

**Consolidated Edison Company of New York  
Telecom Applications Management Department  
March 25, 2004**

**Standard Terms and Conditions  
For Telecommunications Service  
(Pursuant to PSC No. 9 – Electricity, Rider X)**

**SECTION 1:**

**GRANT OF RIGHT TO USE CON EDISON PROPERTY**

- A.** Subject to all of the terms and conditions of the Telecommunications Service Agreement (“Service Agreement”), Con Edison hereby grants to Customer a non-exclusive right to occupy Con Edison Facilities solely to construct, install, repair and maintain Customer's Facilities therein for the Permitted Use. Con Edison Facilities may not be used by Customer or its permitted successors or assigns for any purposes other than the Permitted Use.
- B.** Customer acknowledges that for service requests concerning Con Edison Facilities, other than Engineering Record requests<sup>1</sup>, the Effective Date of Customer's Service Agreement with Con Edison shall occur on the date that Con Edison and Customer sign the Service Agreement. Customer acknowledges that it will be responsible to obtain any required municipal approvals prior to fiber installation. Customer acknowledges that once Con Edison submits the results of the Engineering Record Search for a given route, and customer accepts search for a given route and customer accepts and agrees to reserve the given route, a “Route Grant” will be given to customer by Con Edison. The customer will have one year from the Route Grant acceptance date to install fiber.
- C.** Customer acknowledges that it has been advised by Con Edison that Customer's Facilities are in close proximity to electrical cables that are subject to fault, burnout, or other malfunction which can result in damage, destruction, or disruption to such Fiber Optic Cable. As a material part of this Service Agreement, Customer assumes all risk of such damage, destruction, or disruption.
- D.** Customer is granted no right to physically access high voltage facilities for any purpose other than to construct, install, maintain and operate splice enclosures that shall be mounted on the legs of transmission towers as required by Con Edison. Access to such high voltage facilities for purposes of constructing, installing, and maintaining any portion of Customer's Facilities or Con Edison's Facilities is reserved solely to Con Edison and Con Edison's contractors, except as otherwise permitted by the Operating Procedures for Use of Con Edison Facilities for Telecommunication Purposes (“Operating Procedures”).

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<sup>1</sup> Engineering Record searches are performed upon completion of the Application for Telecommunication Services by Customer and upon receipt by Con Edison of the estimated payment for performing the requested searches.

- E.** Subject to the Operating Procedures and any other restrictions or requirements set forth in the Service Agreement, Customer is granted the right to access the Con Edison Facilities 7 days a week, 24 hours a day, for the purpose of constructing, installing, maintaining, repairing and operating the Fiber Optic Cable in, on, over or through Con Edison Facilities. Customer shall comply with all applicable federal, state, and local laws, executive orders, regulations, ordinances, rules, and safety codes, and the terms and conditions of all applicable governmental and non-governmental franchises, permits, authorizations, and approvals.
- F.** Nothing in this Agreement obligates Con Edison to provide any utilities including, without limitation, any water, electricity, gas, steam, or storm and sanitary sewer service ("Utilities") to, or for the benefit of, Customer. Customer shall be solely responsible for obtaining, at its sole expense, any Utilities that it requires. In connection with obtaining the Utilities that it requires, Customer shall, at its sole expense, satisfy any conditions and requirements of the providers of the Utilities and any conditions and requirements of Con Edison. Con Edison makes no representation or warranty concerning the availability or suitability of any Utilities, the cost of obtaining any Utilities, or the ability of the Con Edison Facilities to be connected to any Utilities.
- G.** Nothing herein shall be construed as a grant by Con Edison of any exclusive right or privilege to Customer and nothing herein shall be construed as a grant of any interest in real property.

## **SECTION 2:**

### **NO WARRANTIES RISK OF DAMAGE TO CUSTOMER'S FACILITIES**

- A.** Con Edison does not make, and hereby disclaims, any express, implied, statutory, or common law warranty, guaranty or representation concerning the Con Edison Facilities or its suitability for the Permitted Use. Without limitation of the generality of the foregoing, Con Edison does not make, and hereby disclaims any express, implied, statutory, or common law warranty of merchantability or fitness for a particular purpose.
- B.** Customer represents that it has visited, examined, and/or analyzed the Con Edison Facilities, has knowledge of all limitations, restrictions, and conditions, legal, physical, or otherwise, concerning the Con Edison Facilities including, without limitation, such limitations, restrictions and conditions as may affect the suitability of the Con Edison Facilities for the Permitted Use, and that Customer is satisfied with the suitability of the Con Edison Facilities for the Permitted Use. Customer acknowledges that the Con Edison Facilities are in close proximity to electrical cables that are subject to fault, burnout or other malfunction which can result in damage, destruction or disruption to customer's facilities and that, without limitation of Section 13 of these Terms and Conditions, the risk of such damage, destruction or disruption is a risk covered by Section 13 hereof.

**SECTION 3:  
PROCEDURES**

- A.** Customer shall not be permitted to occupy Con Edison's property without first having executed Con Edison's Service Agreement. .
- B.** Upon submitting its Application to Con Edison, Con Edison will review the Application and prepare an estimate of the costs it will incur to perform the Engineering Record Search to determine the availability of Customer's route, outlined in Exhibit A to the Application. Con Edison will provide to Customer the estimated engineering record search cost within one week ("Estimated Engineering Record Search Cost"). The Estimated Engineering Record Search Cost will be a valid estimate for 90 days. In the event that the Customer does not pay these estimated costs within the ninety-day period, Con Edison reserves the right to re-compute the estimate. The Engineering Record Search will not begin until payment of the Estimated Engineering Record Search Cost is received by Con Edison. Upon completion of the Engineering Record Search, Con Edison will either bill Customer within 90 days, the difference between the Estimated Engineering Record Search and Con Edison's actual costs or refund the difference to Customer if Con Edison's actual costs for the Engineering Record Search are less than the Estimated Engineering Record Search. Under no circumstances will costs associated with Engineering Record Search be refunded to Customer if the field verification reveals that Customer's requested route is unavailable and Customer requests termination of the Service Agreement or if Con Edison revokes its approval to the Service Agreement.
- C.** Upon Con Edison's review of a specific route through its Engineering Record Search, Customer shall be required to accept or reject such route within ninety (90) days from the date that Con Edison notifies Customer of the availability of such route. The route selected by Con Edison may consist of any combination of Con Edison Facilities.
- D.** The Customer has the right to use any contractor approved by Con Edison to perform Discretionary Services. Should the Customer choose to use Con Edison to perform Discretionary Services and should Con Edison agree to perform the work, Con Edison will enter into an agreement with the customer separate from any agreements for Required Services.
- E.** During the ninety (90) day period, the Customer may, at its discretion, perform route verification activities in order to determine the physical availability and construction requirements for any given route. Consistent with current procedures under Rider X, in no event will charges for Make-Ready work be subject to a refund. Con Edison at its sole discretion may extend the ninety (90) day period for accepting or rejecting any particular route. A route will not be reserved unless the customer accepts the Route and is granted a Route Grant Date.
- F.** Pursuant to this Service Agreement, Customer may elect to construct and install Fiber Optic Cable in, on, over or through the Con Edison Facilities. Customer will be

