA (Free Carrier Alongside) (Incoterms 2010), Metaswitch site. Risk of loss and damage to Metaswitch Hardware and Third Party Hardware shall pass to Customer upon collection from the Metaswitch site by a common carrier.

3.2 Packaging and Usage Profiles. All Metaswitch Hardware shall be packed for shipment and storage in accordance with Metaswitch's standard commercial practices. Customer acknowledges it is responsible for ensuring the Metaswitch Hardware is sufficient for its usage profiles and contention ratios based on Metaswitch's published standard usage profiles.

### (4) SOFTWARE LICENSE

4.1 Software License. Upon and subject to the compliance of Customer with the terms and conditions of this Agreement (including without limitation the payment terms, the license restrictions set forth in section 4.2, the Product Schedule and any other restrictions set out in this Agreement), Metaswitch grants Customer a non-exclusive, revocable, non-transferable and personal license for the duration of the subscription or applicable term as set out in the Quotation or Product Schedule or perpetually if no term is applicable:

(a) to (i) use the Software only in accordance with the Documentation; and (ii) with respect to Software that is client-side software intended for use (as set forth in the Documentation) by Subscribers, to distribute and sublicense such client-side Software to Subscribers who are subject to an end user license agreement with terms no less restrictive than those set forth in the applicable EULA; provided that in the case of each of subclauses (i) and (ii), the license rights granted are restricted to object code form only and are limited to the term, features, capacity and number of subscribers, sites, instances and deployments as may be set out in the Quotation and Product Schedule;

(b) to use, reproduce and distribute updates and upgrades of the Software delivered by Metaswitch to Customer pursuant to the Metaswitch Support Services, solely to the extent necessary to update or upgrade the Software; provided that the usage of any such update or upgrade or new features or functionality contained in the update or upgrade may be subject to additional fees and/or terms and conditions; and

(c) to reproduce the Documentation as reasonably necessary in support of the use, operation and maintenance of the Products by Customer and its Subscribers.

Except as specifically provided in this section 4.1, Customer may not use, reproduce, distribute, modify or sublicense the Software or Documentation. Any Open Source Software provided or made available to Customer as part of the Software shall be governed by the terms and conditions of the applicable Open Source Software license. All rights to Software not specifically granted in this section 4.1 are reserved to Metaswitch.

4.2 Software License Restrictions. Without limiting the generality of Section 4.1 above,

(a) Customer shall not use, distribute, sublicense or transfer in any way any (i) Software that is delivered embedded in hardware separately from such hardware; or (ii) any Third Party Software that is shipped as embedded in hardware or other software separately from the hardware or software in which it is embedded. If Software is transferred from one Qualified Hardware device to another Qualified Hardware device, the Software on the originally licensed Qualified Hardware device must be deleted.

(b) Customer shall not decompile, disassemble, reverse engineer, unlock, access, or discover the source code of, or disclose any trade secrets embodied in, any Products or component thereof, nor attempt to do any of these things, nor encourage, assist or permit any third party to do any of the foregoing; except to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation. Should such conduct occur, Customer shall promptly disclose the information discovered to Metaswitch and shall not disclose any such information to any third party.

(c) The Software is licensed to Customer and not sold. Customer shall not remove any copyright or proprietary rights notices and/or legends appearing on or in the Products. Neither Customer nor any third party shall receive under this Agreement title to or ownership of any copy of the Software or the Metaswitch Confidential Information. Ownership and title to the Software and the Metaswitch Confidential Information shall be retained by Metaswitch and its licensors.

4.3 Benchmark Testing. Customer shall not publicize the results of any performance or other benchmark testing on the Products without the prior written consent of Metaswitch and any such results shall be considered Metaswitch Confidential

Information.

## **(5) INVOICING, PAYMENT, SUPPORT SERVICES, TAXES AND AUDITS**

5.1 **Invoicing and Payment.** The fees for the Products and Services are as set forth in the applicable Quotation. Payment must be made in the same currency as the fees in the Quotation, or if none is stated, in USD. Unless otherwise stated in the Quotation, Metaswitch may invoice 100% of the fees on delivery of the Product or Service (with the exception of Metaswitch Support Services) and payment on the invoice will be due within 30 days of the invoice date. Metaswitch may, at its sole discretion, charge Customer interest on overdue invoices at a compound rate of the lesser of 1.5% per month or the maximum rate permitted by law, unless agreed otherwise.

