

# Service Exchange Terms and Conditions

These Service Exchange Terms and Conditions (this “**Agreement**”) contains the terms and conditions that govern access to and use of the Service Exchange (as defined below) and is an agreement between You and Us. “**You**” or “**Customer**” means the user or customer entity (which may also be referred to as “**Tenant**” or “**Licensee**”) indicated on the applicable service order, colocation order, or order related documentation, as applicable, individually, each a “**service order**” and collectively, “**service orders**”, referencing or incorporating this Agreement or otherwise using the Service Exchange. “**Digital**” “**we**,” “**us**,” or “**our**” means the Digital Realty branded or affiliated entity indicated on the applicable service order as providing you access to the Service Exchange. A “**Party**” means you or us, and “**Parties**” mean both you and us. This Agreement takes effect upon the earlier of (i) your execution of applicable service order, or (ii) when you use any component of the Service Exchange (the “**Effective Date**”). You represent to us that you are lawfully able to enter into contracts (e.g., you are not a minor), have legal authority to bind the Customer, and are hereby doing that.

## 1. Service Exchange Products and Service Levels

- 1.1. **Generally.** The “**Service Exchange**” is an interconnection solution that is designed to enable on-demand direct access to various third parties or end-points on the switching infrastructure within the same data center or connected to certain data centers. The Service Exchange is only available at certain data centers owned, controlled, or managed by Digital Realty Trust, L.P. or its affiliates (each an “**Service Exchange Supported DC**”) and/or end-points connected to those Service Exchange Supported DCs.
- 1.2. **Service Descriptions and Service Levels.** The Service Exchange related component offerings (e.g., 1GB Port, 10GB Port, VXC™ services, etc.) (each a “**Service Exchange Service**” and collectively the “**Service Exchange Services**”) and related service levels (each a “**SLA**” and collectively the “**SLAs**”) are more thoroughly described in schedules attached hereto. The credits and remedies described in those SLAs are your sole and exclusive remedy for any failure to meet a service level and represent our sole liability under this Agreement for failing to meet a SLA.

## 2. Service Orders

- 2.1. **Generally.** You may order Service Exchange Services through service orders and/or our applicable portals, systems and processes that may create electronic service orders. By submitting a service order to us, you warrant that the information you provide in that service order is true and correct and that we may rely upon it and disclose it to our affiliates, suppliers, licensors, and subcontractors as reasonably necessary to provide the Service Exchange Services. The submission to us of an executed service order constitutes a binding offer to acquire the Service Exchange Service(s) described in the service order on the terms set out in this Agreement, and we may accept or reject that offer at our discretion. On and after the Effective Date, charges accrue for an applicable Service Exchange Service.
- 2.2. **Service Order.** Each service order hereby incorporates and is merged with this Agreement with respect to the Service Exchange Services identified on that service order. For the avoidance of doubt, and without limiting your acknowledgment in the opening paragraph of this Agreement, non-Service Exchange Services, if any, identified on an applicable service order (e.g. space, power, or other datacenter products) will be subject to the applicable agreement relating thereto. You acknowledge and agree that this Agreement (and not any other license, services agreement, lease or other contractual arrangement you may have with us or any of our affiliates) solely governs your access to, rights arising under, and use of the Service Exchange, and is independent from such other agreements you may have with us or our affiliates.
- 2.3. **Credit.** Service orders may be rejected, suspended, or modified to require advance payments by us if we have a good faith concern about your credit or ability to pay, and you hereby authorize us to assess your creditworthiness and communicate and exchange information with credit reporting agencies about you.

## 3. Use and Responsibilities

- 3.1. **Our Provision of the Service Exchange Services.** Subject to the other terms and conditions of this Agreement, we will use commercially reasonable efforts to provide the Service Exchange Services within a reasonable timeframe or by the date set out in the relevant service order. We will also establish and maintain all cabling (including all cross-connects) from the Service Exchange Service demarcation point to your equipment at the Service Exchange Supported DC. We may provide the Service Exchange Services ourselves and/or through our affiliates or third party suppliers and licensors, such as Megaport (USA), Inc. and/or its affiliates (“**Megaport**”) who provide technology, software and support to power the Service Exchange Services.

We remain responsible for the provision of the Service Exchange Services notwithstanding our use of our affiliates, suppliers and licensors. The Service Exchange Services may include application program interface(s) to facilitate your use of the Service Exchange Services and are subject to change from time-to-time. We will use reasonable efforts to maintain backward compatibility if reasonably practical and provide you notice of material changes.