responsible for paying to Con Edison the Rental Charges for all innerducts used or reserved. A maximum of 3 innerducts ranging from 1” to 1¼” ID per route will be leased to each customer. If Customer fails to complete or cause to be completed the installation of its Fiber Optic Cable within said one year of the Route Grant Date, Con Edison, at its option may elect to terminate this Service Agreement, or portion thereof, relating to inner duct for which fiber optic cable was not installed pursuant to these Terms and Conditions upon ten days prior written notice to Customer and, if applicable, draw upon the security (see Section 20) furnished in connection with such construction. Under no circumstances will Customer be refunded any Rental Charges incurred to date, or associated costs (Make Ready Work) in relation to the work. In the event Customer elects to install more than one Fiber Optic Cable in, on, over or through the Con Edison Facilities, Customer shall complete the construction and installation of the first Fiber Optic Cable in said one year period of the Route Grant Date and the entire installation of any additional Fiber Optic Cables must be completed within three years from the Route Grant Date, and if such installation of all Fiber Optic Cables is not completed within said three year period, Con Edison, at its option, may elect to terminate the applicable Route Grant upon ten days prior written notice to Customer, with respect to such unused innerducts.

**SECTION 4:**  
**TERM**

The Service Agreement shall have an Initial Term of ten years, renewable for an additional fifteen years at Customer’s option by written notice six months prior to the expiration of the Initial Term. The Initial Term, as extended, shall hereinafter be referred to as the Term of this Service Agreement. After twenty-five years, the Service Agreement, as may be modified by negotiations of the parties and agreed to in writing, may be extended for two additional ten-year terms (First and Second Renewal). Unless otherwise expressly provided in these Terms and Conditions, the word Term shall mean the period beginning with the signing of the Service Agreement by Con Edison and Customer and ending at the expiration of the Initial Term, as may be extended as provided above, subject to any earlier termination in accordance herewith. For any renewal, Customer must also obtain any necessary permits, approvals and/or authority from the relevant municipal authority. Additional Con Edison Facilities may be added from time to time, provided that Customer and Con Edison agree in writing to the additional Con Edison Facilities.

**SECTION 5:**  
**COMPENSATION**

The Rental Charges for the right to use the Con Edison Facilities for the Permitted Use in accordance with the terms and conditions hereof, are set forth in PSC No. 9 – Electricity, Rider X - Rate for Use of Company Facilities for Telecommunications Purposes (“Rider X”). The rental charges may be adjusted periodically by Con Edison in accordance with Rider X. Customer's obligation to pay the amounts due under this section, if any, shall survive the expiration or termination of this Service Agreement.

**SECTION 6:**  
**TAXES**

Customer shall bear all responsibility for any and all federal, state and local income, sales, use, excise, occupations, franchise, property, gross receipts, privilege, transfer, unincorporated business and other taxes that may be applicable to Customer's Facilities and other installations owned by Customer and located in, on, over or through the Con Edison Facilities, and for all federal, state and local taxes, contributions, and premiums imposed upon or measured by Customer's payroll. Customer's obligation to pay the amounts due under this section, if any, shall survive the expiration or termination of this Service Agreement.

**SECTION 7:**  
**CUSTOMER'S OBLIGATIONS RE OPERATIONS**

- A.** Customer shall not: (i) cause or permit objectionable odors to emanate from, or be attributable to, the Con Edison Facilities; (ii) use, store, dispose or permit to be used, stored, or disposed at, or in the vicinity of, the Con Edison Facilities (either as part of any Fiber Optic Cable, or in connection with the construction, installation, repair, maintenance, or operation of Customer's Facilities, or otherwise) any toxic (including asbestos), hazardous, or flammable substance or other substance controlled by federal, state or local law, regulation, or ordinance, (iii) place or permit to be placed in, on, over, or through the Con Edison Facilities any sign, awning, advertising matter or any other thing of any kind, other than normal warning signs, or (iv) use or access the Con Edison Facilities(s) in any way which constitutes a public or private nuisance, or which is annoying, hazardous or which interferes with or disrupts or threatens to interfere with or disrupt any of Con Edison's use of the Company's Facilities for its public utility functions.
- B.** Customer shall at all times exercise every reasonable precaution to protect persons and property. Specific precaution requirements are addressed in the Operating Procedures.
- C.** While on or about the Con Edison Facilities, Customer shall observe and comply with all environmental, noise, fire, safety, hazard, "No Smoking", and all other rules and regulations heretofore or hereafter prescribed by Con Edison, including but not limited to those set forth in the Operating Procedures, together with all applicable federal, state, and local laws, executive orders, regulations, ordinances, rules, and safety codes.
- D.** If an accident involving death or serious injury or serious damage or if there is an environmental release in relation to the Con Edison Facilities, Customer shall immediately report the accident or Environmental Release by telephone to the local control center and Con Edison Construction inspector. The local control center telephone number and the Con Edison contact person to be notified in writing including his/her address and- telephone number shall be provided in a written notice to Customer following the execution of this Agreement. Customer shall, within 24 hours of notifying the local control center, report in writing to Con Edison's Project Manager/Coordinator

all releases to the environment of any toxic substance, (including asbestos) hazardous substance, hazardous waste, flammable substance or any other substance or waste the release of which to the environment is prohibited, controlled, or regulated by federal, state or local law, regulation, or ordinance ("Environmental Releases") and all accidents whatsoever relating to, arising out of, or in connection with the Con Edison Facilities, giving full details and statements of witnesses. By subsequent written notice to Customer, Con Edison may change the reporting requirements and the person to be notified and/or such person's address and/or telephone number listed.

- E.** Customer shall construct, install, operate and maintain the Customer's Facilities and occupy the Con Edison Facilities and otherwise conduct its operations in such a manner as to prevent any liens or attachments from arising or being filed, served, posted, processed or entered with regard to the Con Edison Facilities. Customer shall indemnify and hold Con Edison harmless from and against any such liens or attachments. Without limitation of the generality of the foregoing Customer shall promptly notify Con Edison of any such lien or attachment and, to the extent that such a procedure is permitted by applicable law, Customer promptly shall remove, release and discharge any such lien or attachment on the Con Edison Facilities by doing everything necessary to deposit a sufficient amount or file a sufficient bond with the appropriate court other governmental entity or official so that such lien or attachment is removed, released and discharged from the Con Edison Facilities and applies instead to such amount or bond so deposited or filed. Should Customer fail to so promptly remove, release and discharge any such lien or attachment on the Con Edison Facilities, Con Edison, at the expense of Customer, may, but shall not be obligated to, promptly cause any such lien or attachment to be so removed, released, and discharged.
- F.** Customer shall design, construct and operate the Customer's Facilities in accordance with the safety clearances and personnel safety requirements referenced in ANSI C2-1997 (National Electric Safety Code), as it may be revised from time to time. Customer shall insure that all vehicles, equipment, machinery and other apparatus at or near the high voltage facilities are appropriately grounded. In addition, vehicles, equipment, machinery and other apparatus must be maintained at a minimum of twenty-five (25) feet away from any electrical conductor on the high voltage facilities (additional or different requirements may be imposed by Con Edison for high voltage facilities over 345 kV).
- G.** Customer shall ensure that dust and debris generated during work at or near the Con Edison Facilities is controlled and that dust and debris is not permitted to affect any electrical facilities.

