

## APPENDIX D

### Service Agreement Terms and Conditions

This Service Agreement ("Agreement") is made this \_\_\_\_ day of \_\_\_\_, 2005, ("Effective Date") by and between 3Com Corporation ("3Com") and \_\_\_\_\_ ("Customer"). Subject to the terms and conditions of this Agreement, 3Com shall provide the Services to Customer for those Products and at those locations set forth in the Customer Information Document attached hereto.

#### 1. TERM AND TERMINATION

- 1.0 The term of this Agreement shall be one (1) year from the Effective Date, or for three (3) years if the multi-year option is identified on the Customer Information Document, and may be extended for additional one (1) year terms by mutual agreement. Either party may terminate this Agreement if the other party: (a) fails to perform any material term or condition of this Agreement, and (b) does not remedy the failure within thirty (30) days after receipt of written notice of such failure. In addition, Customer may terminate this agreement if funds sufficient to pay obligation hereunder are not appropriated by the legislative body on behalf of local governments, or by, the Texas legislature on behalf of the state agencies. In the event of non-appropriation 3Com will be provided ten(10) days written notice of intent to terminate.
- 2.0 The termination or expiration of this Agreement shall in no way relieve either party from its obligations to pay the other party any sums accrued hereunder prior to such termination or expiration or affect any other provisions hereunder.

#### 2.0 ELIGIBILITY FOR SUPPORT

- 2.1 This Agreement only covers the 3Com hardware and software ("Products") identified at the time of purchase, any additional Products amended to this Agreement, and any replacement Product, part, or software provided hereunder.
- 2.2 3Com requires that each unit of the same Product located at Customer's site be covered by the same level of Service and must include the chassis and all associated cards.
- 2.3 The Product must contain the most current, or immediately preceding version of 3Com software and/or firmware and be installed and maintained in accordance with the specifications set forth in the manual furnished with the Product.

#### 3.0 RIGHTS AND OBLIGATIONS

- 3.1 Customer shall provide access to all documentation, diagnostics programs, operating systems, utilities, application programs as deemed necessary by 3Com.
- 3.2 3Com may, at its option, designate a sub-contractor to provide Services to Customer on behalf of 3Com.

#### 4.0 SERVICE EXCLUSIONS

- 4.1 Any services outside the scope of this Agreement, including, but not limited to customization or installation of Products. Such additional services may be furnished on a time and materials basis at 3Com's then-current rates, subject to availability of 3Com's service personnel.
- 4.2 Any misuse or negligent use of a Product or part, including replacement of parts or repair of damage, any use other than its intended use, or use outside the environmental range specified by 3Com.
- 4.3 Any services to the Product resulting from unusual external causes such as, but not limited to, power failure, power surges, air conditioning failure, humidity, improper input/output signals to 3Com's connections or Customer's other software not previously approved by 3Com, accident, fire, explosion or Act of God.
- 4.4 All service options may not be available in all locations and may be restricted in some countries due to export or other regulations. Where export restrictions occur, software will not be supplied. 3Com may suspend Services under this Agreement if Customer delivers technical data or Product in violation of the applicable export regulations.

#### 5.0 PAYMENT TERMS

- 1.0 Payment is due in accordance with Chapter 2251, Texas Government Code and will be in US dollars, free of any withholdings or restrictions.
- 5.2 Customer is responsible for all sales, use, value-added, or other taxes (except taxes on 3Com's net income), and all customs, duties, and tariffs now or hereafter claimed or imposed by any governmental authority upon the sale of the Service to Customer under this Agreement. Customer agrees to pay any penalties, interest and collection or withholding costs associated therewith. All such amounts are in addition to other amounts payable hereunder. 3Com acknowledges that Customer is an entity exempt from the assessment and collecting of Texas sales tax, and excise taxes and federal excise taxes and agrees not to charge such taxes in its transactions with customers.
- 1.0 Payment of invoices shall be made in accordance with Chapter 2251, Texas Government Code.
- 2.0 If this Agreement has been purchased from a 3Com reseller, the reseller will be invoiced for the Service fee as defined above and will be liable for the obligations herein. However, should such reseller fail to pay 3Com as required herein, 3Com reserves the right to terminate Services and enforce any rights it may have hereunder, so long as such action does not affect Customer's rights hereunder.