- 3.2. **Your Access and Use.** Your access and use of each Service Exchange Service (and any interfaces relating thereto) is subject to the applicable dependencies, requirements, and restrictions in the Service Description Schedule and this Agreement, including the following:

- If you are licensing/leasing space and power and/or receiving colocation services from us or our affiliates under a separate agreement you must not be in default of that agreement so long as you access and use the Service Exchange Services.
- You must supply and configure your own compatible equipment at the Service Exchange Supported DC to connect to the Service Exchange Services.
- You must comply with our then current Acceptable Use Policy available at [www.digitalrealty.com/acceptable-use-policy/](http://www.digitalrealty.com/acceptable-use-policy/) and other generally applicable operational procedures, technical specifications and directions, rules and regulations relating to the Service Exchange Services made known to you by us, Megaport, or applicable service providers.
- You must take reasonable and customary precautions to avoid damage, disruption, or interference with the equipment, network, sites, and systems used to provide the Service Exchange Services or that could expose us or our affiliates or suppliers or licensors to risks or liability.
- You must comply with applicable laws and regulations.
- You may only use the Service Exchange Services for your internal business purposes and may not resell or make the Service Exchange Services available to any third party without our prior written consent.
- You must implement and maintain reasonable and appropriate security measures, including with respect to equipment, networks, data transmissions, and malicious code or activities (e.g., denial of service attacks or overloading networks or systems with data).
- You may not reverse engineer or decompile the Service Exchange Services or any interfaces or components relating thereto.

- 3.3. **Your Other Responsibilities.** You are solely responsible for your (and your employees’ and contractors’) use of the Service Exchange Services, any service orders placed through your credentials, all information or data transmitted or accessed through the Service Exchange Services, your selection of service provider(s), and the acts and omissions of your end users, agents, employees, contractors, or other service providers.

- 3.4. **Maintenance.** We may temporarily suspend a Service Exchange Service, in whole or in part, for maintenance and repair. As and if practical and permissible, we will use commercially reasonable efforts to (x) provide you notice, and (y) minimize the extent or duration of the suspension.

- 3.5. **IP Addresses.** If we issue IP addresses from our IP address block to you in connection with any Service Exchange Service, you agree that upon termination or expiration of such Service Exchange Service your right to access and use that IP address(es) shall terminate and expire.

4. **Intellectual Property.** You retain all rights, title and interest in and to your data and information processed through the Service Exchange Services.

Excluding your data and information processed through Service Exchange Services, you acknowledge that all the intellectual property rights, including copyrights, patents, trade marks, and trade secrets, in or to the Service Exchange Services and related interfaces and portals (including improvements, enhancements, or derivative works thereto) are owned by us or our affiliates or third party suppliers and licensors. Neither this Agreement (nor your access to the Service Exchange Services) transfers any rights, title or interest in or to such intellectual property rights. We reserve all rights not granted. There are no implied licenses granted by us to you.

**5. Data Protection and Privacy** You represent and warrant that you have the right to provide, transfer and process all data and information through the Service Exchange and with your designated third parties and have obtained any required consents necessary to do so. The Service Exchange Services include reasonable and customary safeguards designed to protect data and information in our possession or control from loss or unauthorized disclosure. Except as otherwise provided in this Agreement, we will only intercept or access your data and information processed through the Service Exchange Services as and if required by applicable law or court order, and will prohibit our affiliates and third party suppliers and licensors from intercepting or accessing your data or information, unless otherwise required by applicable law or court order. Notwithstanding any other agreement between you and us, the security and data privacy provisions herein contain our and our affiliates' entire obligation regarding the security, privacy and confidentiality of your data and information relating to the Service Exchange Services.

**6. Confidentiality.** Each Party agrees that (i) non-public sales, marketing, pricing, business plans and strategies, and any other information marked confidential or proprietary are confidential and constitute proprietary information ("**Confidential Information**"), and (ii) it shall not disclose, and it shall cause its partners, officers, directors, shareholders, employees, brokers, auditors and attorneys to not disclose Confidential Information of the other Party to any other person without first obtaining the prior written consent of the other Party. Notwithstanding the foregoing sentence, each Party shall have the right to disclose such information to the extent required, but only to the extent required (i) to its (or its affiliates' and in the case of us, our applicable suppliers' or licensors') directors, officers, employees, agents and advisers for valid business and accounting purposes ("**Business Disclosures**"), and/or (ii) under any applicable securities or other laws regarding public disclosure of business information and/or as required by law or any court ruling ("**Legal Disclosures**"), and together with the Business Disclosures, the "**Permitted Disclosures**").

