



**NEW ACCOUNT APPLICATION**  
**TERMS AND CONDITIONS**  
**Updated: 4/24/2012**

These **TERMS AND CONDITIONS** (collectively, the “**Agreement**”) govern the New Account Application (the “**Account Application**”) and are between **Beers Enterprises, Incorporated d/b/a The Switch** (“**BEI**” or “**The Switch**”), a Delaware corporation with offices at 683 Main Street, Suite A-2, Osterville, MA 02655 and **Customer**. as referenced on the Account Application . BEI and Customer may each be referred to as a “**Party**” and together as the “**Parties**.”

**1. SCOPE**

BEI shall provide Customer with local switching and long distance transmission services (the “**Service(s)**”) as set forth in the Account Application through BEI’s transmission network known as “**Inter-City On Demand (ICOD)**”. The Services will provide Customer with a means to transport Customer’s content between Customer, its Affiliates, The Switch or third parties, which may include third party switching and/or conversion services, satellite uplinks and/or professional services. In the event of a conflict between the terms and conditions contained in this Agreement and the terms set forth in the Account Application, the terms in this Agreement shall prevail. In the event of a conflict between the terms and conditions contained in this Agreement and the terms set forth in any Master Service Agreement or Service Schedule between the Parties, its affiliates, subsidiaries, or parent company, the terms of the Master Service Agreement and Service Schedule shall prevail.

A Party’s “**Affiliate**” means an entity, directly or indirectly, controlling or under direct or indirect common control with that Party, either now or in the future.

**2. BEI AND CUSTOMER RESPONSIBILITIES**

**2.1** BEI shall be responsible for maintaining all of its own equipment in connection with the provision of the Services to Customer.

**2.2** BEI shall provide Customer with reasonable technical support as may be requested by Customer from time to time from the BEI Network Operations Center (the **NOC**) which will be manned twenty-four hours per day, seven days per week.

**2.3** BEI does not assume any responsibility or make any guaranty or representations with respect to the availability of any specific signal or program (video, audio, control or otherwise) through the Services.

**2.4** Customer shall obtain and maintain or cause to be obtained and maintained, during the Term of the Agreement any applicable licenses, authorizations, permits and rights to the signals and programs (video, audio, control or otherwise) being accessed or transmitted through the Services.

**2.5** Customer shall adhere to all operating procedures and regulations contained and set forth in The Switch Web-based Control System, User Operations Manual provided by BEI, incorporated herein by reference and as may be updated by BEI from time to time.

**2.6** Customer shall use The Switch solely for the purpose of distributing and receiving signals or programs to those entities that are connected to The Switch. In no event shall Customer have the right to sell, lease, license, give, or otherwise dispose of its right to use or access the Services without the consent of BEI and shall bear all liability for any third party’s use or access to the Services arising out of Customer’s actions or omissions.

**2.7** Customer shall use the Services in compliance with applicable federal, state and/or local statutes, laws, regulations, rules or directives (including without limitation, all applicable rules, regulations, directives, or decisions of the Federal Communication Commission or any other government agency that may have jurisdiction over the signals or programs being transmitted through the Services); and in compliance with all technical requirements of the common carriers that provide the connecting circuits.

**2.8** Customer acknowledges that BEI may provide certain property and equipment in connection with the Services, which property and equipment will be located at Customer’s premises. Said property and equipment shall remain the exclusive property of BEI and Customer shall take reasonable care of said equipment (which care shall be not less than that which it uses in respect of its own property of a similar nature) while it is on Customer’s premises to protect it from fire, theft, vandalism or other casualty loss. Customer shall be responsible for loss or damage to such property and equipment, including due to the actions of its employees and/or agents. Customer will not permit to exist or create any liens or encumbrances in on BEI’s property and equipment relating

to the Services. All BEI property and equipment at Customer's premises or under the control of Customer shall be returned to BEI upon termination of this Agreement.

**2.9** Customer understands that for continued operation of the Services in accordance with the terms of this Agreement, it shall be necessary to perform maintenance operations, repairs and testing of components and equipment from time to time, as described in Paragraph 5. Customer agrees to cooperate with and assist BEI in the performance of such functions so as to best ensure that such functions are properly accomplished and so as to minimize any interference with the provision of the Services to Customer.