5.2 **Invoice Disputes.** Notwithstanding Section 5.1 above, Customer shall have the right to withhold payment of amounts disputed in good faith provided that Customer (a) has notified Metaswitch of its intention to withhold payment and such notice is received by Metaswitch within 10 business days of the relevant invoice date; and (b) pays the undisputed element of the invoice within the payment terms set out herein. The Parties agree to work together in good faith to expeditiously investigate and resolve all billing disputes. Once the billing dispute has been resolved, Customer shall make prompt payment of the amount due.

5.3 **Support Services.** Unless otherwise set forth in the Quotation, the term of each Metaswitch Support Services contract is one year, which shall be renewed automatically unless either party provides advance written notice of non-renewal at least thirty (30) days prior to the expiration of the then-current term. The initial term for the Metaswitch Support Services contract commences upon the expiration of the Warranty Period. The fee for the Metaswitch Support Services contract is due and payable in advance, with the payment for the initial term due at the end of the Warranty Period, and for renewal terms on each anniversary of the expiration of the Warranty Period. Metaswitch may change the pricing, SLA or support terms with at least forty-five (45) days' advance written notice prior to expiration of the then-current term, with such pricing, SLA or support terms becoming effective on the commencement of the next renewal term. If Metaswitch Support Services are cancelled or suspended, Metaswitch may charge an additional fee for reinstatement.

5.4 **Taxes and Customs.** The prices set forth in the Quotation do not include taxes. If Metaswitch is required to pay any federal, state, VAT, provincial or local taxes based on the Products or Services, the taxes shall be billed to and paid by Customer. Metaswitch shall be responsible for payment of any income or other taxes imposed upon Metaswitch and measured by the gross or net income of Metaswitch and any employment-related or corporate franchise taxes due on the Products and Services. Customer will be responsible for ensuring that deliveries of Products clear customs. Customer is responsible for any charges related to shipment, import and usage of the Products, including import duties, sales, use, privilege, excise or other taxes, duties, assessments and other related charges levied by any jurisdiction, and shipping, handling, insurance, brokerage, and similar fees.

5.5 **Audit.**

(a) Customer shall keep accurate and complete records, no less detailed than industry standard, relating to the use, sale, license, sublicense, export, import and distribution of the Products and Services. Metaswitch may conduct an audit of such records to verify compliance with the Agreement either electronically by remote connection to the systems to be audited or on-site at Customer's offices during regular business hours. Metaswitch will conduct on-site audits no more frequently than twice per calendar year, except as may be needed in Metaswitch's reasonable opinion to investigate violations of law, and will use reasonable efforts to minimize interruption of Customer's business activities. Metaswitch may conduct an electronic audit at any time.

(b) If Metaswitch determines that Customer has underpaid Metaswitch, then Metaswitch will notify Customer in writing of the amount of such underpayment. Within thirty (30) days of any notification of an underpayment, Customer shall pay to Metaswitch any monies due. If an audit reveals an underpayment to Metaswitch during any 12-month period exceeding ten percent (10%) of all charges in the aggregate paid by Customer during such period, then Customer will reimburse Metaswitch for the cost of the audit.

## **(6) CONFIDENTIALITY**

6.1 Each party shall limit access to all Confidential Information to those of its Affiliates and Representatives who require such access to carry out their duties under this Agreement and who are bound by confidentiality obligations at least as strict as those in this Agreement. The receiving party will not, during or after the term of the Agreement: (a) disclose the other party's Confidential Information to any third party not listed in the preceding sentence; or (b) use the disclosing party's Confidential Information for any purpose other than as is necessary to exercise its rights or carry out its obligations under

this Agreement. Notwithstanding the foregoing, Customer and Metaswitch shall have no obligation with respect to any Confidential Information which: (i) is already in the receiving party's possession under no duty of confidentiality, other than as a result of a breach of a legal obligation; (ii) is or becomes generally available to the public through no wrongful act of the receiving party; (iii) is approved for release in writing by the disclosing party; or (iv) is required to be disclosed by order of a court, administrative agency, or other government body of competent jurisdiction (including without limitation any relevant securities exchange), or by subpoena, summons or other legal process, or by law, rule or regulation, or by applicable regulatory or professional standards, provided that, to the extent permissible by law, rule or regulation, the disclosing party is given reasonable advance notice of such disclosure and, at its own expense, an opportunity to object to such disclosure or to obtain confidential treatment of the Confidential Information.