## 7. Fees

**7.1. Fees, Invoicing and Payment.** Fees for the Service Exchange Services will be specified on service orders, our applicable portals, systems or processes, as applicable, or if not specified, as set out in our then current price list. We will issue invoices monthly in accordance with the following: Service Exchange Service ports will be invoiced based on the number of active ports on the billing date, and Service Exchange Service VXC™ fees and usage will be billed in arrears. All charges will be invoiced and must be paid in the currency specified on the relevant service order (or USD if not otherwise specified). You must arrange to pay all invoices within thirty (30) days of the invoice date using one of the payment methods listed on the invoice and hereby authorize us (or our affiliates) to process payment in accordance with the service order.

**7.2. Late Payment.** If an invoice is not paid in full by the due date, then, in addition to our other rights, we may charge you a default fee on the unpaid amount on a daily basis from the due date until payment is made at the lesser of 1% per month or the highest rate permitted under applicable law.

**7.3. Disputes.** If you believe there has been a mistake in any invoice or fee charged to you, you must notify us within ninety (90) days after the relevant invoice date or charge with the details and hereby waive your right to dispute such amount thereafter. Following receipt of a dispute notice, we will investigate your claim. You do not have to pay any amount specifically and timely disputed in good faith in accordance with this Section, but you will pay all amounts not disputed in accordance with this Section.

**7.4. Taxes and Regulatory Fees.** Unless otherwise expressly stated in this Agreement or a service order, amounts payable and other consideration to be provided under or in accordance with this Agreement are exclusive of any applicable regulatory fees or charges of any kind or nature ("**Regulatory Fees**") and value added tax, goods and services tax, or similar imposition, duty and levy whatsoever (collectively, "**Tax**"), which from time to time may be imposed or charged by any government, quasi-government, regulatory, statutory or tax authority. You will pay all such Regulatory Fees and Tax. Tax does not include income taxes.

**7.5. Adjustments.** Unless otherwise provided on a service order, fees will be subject to change once per year on thirty (30) days' notice from us to you by up to three percent (3%) per year.

## 8. Term and Termination

**8.1. Service Term and Renewals.** If a term or period is specified in a service order, our systems, or on our applicable portal, for a Service Exchange Service ("**Minimum Initial Term**"), you will pay for and have access to that Service Exchange Service until the term or period indicated expires, subject to the other provisions of this Agreement. Thereafter, such Service Exchange Service shall automatically renew on a month-to-month basis, unless a Party provides at least 1 month prior notice of non-renewal. If no term or period is specified in a service order for a Service Exchange Service, the Service Exchange Service will be provided on a month-to-month basis, until terminated on at least 1 month prior notice of non-renewal.

**8.2. Termination for Cause.** Either Party may terminate a Service Exchange Service under a service order if the other party materially breaches any term of this Agreement (including your compliance with Section 3.2) relating to that service order and fails to remedy that breach within thirty (30) days of receipt of notice from the non-defaulting party requiring the breach to be remedied. We may also terminate any or all Service Exchange Services if you breach your payment obligations and fail to remedy that breach within five (5) business days of receipt of notice of non-payment.

**8.3. Other Terminations Rights.** You may terminate a Service Exchange Service upon 1 month notice to us if we materially modify the Service Exchange Services, SLAs, or this Agreement and such modification adversely impacts you, unless we agree to waive such change with respect to you. However, you may only exercise this termination right within ninety (90) days following such reduction or modification. No early termination fees will apply for a termination by you under the foregoing two sentences. We may suspend or terminate a Service Exchange Service, service order or this Agreement to you if (i) we reasonably believe we need to do so to comply with any law, regulation or order of any government, regulatory body, or court or to avoid or minimize liability to third parties, (ii) we are unable to provide a Service Exchange Service to you for any reason outside of our direct control (e.g., due to technical reasons or the termination of any agreement or relationship with licensors, partners, or other third party suppliers), (iii) we reasonably believe your use of the Service Exchange Service is adversely impacting the Service Exchange for other customers, or (iv) we sell or assign our interest in or to any Service Exchange Supported DC relating to the Service Exchange Services. As and if practical and permissible, we will use commercially reasonable efforts to provide you advance notice thereof, and minimize the extent or duration of any such suspension or termination. During any suspension of a Service Exchange Service the applicable fees relating thereto will be waived or equitably adjusted, unless the suspension arose due to your breach, negligence, or violation of law, regulation, or third party rights. We may also terminate if you cease to license or lease space or procure applicable colocation services from us.