**SECTION 8:**  
**PERMITS, CODES, LAWS AND REGULATIONS**

- A.** Customer shall, at its expense, obtain and maintain all governmental and non-governmental franchises, consents, easements, permits, authorizations, and approvals required for the construction, installation, operation, repair and maintenance of Customer's Facilities in, on, over or through the Con Edison Facilities for the Permitted

Use ("Approvals") and must provide copies of same to Con Edison before such construction, installation, operation, maintenance or repair, as applicable.

- B.** If applicable law requires that Con Edison execute applications for an Approval or documentation related to such applications, Customer, at its expense, shall prepare such applications and documentation for review by Con Edison (which review shall be conducted at Customer's expense) and, if the applications and documentation meet with Con Edison's approval (which approval shall not be unreasonably withheld), Con Edison shall cause its authorized representative to execute such applications of documentation. Customer, at its expense, shall make such corrections or amendments to such applications and documentation as Con Edison reasonably may request.
- C.** Customer shall comply with all federal, state, and local laws, executive orders, regulations, ordinances, rules, and safety codes, and Con Edison requirements applicable to the Con Edison Facilities, the Permitted Use, or the construction, installation, operation, repair and maintenance of Customer's Facilities, including, without limitation, all applicable federal, state, and local environmental laws, orders, regulations, ordinances, rules, codes, and Con Edison environmental requirements and procedures (including but not limited to those pertaining to air pollution, water pollution, management, removal, or disposal of toxic substances (including asbestos), hazardous substances, flammable substances, hazardous waste, oily waste and solid waste, pesticides, and protection of wetlands and wildlife).
- D.** Customer shall be responsible for obtaining from private and or public authority any necessary easement, right of way, license, permit, permission, certificate or franchise to construct, operate and/or maintain Customer's Facilities in or on public and private locations where Customer's Facilities enter the Con Edison Facilities. Con Edison does not warrant the validity or apportionability of any rights it may hold to place Customer's Facilities on private property.

**SECTION 9:**  
**ENVIRONMENTAL ASSESSMENTS**

- A.** Prior to construction or installation of Customer's Facilities in, on, over or through the Con Edison Facilities, Customer shall have the right to conduct, at Customer's sole cost and expense, environmental assessments of the Con Edison Facilities ("Assessments"). The Assessments shall comply with ASTM standards for Phase I and Phase II Environmental Site Assessments and may consist of reviewing records of the Con Edison Facilities and, to the extent that Con Edison Facilities consists of land owned by Con Edison, sampling and testing the soil and groundwater on the Con Edison Facilities.
- B.** Con Edison hereby gives permission to Customer, its contractors, and subcontractors to enter upon the Con Edison Facilities for the purpose of conducting the Assessments subject to the following conditions: (i) Customer must give notice to Con Edison of any such intent to enter upon the Con Edison Facilities (and must specify the specific Con

Edison Facilities that will be entered and that will be the subject of any Assessment) at least ten (10) business days in advance of the access date requested; and (ii) if Customer requires a Phase II (Soil or Groundwater Investigation and Sampling) Environmental Assessment, Customer must submit a field sampling and analysis work plan ("Work Plan") to Con Edison for written approval by Con Edison prior to Customer's entrance onto the Con Edison Facilities for the purpose of the Assessments. The Work Plan shall include, at a minimum, a description of the sampling equipment and procedures to be employed in the course of the Phase II Assessment, the number of samples to be collected, a site-specific health and safety plan, and the name and relative qualifications of the contractor and analytic laboratory to be used by Customer in connection with the Assessment and, if necessary, waste management procedures to be followed by Customer or its contractor including the name of the licensed transporter and the licensed waste management facility to handle waste streams in compliance with law. Con Edison will have the right to oversee all field sampling activities conducted by Customer, or its contractors or subcontractors in connection with this Section. Customer is responsible for all costs and expenses and record keeping associated with any Assessment, the management, removal or disposal of any wastes generated in connection with any Assessment, or any work related to such Assessment or to such Assessment, management, removal, or disposal. Customer shall defend, indemnify, and hold Con Edison harmless from any such costs and expenses and from any and all liabilities in connection with any such Assessment, management, removal, disposal or any work related to such Assessment, management, removal or disposal.

- C. Customer shall notify Con Edison in writing within ten (10) days after the action items in the Work Plan have been completed. Within sixty (60) days after completion of the action items specified in the Work Plan and receipt of any testing results, Customer shall provide Con Edison with a report detailing the findings of any Assessment, including a description of all field sampling activities, analytical results and soil boring logs. Should Customer obtain any reports from contractors or subcontractors concerning an Assessment, Customer shall provide Con Edison with a copy of such reports as such reports are received by Customer. Con Edison retains the right to make initial notification to the New York State Department of Environmental Conservation ("DEC") or to any other governmental agencies having jurisdiction of any environmental conditions revealed from the Assessment, unless Customer is otherwise required by law to notify the DEC or such other governmental agencies. Within ninety (90) days after the date of completion of the action items specified in the Work Plan, each party, based on the information in its possession from the Assessment, shall notify the other party of any environmental conditions it asserts exist on the Con Edison Facilities that was the subject of the Assessment which require remediation. Con Edison shall then have sixty (60) days from the expiration of such ninety (90) day period within which to prepare (at Customer's cost and expense) and submit a written "Environmental Proposal" to Customer describing Con Edison's proposed remedy for the asserted environmental conditions. All costs and expenses associated with such proposed remedy, any removal, management, or disposal of waste generated in connection with such proposed remedy, or any other work related to such proposed remedy or to such removal, management or disposal shall be borne entirely by Customer.



Without limitation of the terms and conditions upon which Con Edison may require the work in such Environmental Proposal to be performed, Customer shall defend, indemnify, and hold Con Edison harmless from any such costs and expenses and from any and all liabilities in connection with such proposed remedy, any removal, management, or disposal of waste generated in connection with such proposed remedy, or any other work related to such proposed remedy or to such removal, management or disposal. Within thirty (30) days of its receipt of the Environmental Proposal or within such shorter period as may be specified in the Environmental Proposal if circumstances, including legal requirements, reasonably require that the work to effect the remedy described in such Environmental Proposal be commenced earlier, Customer shall notify Con Edison in writing whether it accepts or rejects such Environmental Proposal (a failure to timely reject such Environmental Proposal shall be considered by the parties as an acceptance of such Environmental Proposal). If Customer rejects such Environmental Proposal, Con Edison shall have the option to terminate this Agreement without any liability to Customer by sending written notice of such termination to Customer within thirty (30) days after such rejection. Such a termination shall result in, among other things, Customer's Facilities being removed from the Con Edison Facilities at Customer's expense.