6.2 Upon termination or the earlier request of the disclosing party, all copies of Confidential Information shall, upon the election of the disclosing party, be returned or certified by the receiving party as having been destroyed; provided that Customer may retain Documentation and other materials necessary for Customer's authorized usage of the Products following termination. Neither party shall make or use any copies, synopses, or summaries of the other party's Confidential Information, except as needed internally in connection with the parties' business relations and in accordance with the Agreement.

6.3 The confidentiality obligations under this Agreement shall not be construed to limit either party's right to independently develop or acquire products without use of the other party's Confidential Information. Confidential Information shall not include feedback or enhancement requests provided by Customer on the Products or Services. Either party may publicize the existence of this Agreement, but may not disclose the terms and conditions without prior written consent from the other party.

6.4 The receiving party agrees that the disclosing party retains all rights and remedies available under applicable law in respect of its Confidential Information. The parties acknowledge that damages alone would not be an adequate remedy for the breach of any of the provisions of this Section (6). Accordingly, without prejudice to any other rights and remedies it may have, the disclosing party shall be entitled to seek equitable relief (including without limitation injunctive relief) concerning any threatened or actual breach of any of the provisions of this Section (6), without the need to post security or to prove damages.

## **(7) LIMITED WARRANTY FOR METASWITCH HARDWARE AND METASWITCH SOFTWARE**

7.1 Limited Warranty. Subject to the limitations and disclaimers set forth in this Section 7, Metaswitch warrants to Customer that during the applicable Warranty Period:

(a) The Metaswitch Hardware will be free from material defects in material and workmanship under normal use. Metaswitch's liability under this warranty is limited to the repair or replacement (with new or like new used equipment), at Metaswitch's option, of any defective Metaswitch Hardware in accordance with the procedures set forth in the SLA, provided the defective Metaswitch Hardware is promptly returned to Metaswitch. Metaswitch will pay the shipping costs, unless upon inspection Metaswitch finds no defect in which case Customer will bear the cost of shipping.

(b) The Metaswitch Software will materially conform to the Product Specifications. Metaswitch's liability under this warranty is limited to repair (debugging) or replacement of the Metaswitch Software, at Metaswitch's option, under the terms of the SLA.

(c) The Metaswitch Professional Services will be performed in a professional and workmanlike manner by qualified personnel. Metaswitch's liability under this warranty is limited to re-performance of the Metaswitch Professional Services.

7.2 Except as stated in Section 7.1, Metaswitch will have no obligation to accept hardware, components, software or services for analysis, replacement or repair. The warranty shall not apply if Customer does not provide written notice of the defect or other problem to Metaswitch during the applicable Warranty Period. The warranty shall not apply to usage outside scope of authorizations set forth in this Agreement or to defects or other problems caused by any of the following: (i) improper or inadequate maintenance; (ii) use of a Metaswitch Product outside of its environmental specifications; (iii) misuse or abuse of a Metaswitch Product, including without limitation defacing the Metaswitch Product or causing cosmetic damage such that it is no longer fit for resale; (iv) modification or repair of a Metaswitch Product not performed or authorized in writing by Metaswitch; (v) installation of components not authorized in writing by Metaswitch or usage in combination with third party products; or (vi) use of the Metaswitch Software on hardware that is not Qualified Hardware.

7.3 Warranty of Title. Metaswitch warrants that Customer will acquire good title to the Metaswitch Hardware free and clear of all liens and encumbrances upon Customer's final payment.

7.4 Disclaimers.

(a) EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN SECTIONS 7.1 AND 7.3 ABOVE, METASWITCH PROVIDES THE METASWITCH SOFTWARE, METASWITCH HARDWARE AND METASWITCH SERVICES “AS IS” AND MAKES NO WARRANTIES OR REPRESENTATIONS OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OR CONDITION OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, SECURITY, NON-INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, ABSENCE OF VIRUSES, RESULTS OR WORKMANLIKE EFFORT, THAT USE OF THE METASWITCH SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE, THAT THE METASWITCH SOFTWARE WILL MEET ANY PARTICULAR REQUIREMENTS OF CUSTOMER, OR ANY WARRANTY AGAINST LATENT DEFECTS OR THE VALIDITY OR SCOPE OF ANY PATENT. TO THE EXTENT AN IMPLIED WARRANTY OR CONDITION CANNOT BE DISCLAIMED UNDER APPLICABLE LAW, SUCH WARRANTY OR CONDITION IS LIMITED IN DURATION AND TO THE EXTENT PERMISSIBLE UNDER APPLICABLE LAW.

