

Carpathia Terms and Conditions as of January 1, 2009

1. The following terms and conditions set forth the legal rights and obligations between Carpathia Hosting, Inc. ("Carpathia") and its Customer for the Service(s) (the "Agreement"). **PLEASE READ THIS AGREEMENT CAREFULLY BEFORE SIGNING A SERVICE ORDER AS DOING SO INDICATES THAT YOU ARE A CUSTOMER AND THAT YOU AGREE TO BE BOUND BY THIS AGREEMENT.**
2. **Definitions**
  - 2.1. "Acceptable Use Policy" means use of the Service(s) by the Customer in a manner (in Carpathia's sole judgment) consistent with the purposes of such Service(s), as further described, but not limited by, the policy (which Carpathia may update at any time) at <http://www.carpathiahost.com/acceptable-use-policy>.
  - 2.2. "Affiliates" means, in relation to either party, any entity (a) which is owned 50% or more by that party; or (b) over which that party exercises management control.
  - 2.3. "Customer" means the person or entity who signs a Service Order or Statement of Work for Service(s) which is accepted by Carpathia. Customer includes Affiliates, employees, subcontractors and agents of the customer.
  - 2.4. "Service" or "Services" means any (a) Carpathia service(s) identified on Service Order; or (b) any Carpathia service(s) as described in a Statement of Work.
  - 2.5. "Service Charges" means the amounts due by Customer to Carpathia for each Service, as specified in the Service Order.
  - 2.6. "Service Order" means the proposal form provided by Carpathia listing one or more Service(s), the Service Charges for such Service(s), and the Term for such Service(s).
  - 2.7. "Start Date" means the date upon which Carpathia notifies the Customer that a Service is available for use by the Customer.
  - 2.8. "Statement of Work" means the written description of Service(s), the Service Charges for such Service(s), and the Term for such Service(s).
  - 2.9. "Taxes" means all applicable taxes imposed upon Customers by operation of law excluding any taxes due by Carpathia on Carpathia's net income.
  - 2.10. "Term" means minimum duration of time, beginning on the Start Date, during which the Customer agrees it shall receive and pay the Service Charges for the Service(s). In the event more than one Service is included in a Service Order or Statement of Work, the Term shall begin on the Start Date of the last Service Start Date.
3. **Billing and Payment**
  - 3.1. Customers will be invoiced the Service Charges monthly (a) in advance for non-variable use Service(s); and (b) in arrears for variable use Service(s). All Service Charges are due in full, without offset, upon receipt of invoice.
  - 3.2. The first invoice will include (a) any set up Service Charges; and (b) a prorated portion of any monthly recurring Service Charges from Service Start Date through the end of that calendar month; and (c) Service Charges for the subsequent calendar month for non-variable use Service(s).
  - 3.3. Any undisputed Service Charges not paid within thirty (30) days of the date of invoice shall bear interest at the lesser of 1.5% per month or the maximum rate allowed by law.
  - 3.4. Customers may reasonably dispute any Service Charges provided such reasonable dispute is made (a) in writing with sufficient detail as to (i) the nature of the claim, (ii) the amount disputed and (iii) the specific Service(s) and related Service Charges disputed; and (b) within sixty (60) days from the date of the invoice (after which Customer agrees the Service Charges on the invoice are deemed accurate).

3.5. Carpathia may bring legal action to collect any Service Charges not paid within thirty (30) days. Customer agrees that it shall pay all costs associated with such action to collect, including reasonable attorney fees and court costs.

3.6. Carpathia may require a credit review and Customer agrees to provide Carpathia with credit information as requested by Carpathia. Carpathia may require a security deposit or other form of security as a condition to (a) accept a Service Order(s) and/or Statement(s) of Work; and/or (b) continue delivery of variable use Service(s); and/or (c) continue to deliver Service(s) in the event the Customer (i) fails to pay undisputed invoice within thirty (30) days from the invoice date; or (ii) Customer has a material, negative change in financial condition (as reasonably determined by Carpathia in its sole discretion). Any security deposit requested by Carpathia shall be due immediately upon written request. Any security deposit shall be limited to a maximum of three (3) months estimated Service Charges. Any security deposit shall be held by Carpathia as security for the full and faithful performance and observance by Customer of the terms and conditions of this Agreement, including, without limitation, the payment of Service Charges by Customer. No interest shall be payable on the security deposit, and unless prohibited by law, the security deposit may be commingled with Carpathia's other funds. Upon expiration of the Term for all Service(s), Carpathia shall credit the amount of the security deposit against any remaining Service Charges and any excess amount shall be refunded to the Customer within sixty (60) days.