- D.** Without limitation of any other environmental obligation of Customer, Customer shall be responsible for complying fully with any and all environmental laws, including regulations, guidelines, standards, or policies of any governmental authorities authorized to regulate environmental conditions or concerns, as may now or hereafter be in effect, which are applicable to Customer's Facilities or the Con Edison Facilities or any use of, or activity upon or concerning same. Customer shall defend, indemnify and hold Con Edison harmless from and against any failure of Customer or its contractors or subcontractors to comply fully with any such laws, regulations, guideline, standards, or policies.
- E.** It is understood and agreed that other environmental obligations of Customer in connection with any construction, installation, maintenance, repair or operation of Customer's Facilities, including but not limited to Customer's obligation to bear the expense of removal, management and disposal of any waste generated on or about Con Edison Facilities and of any flushing or cleaning of any manholes or service boxes that comprise Con Edison Facilities, are set forth in the Operating Procedures.
- F.** Telecom Customers and their contractors performing work in, on, over or through Company facilities are required to provide a Health and Safety Plan (HASP) to the assigned Project Manager/Coordinator, Telecom Applications Management, for approval by Environmental Health and Safety, prior to the start of said work. The HASP is a job-specific plan that addresses the environmental, health, and safety practices that will be employed by the Customer's site workers participating in activities at the job site.

The HASP shall include discussions of the following subjects, as appropriate:

- Contractor Background

- Project Overview
- Project Organization and Responsibilities
- Potential Hazards of the Job Site
- Activity Hazard Analysis
- Personal Protective Equipment
- Job Site Control, Protection, and Communication
- Safety Considerations
- Waste Disposal Practices
- Emergency Response Plan
- Training and Certifications
- Logs, Reports, and Record Keeping
- Environmental and Work Permits

Telecom Customers are required to comply with all of the safety and health standards set forth in 29CFR 1910.268 -Telecommunications, and the submitted HASPS must clearly indicate that understanding.

- G.** Telecom Customers are required to provide the assigned Project Manager/Coordinator an MSDS sheet for all materials they or their contractors plan to bring onto Company property for any reason. The Project Manager/Coordinator will confer with EH&S and inform the Customer of approval to bring and use the material on Company property. The Customer requires approval from the Project Manager/Coordinator prior to bringing or using any material on Company property.
- H.** Telecom Customers and their contractors are required to successfully complete safety training as indicated in the Operating Procedure and correctly use the required PPE (Personal Protective Equipment) at all times. From time to time, the Assigned Project Manager may inform the Customer of changes or additions to safety requirements including training, work practices and PPE requirements. The Customer is required to comply with all such requests to ensure the integrity and safety of the Con Edison system, its employees and the public.

**SECTION 10:**

**TITLE TO CUSTOMER'S FACILITIES; REMOVAL OF CUSTOMER'S FACILITIES**

- A.** Subject to the terms of this Service Agreement, Customer shall retain title to all portions of the Customer's Facilities.
- B.** All portions of Customer's Facilities shall be capable of removal at any time, including upon the expiration of this Agreement or its earlier termination. Unless otherwise agreed to in a writing signed by both parties, within thirty (30) days after the expiration of this Service Agreement or its earlier termination for any reason and at Customer's expense, Customer's Facilities shall be removed from the Con Edison Facilities and the Con Edison Facilities shall be restored to substantially the same condition as existed prior to the construction, installation, operation, repair and maintenance of Customer's

Facilities therein, thereon, thereover, or there through; provided, however, that any portion of Customer's Facilities that is direct-buried with two feet or more of cover on Con Edison-owned land and which is not attached to a Con Edison transmission tower or contained in a Con Edison duct, any associated manhole or service entrance pipe or any associated service box, may, at Con Edison's option, and except as otherwise provided in the Operating Procedures, be abandoned in place, but shall thereafter be owned by Con Edison and be subject to removal thereafter by Con Edison. At Con Edison's sole election, at the expiration of the term of this Service Agreement or upon earlier termination in accordance with the terms and conditions of the Agreement, Customer, may be required to remove all customer facilities and/or innerduct installed pursuant to this Service Agreement at Customer sole cost and expense. With regard to all portions of Customer's Facilities on or about high voltage facilities, such removal and restoration shall be performed by Con Edison or its contractors at Customer's expense, except to the extent that the Operating Procedures otherwise provide.

## **SECTION 11:** **INSURANCE**

- A. Customer shall and shall cause all contractors and subcontractors doing work on behalf of Customer, to procure and maintain at their own expense the following insurance until this Service Agreement expires or is earlier terminated, with at least the monetary limits specified. The insurance shall be in policy forms which contain an "occurrence" and not a "claims made" determinant of coverage and shall be placed with insurance companies that are acceptable to Con Edison.
- (i) Employment related insurance.
    - (a) Workers' Compensation Insurance and Disability Insurance Benefits as required by law. Such insurance shall contain a waiver of subrogation clause endorsement in favor of Con Edison.
    - (b) Employer's Liability Insurance, including accidents (with a limit of \$1,000,000 per accident) and occupation diseases (with a limit of \$1,000,000 per employee).
    - (c) Where applicable, insurance required by the United States Longshoremen's and Harbor Workers' Act, the Federal Employers' Liability Act, and the Jones Act.
  - (ii) Comprehensive (also called Commercial) General Liability Insurance, inclusive of excess liability if necessary, including Contractual Liability, with limits of \$10,000,000 per occurrence for bodily injury or death and \$10,000,000 per occurrence for property damage or a combined single limit of \$10,000,000 per occurrence, and, for at least one year after the expiration or earlier termination of this Agreement, Products/Completed Operations Liability Insurance with

similar but separate and independent limits. Where work is to be performed in or on streets or sidewalks the liability policies shall have no deductibles.

There shall be no policy deductibles unless and to the extent that Con Edison's prior written approval has been obtained for the same. The insurance shall contain no exclusions for explosion, collapse of a building or structure, or underground hazards. The insurance policy or policies shall name Con Edison as an additional insured, shall be primary and non-contributory to any insurance carried by Con Edison, and shall contain a cross-liability endorsement. There shall be no exclusions for claims by or on behalf of employees of Customer or any contractors or subcontractors of Customer against Con Edison based on injury or death to such employees. Without limitation of the exclusions that shall not be permitted, there shall be no exclusions for any claims by or on behalf of Customers of Customer or by or on behalf of lessees or licensees of single mode dark or lit fiber optic strands in Fiber Optic Cable.

- (iii) Comprehensive Automobile Liability Insurance, inclusive of excess liability if necessary, covering all owned, non-owned and hired automobiles used by Customer, with limits of \$2,000,000 per occurrence for bodily injury or death and \$2,000,000 per occurrence for property damage or a combined single limit of \$2,000,000 per occurrence.
- (iv) Where any work involves the use of aircraft, Aircraft Liability Insurance, covering all owned, non-owned and hired aircraft, including helicopters, used by Customer with a combined single limit of \$5,000,000 for bodily injury or death and property damage. The insurance shall name Con Edison as an additional insured.
- (v) For any work involving asbestos abatement or lead abatement, Asbestos Abatement General Liability Insurance and Lead Abatement Liability Insurance, as applicable, each with a combined single limit of \$5,000,000 for bodily injury or death and property damage. Each insurance policy shall name Con Edison as an additional insured. Where the abatement work is to be performed by a contractor or subcontractor, Customer shall require the contractor and subcontractor to name Customer, its contractor and subcontractor and Con Edison as additional insured and to submit copies of the policies to Con Edison.
- (vi) If any work involving excavation on Con Edison property is planned to be performed, thirty (30) days' advance written notice of such work shall be provided to Con Edison and Con Edison, within fifteen (15) days after receipt of such notice may, upon written notice to Customer, require that such pollution insurance or additional pollution insurance with such limits as Con Edison may require in its reasonable discretion be obtained by Customer prior to the commencement of such work, in which case each such insurance policy shall name Con Edison as an additional insured as well as any others as Con Edison may require in its reasonable discretion.