(b) CUSTOMER WILL NOT REPRESENT OR WARRANT TO ITS CUSTOMERS OR SUBSCRIBERS, OR TO ANY OTHER THIRD PARTIES, THAT SUCH PARTIES RECEIVE ANY WARRANTY FROM METASWITCH, WHETHER PROVIDED BY METASWITCH OR A THIRD PARTY, AND CUSTOMER SHALL NOT BIND OR PURPORT TO BIND METASWITCH TO ANY SUCH REPRESENTATION OR WARRANTY.

(c) CUSTOMER IS ON NOTICE THAT THE PRODUCTS AND SERVICES ARE NOT DESIGNED, MANUFACTURED, OR INTENDED FOR USE IN ANY SETTING IN WHICH FAILURE COULD LEAD TO DEATH, PERSONAL INJURY OR SEVERE PHYSICAL OR ENVIRONMENTAL DAMAGE (“HIGH RISK ACTIVITIES”), INCLUDING WITHOUT LIMITATION USE AS CONTROL EQUIPMENT IN ENVIRONMENTS REQUIRING FAIL-SAFE PERFORMANCE, SUCH AS IN THE OPERATION OF NUCLEAR FACILITIES, AIRCRAFT NAVIGATION OR COMMUNICATION SYSTEMS, AIR TRAFFIC CONTROL, LIFE SUPPORT MACHINES OR WEAPONS SYSTEMS. METASWITCH SPECIFICALLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTY OF FITNESS FOR HIGH RISK ACTIVITIES.

## (8) INDEMNIFICATION

8.1 Indemnity by Customer. Subject to the indemnification procedures set forth in Section 8.3, Customer agrees to indemnify, defend and hold harmless Metaswitch and its Affiliates from any and all damages, penalties, costs, liabilities and expenses, including without limitation reasonable attorneys’ fees, (together, “Losses”) and threatened Losses to the extent resulting from any of the following:

- (a) an injury to or death of any Representative of Metaswitch or its Affiliates during or as a result of the performance of the Services, caused by the actions or inactions of Customer or any of its Representatives; or
- (b) the failure of Customer to comply with all applicable laws, rules and/or regulations governing its obligations hereunder.

8.2 Indemnity by Metaswitch. Subject to Section (9) and the indemnification procedures set forth in Section 8.3, Metaswitch agrees to indemnify, defend and hold harmless Customer from and against any and all Losses and threatened Losses to the extent resulting from any of the following:

- (a) an injury to or death of any Representative of a Customer during or as a result of the performance of the Services, caused by the actions or inactions of Metaswitch or its Affiliates or any of their respective Representatives;
- (b) any third party action, assertion, claim, suit or proceeding against Customer alleging that Metaswitch Hardware, Metaswitch Software, Metaswitch Managed Services or the Metaswitch Support Services (together, the “Indemnified Products”) infringes the patent, copyright, trademark or trade secret of a third party where such rights issue from a government body of an Issuing Country; provided, however, that Metaswitch will have no obligation to provide such indemnity to the extent any such action, assertion, claim, suit or proceeding arises out of or is in connection with any of the following: (i) Customer’s breach of the Agreement or failure to comply with any applicable Open Source Software license; (ii) modification of the Indemnified Products by any person or entity other than Metaswitch or the combination of Indemnified Products with any product or service not supplied by Metaswitch, (iii) Metaswitch’s modification of the Indemnified Products to comply with technical specifications provided by Customer; (iv) the compliance of the Indemnified Products with standards promulgated by any industry recognized standards setting organization, where compliance with the asserted standard is a commercially necessary aspect of the product and there is no commercially available non-infringing method or manner of complying with such standards, or (v) Customer’s failure to incorporate updates, upgrades, workarounds, enhancements or other modifications or corrections of the Indemnified Products that would have avoided the alleged infringement and that were provided by Metaswitch. This Section 8.2(b) sets forth Customer’s sole remedies for intellectual property rights infringement actions, assertions, claims, suits and proceedings.