3.7. All Service Charges are exclusive of Taxes. Customer is liable for all Taxes. In the event Customer is entitled to an exemption from Taxes, Customer is responsible for providing Carpathia with valid documentation (in a form reasonably acceptable to Carpathia) proving such exemption from Taxes. Carpathia shall give effect to such exemption from Taxes on a prospective basis only from the date of receipt of such valid documentation.

#### **4. Term, Termination and Suspension**

4.1. Each Service Order shall have a Term which applies to all Service(s) on that Service Order. Unless Customer provides Carpathia written notice prior to the end of any Term, the Service(s) shall automatically renew for an additional duration of time equal to the original Term.

4.2. Customer may terminate Service(s) prior to the end of the Term by providing thirty (30) days written notice provided (a) Customer pays an early termination charge equal to the monthly non-variable Service Charge for such Service multiplied by the remaining months in the Term; and (b) Customer pays all outstanding invoices.

4.3. Customer may terminate this Agreement for breach in the event (a) Carpathia materially fails to perform a Service as described and Carpathia fails to remedy such failure within fifteen (15) days of Customer's written notice describing the material failure; or (b) Carpathia materially fails to meet an obligation in this Agreement and Carpathia fails to remedy such failure within thirty (30) days of Customer's written notice describing the material failure to meet the Agreement's obligation.

4.4. Carpathia may immediately, and without prior written notice, terminate this Agreement and/or any Service(s) for breach in the event (a) Customer fails to pay an undisputed invoice within thirty (30) days from the invoice date; or (b) Customer violates the Acceptable Use Policy.

4.5. Carpathia may immediately, and without prior written notice, suspend any Service(s) in the event (a) Customer fails to pay an undisputed invoice within thirty (30) days from the invoice date, and deny Customer access to any Carpathia-provided facilities until all outstanding amounts are paid; or (b) Carpathia reasonably believes that the Service(s) are being used in violation of this Agreement or the Acceptable Use Policy; or (c) Carpathia reasonably believes Customer equipment has been accessed or

manipulated by a third party without Customer consent, and Carpathia reasonably believes that Carpathia or Carpathia's customers may be at risk.

4.6. Carpathia may upon written notice, effective as of the date in the notice, terminate this Agreement and/or any Service(s) for breach in the event (c) Customer materially fails to meet an obligation in this Agreement and Customer fails to remedy such failure within thirty (30) days of Carpathia's written notice describing the material failure to meet the Agreement's obligation.

4.7. Carpathia may immediately, and without prior written notice, suspend any Service(s) in the event Customer has failed to remedy a material failure to meet an obligation of this Agreement within thirty (30) days of Carpathia's written notice describing the material failure to meet the Agreement's obligation.

4.8. In addition to any other remedies available to Carpathia, in the event Carpathia terminates this Agreement and/or any Service(s) for breach (a) Customer shall immediately be required to pay, in addition to any other amounts due and owing to Carpathia, a termination charge equal to the monthly non-variable Service Charge for such Service(s) multiplied by the remaining months in the Term; and (b) Carpathia may deny Customer access to any Carpathia-provided facilities until all outstanding amounts are paid.

## **5. Service Level Agreement**

Service Level Agreements, if any, for each Service are described either at <http://www.carpathiahost.com/sla> or in a Statement of Work. Any reductions in Service Charges provided as a result of Carpathia failing to achieve the Service Level Agreement are the sole and exclusive remedy for such failing to achieve the Service Level Agreement. Customer hereby agrees that failure to achieve the Service Level Agreement may not be the basis for a termination under section 4.3.