- B.** Customer shall cause all insurance carried hereunder to be endorsed by the insurer to require that the insurer furnish Con Edison with at least 30 days' written notice prior to the effective date of cancellation of the insurance or of any changes in policy limits or scope of coverage. All coverage of additional insureds shall be primary as to the additional insureds.
- C.** Five (5) business days prior to any Permitted Use of the Con Edison Facilities, Customer shall furnish Con Edison with Certificate(s) of Insurance signed by the insurer or its authorized representative certifying that the required insurance has been obtained and will not be cancelled without at least 30 days' prior written notice to Con Edison. Such certificates shall state that the policies have been issued and are effective, show their expiration dates, and state that Con Edison is an additional insured with respect to all coverage enumerated in Paragraph A (ii), (iv), and (v) of this Section. Such certificates shall not contain a disclaimer of liability of the insurer for failure to provide Con Edison with notice of cancellation or substantial alteration. Customer shall furnish Con Edison with a copy of the insurance policy containing the coverage enumerated in Paragraph A (ii) of this Section at the time that certificates are required to be furnished as provided above. Con Edison shall have the right to require Customer to furnish Con Edison, upon request, with a copy of the insurance policy or policies required under Paragraphs A(i), A(iii), A(iv), A(v), and A(vi) of this Section. Customer agrees that this is an insured contract. The insurance required herein is intended to cover any cause of action or lawsuit arising from, relating to, or connected with Customer's Facilities or the Con Edison Facilities or any work performed by any person or entity concerning Customer's Facilities or the Con Edison Facilities. For purposes of interpretation of coverage of any policy of insurance or endorsement thereto, Customer shall be deemed to have assumed tort liability for any injury to or death of any employee of Customer or of Con Edison, and of any contractor or subcontractor of either arising from, relating to, or connected with Customer's Facilities, the Con Edison Facilities, or any work performed by any person or entity concerning Customer's Facilities or the Con Edison Facilities, except to the extent of any liability arising out of the negligence of Con Edison.

The Certificates of Insurance and the copy of insurance required under Paragraph C of this Section shall be sent to:

Consolidated Edison Company of New York, Inc.  
TeAM – Telecom Applications Management  
4 Irving Place, Room 606S  
New York, NY 10003  
Attention: Project Manager/ Coordinator

- D.** Customer shall cause the following provisions to be a part of any contract with any contractor hired by Customer to perform work relating to the construction, installation, maintenance, or operation of new Telecommunications Underground Facilities or Customer's Facilities and shall cause any such contractor who hires a subcontractor to cause the following provisions to be a part of any subcontract which provisions: (i)

require such contractors and subcontractors to procure and maintain, without expense to Con Edison, the same insurance as Customer is required to procure and maintain by this Service Agreement; (ii) require such contractors and subcontractors to name Consolidated Edison Company of New York, Inc. as an additional insured on such insurance policies to the same extent that Con Edison is required to be named as an additional insured on the policies required to be procured and maintained by Customer pursuant to this Agreement; and (iii) expressly state that such insurance and additional insured requirements are also for the benefit of Consolidated Edison Company of New York, Inc.

- E. Every three (3) years after the anniversary of the PSC approval of Rider X, Con Edison shall have the right to amend the insurance requirements and increase the monetary limits contained in this Section, but in no event shall an increase in a monetary limit for insurance be more than twenty-five percent (25%) of the monetary limits previously required under this Section for that insurance immediately before such increase.

## **SECTION 12**

### **INDEMNIFICATION; RELEASE; WAIVER; LIMITATION OF LIABILITY**

- A. Except for claims, actions, liabilities, damages, costs and expenses to the extent they are caused by the negligence of Con Edison, Customer, to the fullest extent permitted by law, shall indemnify, defend, and hold harmless Con Edison, its affiliates and its and their respective trustees, directors, officers, employees, and agents (referred to herein collectively as the "Protected Parties") from and against any and all claims, actions, liabilities, damages, costs, and expenses (including without limitation attorney fees and other legal costs and expenses), whether based in contract, tort or otherwise, which are asserted, suffered, or incurred by any person or entity (including Customer and the Protected Parties), and which arise from, relate to, or are connected with Customer's Facilities, the Con Edison Facilities or any work performed by any person or entity concerning Customer's Facilities, or the Con Edison Facilities (the foregoing claims, actions, liabilities, damages, costs, and expenses being hereinafter referred to as the "Covered Claims"). To the fullest extent permitted by law, Customer hereby irrevocably and unconditionally agrees to release and forever discharge the Protected Parties from any and all liability for any of the Covered Claims, and to waive any and all rights to assert any of the Covered Claims (directly or by impleader, crossclaim, counterclaim or otherwise) against the Protected Parties or any of them in the future.
- B. Notwithstanding the exception contained in Paragraph A of this Section 12 relating to Covered Claims to the extent caused by the gross negligence or willful misconduct of Con Edison, Customer and Con Edison agree, to the fullest extent permitted by law, that under no circumstances shall the Protected Parties or any of them be liable to Customer, whether in contract, tort (including negligence, gross negligence and strict liability), or otherwise, for any special, indirect, incidental, or consequential damages (including but not limited to damage, loss, liability, costs, and expenses resulting from loss of use, loss of business or business opportunities, loss of profits or revenue, costs of capital,

loss of goodwill, claims of customers, claims of unrelated companies and other third parties, cost of purchased or replacement telecommunications capacity and like items of special, indirect, incidental, or consequential loss and damage) asserted, suffered, or incurred by any person or entity (including Customer and the Protected Parties), which arise, relate to or are connected with this Service Agreement the implementation of same, Customer's Facilities, or any work performed by any person or entity concerning the Con Edison Facilities or Customer's Facilities regardless of whether or not such damages, loss, liability, costs or expenses are caused in whole or in part by the acts or omissions (including negligence, gross negligence or willful acts) of the Protected Parties or any of them.

The damages referred to in this Paragraph B are hereinafter referred to as the "Consequential Losses." To the fullest extent permitted by law, Customer hereby irrevocably and unconditionally agrees to release and forever discharge the Protected Parties from any and all liability for any Consequential Losses and to waive any and all rights to recover any Consequential Losses from the protected parties or any of them in the future. To the fullest extent permitted by law, Customer shall indemnify, defend, and hold the Protected Parties harmless from and against any and all Consequential Losses (including any attorneys fees and any other legal costs and expenses in connection therewith) asserted, suffered or incurred by any person or entity (including the parties hereto)

- C. If a court of competent jurisdiction determines that any provision of Paragraph A or B of this Section 12 is unenforceable, the total liability of the Protected Parties or any of them for all matters which otherwise would have been covered by such Paragraphs shall be \$250,000. If a court of competent jurisdiction determines that any provision of Paragraphs A or B of this section or the preceding sentence of this Paragraph C is unenforceable, such court shall limit the operation of only such portions of such provisions as are unenforceable so as to give them the effect intended to the fullest extent permitted by law.