8.3 Indemnification Procedures. Following receipt by any party entitled to indemnification hereunder (the “indemnitee”) of notice of any demand, action, proceeding or other claim which may result in Losses or threatened Losses

subject to indemnification under this Agreement (a “Claim”), the indemnitee will promptly notify the party obligated to provide indemnification hereunder (the “indemnitor”) of such Claim in writing. The indemnification notice will provide a copy of any written documentation regarding the Claim received by the indemnitee. The indemnitee shall grant sole control of the defense and settlement of the Claim to the indemnitor. Notwithstanding the foregoing, the indemnitee will have the right to employ its own counsel at its own expense and the right to approve in advance the terms of any settlement or compromise that restricts its rights or subjects it to any ongoing obligations. The indemnitee shall give the indemnitor reasonable information, assistance and cooperation in the defense of the Claim.

#### **(9) LIMITATION OF LIABILITY**

9.1 THE TOTAL CUMULATIVE LIABILITY OF METASWITCH AND ITS AFFILIATES AND THEIR RESPECTIVE REPRESENTATIVES, SUPPLIERS AND LICENSORS ARISING OUT OF OR RELATED TO THE AGREEMENT AND THE MANUFACTURE, SALE AND SUPPLYING OF THE PRODUCTS AND SERVICES AND THEIR USE, OPERATION, INSTALLATION OR DISPOSITION, BASED ON ANY CAUSE OF ACTION OR LEGAL THEORY, INCLUDING WITHOUT LIMITATION WARRANTY, CONTRACT, TORT (REGARDLESS OF THE DEGREE OF FAULT), INDEMNITY, INFRINGEMENT AND STRICT LIABILITY, SHALL NOT EXCEED THE GREATER OF (A) USD \$5,000 (FIVE THOUSAND DOLLARS) AND (B) THE AMOUNT PAID BY CUSTOMER TO METASWITCH, FOR THE PRODUCTS OR SERVICES AT ISSUE, DURING THE TWELVE MONTHS PRIOR TO THE DATE UPON WHICH CUSTOMER’S CLAIM ARISES. IN NO EVENT SHALL METASWITCH OR ITS AFFILIATES OR THEIR RESPECTIVE REPRESENTATIVES, SUPPLIERS OR LICENSORS BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR INDIRECT, SPECIAL, PENAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES INCLUDING, BUT NOT LIMITED TO, LOSSES DUE TO LOST PROFITS, REVENUE, AND SAVINGS, OPPORTUNITY COSTS, LOSS OR CORRUPTION OF DATA, REPUTATIONAL DAMAGE AND LOSS OF USE OF FACILITIES OR EQUIPMENT, ARISING OUT OF OR RELATED TO THE AGREEMENT OR THE MANUFACTURE, SALE OR SUPPLY OF THE PRODUCTS AND SERVICES OR THEIR USE, INSTALLATION, OPERATION OR DISPOSITION, EVEN IF ADVISED IN ADVANCE OF THE POSSIBILITY OF THE DAMAGES IN QUESTION AND EVEN IF SUCH DAMAGES WERE FORESEEABLE. THE LIABILITIES LIMITED BY THIS SECTION 9.1 APPLY EVEN IF CUSTOMER’S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. TO THE EXTENT THAT APPLICABLE LAW RESTRICTS THE APPLICATION OF THIS SECTION 9.1, THE PROVISIONS OF THIS SECTION 9.1 WILL APPLY TO THE MAXIMUM EXTENT PERMITTED. NOTHING IN THIS SECTION 9.1 SHALL LIMIT OR EXCLUDE METASWITCH’S LIABILITY FOR DEATH OR PERSONAL INJURY CAUSED BY ITS NEGLIGENCE OR FRAUD OR FRAUDULENT MISREPRESENTATION OR ANY LIABILITY WHICH MAY NOT BE LIMITED OR EXCLUDED UNDER APPLICABLE LAW.