#### 6.0 CONFIDENTIAL INFORMATION

Certain information, which is confidential in nature, may be exchanged in connection with the provision of Services under this Agreement. Confidential information may not be divulged to any third party without the prior written consent of the disclosing party for a period of three (3) years. This obligation does not apply to information which: (i) is now, or becomes, generally known or available; (ii) is lawfully known to the recipient without an obligation of confidentiality; (iii) is lawfully furnished to the recipient by a third party without restriction on disclosure; (iv) is furnished to others by the disclosing party without restriction; (v) is independently developed by the recipient without use of the disclosing party's confidential information; or (vi) is required to be

disclosed by a governmental agency or law, provided the recipient gives prompt notice to the other party prior to any disclosure. 3Com acknowledges that Customer's ability to comply with Article 6.0 may be constrained by circumstances with the Texas Public Information Act. Therefore, Customer shall be excused from compliance with this article to the extent that conflicts with the Act.

**7.0 LIMITED WARRANTY**

- 7.1 3Com warrants that the repaired or replacement Product or part will be free from defects in material and workmanship for the later of a period of ninety (90) days from the date of shipment or the remainder of the original warranty period. 3Com's sole obligation under this limited warranty shall be, at 3Com's option, to repair or replace any defective Product or part.
- 7.2 3Com's technical engineers will provide quality technical support in accordance with generally recognized business practices and standards.
- 7.3 TO THE FULL EXTENT ALLOWED BY LAW, THE FOREGOING WARRANTIES AND REMEDIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, TERMS, OR CONDITIONS, EXPRESS OR IMPLIED, EITHER IN FACT OR BY OPERATION OF LAW, STATUTORY OR OTHERWISE, INCLUDING WARRANTIES, TERMS, OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND SATISFACTORY QUALITY. 3COM'S WARRANTIES CONTAINED HEREIN RUN ONLY TO CUSTOMER, AND ARE NOT EXTENDED TO ANY THIRD PARTIES. 3COM NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY OTHER LIABILITY IN CONNECTION WITH THE SERVICES PROVIDED UNDER THIS AGREEMENT. 3COM SHALL NOT BE LIABLE UNDER THIS WARRANTY IF ITS TESTING AND EXAMINATION DISCLOSE THAT THE ALLEGED DEFECT IN THE EQUIPMENT OR SOFTWARE DOES NOT EXIST OR WAS CAUSED BY CUSTOMERS OR ANY THIRD PERSON'S MISUSE, NEGLIGENCE, IMPROPER INSTALLATION OR TESTING, UNAUTHORIZED ATTEMPTS TO REPAIR OR MODIFY, OR ANY OTHER CAUSE BEYOND THE RANGE OF THE INTENDED USE, OR BY ACCIDENT, FIRE, LIGHTNING OR OTHER HAZARD.

**8.0 LIMITATION OF LIABILITY**

- 8.0 3Com shall not be liable for any damages arising from performance or non-performance of the Product during a testing period or for any damages caused by the failure of Customer to perform its responsibilities.
- 8.0 3Com shall not be responsible for any software, firmware, information or memory data of Customer contained in, stored on, or integrated with any Product returned to 3Com under this Agreement.
- 1.0 TO THE FULL EXTENT ALLOWED BY LAW THE PARTIES EXCLUDE ANY LIABILITY, WHETHER BASED IN CONTRACT OR TORT (INCLUDING NEGLIGENCE), FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES OF ANY KIND, OR FOR LOSS OF REVENUE OR PROFITS, LOSS OF BUSINESS, LOSS OF INFORMATION OR DATA, OR OTHER FINANCIAL LOSS ARISING OUT OF OR IN CONNECTION WITH THE PERFORMANCE OF SERVICES UNDER THIS AGREEMENT EVEN IF ADVISED OF THE POSSIBILITY OF SUCH POTENTIAL LOSS OR DAMAGE. THE DISCLAIMER OF LIABILITY FOR DAMAGES WILL NOT BE AFFECTED IF ANY REMEDY PROVIDED HEREIN SHALL FAIL OF ITS ESSENTIAL PURPOSE.