## **6. Confidential Information**

Each party acknowledges that it will acquire certain confidential information and materials from the other party and proprietary knowledge about the business, plans, customers, technology, Customer data, and products of the other party (collectively, "Confidential Information"). Confidential Information will include all information in tangible or intangible form that is marked or designated as confidential, or that under the circumstances of its disclosure, should reasonably be considered confidential. Confidential Information will include, but not be limited to, Carpathia's performance, prices and discounts under this Agreement, as well as any data provided by Carpathia to Customer regarding Carpathia's performance under this Agreement. Confidential Information shall also include any information or data provided to Customer regarding the performance of Carpathia's third-party vendors. Each party agrees that it will not disseminate the other party's Confidential Information among its employees, consultants or other agents except on a need-to-know basis for performing its obligations hereunder and subject to a written confidentiality agreement with terms at least as restrictive as those in this Agreement. Each party further agrees that it will not disclose the other party's Confidential Information to third parties except as provided hereunder or as agreed in writing by the parties. Confidential Information shall not include information which is (i) already known to the receiving party prior to disclosure by the other party, as shown by the receiving party's contemporaneous written records; (ii) in or has entered the public domain through no breach of this Agreement or other wrongful act of the receiving party; (iii) rightly received from a third party who is not under any obligation of confidentiality with respect to such information; (iv) independently developed by the receiving party, as shown by the receiving party's contemporaneous records; or (v) required to be disclosed by law. The confidentiality obligations set forth in this section 6 shall survive the termination or expiration of this Agreement for a period of two (2) years.

## **7. Warranty**

**7.1. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, THE SERVICE(S) PROVIDED ARE ON AN "AS IS" BASIS AND CUSTOMER'S USE OF THE SERVICE(S) AND ANY RESULTS THEREFROM IS AT COMPANY'S OWN RISK, AND CARPATHIA MAKES NO OTHER REPRESENTATIONS OR WARRANTIES IN CONNECTION WITH THE SERVICE(S), WHETHER WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY, NON-INFRINGEMENT, QUIET ENJOYMENT, DATA ACCURACY, SYSTEM INTEGRATION AND FITNESS FOR A PARTICULAR PURPOSE OR USE. CARPATHIA DOES NOT WARRANT THAT THE SERVICE(S) WILL BE ERROR-FREE, UNINTERRUPTED OR COMPLETELY SECURE.** Customer agrees and acknowledges that it is ultimately responsible for determining if any particular Service will meet its requirements, and that the Service Level Agreements set forth in at <http://www.carpathiahost.com/sla> are not a warranty, but a contractual provision agreed to by the parties to address outages.

**7.2. CARPATHIA MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER REGARDING THIRD PARTY PRODUCTS AND RELATED SUPPORT SERVICES AND AS BETWEEN CARPATHIA AND CUSTOMER, SUCH SERVICES ARE PROVIDED "AS IS."**

## **8. Indemnity**

8.1. Customer agrees to defend, indemnify and hold harmless Carpathia and its affiliates, officers, directors, employees, and agents against any and all allegations, claims, expenses (including reasonable attorney's fees and disbursements), liability, costs and losses from suits, actions or proceedings threatened, made or brought by any third party in relation to or arising from: (i) Customer's creation, distribution or use of its content, including, but not limited to, any infringement of intellectual property rights, or (ii) Customer-provided or Customer-loaded software, or (iii) Customer's violation of this Agreement, including the Acceptable Use Policy; or (iv) Carpathia's failure to pay any tax to the extent that Carpathia relied on Customer's claimed exemption under applicable law; or (v) any other acts or omissions of Customer that directly results in property or personal claims attributable to service outages incurred by Carpathia or its customers.