**8.4. Early Termination Fee.** If you elect to terminate a Service Exchange Service before the Minimum Initial Term expires other than as described in Sections 8.2 or 8.3, then you will pay us an early termination fee equal to fifty percent (50%) of the average monthly fees (as invoiced in the three (3) months immediately prior to termination) or the monthly recurring charge (whichever is greater) for the terminated Service Exchange Service, multiplied by the number of months (or part thereof) between the date of termination and the end of the Minimum Initial Term. Early termination fees will also apply if we terminate for cause, without limiting our other rights and remedies.

## 9. INDEMNIFICATION

**9.1. By Us.** We will defend you at our expense for any claim brought against you by a third party based upon an allegation that the Service Exchange Services directly infringe any third party intellectual property rights. We will pay those costs and damages finally awarded against you in any such claim that are specifically attributable to such claim or those costs and damages agreed to in a monetary settlement of such claim. If the Service Exchange Services become, or in our opinion are likely to become, the subject of an infringement claim or injunction, we may, at our option and expense, either (i) procure for you the right to continue using the Service Exchange Services; (ii) replace or modify the Service Exchange Services to become non-infringing; or (iii) terminate. Notwithstanding anything to the contrary, we will have no obligation or liability to the extent that a claim or liability arises from (1) the combination, operation, or use of the Service Exchange Services with products, services, data, information, equipment, materials, technologies, business methods or processes not furnished by us; (2) modifications which were not made by us; (3) your breach of this Agreement or use of the Service Exchange Services other than in accordance with this Agreement; or (4) your use of the internet or selection of third parties (collectively, "**Exclusions**"). This Section states our entire liability and your sole and exclusive remedy for third party infringement claims.

**9.2. By You.** You will defend at your expense any claim against us or our affiliates, suppliers or licensors resulting from (a) an Exclusion, or (b) your (or your users') use of the Service Exchange Services, except to the extent the claim is subject to indemnification under Section 9.1 above or caused by the proven gross negligence or willful misconduct of us or our affiliates, suppliers or licensors. You will pay those costs and damages finally awarded in any such claim that are specifically attributable to such claims or those costs and damages agreed to in a monetary settlement of such claims.

**9.3. Procedure.** Any party that is seeking to be defended under the provisions of this Section (an “**Indemnified Party**”) must (a) promptly notify the other party (the “**Indemnifying Party**”) in writing of any third-party claim, suit, or action for which it is seeking to be defended hereunder, (b) give the Indemnifying Party sole control over the defense of such claim, suit or action and any related settlement negotiations, and (c) cooperate and assist in such defense at the Indemnifying Party’s expense.

## **10. Disclaimers and Limitations of Liability**

**10.1.** THE SERVICE EXCHANGE SERVICES ARE PROVIDED “AS IS” AND “AS AVAILABLE.” SLA CREDITS ARE YOUR SOLE MONETARY REMEDY AND OUR SOLE LIABILITY WITH RESPECT TO UNAVAILABILITY OR OTHER SLA PERFORMANCE ISSUES RELATING TO THE SERVICE EXCHANGE SERVICES. WE AND OUR AFFILIATES, SUPPLIERS AND LICENSORS MAKE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE REGARDING THE SERVICE EXCHANGE SERVICES, INCLUDING ANY WARRANTY THAT THE SERVICE EXCHANGE SERVICES WILL BE UNINTERRUPTED, ERROR FREE OR FREE OF HARMFUL COMPONENTS, OR THAT ANY DATA WILL BE SECURE OR NOT OTHERWISE LOST OR DAMAGED, OR THAT ANY THIRD PARTY WILL CONTINUE TO SUPPORT CONNECTIVITY OR YOU. EXCEPT TO THE EXTENT PROHIBITED BY LAW, WE AND OUR AFFILIATES, SUPPLIERS, AND LICENSORS DISCLAIM ALL WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, QUALITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR QUIET ENJOYMENT, AND ANY WARRANTIES ARISING OUT OF ANY COURSE OF DEALING OR USAGE OF TRADE.