**2.10** Customer agrees that BEI shall have no responsibility or liability whatsoever with respect to any Customer signal or program outside the points of entry where any such signal or program enters into or departs from the BEI Network. As used herein, points of entry and/or departure shall refer to those points where a Customer signal or program enters into or departs from BEI equipment furnished hereunder, regardless of location.

**2.11** Customer shall be solely responsible for obtaining access to a third party's hardware and/or other resources to effectuate BEI's transmission Services and BEI shall not be liable, for any reason and under any circumstances, for Customer's inability to obtain access to initiate an order or otherwise.

**2.12** Customer is solely responsible for confirming accuracy of booking information made via phone or email.

### **3. PRICE AND PAYMENT TERMS**

**3.1 Terms of Payment.** Services shall be invoiced at BEI's then-current rates which are subject to change at BEI's discretion. Customer shall pay BEI invoices upon receipt but, in no event, later than five (5) days from the date of invoice.

**3.2 Billing Period.** BEI shall invoice Customer for all recurring fees after commencement of the Service- on a monthly basis . BEI shall invoice all non-recurring fees as incurred. Any dispute regarding invoices shall be submitted to BEI in writing within thirty (30) days of the date of invoice. Customer shall be responsible for all fees on an invoice if not disputed within said time period.

**3.3 Tax Liability.** All fees and charges for Services are exclusive of any taxes that may be imposed on or applicable to the Services being provided by BEI pursuant to this Agreement and the Account Application. Customer shall pay all current and future taxes, fees and assessments due, imposed, assessed or levied against any of the goods or services contemplated in this Agreement, by any federal, state, local, provincial, and foreign government or taxing authority including, without limitation, all sales, use, transfer, gross receipts, duties, Universal Service Fund assessments or any similar assessments, value added, excise, regulatory surcharges, recovery fees, or any similar transactional charges relating to the sale, use or provision of the Services being provided by BEI. If Customer is entitled to an exemption from any applicable taxes for the Service, Customer may submit to BEI a valid tax exemption certificate (in a form reasonably acceptable to BEI) and income tax withholding certificate or other documentation acceptable to the taxing authorities within fifteen (15) days of the first invoicing date.

**3.4 Late Fees.** In the event Customer fails to remit payment within the time period above, BEI may charge Customer an additional fee equal to 1.5% of the then outstanding and unpaid fees for each month, or portion thereof that such charges remain outstanding. Said charges shall be included in the invoicing outlined in Section 3.2 above and subject to the payment term of section 3.1 above.

**3.5 Non-payment.** In the event of any non-payment of an invoice by its due date, BEI reserves the right, at its sole discretion, to refuse to offer Customer further Services. Said remedy shall be without prejudice to all other rights and remedies and shall not affect the rights and obligations of the Parties regarding any other Service.

### **4. PLANNED INTERRUPTIONS**

During the Term occasional interruptions of Service to Customer may be required for repairs or maintenance, testing or improvement of the systems operated by BEI. BEI shall, wherever possible give Customer at least twenty-four (24) hours notice of any such interruption and shall use reasonable efforts to minimize any disruption of the Service. Maintenance that may place the Services in jeopardy or require system down time will normally be performed during a maintenance window, which shall be as mutually agreed to between BEI and Customer or other reasonable time determined in good faith by BEI. Any interruptions pursuant to this Paragraph shall be excluded for the purposes of determining Service Credits, as noted in Section 6.

### **5. SERVICE CREDITS**

**5.1** A "**Service Outage**" means an actual interruption of the Service when such Service is reasonably determined by both Parties to be considered unusable for its intended commercial purpose. The duration of the Service Outage will be the period from when Customer reports the outage to the BEI Network Operations Center (NOC) and the outage is verified in the BEI NOC operational logs as relevant until BEI informs Customer and

Customer confirms that the outage is cleared.

**5.2** BEI or Customer may log Service Outages with detailed information designed to enable BEI to reproduce and investigate the Service Outage. BEI shall remedy all Service Outages as expediently as practicable.