8.2. Carpathia agrees to defend, indemnify and hold harmless Customer and its affiliates, officers, directors, employees, and agents against any and all allegations, claims, expenses (including reasonable attorney's fees and disbursements), liability, costs and losses from suits, actions or proceedings threatened, made or brought by any third party in relation to or arising from any claim or action brought by any third party for actual or alleged infringement of any patent, trademark, copyright, or trade secret right, based upon the technology used by Carpathia in providing the Service(s) (collectively an "Infringement Claim"). If Carpathia determines that the technology used to perform the Service(s) are, or are likely to be, the subject of an Infringement Claim, Carpathia shall have the right to (i) modify the technology so that it is non-infringing; (ii) procure the right for Customer to continue to use such technology; (iii) replace the technology with a non-infringing substitute that has substantially equivalent functionality; or (iv) terminate the Service(s). Notwithstanding anything to the contrary in the foregoing, Carpathia will have no obligation with respect to any Infringement Claim that is based upon: (a) modification of the technology or the Service(s) by anyone other than Carpathia; or (b) Customer's combination, operation or use of the technology or Service(s) with apparatus, data, software and/or hardware that was not furnished by Carpathia or approved by Carpathia in writing where use of such apparatus, data, software and/or hardware gave rise to such Infringement Claim; or (c) the use by Customer of the technology or Service(s) in a manner inconsistent with this Agreement.

8.3. If any claim for which indemnity is, or may be, sought is made, or appears reasonably possible, the indemnified party agrees (i) promptly to notify the indemnitor in writing; (ii) to cooperate with the indemnitor, and to allow the indemnitor sole authority to control the defense and settlement of such claim.

9. **Limitation of Liability**

9.1. **NEITHER CARPATHIA, ITS AFFILIATES, SUCCESSORS, AND ASSIGNS AND THEIR DIRECTORS, OFFICERS, SHAREHOLDERS, EMPLOYEES, AGENTS AND SUBCONTRACTORS, NOR THE CUSTOMER, ITS AFFILIATES, SUCCESSORS, AND ASSIGNS AND THEIR DIRECTORS, OFFICERS, SHAREHOLDERS, EMPLOYEES, AGENTS AND SUBCONTRACTORS, SHALL BE LIABLE TO THE OTHER FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, RELIANCE, PUNITIVE OR ANY OTHER DAMAGES, LOST DATA OR COST OF PROCUREMENT OR SUBSTITUTE SERVICE(S) OR FOR ANY LOST PROFITS OF ANY KIND OR NATURE WHATSOEVER, REGARDLESS OF THE FORESEEABILITY THEREOF, ARISING OUT OF THE SERVICE(S) OR IN ANY WAY ARISING OUT OF THIS AGREEMENT, WHETHER IN AN ACTION ARISING OUT OF BREACH OF CONTRACT, BREACH OF WARRANTY, DELAY, NEGLIGENCE, STRICT TORT LIABILITY, PRODUCT LIABILITY, PATENT OR INTELLECTUAL PROPERTY MATTERS OR ANY OTHER LEGAL OR EQUITABLE THEORY. FOR ANY BREACH, EACH PARTY'S MAXIMUM LIABILITY SHALL NOT EXCEED THE TOTAL AMOUNT OF FEES AND CHARGES PAID TO CARPATHIA BY CUSTOMER WITHIN THE TWELVE (12) MONTHS PRECEDING THE DATE OF THE CLAIM.** Customer's payment obligations, Customer's liability for early termination charges, and the parties' indemnification obligations under the Agreement are excluded from this section. Liability for damages will be limited and excluded, even if any exclusive remedy provided for in the Agreement fails of its essential purpose.