**10.2.** EXCEPT AS PROVIDED BELOW IN THIS SECTION, YOU WILL NOT BE LIABLE TO US AND WE (INCLUDING OUR AFFILIATES, SUPPLIERS, AND LICENSORS) WILL NOT BE LIABLE TO YOU FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES (INCLUDING DAMAGES FOR LOSS OF PROFITS, GOODWILL, USE, OR DATA), EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. EXCEPT AS PROVIDED BELOW IN THIS SECTION, NEITHER PARTY (WHICH FOR PURPOSES OF THIS SECTION 10.2, SHALL INCLUDE OUR AFFILIATES, SUPPLIERS AND LICENSORS) WILL BE RESPONSIBLE TO THE OTHER FOR ANY COMPENSATION, REIMBURSEMENT, OR DAMAGES ARISING IN CONNECTION WITH: (A) YOUR INABILITY TO USE THE SERVICE EXCHANGE SERVICES, INCLUDING CHANGES OR DISCONTINUATION OF ANY OR ALL OF THE SERVICE EXCHANGE SERVICES; (B) THE COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; (C) ANY INVESTMENTS, EXPENDITURES, OR COMMITMENTS IN CONNECTION WITH THIS AGREEMENT; OR (D) ANY UNAUTHORIZED ACCESS TO, ALTERATION OF, OR THE DELETION, DESTRUCTION, DAMAGE, LOSS OR FAILURE TO STORE ANY OF YOUR DATA. EXCEPT AS PROVIDED BELOW IN THIS SECTION, YOUR AGGREGATE LIABILITY TO US AND OUR (INCLUDING OUR AFFILIATES’ AND SUPPLIERS’ AND LICENSORS’) AGGREGATE LIABILITY TO YOU WILL BE LIMITED TO THE AMOUNT YOU ACTUALLY PAY US FOR THE SERVICE EXCHANGE SERVICE(S) THAT GAVE RISE TO THE LIABILITY DURING THE 12 MONTHS BEFORE THE MOST RECENT EVENT GIVING RISE TO LIABILITY OCCURRED. THE FOREGOING LIMITATIONS AND EXCLUSIONS OF LIABILITY IN THIS SECTION WILL NOT APPLY TO FEES OWED TO US FOR SERVICE EXCHANGE SERVICES PROVIDED OR MADE AVAILABLE, EARLY TERMINATION FEES UNDER SECTION 8.4, OR SLA CREDITS OWED TO YOU.

## **11. Miscellaneous**

**11.1. Customer List.** You consent to Digital, Megaport and their affiliates listing you as a customer and using your logo on their websites and portals in connection with Service Exchange Services and identifying you as a potential connection point through the Service Exchange.

**11.2. Modifications.** We may modify this Agreement (including Service Description Schedules, SLAs, and the Acceptable Use Policy) at any time by posting a revised version on our portal or website or by otherwise notifying you in accordance with this Agreement; provided, however, that we will provide at least 90 days’ advance notice for changes to any SLA. Subject to the foregoing, the modified terms will become effective upon posting or, if we notify you by email or other means, as stated therein. By continuing to use the Service Exchange Services after the effective date of any modifications, you agree to be bound by the modified terms unless you provide notice of termination in accordance with Section 8.3.

**11.3. Force Majeure.** We and our affiliates, suppliers and licensors will not be liable for any delay or failure to perform any obligation under this Agreement where the delay or failure results from any cause beyond our reasonable control, including acts of God, industrial disturbances, systemic electrical,

telecommunications, or other utility failures, earthquake, storms or other elements of nature, blockages, embargoes, riots, acts or orders of government, acts of terrorism, or war.

**11.4. Independent Contractors.** We and you are independent contractors, and neither Party, nor any of their respective affiliates, is an agent of the other for any purpose or has the authority to bind the other.

**11.5. Third Party Beneficiaries.** Except as otherwise provided below, this Agreement does not create any third party beneficiary rights in any individual or entity that is not a party to this Agreement. Our suppliers and licensors are express third party beneficiaries and may enforce their rights with respect to their intellectual property or confidential information which you may possess or use and with respect to the limitations of liability, disclaimers, and indemnification related obligations set forth in this Agreement expressly benefiting them with respect to you.

**11.6. Import and Export Compliance.** In connection with this Agreement, each Party will comply with all applicable import, re-import, export, and re-export control laws and regulations, including the Export Administration Regulations, the International Traffic in Arms Regulations, and country-specific economic sanctions programs implemented by the Office of Foreign Assets Control. For clarity, you are solely responsible for compliance related to the manner in which you choose to use the Service Exchange Services, including your transfer and processing of your data and use of the connectivity services.