**5.3** In the event BEI is unable to furnish the Service ordered pursuant to the Account Application, for any reason whatsoever, whether due to acts or omissions, war, national emergency, labor disputes, force majeure or any other similar or dissimilar reason, the BEI liability to Customer shall in all events and under all circumstances be limited to service credits applied against the assessed charge on a prorated basis.

**5.4** In no event shall the credit for a particular Service exceed the fees for the lost transmission feed, and in no event shall the credit to the Customer be in excess of the credit given BEI by the underlying network capacity provider.

**5.5** BEI shall have no liability to pay service credits or any other compensation in respect of any Service Outage due to the following: (i) Customer's fault or negligence, (ii) the failure of power or equipment provided by Customer, (iii) the local fiber circuit, (iv) planned interruptions as specifically provided for in Paragraph 5, (v) during any period in which BEI is not given access to Service premises when required, which is necessary to restore the Service, where such premises are within the control of Customer, (vi) Customer's failure to adhere to the operating procedures and regulations contained in The Switch Web-based Control System, User Operations Manual, (vii) Customer's breach of the terms of this Agreement

**5.6** In every instance under this subsection where Customer is entitled to a credit, such credit shall be applied by BEI to Customer's next billing cycle invoice following the month in which such credit is identified.

## **6. REPRESENTATIONS AND WARRANTIES**

### **BEI warrants and represents the following:**

**6.1** BEI is free to enter into this Agreement, is not subject to any obligation or disability and has not made and will not make any grant or assignment which will prevent or interfere with the full performance of its obligations, or which will conflict with or impair the complete enjoyment of the rights and privileges granted to Customer.

**6.2** The Services will be provided with promptness and diligence and will be executed in a workmanlike manner, in accordance with the practices and standards used in similar professional well-managed operations.

### **CUSTOMER warrants and represents the following:**

**6.3** Customer is free to enter into this Agreement, is not subject to any obligation or disability and has not made and will not make any grant or assignment which will prevent or interfere with the full performance of its obligations, or which will conflict with or impair the complete enjoyment of the rights and privileges granted to BEI.

**6.4** Customer shall not violate any law or regulation and the performance by Customer and its obligations hereunder do not and shall not violate any rights of any kind or nature of any third party.

**6.5** Customer has the right or will acquire the right to distribute and access the signal or program in the manner contemplated by this Agreement and the signals or programs transmitted shall not contain any matter that constitutes an infringement upon any copyright, patent, trademark, trade secret or other intellectual property right or violates the right of privacy, any common law rights or any other rights of any person or entity.

## **7. INDEMNIFICATION**

**7.1 Indemnification by BEI.** BEI agrees to defend, indemnify and hold harmless Customer and its Affiliates, successors, transferees, assignees and licensees, and the respective agents, officers, directors and employees of each, from and against any and all damages, costs (including, without limitation, reasonable attorneys' fees and legal expenses), expenses, liabilities, claims and causes of action in any way arising by reason of or relating to: (i) any claim for any compensation by any third party related to the breach by BEI of any warranty, representation or any other provision in this Agreement; (ii) any claim by any third party that the Services or BEI's business methods or the use thereof constitute an infringement upon any copyright, patent, trademark, trade secret or other intellectual property right.

**7.2 Indemnification by CUSTOMER.** Customer agrees to defend, indemnify and hold harmless BEI and its Affiliates, successors, transferees, assignees and licensees, and the respective agents, officers, directors and employees of each, from and against any and all damages, costs (including, without limitation, reasonable attorneys' fees and costs in the defense and disposition of such matters), expenses, liabilities, claims and causes of action in any way arising by reason of or relating to: (i) any claim for any compensation by any third party related to the breach by Customer of any warranty or representation, or any other provision in this Agreement (ii) any physical damage to BEI's property caused by Customer; (iii) any infringement of copyrighted content within Customer originated signals or programs that pass through the BEI's Service; (iii) any claim that the content within Customer originated signals or programs that pass through BEI's Service constitute an infringement upon any copyright, patent, trademark, trade secret or other intellectual property right; (iv) any claim by any third party

alleging defamation, invasion of privacy, infringement of rights of publicity or violation of any other rights of any person or entity arising from or related to Customer originated signals or programs that pass through BEI's Service, including without limitation, claims related to applicable rules, regulations, directives, or decisions of the Federal Communication Commission or any other government agency that may have jurisdiction over the signals or programs being transmitted through the Service.