10. **Acceptable Use**

10.1. Carpathia may reasonably modify the Acceptable Use Policy, including modifications necessary to remain consistent with industry practices. Carpathia shall notify Customer of any modification to the Acceptable Use Policy. All modifications become effective thirty days following Carpathia's notice. In the event a modification to the Acceptable Use Policy materially and adversely affects Customer, Customer may request to terminate this Agreement by giving Carpathia notice, in writing, with sufficient detail as to the materiality and adverse nature of the modification. Such notice must be received within twenty (20) days from the date of Carpathia's notice to Customer of the modification to the Acceptable Use Policy (after which Customer agrees the modified Acceptable Use Policy). Carpathia, at Carpathia's sole option, shall within ten (10) days, either (a) agree to terminate the Agreement on the basis that the modification to the Acceptable Use Policy does materially and adversely affect Customer, in which case Carpathia shall agree a reasonable date for such termination, not to exceed sixty (60) days, and waive any early termination charges; OR (b) not agree to terminate the Agreement on the basis that the modification to the Acceptable Use Policy does not materially and adversely affect Customer, in which case the Agreement and any Service Order(s) shall remain in effect for the Term subject to the new, modified Acceptable Use Policy; OR (c) expressly agree in writing, that the modification to the Acceptable Use Policy will not apply to Customer, in which case the Agreement and any Service Order(s) shall remain in effect for the Term subject to the original, unmodified Acceptable Use Policy.

11. **Customer Security Obligations and Compliance with Law**

11.1. Customer agrees it is responsible for determining what laws and regulations are applicable to its use of the Service(s) and to comply with all such applicable laws and regulations.

11.2. Customer shall use reasonable precautions to protect Customer equipment from an unauthorized access, attack or use.

## **12. Force Majeure**

Neither party will be responsible for any delay, interruption or other failure to perform under the Agreement due to acts, events, and causes beyond the control of the responsible party, including, but not limited to, embargoes, explosions, failure of third party suppliers, fires, governmental decrees, labor disputes, natural disasters, riots, strikes, terrorist activities, or war.

## **13. Intellectual Property Rights**

Each of the parties (or their respective third party licensors) shall retain all intellectual property rights in all of its respective trade secrets, inventions, copyrights, Marks, and other intellectual property. Any intellectual property developed by Carpathia during the performance of the Service(s) shall be deemed the intellectual property of Carpathia unless Carpathia has expressly agreed, in advance and in writing, that Customer has any interest in the intellectual property.

## **14. Marks and Publicity**

14.1. Customer agrees that Carpathia may publicly disclose that Carpathia is providing Service(s) to Customer.

14.2. Customer agrees that Carpathia may include the Customer name and Marks in press releases, on the Carpathia web site and in promotional materials; and reasonably work with Carpathia to produce customer testimonials and case studies (collectively "Marketing Rights").

14.3. Pursuant to the Marketing Rights, Customer hereby grants Carpathia a nonexclusive right, during the term of this Agreement, to use the Customer's trademarks, trade name, logos and service marks (collectively the "Marks"). Except as specifically set forth in this section, Customer shall retain all right, title and interest in and to the Marks and nothing in this Agreement shall vest in Carpathia any rights in the Marks other than the limited right of use set forth herein.

## **15. Assignment**

Neither party may assign or otherwise transfer any of its rights or obligations under this Agreement without the prior written consent of the other party, which consent will not be unreasonably withheld, except that: (a) Carpathia may assign its right to receive payment; and (b) Carpathia may use subcontractors in the performance of its obligations, in which case Carpathia will remain responsible for the performance by such subcontractors; and (c) Carpathia may assign the Agreement as part of a corporate reorganization or due to Carpathia selling all, or the majority, of its business or assets, including through merger or other operation of law.

## **16. Severability**

In the event that any provision of this Agreement is held or construed to be invalid by any court having jurisdiction over disputes related to this Agreement, such provision will, if reasonable to do so, be restated to reflect as nearly as possible the original intentions of the parties in accordance with applicable law or, if not reasonable to do so, be deemed to be excluded from this Agreement. In any event, all other provisions of this Agreement will remain in full force and effect.

## **17. Survival**

Any provision of this Agreement which, by its nature, would survive termination or expiration of this Agreement will survive any such termination or expiration of this Agreement.