9.2 METASWITCH’S WARRANTIES AND INDEMNITIES IN THIS AGREEMENT AND ITS OTHER REPRESENTATIONS AND DUTIES EXTEND TO CUSTOMER ONLY AND SHALL NOT BE APPLICABLE TO ANY OTHER PERSON OR ENTITY INCLUDING WITHOUT LIMITATION SUBSCRIBERS OF CUSTOMER. ALL REPRESENTATIONS AND WARRANTIES SET FORTH IN THIS AGREEMENT ARE CONTRACTUAL IN NATURE ONLY AND SUBJECT TO THE SOLE AND EXCLUSIVE REMEDIES SET FORTH HEREIN.

#### **(10) TERM AND TERMINATION**

10.1 This Agreement will remain in effect until terminated in accordance with this Section 10. Notwithstanding anything to the contrary in this Section 10, Customer shall have no right to cancel any PO that has been acknowledged by Metaswitch prior to the effective date of termination without the written consent of Metaswitch.

10.2 Either party may terminate this Agreement on thirty (30) days' written notice for material breach, unless such material breach is cured within the thirty (30)-day period. If Customer is in material breach of this Agreement, including without limitation its payment obligations, upon written notice to Customer Metaswitch shall have the right to suspend performance of its obligations under the Agreement until such breach is cured. Notwithstanding the foregoing, Metaswitch may terminate the Agreement immediately upon written notice with no opportunity to cure if Customer breaches Sections (4), (6) or (11), or upon the occurrence of an Insolvency Event as defined under Section 12.8. The parties may terminate this Agreement by mutual written consent.

10.3 Upon termination of this Agreement, (a) Metaswitch may in its sole discretion cease all further delivery of Products and Services under this Agreement, except in the case that the Agreement is terminated other than for a material breach by Customer in which case Metaswitch shall fulfill all POs acknowledged by Metaswitch prior to termination; (b) all outstanding invoices issued under the Agreement will immediately become due and payable; (c) if the Agreement is terminated other than for material breach by Customer, Customer may continue to use for the term of the license any Software that is fully paid up;

and (d) each party will comply with Section 6.2 with respect to return or destruction of Confidential Information. The obligations of confidentiality, compliance with laws, indemnity, dispute resolution, payment, audit and record-keeping, and limitation of liability shall survive the termination of this Agreement. No other obligation shall survive termination of this Agreement except those which by their language, nature or context are intended to survive.

#### (11) COMPLIANCE WITH LAWS

11.1 The parties shall comply with all applicable laws and regulations governing use, export, re-export and transfer of the Products and Services. Without limitation to the generality of the foregoing, each party will comply with the U.S. Export Administration Regulations and International Traffic in Arms Regulations and other restrictions imposed by the US Government on the export, re-export or transfer of items to prohibited parties, including but not limited to, prohibitions on export to parties designated by the U.S. Department of Treasury's Office of Foreign Asset Control (OFAC) Sanction Programs or listed on any of the Bureau of Industry and Security Lists of Parties of Concern, or to any other party forbidden to receive the Products or Services by applicable law or regulation. Each party will provide the other with such information and assistance as may reasonably be requested in connection with securing such authorizations and licenses and to take timely action to obtain all required support documentation. Each of the parties agrees to maintain full, true and accurate records of exports, re-exports and transfers according to applicable U.S. or other applicable law, for at least five (5) years following the date of such export, re-export or transfer, or longer as required by applicable law.

11.2 In connection with the carrying out its obligations under the Agreement, each of the parties agrees that it (a) shall comply with all applicable federal, provincial, state and local laws and regulations, including without limitation the U.S. Foreign Corrupt Practices Act ("FCPA") and the U.K. Bribery Act 2010; and (b) shall not offer, give, request or accept a financial or other advantage in any form (money, business courtesy, or kickback) to another person in connection with any current or prospective commercial business of Metaswitch or its Products or Services for the purpose of improperly obtaining or rewarding favorable treatment. Each party shall promptly notify the other party upon becoming aware of any of the following regarding activities related to this Agreement: (i) any violation of the FCPA or the Bribery Act, (ii) any extortive solicitation, demand, bribe or other request for anything of value, and (iii) a public official taking a position as an officer or employee or acquiring a direct or indirect interest in it.