**7.3 Procedure for Indemnification.** The indemnified Party shall promptly notify the indemnifying Party, in writing, of any claim or litigation to which the indemnities set forth herein applies, provided that the failure of the indemnified Party to do so shall not relieve the indemnifying Party of its obligations under this section except to the extent that the indemnifying Party is actually prejudiced by such failure. The indemnified Party shall have the right (but not the obligation) to participate in such defense or settlement with its own counsel and at its own cost. The indemnified Party shall provide reasonable assistance to the indemnifying Party in the resolution of such proceedings.

## **8. LIMITATION OF LIABILITY AND WARRANTY**

Except as otherwise set forth in this agreement, BEI makes no warranties, representations or other agreements, express or implied with respect to the Services, including, without limitation, any implied warranties of merchantability or fitness for a particular purpose. BEI shall use commercially reasonable efforts to provide and maintain the Services to Customer as specified herein. BEI's entire liability for any claim, loss expense, or damage under this Agreement and the Account Application shall in no event exceed the sum actually paid by Customer to BEI for the particular transmission which gives rise to the claim. BEI shall not have any liability to Customer for direct damages whether at law or in equity, for any breach or alleged breach by BEI of any provision of this Agreement.

## **9. NO CONSEQUENTIAL DAMAGES**

In no event shall BEI be liable to Customer or any third party for any consequential, incidental, indirect, punitive or special damages (including loss of revenue, income, profits, data, business or good will, cost of replacement services, diminution of value) in connection with this Agreement or the Services, whether or not liability is based on breach of contract, tort, strict liability, breach of warranty, failure of essential purpose or otherwise, even if it is advised of the likelihood of such damages.

## **10. CONFIDENTIALITY**

Except as required to do otherwise by law, both Parties shall exercise reasonable efforts to protect any proprietary information and shall keep confidential any information obtained under this Agreement and will not divulge it to any person (other than their employees who need to know the information and subject to their employer making them fully aware of and causing them to comply with the provisions of this section) without the consent of the other Party. Confidentiality shall not apply to information (i) which was in the public domain at the time of disclosure other than in breach of this Agreement; or (ii) in the possession of the receiving Party prior to its disclosure to them under the terms of this Agreement; or (iii) obtained from a third party who is free to divulge it; or (iv) which is independently developed by the receiving Party or its employees or where such Party can show there has been no breach of confidentiality under this Agreement; or (v) the disclosure of information is required by a court of law or other competent authority.

## **11. GOVERNING LAW**

This Agreement shall be construed under the laws of the State of New York without regard to choice of law provisions thereof. .

## **12. ASSIGNMENT**

Neither Party may assign this Agreement or any Account Application, in whole or in part, without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed, except that either Party may assign this Agreement or any of its rights in whole or in part to an Affiliate or to a party acquiring all or substantially all of the shares in the capital or assets of the assigning Party.

## **13. NOTICES**

All notices, requests, demands and other communications between the Parties must be in writing except for those orders for Services which may be placed by phone. Notice may be sent by overnight carrier, facsimile, email, hand delivery, or by first class postage prepaid registered or certified mail. Notice shall be deemed received upon: (i) receipt when delivered personally or when sent via email; (ii) written verification of receipt from overnight courier; (iii) verification of receipt of registered or certified mail; or (iv) verification of receipt via facsimile, provided that such notice is also sent the same day via first class mail or overnight courier. Contact information shall be updated as necessary to ensure that each Party has current information regarding all such contacts. E-mail

addresses are included below to facilitate communication; however e-mail is not an acceptable method of providing notice under this Agreement.