### **11.7. Notice.**

**(a) To You.** We may provide any notice to you under this Agreement by sending a message to the email address then associated with your account. Notices we provide by email will be effective when we send the email. It is your responsibility to keep your email address current. You will be deemed to have received any email sent to the email address then associated with your account when we send the email, whether or not you actually receive the email.

**(b) To Us.** To give us notice under this Agreement, you must contact us as follows: (i) by email at [cocrm@digitalrealty.com](mailto:cocrm@digitalrealty.com); or (ii) by personal delivery, overnight courier or registered or certified mail to us at the address indicated in the applicable service order. We may update this contract information from time to time through either means described above. Notices provided by personal delivery will be effective immediately. Notices provided by email or overnight courier will be effective one business day after they are sent. Notices provided by registered or certified mail will be effective three business days after they are sent.

**11.8. Assignment.** You will not assign this Agreement, or delegate or sublicense any of your rights under this Agreement, without our prior written consent. We will not unreasonably refuse to grant consent in connection with any assignment or subletting relating to colocation space or services which you are permitted to assign or sublet under other agreements with us or our affiliates. Any assignment or transfer in violation of this Section will be void. Subject to the foregoing, this Agreement will be binding upon, and inure to the benefit of the parties and their respective successors and assigns.

**11.9. REIT Saving Clause.** Without limiting any other right that we may have under this Agreement or under applicable laws, we have the right, from time to time, to assign part or all of our interest and obligations in and under this Agreement or any service order to an affiliate, if and to the extent that we determine such action is necessary or advisable in connection with our status, or any affiliate’s status, as a real estate investment trust within the meaning of Section 856 of the United States Internal Revenue Code of 1986, as amended. To the extent any fees and charges or other sum (in addition to or included in the monthly recurring charge or otherwise) is paid with respect to any Service Exchange Services that are assigned to and provided by or on behalf of an affiliate, any such amounts paid by you to us with respect to such Service Exchange Services (as determined by us in our sole discretion) will be received by us as agent of, and paid over to, such affiliate.

**11.10. No Waivers.** The failure by us to enforce any provision of this Agreement will not constitute a present or future waiver of such provision nor limit our right to enforce such provision at a later time. All waivers by us must be in writing to be effective.

**11.11. Severability.** If any portion of this Agreement is held to be invalid or unenforceable, the remaining portions of this Agreement will remain in full force and effect. Any invalid or unenforceable portions will be interpreted to the effect and intent of the original portion. If such construction is not possible, the invalid or unenforceable portion will be severed from this Agreement but the rest of the Agreement will remain in full force and effect.

**11.12. Governing Law.** The laws of the State of Texas, without reference to conflict of law rules, govern this Agreement and any dispute of any sort that might arise between you and us. The United Nations Convention for the International Sale of Goods does not apply to this Agreement.

**11.13. Disputes.** Any dispute or claim relating in any way to your use of the Service Exchange Services or this Agreement will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this Agreement. There is no judge or jury in arbitration, and court review of an arbitration award is limited. However, an arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages), and must follow the terms of this Agreement as a court would. To begin an arbitration proceeding, you must send a letter requesting arbitration and describing your claim to us pursuant to Section 11.7. The arbitration will be conducted by the American Arbitration Association (AAA) under its short form and expedited rules and procedures, which are available at [www.adr.org](http://www.adr.org) or by calling 1-800-778-7879. Payment of filing, administration and arbitrator fees will be governed by the AAA's rules. We will reimburse those fees for claims totaling less than \$10,000 unless the arbitrator determines the claims are frivolous. We will not seek attorneys' fees and costs in arbitration unless the arbitrator determines the claims are frivolous. You may choose to have the arbitration conducted by telephone, based on written submissions, or at a mutually agreed location. All proceedings and rulings will be deemed Confidential Information of each party. We and you agree that any dispute resolution proceedings will be conducted only on an individual basis and not

in a class, consolidated or representative action. If for any reason a claim proceeds in court rather than in arbitration we and you waive any right to a jury trial. We and you both agree that you or we may bring suit in court to enjoin infringement or other misuse of intellectual property rights.