#### (12) GENERAL

12.1 Notice. Subject to Section 12.5, all notices, requests, consents, claims, demands, waivers and other communications under the Agreement shall be in writing and shall be deemed to have been given: (a) when delivered by hand (with written confirmation of receipt); (b) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by facsimile or e-mail of a PDF document (with confirmation of transmission) if sent during normal business hours of the recipient, and on the next business day if sent after normal business hours of the recipient; or (d) on the third day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective parties at the following addresses, or to such other address that may be designated by a party in writing:

- (a) Metaswitch: General Counsel, 33 Genotin Road, Enfield, EN1 2AG, UK  
Email: chieflegalofficer@metaswitch.com.
- (b) Customer: To the Customer address which is listed on the Quotation, or if none, on the PO.

12.2 Force Majeure. Neither party shall be liable to the other for delays or failures to perform if such delay or failure to perform is shown to be due to causes beyond the reasonable control of the party charged with a default, including, but not limited to, strikes, lockouts or other labor disputes, riots, civil disturbances, actions or inactions of governmental authorities or suppliers, epidemics, war, embargoes, severe weather, fire, earthquake, acts of God or public enemy, nuclear disasters, terrorism, or default of a common carrier. If any such force majeure delay on Metaswitch's part extends beyond sixty (60) days, Customer may cancel the delayed Product or Service without liability.

12.3 Miscellaneous. In the event that any one or more of the provisions of the Agreement shall for any reason be held by a court, agency or arbitrator having jurisdiction to be invalid or unenforceable under applicable law, that determination will not affect any other provision and the Agreement shall then be construed as if such invalid or unenforceable provision had never been contained herein. The Agreement supersedes all proposals, oral or written, and all negotiations, conversations and discussions between the parties relating to the Agreement and all past course of dealing or industry custom. Headings included in the Agreement are for reference only and are not to be used to interpret the Agreement. The failure of either party to enforce at any time any of the provisions hereof shall not be construed to be a waiver of the right of such party thereafter to enforce any such provisions. Customer and Metaswitch acknowledge that they have not been induced to enter into the

Agreement by any representations or statements, oral or written, not expressly contained herein, and that they have had an opportunity to have the Agreement reviewed by legal counsel.

12.4 U.S. Government End Users. The Software and related Documentation are “Commercial Items”, as that term is defined at 48 C.F.R. §2.101, consisting of “Commercial Computer Software” and “Commercial Computer Software Documentation”, as such terms are used in 48 C.F.R. §12.212 or 48 C.F.R. §227.7202, as applicable. Consistent with 48 C.F.R. §12.212 or 48 C.F.R. §227.7202-1 through 227.7202-4, as applicable, the Commercial Computer Software and Commercial Computer Software Documentation shall be licensed to U.S. Government end users only (a) as Commercial Items and (b) with those rights as are granted to all other end users pursuant to the terms and conditions herein.

12.5 Governing Law and Dispute Resolution. The 1980 U.N. Convention on Contracts for the International Sale of Goods will not apply to this Agreement. With the exception of violation of laws or breaches of the confidentiality or license provisions, the parties shall first attempt to resolve any dispute, controversy or claim between them through negotiation by senior managers of both parties without resorting to formal proceedings, other than mediation. If after thirty (30) days such dispute cannot be resolved, then the parties shall have the option to proceed to the dispute resolution proceedings as set forth below.

*United States.* If the Customer is headquartered in the United States (including its territories), then the Agreement and all disputes and claims arising out of it or in connection with its subject matter or formation (including non-contractual disputes or claims), are to be governed by and construed in accordance with the laws of the State of California; provided, however, that no application of conflicts of laws principles shall be effective to modify the application of California law to the rights and duties of the parties. The parties submit to exclusive jurisdiction and venue of the federal and state courts of San Francisco, California. In the event that there is no other effective manner of service, each of Metaswitch and Customer hereby appoints the Secretary of the State of California as its agent for purposes of service of process.

*Europe and Africa.* If Customer is headquartered in the continents of Europe or Africa, then the Agreement and all disputes and claims arising out of it or in connection with its subject matter or formation (including non-contractual disputes or claims), are to be governed by and construed in accordance with the laws of the State of New York. Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration Rules (the “Rules”), which Rules are deemed to be incorporated by reference into this clause, by one or more arbitrators appointed in accordance with such Rules. The arbitration shall be held, and the award shall be rendered, in the English language. The seat of arbitration shall be London. The award shall be final and binding on the parties and may be entered and enforced in any court having jurisdiction. Either party also may, without waiving any remedy under the Agreement, seek from any court of competent jurisdiction any interim or preliminary injunctive relief that is necessary to protect the rights or property of that party pending the constitution of the arbitral tribunal.