#### **18. Governing Law and Venue**

This Agreement shall be construed under and governed by the substantive Laws of the Commonwealth of Virginia, without giving effect to its rules pertaining to conflicts of laws, except for those giving effect to this choice of law provision. Any suit or action of any kind brought to enforce any provision of this Agreement shall be brought in any court of competent jurisdiction in Loudoun County, Virginia. Customer consents to personal jurisdiction of and venue in the state and federal courts within that county and hereby irrevocably waive any objections to such jurisdiction, including, the laying of venue or based on the grounds of forum non conveniens, which Customer may now or hereafter have to the bringing of any such action or proceeding in such respective jurisdictions. Customer hereby irrevocably consents to the service of process of any of the aforementioned courts in any such action or proceeding by the means set out for the giving of notice pursuant to section 26 of this Agreement. Nothing herein shall affect the right of Carpathia to serve process in any other manner permitted by law. The provisions of this section shall not prevent Carpathia from seeking or obtaining injunctive relief or other extraordinary relief in any courts with jurisdiction. To the extent permitted by applicable law, Carpathia may take concurrent proceedings for injunctive relief in accordance with this section in any number of jurisdictions.

#### **19. Export**

The Service(s), technology, materials, tools, and technical data delivered by Carpathia may be subject to U.S. export controls or the trade laws of other countries. Customer agrees to comply with all export control regulations and acknowledge that Customer has the responsibility to obtain such licenses to export, re-export or import as may be required. Customer agrees not to export or re-export to entities on the most current U.S. export exclusion lists or to any country subject to U.S. embargo or terrorist controls as specified in the U.S. export laws, unless permitted pursuant to U.S. Law. Customer will not use the Service(s), or any Carpathia-provided technology, materials, tools, or technical data for nuclear weaponry or missile weaponry or chemical and biological weaponry end uses. Furthermore, Customer represents and warrants that Customer is not on the United States Department of Treasury, Office of Foreign Asset Controls list of Specially Designated National and Blocked Persons and Customer is not otherwise a person to whom Carpathia is legally prohibited to provide the Service(s).

#### **20. No Waiver**

Failure to enforce compliance with any term or condition of this Agreement will not constitute a waiver of such term or condition of this Agreement or the right to subsequently enforce such term or condition in the future.

#### **21. Complete Agreement**

This Agreement and the Service Order(s), and the Service Level Agreement at <http://www.carpathiahost.com/sla> and the Acceptable Use Policy constitute the entire agreement between Carpathia and the Customer with respect to the subject matter of this Agreement and supersede all prior agreements, discussions, proposals, representations or warranties, whether written or oral, on this subject matter.

#### **22. Headers**

The headings used in this Agreement have been inserted for convenience of reference only and do not constitute a part of this Agreement or define, expand or limit the provisions hereof.

**23. 3<sup>rd</sup> Party Beneficiaries**

Except for the right of Carpathia to assign payment hereunder, this Agreement shall not benefit or create any right or cause of action in or on behalf of any person other than the parties hereto.

**24. Counterparts**

The Service Order(s) may be executed in counterparts signed with the handwritten signature of an authorized representative of each party, each of which will be considered an original, and all of which will be considered one and the same document. Any original handwritten signature, signature on an electronic image (such as .pdf or .jpg format), or electronic signature which meets the requirements in the preceding sentence and transmitted by facsimile shall be considered a handwritten signature for purposes of this Agreement.

**25. Precedence**

Except with respect to each party's indemnification and confidentiality obligations hereunder, in the event of any conflict in terms between this Agreement and any Service Order, the terms of the applicable Service Order shall govern solely with respect to the applicable Service Order.

**26. Notice**

All notices will be given in writing and will be deemed to have been delivered and given for all purposes (i) on the delivery date, or, if not a business day, the first business day thereafter, if delivered by confirmed facsimile or confirmed email; or (ii) on the delivery date, if delivered personally to the party to whom the same is directed; or (iii) one (1) business day after deposit with a commercial overnight carrier, with written verification of receipt, if the contracted delivery is "next business day service".

All notices to Carpathia are to be delivered to

Carpathia Hosting  
43480 Yukon Drive, Suite 200  
Ashburn, VA 20147  
Attn: William Ranney  
legal@carpathiahost.com  
Phone: 703 740 1730  
Fax: 440 848 1730

All notice to Customer are to be delivered to the name, address, fax and email provided on the Service Order; or in the event not completed by the Customer in the Service Order, at the Customer's registered corporate address.