**11.14. Entire Agreement; English Language.** This Agreement (including the service orders, Service Exchange Service description schedules, SLAs, Acceptable Use Policy, and other attachments or exhibits) is the entire agreement between you and us regarding the subject matter of this Agreement. This Agreement supersedes all prior or contemporaneous representations, understandings, agreements, or communications between you and us, whether written or verbal, regarding the subject matter of this Agreement. We will not be bound by, and specifically object to, any term, condition or other provision which is different from or in addition to the provisions of this Agreement (whether or not it would materially alter this Agreement) and which is submitted by you in any order, receipt, acceptance, confirmation, correspondence or other document. If we provide a translation of the English language version of this Agreement, the English language version of the Agreement will control if there is any conflict. Including and its derivatives mean including without limitation.

## **Service Description Schedules**

### **Service Description Schedule 1**

#### **Service Exchange Port**

A **“Service Exchange Port”** is a high-speed Ethernet interface service that provides a physical connection to access the Service Exchange and other associated Service Exchange Services (such as a virtual cross-connect service (VXC™)). Available speed options are 1Gbps and 10Gbps.

A **“Redundant Service Exchange Service”** occurs when the Customer orders two (2) Service Exchange Ports on physically diverse infrastructure within the same Service Exchange Supported DC and maintains active uplinks to the ports at all times.

### **Service Description Schedule 2**

#### **Virtual Cross Connect™ Services**

A Virtual Cross Connect™ service (**“VXC™”**) is a high-speed point-to-point Ethernet virtual circuit service between two Service Exchange Ports. VXC™ speed may be configured in 1Mbps increments, with a maximum speed equal to the speed of the slowest Service Exchange Port connected to the VXC™.

You must have one or more active Service Exchange Ports in order to use a VXC™ service.

When you order a VXC™ service, you will order it between your port (the A-End) and another port (the B-End). The B-End may be owned or controlled by you or a third party. If you order a VXC™ service connected to a B-End owned or controlled by a third party, you acknowledge that we cannot activate the VXC™ service until we have received applicable consent from the B-End.

You acknowledge that if any Service Exchange Port associated with the VXC™ Service Exchange Services is terminated, the VXC™ service will automatically terminate as well.

You acknowledges that if a third party B-End owner terminates a B-End associated with the VXC™ service, the VXC™ service will automatically terminate.

Virtual Cross Connect™ and VXC™ are trademarks and registered trademarks of Megaport and its affiliates.

## Service Level Agreement

### Service Exchange Port

The Service Exchange Port Service Availability target is 100% for each redundant Service Exchange Port and 99.5% for each non-redundant Service Exchange Port, where

“**Service Availability**” is calculated per Charging Period as Uptime divided by (the number of minutes in the Charging Period less Excused Downtime), expressed as a percentage.

“**Charging Period**” means the charging period applicable to your SE Service, as specified in the Agreement or on the service order (and if not specified, a monthly Charging Period applies).

“**Uptime**” means the number of minutes in the Charging Period where the link state of your Service Exchange Port (or in the case of the Redundant Service Exchange Service, one of the two connected Service Exchange Ports) is ‘up’, rounded to the nearest minute.

“**Excused Downtime**” means the number of minutes in the Charging Period, rounded to the nearest minute that the link state of your Service Exchange Port is ‘down’ due to:

- your acts or omissions or the acts or omissions of your agents, contractors or anyone you are responsible for;
- the acts or omissions of any third party or a fault on a third party’s network;
- any failure, incompatibility or error in the configuration of your equipment or cabling (including any cross-connects);
- Our suspension of the SE Services in accordance with the Agreement or the Acceptable Use Policy; or
- any event or circumstance excused under Section 11.3 of the Agreement.

If we fail to meet the Service Availability target in a Charging Period, then subject to the conditions set out below, you will be able to claim a SLA credit calculated as follows:

- for a Service Exchange Port:  
 $(\text{Downtime} / \text{Charging Period}) \times \text{Recurring Charge}$
- for a Redundant Service Exchange Service:  
 $[(\text{Downtime} / \text{Charging Period}) \times \text{Recurring Charge}] \times 2.5$

provided that where Downtime exceeds 72 consecutive hours in any Charging Period, you will be able to claim a SLA credit calculated as 100% of the recurring fee for the affected Charging Period for that SE Exchange Port.

Where:

“**Downtime**” is calculated per Charging Period as the total number of minutes in the Charging Period less (Uptime plus Excused Downtime); and

“**Recurring Charge**” means the recurring charge applicable to the applicable Charging Period.