*Asia, Oceania and Australia.* If Customer is headquartered in the continents of Asia, Oceania or Australia, then the Agreement and all disputes and claims arising out of it or in connection with its subject matter or formation (including non-contractual disputes or claims), are to be governed by and construed in accordance with the laws of the State of New York. Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (“Rules”) for the time being in force, which Rules are deemed to be incorporated by reference in this clause. The arbitration shall be held, and the award shall be rendered, in the English language. The award shall be final and binding on the parties and may be entered and enforced in any court having jurisdiction. Either party may apply under the Rules for interim or preliminary injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under the Agreement, seek from any court of competent jurisdiction any interim or preliminary injunctive relief that is necessary to protect the rights or property of that party pending the constitution of the arbitral tribunal.

*North America (excluding U.S.) and South America.* If Customer is headquartered in the continents of North or South America (excluding the U.S.), then the Agreement and all disputes and claims arising out of it or in connection with its subject matter or formation (including non-contractual disputes or claims), are to be governed by and construed in accordance with the laws of the State of New York; provided, however, that no application of conflicts of laws principles shall be effective to modify the application of New York law to the rights and duties of the parties. All disputes arising out of or in connection with the present Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (“Rules”) by one or more arbitrators appointed in accordance with such Rules. The arbitration shall be held, and the award shall be rendered, in the English language. The seat of arbitration shall be New York. The award shall be final and binding on the parties and may be entered and enforced in any court having jurisdiction. Either party may apply under the Rules for interim or preliminary injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under the Agreement, seek from any court of competent jurisdiction any interim

or preliminary injunctive relief that is necessary to protect the rights or property of that party pending the constitution of the arbitral tribunal.

12.6 Attorneys' Fees. If either party brings any suit or commences any other proceeding with respect to the Agreement, the prevailing party (as finally determined by the court, agency, arbitrator, or other authority before which such suit or proceeding is commenced), in addition to such other relief as may be awarded, shall be entitled to recover its reasonable attorneys' fees, expenses, costs and arbitration fees actually incurred.

12.7 This Agreement shall not be deemed to create an employment, agency, joint venture or partnership relationship between the parties. Neither party shall have any power to enter into any contracts or commitments in the name of, or on behalf of, the other party, or to bind the other party in any respect whatsoever.

12.8 Insolvency of Customer. If Customer ceases or threatens to cease conducting business as a going concern, becomes insolvent or unable to pay its debts as they mature in the ordinary course, makes a general assignment for the benefit of creditors, suffers or permits the appointment of a receiver for its business or assets, or avails itself of or becomes subject to any proceeding under the bankruptcy laws or any other statute of any state, territory, country or province relating to insolvency or the protection of rights and creditors (each, an "Insolvency Event"), then:

- (a) Customer shall promptly notify Metaswitch in writing.
- (b) Metaswitch may reclaim and take possession of any Products on Customer's premises for which Customer has not made full payment and Customer shall cease using any Products for which it has not made full payment to Metaswitch.
- (c) Metaswitch has the right to terminate the Agreement pursuant to Section (10).

12.9 Assignment. Customer may not assign or attempt to assign the Agreement, by operation of law, change in control, merger, consolidation or otherwise, without the prior written consent of Metaswitch, which shall not be unreasonably denied. Any assignment not in accordance with the Agreement shall be null and void. Metaswitch may assign the Agreement to (a) one of its subsidiaries or an Affiliate or (b) any legally recognized successor organization acquiring, through a merger, consolidation, or asset sale, all or substantially all of the business to which the Agreement relates. Subject to the foregoing, (a) the provisions of the Agreement shall inure to the benefit of and be binding upon the parties hereto, their successors and assigns; and (b) in the event of assignment by either party of the Agreement, the assigning party shall notify the other party in writing of the assignment and the third party to whom rights are to be assigned shall separately and in writing confirm to the other party that the third party understands and accepts all terms of the Agreement, including without limitation those of payment obligations. Assignment of the Agreement is not effective until the other party has received both the notification from the assigning party and the confirmation from the third party.