All notices directed to BEI regarding this Agreement with the exception of Service related inquiries shall be sent to the addresses provided below. All Service related inquiries shall be directed to The Switch NOC, 60 Hudson Street, New York, NY Tel: 212 227-9191. All notices regarding this Agreement directed to Customer shall be sent to the addresses provided in the Account Application.

BEI Enterprises, Incorporated  
683 Main Street, Suite A-2  
Osterville, MA 02655

Tel: 508-420-9676  
Fax: 508-420-3779

A second copy of all notices of a legal nature shall be sent to:

Beers Enterprises, Incorporated  
683 Main Street, Suite A-2  
Osterville, MA 02655  
Attn: Legal Department

Tel: 508-420-9676  
Fax: 508-420-3779  
E-mail: legal@theswitch.tv

#### **14. SUBCONTRACTING**

BEI may subcontract or delegate the provision of the Services in whole or in part in which case BEI shall remain primarily responsible to fulfil the obligations that it has accepted pursuant to this Agreement.

#### **15. FORCE MAJEURE**

Neither Party shall have any claim or right against the other for any failure of or delay in performance by the other Party under this Agreement to the extent such failure or delay: is caused by or the result of causes beyond the reasonable control of such other Party, including, but not limited to, acts of God, fire, flood, hurricane, or other natural catastrophe; interruption in water, electricity, heating or air conditioning, quarantines, embargoes, malicious acts of third parties, labor disputes affecting either Party or its subcontractors and for which the Party claiming force majeure is not responsible, terrorist actions, laws, orders, policies, regulations, directions or actions of governmental authorities having jurisdiction over the subject matter hereof; or any civil or military authority, national emergency, insurrection, riot or war; inability to obtain circuits or equipment, material or other supplies, or other similar occurrence beyond the control and without the fault or negligence of the affected Party.

#### **16. GENERAL PROVISIONS**

**16.1 Authorization Signature.** The Account Application bound by this Agreement is not valid or binding unless and until signed in ink by a duly authorized representative of both Parties. No amendment, modification, extension, release, discharge or waiver of this Agreement, or of any provision hereof, shall be valid or binding unless in writing signed by a duly authorized officer of both Parties. No oral agreement shall be binding on either Party unless and until reduced to writing and signed by a duly authorized officer of each Party.

**16.2 Authority to Contract.** Customer warrants that neither this Agreement nor the Account Application will conflict with, result in breach of, or cause a default under its or its parent company's or affiliates' articles of incorporation, by-laws, partnership or joint agreements, or any material agreement or instrument to which it is a party or by which it or any of its property is bound.

**16.3 Severability.** The invalidity or unenforceability of any particular provision of this Agreement does not affect the other provisions hereof, and this Agreement will be construed in all respects as if such invalid or unenforceable provision has been omitted.

**16.4 Waiver.** No delay or omission by either Party to exercise any right or power it has under this Agreement shall impair or be construed as a waiver of such right or power. A waiver by either Party of any covenant or breach shall not be construed to be a waiver of any succeeding breach or of any other covenant. All waivers must be in writing and signed by the Party waiving its rights.

**16.5 Relationship of the Parties.** BEI agrees to perform the Services solely as an independent contractor. No employer and employee relationship exists between BEI and Customer, either under common law

or any statute. The relationship between BEI and Customer shall not create any actual or apparent agency, partnership or joint venture, franchise or other association between the Parties.

**16.6 Complete Agreement.** This Agreement, together with the Account Application signed by the Parties and The Switch Web-based Control System, User Operations Manual, constitute the sole and only agreement of the Parties and supersedes any prior understandings or written or oral agreements between the Parties respecting subject matter of this Agreement. The Account Application may be executed in counterparts, each of which shall be deemed an original, but all of which taken together will constitute one and the same instrument. To the extent that an Account Application is signed and delivered by means of a facsimile, it shall be considered to have the same binding legal effect as if it were the original signed version delivered in person. No Party shall raise the use of facsimile or electronic mail to deliver a signature or the fact that any signature or agreement or instrument was transmitted or communicated through the use of facsimile or electronic mail as a defense to the formation or enforceability of the agreement and Customer forever waives any such defense.