### **SECTION 13**

#### **DAMAGE AND DESTRUCTION**

- A. Without limitation of Section 12, to the extent that any portion of Customer's Facilities or the Con Edison Facilities shall be damaged or destroyed during the Term by any cause other than the gross negligence or willful misconduct of Con Edison, such damage or destruction shall be promptly repaired or replaced at Customer's expense if the damage is to Customer's Facilities and at the Telecommunication Class' expense if the damage is to the Con Edison Facilities unless such damage or destruction was the result of Customer's negligence. In the event the damage or destruction was the result of Customer's negligence, the damage or destruction to Customer's Facilities and the Con Edison Facilities shall be repaired or replaced at Customer's sole expense and in neither event shall there be an abatement or reduction in the Rental Charges to be paid or provided to Con Edison hereunder.

- B.** To the extent that (i) any portion of Customer's Facilities or the Con Edison Facilities is materially damaged or destroyed during the term of this Service Agreement by the gross negligence or willful misconduct of Con Edison during the Term, such damage or destruction shall be promptly repaired or replaced at Con Edison's sole expense. Customer's obligation to pay the Rental Charges applicable to any portion of the Con Edison Facilities which is made unusable for the Permitted Use by such damage or destruction shall be suspended until such portion of the Con Edison Facilities is again useable for the Permitted Use. Such obligation to promptly repair or replace and such suspension of Customer's obligation to pay the Rental Charges shall be the sole and exclusive remedy of Customer against Con Edison arising from, relating to, or connected with any damage to or destruction of Customer's Facilities or the Con Edison Facilities.
- C.** To the extent that any other Con Edison property is damaged or destroyed by the act or omission of Customer and such act or omission to act is related to or arises out of Customer's Service Agreement with Con Edison or Customer's occupancy of the Con Edison Facilities, Customer shall cause said property to be repaired or replaced at Customer's sole cost and expense.
- D.** Notwithstanding anything to the contrary in Paragraphs A, B or C of this Section 13 proceeds from the insurance required by this Service Agreement on account of damage or destruction to the Con Edison Facilities or Customer's Facilities or other Con Edison property shall be applied to the cost of repairing or replacing such damage or destruction and the party responsible for bearing the cost of such repair or replacement only shall be responsible for such cost to the extent it exceeds such insurance proceeds.

**SECTION 14**  
**CONDEMNATION; OTHER LEGAL REQUIREMENTS**

- A.** To the extent that any portion of the Con Edison Facilities shall be taken under the power of eminent domain ("Taken Portion"), commencing with the date that Con Edison yields possession to the condemning authority of the Taken Portion, the license fee applicable to the Taken Portion and any portion of the Con Edison Facilities rendered unusable for the Permitted Use shall not be paid and Con Edison shall endeavor in good faith to provide, on terms reasonably acceptable to Con Edison, and Customer shall endeavor in good faith to obtain, on terms reasonably acceptable to it, the use of property of others as a substitute for such unavailable Con Edison Facilities
- B.** If any portion of the Customer's Facilities shall be taken under the power of eminent domain, as of the date that Customer yields possession of such portion to the condemning authority, Customer shall be relieved of the obligation to pay Con Edison the monthly Rental Charges applicable to such portion so taken. In the event that such a taking results in such a portion of the Con Edison Facilities not being available for the Permitted Use and replacement, in kind of the portion of Customer's Facilities so taken, Con Edison shall endeavor in good faith to provide, on terms reasonably acceptable to Con Edison and the customer, other Con Edison property as a substitute for such unavailable Con



Edison Facilities and Customer shall endeavor in good faith to obtain, on terms reasonably acceptable to it, the use of property of others as a substitute for such unavailable Con Edison Facilities

- C. Each party shall notify the other in writing promptly after it learns that any eminent domain taking of any portion of Customer's Facilities or the Con Edison Facilities is threatened.
- D. All compensation awarded for any taking of the Con Edison Facilities or any portion thereof by power of eminent domain shall belong to Con Edison; provided, however, that nothing contained herein shall prevent Customer from applying (if permitted by law) for reimbursement from the condemning authority for any expense it suffers relating to or arising from any such taking, including but not limited to, any expense related to any obligation of Customer that arises from such taking for the removal, alteration, relocation, repair, installation or construction of any portion of Customer's Facilities, but only if such application will not reduce the amount of the award or other compensation otherwise recoverable from the condemning authority by Con Edison.
- E. All compensation awarded for any taking of Customer's Facilities or portion thereof by power of eminent domain shall belong to Customer, including but not limited to any expense related to or arising from any such taking, including but not limited to any expense related to any obligation of Customer that arises from such taking for the removal, alteration, relocation, repair, installation or construction of any portion of Customer's Facilities, but only if such application will not reduce the amount of the award or other compensation otherwise recoverable from the condemning authority by Con Edison.

**SECTION 15**  
**REPRESENTATIONS AND WARRANTIES OF CUSTOMER**

Customer makes the following representations and warranties to Con-Edison as of the Effective Date:

- (i) Customer is duly organized and validly existing under the laws of the state under which it was formed as set forth on the Application and has all the necessary power and authority to execute, deliver and perform its obligations under this Service Agreement.
- (ii) The execution, delivery and performance by Customer of this Service Agreement does not conflict with, or constitute a breach of or a default under, any law, regulation, order, license, contract or instrument to which Customer is subject or by which Customer is bound.
- (iii) This Service Agreement constitutes the valid and binding agreement of Customer, enforceable against Customer in accordance with its terms.

**SECTION 16**  
**REPRESENTATIONS AND WARRANTIES OF CON EDISON**

Con Edison makes the following representations and warranties to Customer as of the Effective Date of this Service Agreement:

- (i) Con Edison is a corporation duly organized and validly existing under the laws of the state of New York and has all the necessary corporate power and authority to execute, deliver and perform its obligations under this Agreement.
- (ii) The execution, delivery and performance by Con Edison of this Agreement does not conflict with, or constitute a breach of or a default under, any law, regulation, order, license, contract or instrument to which Con Edison is subject or by which Con Edison is bound provided, however, that Con Edison does not represent or warrant that it has the requisite authority, consent, franchise or permit of any governmental or non-governmental authority to permit the construction, installation, operation, maintenance or repair of Customer's Facilities in or upon the Con Edison Facilities. In the event that any such governmental or non-governmental authority disputes Con Edison's allowance of the construction, installation, operation, maintenance or repair of Customer's Facilities in or upon the Con Edison Facilities, Con Edison may terminate this Agreement or applicable portions thereof. It is agreed by the parties that termination pursuant to this Paragraph shall not be a default on Con Edison's part but merely an inability to satisfy a condition precedent to Con Edison's obligation to provide the services contemplated by this Service Agreement.
- (iii) This Agreement constitutes the valid and binding agreement of Con Edison, enforceable against Con Edison in accordance with its terms.