**9.0 GENERAL**

- 9.1 Each party is an independent contractor, and not an agent or employee of the other party.
- 9.2 This Agreement is intended as the complete statement of the terms of the agreement between the parties relating to Services.
- 9.3 If either party is prevented from carrying out any of its obligations under this Agreement due to any circumstance beyond its reasonable control including, without limitation, act of government or God, interruption of power supplies, interference by a third party, industrial disputes, earthquake or other natural disaster, the party affected shall be excused from performance of such obligation for the duration and to the extent of such preventing circumstance.
- 9.4 A waiver of any default hereunder or of any of the terms and conditions of this Agreement shall not be deemed to be a continuing waiver or a waiver of any other default or of any other term or condition. In the event any provision of this Agreement is found to be invalid, illegal or unenforceable, the validity, legality and enforceability of any of the remaining provisions shall not be affected thereby.
- 9.5 Neither this Agreement nor any of the rights or obligations can be assigned or transferred without the prior written consent of the both parties. However, 3Com has the right (i) to assign all of its rights and obligations in the case of a merger, consolidation or sale of substantially all its assets or substantially all the assets of a particular product line or business line which is included within the terms of this Agreement and (ii) to assign the right to receive payment, provided, however, that Customer has the right to assign all its rights and obligations in the case of a legislatively mandated change of governmental entity responsible for the assets acquired pursuant to this Agreement.
- 1.0 The validity, performance construction, and interpretation of this Agreement shall be governed by the laws of the State of Texas, excluding conflicts of laws principles.
- 9.7 Nothing herein shall be construed to waive the sovereign immunity of the State of Texas.
- 9.8 The provisions of this section shall survive for a period of five (5) years from the termination or expiration of this Agreement. All warranties and confidentiality provisions shall remain in effect for their stated duration.
- 9.9 If Customer is a Texas state agency, the provision of Chapter 2260, Texas Government code shall govern the resolution of all disputes.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement as of the Effective Date stated at the beginning of this Agreement.

**3Com Corporation**

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

Printed: \_\_\_\_\_

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

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

**Customer:** \_\_\_\_\_

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

Printed: \_\_\_\_\_

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

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

## Service Descriptions

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### Guardian<sup>sm</sup> Service

#### Description

Guardian<sup>sm</sup> Service entitles Customer to technical support for an unlimited number of incidents, on-site support, advance hardware replacement and Software Updates for those Products and to those sites listed in Appendix A, Customer Information Document(s).

- **Technical Support**

Technical Support will be available via access to 3Com technical support web site and via telephone. If telephone support is requested, and a technical engineer is not immediately available, 3Com will respond with a callback within one (1) hour of Customer's initial request.

Technical Support will include assistance in the use of the Products, as well as problem identification and resolution, including workarounds, when possible. Assistance may also include logging into Customer's system via modem for diagnosis of problems, if such access is made available to 3Com.

For NBX Products, 3Com shall provide limited assistance in resolving problems that are related to Customer's telecommunication providers. Such assistance shall consist of limited troubleshooting of 3Com Products, including testing of connections as necessary for problem identification, but does not include problem resolution on non-3Com products.

- **Advance Hardware Replacement**

Advance Hardware Replacement ensures that a replacement for a defective hardware Product or part will be shipped to the Customer before requiring the Customer to return the defective Product or part to 3Com. Product or part will be shipped to arrive at Customer's site the next business day after dispatch. However, any requests for replacement Product received after 3:00 PM local time may ship the following business day for second day delivery. 3Com will provide a Return Material Authorization number (RMA) to allow the return of the defective Product or part. All delivery costs are borne by 3Com.

A replacement Product or part may be new or reconditioned of like kind, functionality, and quality. The defective Product or part must be returned to 3Com within fifteen (15) days of receipt of the replacement product; all shipping costs are borne by Customer. In the event the defective Product or part is not returned within fifteen (15) days, or is returned in an unacceptable condition, Customer agrees to pay the list price per Product or part as stated in the then-current 3Com price list. Failure to pay the price or return the defective Product or part promptly will result in the suspension of Services.

- **On-Site Engineer**

When a problem cannot be resolved by utilizing technical support, 3Com will dispatch an engineer to arrive on-site pursuant to the Service level purchased by Customer.

3Com shall comply with all Customers or Government imposed security requirements while on Customer premises. However, 3Com shall not be responsible for delays in performing Services due to Customer's failure to provide 3Com with access to Customer's facilities or due to such security requirements

- **Software Updates**

Customer is entitled to access Software Updates (including related documentation) that are made available for the Products during the term of this Agreement; however, 3Com does not guarantee the frequency or quantity of such Software Updates. Software Updates are defined as formal software releases that may include new features and functionality, and that are not considered a new product or a chargeable upgrade by 3Com, for which there will be a separate cost.