The following conditions apply to the SLA credits:

- Service credits apply from the first full Charging Period that the relevant SE Service is operational;
- where a SLA credit is available, the credit is your only remedy in the event of our failure to meet the Service Availability target;
- You must apply for the SLA credit by giving us notice of its claim within thirty (30) calendar days of the end of the Charging Period to which the credit applies;
- the SLA credit can only be applied as a credit toward SE Services, and cannot be redeemed for cash or applied against other services under other agreements;
- the maximum SLA credit available for each SE Service in a Charging Period will not exceed one-hundred per cent (100%) of the total Recurring Charges for that Charging Period for that SE Service; and
- SLA credits are not available if you have failed to pay charges for any SE Service when due and payable.

### VXC

The VXC has a Service Availability target of 100%, where

“**Service Availability**” is calculated per Charging Period as Uptime divided by (the number of minutes in the Charging Period less Excused Downtime), expressed as a percentage.

“**Charging Period**” means the charging period applicable to your SE Service, as specified on the service order (and if not specified, a monthly Charging Period applies).

“**Uptime**” means the number of minutes in the Charging Period where the VXC is Available (as defined below), rounded to the nearest minute. Each VXC traverses a single Label Switched Path (as defined by ITU-T Recommendation Y.1561 (05/2004))(LSP) through our network, and the availability of a VXC is measured by the availability of that Label Switched Path (“**LSP**”).

A VXC will be considered available when the LSP meets or exceeds all of the service targets below for three consecutive five-minute intervals, in which case the time of availability will start from the first of these intervals (“**Available**”). A VXC will continue to be considered Available until the LSP fails to meet one or more of the service targets below for three consecutive five-minute intervals, in which case the time of unavailability will

start from the first of these intervals (“**Unavailable**”). A VXC will continue to be considered Unavailable until it is Available again. Availability is measured by reference to ITU-T Recommendation Y. 1561 (05/2004).

Service Target	Value
Packet Error Ratio (PER)	<0.1%
Packet Loss Ratio (PLR)	<0.1%
Packet Transfer Delay (PTD)	Refer to <a href="https://megaport.com/legal/packet-transfer-delay">https://megaport.com/legal/packet-transfer-delay</a>  Note that the target does not apply between Service Exchange ports with a 5 minute average traffic load of more than 70% for either incoming or outgoing traffic.

PER, PLR and LSP are defined in ITU-T Recommendation Y. 1561 (05/2004).

“**Excused Downtime**” means the number of minutes in the Charging Period that the LSP is unavailable due to:

- your acts or omissions or the acts or omissions of your agents, contractors or anyone you are responsible for;
- the acts or omissions of any third party (including the B-End owner) or a fault on a third party’s network (including the B-End owner’s network);
- any failure, incompatibility or error in the configuration of the equipment or cabling (including any cross-connects) at the A-End or the B-End;
- our suspension of the SE Services in accordance with the Agreement or the Acceptable Use Policy; or
- any event or circumstance excused under Section 11.3 of the Agreement.

If we fail to meet the Service Availability target in a Charging Period, then subject to the conditions set out below, you will be able to claim a SLA credit calculated as:

$$\frac{\text{Downtime}}{\text{Charging Period}} \times \text{Recurring Charge}$$

provided that where Downtime exceeds 72 consecutive hours in any Charging Period, you will be able to claim a SLA credit calculated as 100% of the Recurring Charge for the affected Charging Period.

Where:

“**Downtime**” is calculated per Charging Period as the total number of minutes in the Charging Period less (Uptime plus Excused Downtime); and

“**Recurring Charge**” means the recurring charge applicable to the applicable Charging Period.

The following conditions apply to SLA credits:

- Service credits apply from the first full Charging Period that the relevant SE Service is operational;
- where a SLA credit is available, the credit is your only remedy in the event of our failure to meet the Service Availability target;
- SLA credits are available to you, the A-End owner only;
- You must apply for the SLA credit by giving us notice of its claim within thirty (30) calendar days of the end of the Charging Period to which the credit applies;
- the SLA credit can only applied as a credit toward SE Services, and cannot be redeemed for cash or apply against other Digital services under other agreements;
- the maximum SLA credit available for each SE Service in a Charging Period will not exceed one-hundred per cent (100%) of the total Recurring Charges for that Charging Period for that SE Service; and
- SLA credits are not available if you have failed to pay charges for any SE Service when due and payable.

**Miscellaneous**

All SLA credits are determined on a per SE Service and service order basis.