**SECTION 17**  
**TERMINATION FOR BREACH**

If a party breaches a material term or condition of this Service Agreement, the non-breaching party may terminate this Service Agreement after at least 30 days has expired since it has given the breaching Party written notice of the nature of the breach and its intention to terminate, provided that the breaching party does not cure the claimed breach within such 30 day period or within such longer period as may be provided in the written notice from the non-breaching party. If the breach has not been cured within such 30 day period or within such longer period as may be provided in the first written notice from the non-breaching party, the non-breaching party may send a second written notice to the breaching party notifying the breaching party that this

Agreement, or the applicable portions thereof, is terminated. Notwithstanding the foregoing, Con Edison may terminate on shorter notice than provided above and/or without any opportunity by Customer to cure if Customer Facilities interfere with Con Edison's Public Utility Purposes.

For purposes of this Service Agreement, breach of a material term or condition by Customer shall include but not be limited to

- i) Any breach of a condition or obligation for which this Agreement states that Customer's occupancy may be terminated;
- ii) Failure by Customer to pay the Rental Charges, and any other applicable charges, in accordance with the terms of the Agreement;
- iii) Customer's Facilities being constructed, installed, operated, repaired or maintained in violation of any law or in aid of any unlawful act or undertaking
- iv) Customer's occupying Con Edison property without first obtaining authorization from Con Edison to so occupy;
- v) Customer's failure to abide by the Operating Procedures and any other requirement contained in this Agreement;
- vi) Customer's assigning, sub-licensing, subletting or transferring all or a portion of the Service Agreement to others without Con Edison's prior, express written consent;
- vii) Customer's dissolving or being liquidated or admitting in writing its inability to pay its debts as they become due, or failing to lift an execution, garnishment or attachment of such consequence as will impair the Customer's ability to perform substantially its obligations pursuant to this Service Agreement, or committing any act of bankruptcy or being adjudicated as a bankrupt, or making an assignment for the benefit of creditors, or entering into an agreement of composition with its creditors; and
- viii) Customer's failure to provide or maintain the requisite security required under Section 20 of these Terms and Conditions.

## **SECTION 18**

### **RECALL OF CON EDISON FACILITIES;**

### **TERMINATION FOR REASONS OTHER THAN BREACH**

In the event that Con Edison determines in its sole discretion that it requires any portion of

the Con Edison Facilities for its Public Utility Purposes and a portion of or all of Customer's Facilities are located within the Con Edison Facilities required for said Public Utility Purposes, then Con Edison may, upon sixty days prior written notice, recall the Con Edison Facilities and provide an alternative path for Customer's Facilities which are in or upon the Con Edison Facilities which is the subject of the recall, at Con Edison's sole option, in accordance with Rider X.

## **SECTION 19** **SECURITY**

As required by Rider X, Customer shall furnish a bond, letter of credit or other evidence of security acceptable to Con Edison, which guarantees the payment of any sums which may become due to Con Edison hereunder, including but not limited to, sums for new construction, charges due under Rider X, and reimbursement for Make Ready Work and the removal of Customer's Facilities from the Con Edison Facilities upon termination of the Service Agreement or applicable portions thereof.

Every year the security furnished by Customer shall be reviewed by Con Edison and, if upon review it is determined that the estimated security has fallen below 100% of the estimated monthly rental charges over the Term hereof due to a change in the monthly rental charges applicability by operation of a change to Rider X or extensions of the Term, Customer shall furnish to Con Edison such additional security to bring said security deposit back up to 100% of the total monthly rental charges due over the Term of the Service Agreement.

Con Edison shall be permitted to apply such security deposit to satisfy any obligations of Customer hereunder that has not been timely performed by Customer. If at any time during the Term of the Service Agreement, Con Edison draws upon said security due to Customer's failure to timely perform its obligations pursuant to the Service Agreement, Customer shall be notified that the security deposit has been drawn upon and Customer shall, within ten days from the date of notification, immediately replenish the security. Failure to replenish the security by Customer within said ten day period shall be deemed a breach of a material default under this Agreement for which Con Edison may terminate in accordance with the provisions of Section 19.

As required by Rider X, in the event that Customer requests Construction of new Telecommunications Facilities, upon confirmation of the route by Con Edison through its Engineering Record Search, Customer shall furnish a bond, letter of credit or provide another form of security acceptable to Con Edison for the entire projected cost of the construction of the new Telecommunications Facilities ("New Construction Security") which security shall remain in place until Customer's Facilities are installed in such new Telecommunications Facilities. Upon such installation, Customer's New Construction Security may be cancelled by Customer or refunded by Con Edison to Customer, if such security is in the form of cash. Should Customer default in performing its obligations under this Agreement while this New Construction Security is in effect, Con Edison will have the right to draw upon the New Construction Security to reimburse Con Edison for the costs of the New Construction.

**SECTION 20**  
**FORCE MAJEURE**

Without limitation of any other provision of the Service Agreement that limits liability or conditions any obligation to perform, neither Party shall have any liability for any delay in performing or any failure to perform caused by any event or occurrence beyond its reasonable control, including but not limited to acts of God, earthquakes, extraordinary weather conditions, accidents such as fires or explosions not due to the negligence of the party claiming the force majeure event as the reason for a delay in performing or failure to perform, strikes, labor disputes, riots, insurrections, acts of war (whether declared or otherwise), and acts or failures to act of governmental authorities.

**SECTION 21**  
**OPERATING PROCEDURES; INSPECTIONS; UNAUTHORIZED OCCUPANCIES**

- A. Customer shall bear all cost and expense associated with constructing, installing, operating, maintaining and repairing Customer's Facilities, which activities shall conform in all respects with the Operating Procedures in effect from time to time.
- B. At its sole election, Con Edison may conduct periodic inspections during the Term of this Service Agreement on all or portions of Customer's Facilities or the Con Edison Facilities to determine that (i) all Make Ready Work is being performed in accordance with this Agreement; (ii) Customer's Facilities are being installed or are installed and are operating and being maintained in accordance with this Service Agreement; and (iii) Customer's occupancies are authorized. Customer shall be responsible for reimbursing Con Edison for all inspection costs associated with this Agreement, Customer's Facilities or the Con Edison Facilities at rates provided for in the Service Agreement.
- C. In the event that inspections by Con Edison reveal unauthorized occupancies by customer, Con Edison, without prejudice to its rights or remedies to terminate this Agreement contained in Section 18 of these Terms and Conditions will impose a penalty charge as provided in the Rider X for such unauthorized occupancies and Customer shall submit in writing within ten days after written notification of such unauthorized occupancy, an Application for said unauthorized occupancy. If said Application is not received by Con Edison within said ten day period, Con Edison may remove Customer's Facilities that constitute the unauthorized occupancy without liability and the cost of such removal shall be borne by Customer. Receipt of an Application by Con Edison shall in no way be construed as Con Edison's consent for such unauthorized occupancy, and the Application will be reviewed in accordance with the procedures followed by Con Edison for all customers. For the purpose of determining the applicable penalty, the unauthorized occupancy shall be treated as having existed from the period beginning with the date of the Service Agreement.