Any software provided hereunder will be governed by the license agreement accompanying the original Product purchased by Customer. Customer has the right to duplicate both the software and documentation for its own internal use, provided that all copyright, trademark, and other proprietary rights notices are also reproduced in the same form and manner as on the original media.

3Com may issue a Software Update that also requires a hardware upgrade in order to utilize new functionality of the Software. Any such hardware upgrade is not covered. Customer may purchase the hardware upgrade at the price set forth in the then-current 3Com Price List, less applicable discount (if any).

Software Updates for Network Management applications, Advanced Features and those requiring specific Software license keys are not included as part of this Service.

## **Express<sup>sm</sup> Service**

### **Description**

Express<sup>sm</sup> Service entitles Customer to technical support for an unlimited number of incidents, advance hardware replacement and Software Updates for those Products and to those sites listed in Appendix A, Customer Information Document(s).

- **Technical Support**

Technical Support will be available via access to 3Com technical support web site and via telephone. If telephone support is requested, and a technical engineer is not immediately available, 3Com will respond with a callback within one (1) hour of Customer's initial request.

Technical Support will include assistance in the use of the Products, as well as problem identification and resolution, including workarounds, when possible. Assistance may also include logging into Customer's system via modem for diagnosis of problems, if such access is made available to 3Com.

For NBX Products, 3Com shall provide limited assistance in resolving problems that are related to Customer's telecommunication providers. Such assistance shall consist of limited troubleshooting of 3Com Products, including testing of connections as necessary for problem identification, but does not include problem resolution on non-3Com products.

- **Advance Hardware Replacement**

Advance Hardware Replacement ensures that a replacement for a defective hardware Product or part will be shipped to the Customer before requiring the Customer to return the defective Product or part to 3Com. Product or part will be shipped to arrive at Customer's site the next business day after dispatch. However, any requests for replacement Product received after 3:00 PM local time may ship the following business day for second day delivery. 3Com will provide a Return Material Authorization number (RMA) to allow the return of the defective Product or part. All delivery costs are borne by 3Com.

A replacement Product or part may be new or reconditioned of like kind, functionality, and quality. The defective Product or part must be returned to 3Com within fifteen (15) days of receipt of the replacement product; all shipping costs are borne by Customer. In the event the defective Product or part is not returned within fifteen (15) days, or is returned in an unacceptable condition, Customer agrees to pay the list price per Product or part as stated in the then-current 3Com price list. Failure to pay the price or return the defective Product or part promptly will result in the suspension of Services.

- **Software Updates**

Customer is entitled to access Software Updates (including related documentation) that are made available for the Products during the term of this Agreement; however, 3Com does not guarantee the frequency or quantity of such Software Updates. Software Updates are defined as formal software releases that may include new features and functionality, and that are not considered a new product or a chargeable upgrade by 3Com, for which there will be a separate cost.

Any software provided hereunder will be governed by the license agreement accompanying the original Product purchased by Customer. Customer has the right to duplicate both the software and documentation for its own internal use, provided that all copyright, trademark, and other proprietary rights notices are also reproduced in the same form and manner as on the original media.

3Com may issue a Software Update that also requires a hardware upgrade in order to utilize new functionality of the Software. Any such hardware upgrade is not covered. Customer may purchase the hardware upgrade at the price set forth in the then-current 3Com Price List, less applicable discount (if any).

Software Updates for Network Management applications, Advanced Features and those requiring specific Software license keys are not included as part of this Service.

## **Software Updates Service**

### **Description**

Software Updates Service entitles Customer to Software Updates for those Products and to those sites listed in Appendix A, Customer Information Document(s). Software Updates are defined as formal software releases that may include new features and functionality, and that are not considered a new product or a chargeable upgrade by 3Com, for which there will be a separate cost.

- **Software Updates**

Customer is entitled to access Software Updates (including related documentation) that are made available for the Products during the term of this Agreement; however, 3Com does not guarantee the frequency or quantity of such Software Updates.

Any software provided hereunder will be governed by the license agreement accompanying the original Product purchased by Customer. Customer has the right to duplicate both the software and documentation for its own internal use, provided that all copyright, trademark, and other proprietary rights notices are also reproduced in the same form and manner as on the original media.

3Com may issue a Software Update that also requires a hardware upgrade in order to utilize new functionality of the Software. Any such hardware upgrade is not covered. Customer may purchase the hardware upgrade at the price set forth in the then-current 3Com Price List, less applicable discount (if any).

Software Updates for Network Management applications, Advanced Features and those requiring specific Software license keys are not included as part of this Service.