In the event that inspection by Con Edison reveals that Customer's Facilities, including but not limited to installation, operation, maintenance and any Make Ready Work are not in compliance with the Operating Procedures or any other terms of this Service Agreement, Con Edison shall provide Customer notice of said noncompliance and Customer shall correct all non-complying conditions within fifteen days from the date of receipt of written notice. If corrections are not completed within said fifteen day period, Con Edison may terminate this Agreement upon written notice regardless of whether Customer has activated its Fiber Optic Cable(s), and upon such termination, Customer shall remove or cause to be removed from the Con Edison Facilities Customer's Facilities at the Customer's sole cost and expense. Notwithstanding anything to the contrary in Section 21, Con Edison may, in its sole discretion, extend the time for compliance, if Con Edison finds that Customer has made a good faith effort to remedy the noncompliance. No further Agreements for other Con Edison property shall be issued to Customer until Customer's non-complying facilities are removed from the Con Edison Facilities. The making of inspections by Con Edison shall not operate to relieve Customer of any responsibility, obligation or liability pursuant to this Agreement.

## **SECTION 22**

### **MISCELLANEOUS PROVISIONS**

- A. Entire Agreement.** This Service Agreement constitutes the entire agreement and understanding between the parties relating to the subject matter hereof. Any prior written or oral agreements, representations, warranties, promises or understandings between the parties relating to such subject matter are merged herein. No waiver of any right under this Service Agreement shall be effective unless in writing and signed by an authorized representative of the party granting such waiver and such waiver shall be effective only with respect to the particular event expressly referred to in such signed writing.
- B. Governing Law.** This Service Agreement shall be interpreted and will be governed by the laws of the State of New York, without regard to such State's conflict of laws rules.
- C. Successors and Assigns/Assignment.** This Service Agreement shall apply to and bind the successors and permitted assigns of the parties provided, however, that neither Party may assign this Service Agreement without the prior express written consent of the other party, which consent shall not unreasonably be withheld. Any purported assignment without such prior express written consent shall be void. Notwithstanding the foregoing, however, (i) either party may, without the other party's consent, assign this Service Agreement to (1) a parent corporation or other organization that owns or controls a majority interest in such party, or (2) a corporation or other organization that is entirely owned or controlled by the same corporation or other organization that entirely owns or controls such party, or (3) a corporation or other organization that is entirely owned or controlled by such party. Unless otherwise agreed in a writing signed by authorized representatives of both parties, any assignment of this Service Agreement, whether or not requiring consent of the other party: (1) shall be conditioned on the assignee expressly assuming all of the obligations of the assignor under this Service Agreement and (2) shall not be a novation or otherwise release or discharge the assignor from any of its obligations under this Service Agreement. Any

assignment must also comply with the relevant laws, rules, codes and regulations of the relevant municipal authorities.

- D. Counterparts.** The Service exhibits, and amendments thereto, may be signed in one or more counterparts, each of which is an original for all purposes but all of which taken together constitute only one instrument.
- E. Severability.** If any provision of this Service Agreement or any application of any such provision is held by a court of competent jurisdiction to be invalid or unenforceable, the affected provision or application shall be stricken or limited so as to give it the effect intended to the fullest extent permitted by law, and the remaining provisions of this Agreement and applications of such provisions shall continue in full force and effect; provided, however if the stricken or limited provision is considered essential to the Service Agreement, such stricken or limited provision shall be revised by Con Edison in accordance with rules and regulations of the appropriate regulatory authorities. In the event that a court or regulatory agency of competent jurisdiction holds any rate or charge to be invalid or unenforceable, or otherwise requires a change on a retroactive basis, Con Edison shall re-bill Customer at the redetermined rate(s) and/or charge(s) and shall make refunds or bill Customer for additional amounts, as applicable. If additional amounts are due from Customer, Customer hereby waives any rights that it may have to object to paying such additional amounts.
- F. Notices.** All notices and other communications hereunder required to be in writing shall be personally delivered, mailed by registered or certified mail, return receipt requested, postage paid, or transmitted by facsimile, as provided in the Service Agreement.
- G. Submission To Jurisdiction/Choice Of Forum/Service Of Process.** The parties hereby irrevocably submit to the jurisdiction of the courts located within the State of New York with regard to any controversy arising out of or relating to this Agreement. The parties agree that service of process on each other in relation to such jurisdiction may be made, at the option of the serving party, by personal delivery or by certified or registered mail, return receipt requested, postage prepaid to the party to be served at the address set forth in the Service Agreement. A party may change its address/facsimile number for receipt of service of process by notifying the other party in writing of such change pursuant to Paragraph F of this Section 23. Service of process pursuant to this Paragraph shall be deemed to be sufficient even under circumstances where, apart from this Agreement, there would be no jurisdictional basis for such service. Service of process on a party may also be effected in any manner permitted by law. The parties consent to the selection of the New York City, New York State and United States courts situated within the City of New York or Westchester County (State of New York) as the exclusive forums for any legal proceeding arising out of or relating to this Agreement.
- H. No Third Party Rights.** Except as may be expressly provided herein, nothing in this Agreement is intended or shall be construed to grant any rights or benefits to any entity or person other than the parties and their successors and permitted assigns.

**I. No Brokers.** Con Edison and Customer each represent and warrant that no broker or other third party brought about the execution and delivery of this Agreement and no discussion or other contact was had with any broker or other third party which could be the basis of a claim for any brokerage commission, finder's fee or similar payment arising from, related to, or connected with this Agreement ("Broker Claims"). Each party agrees to defend, indemnify, and hold the other party harmless from any and all Broker Claims arising from, related to, or connected with the indemnifying party's discussion or other contact with any broker or other third party.

**J. Dispute Resolution Process.** If at any time process, a Customer has a complaint with respect to access or with respect to the terms and conditions governing access, the Customer may bring its complaint to the Telecom Applications Management Department within Con Edison to resolve the problem. The parties may also pursue other legal mechanisms to address complaints and disputes, including the Public Service Commission's Expedited Dispute Resolution Process.

In the event the Customer wishes to complain directly to Con Edison, it may initiate the dispute resolution process by presenting a written description of the dispute/complaint, and a proposed resolution to Con Edison.

Con Edison will, within fifteen calendar days following receipt of the complaint, provide a written response to Customer with an alternative resolution proposal if the complaining party's resolution is deemed unacceptable or with the results of any informal resolution that may have been reached with respect to other party(ies) prior to that date

If the initial exchange of written material does not resolve the dispute, the Customer may request a meeting to discuss the matter further. The responding party must agree to such meeting to be held within fifteen calendar days following the request.

The parties may agree to a different time frame or to use alternative dispute resolution techniques with mutually agreed upon time frames that may differ from those defined in the dispute resolution process.

All correspondence or documents to be delivered from one party to another under this process must be sent in a manner that provides verification that it is received within the time periods specified by this dispute resolution process.

A Customer may at any time seek assistance of the Department of Public Service in order to resolve the dispute.

**K. Agreement Not Binding Until Executed and Delivered.** No portion of the Service Agreement is binding upon a party hereto until the Service Agreement is executed by the authorized representatives of both parties in the spaces provided in the Service Agreement.