



TERMS AND CONDITIONS OF SALE

1. **Offer of Sale.** Offers of sale are based on the terms and conditions found on the Powernet Equipment Order and those provided below. Unless otherwise provided on the face hereof, offers are available for acceptance for a period of 30 days from the date of this offer. An order by Customer shall constitute an acceptance of these terms and conditions of sale.
2. **Purchase Orders.** Purchase orders may be placed by Customer in any commercially reasonable manner that Customer and Powernet determine is appropriate including facsimile or electronic transmission. The purchase order will indicate the specific products, specifications related thereto, quantity, price, total purchase price, shipping instructions, requested delivery dates, "bill to" and "ship to" addresses, tax exempt certifications, if applicable, and any other special instructions. Any contingencies contained on such order are not binding upon Powernet until Powernet's acceptance. All purchase orders are subject to acceptance by Powernet and are subject to a credit check.
Purchase orders shall be written to Powernet and Invoiced as a direct purchase.
3. **Prices.** Prices quoted by Powernet are subject to change without notice.
4. **Payment.** Payment terms for all products under this Agreement shall be due upon receipt of Invoice. Customer shall pay all applicable sales tax, installation and freight charges. If Customer fails to make any payment when due, there will be a service charge of one and one-half percent (1 1/2%) of the total amount due or the maximum legal rate allowed by law, whichever is less. Powernet reserves a security interest in the products until payment in full has been collected and Customer agrees to notify Powernet prior to relocation of any product in which Powernet has a security interest. Customer shall execute any other document, including a financing statement or other document similar to the UCC-1, necessary to perfect Powernet's security interest in the products. Customer authorizes Powernet to file at Customer's expense any financing statement relating to the products without Customer's signature, except where prohibited by law.
5. **Availability.** Customer agrees that the products are subject to availability. Powernet may cancel any order or any part of an order without cause at any time and without penalty, and Powernet's sole obligation shall be to return any down payment paid by Customer. If Customer is delinquent in the payment of any invoice, or is otherwise in breach of this Agreement, Powernet may at its discretion, withhold shipment (including partial shipments) of any order, or may at its option, require Customer to prepay for further shipments. Powernet shall retain the right to suspend performance of any order or require payment in cash, security or other adequate assurance satisfactory to Powernet when, in its opinion, the financial condition of Customer, or other grounds for insecurity warrant such action.
6. **Delivery.** All products purchased by Customer pursuant to this Agreement will be shipped F.O.B. Destination, freight collect. Freight will be prepaid and added to the invoice based on common carrier rates. An anticipated shipping date will be established by Powernet upon receipt of orders. The delivery date is the best estimate possible based on current and anticipated manufacturer operations of when product will be shipped. Powernet assumes no liability for loss, damage or consequential damage due to delays. Delivery shall occur and risk of loss shall pass to Customer upon delivery of the products to the FOB point. If Powernet has reason to believe that delivery of products will not be completed by the date requested, Powernet will notify Customer of the duration of the anticipated delay.
7. **Software.** (a) Customer acknowledges that the Products offered hereunder may include embedded computer software ("Software") and related technology which Powernet, its parent, affiliates or suppliers owns or licenses. During the term of this Agreement, Customer is granted a non-transferable, royalty-free license to use the Software in object code form only. The foregoing license is limited to the use of any product containing the Software only in the manner authorized by Powernet. Customer may not sublicense the Software to any other entity nor assign its license rights. Nothing contained herein shall cause Customer to acquire any right, title, or interest in the Software anywhere in the world, except as authorized herein. Notwithstanding the above, in the event Customer transfers title to the product containing the Software, this license shall transfer to Customer's transferee.
(b) This license shall continue until the license is terminated in accordance with this Agreement, or for the useful life of the product in which the Software is embedded or of which the Software is an integral part, or the useful life of the Software, whichever is shorter. Removal of the Software, service by any unauthorized person, use of the Software on any product other than that for which it was obtained or authorized, or any breach of this license by Customer shall automatically terminate this license.
8. **Installment Shipments.** Powernet reserves the right to deliver the products in installments. Each installment may be invoiced separately, and Customer will pay each invoice when due, without regard to delivery or non-delivery of subsequent installments. Delay in delivery of any installments shall not relieve Customer of its obligations to accept remaining installments. Requests to reschedule deliveries will be subject to acceptance by Powernet.
9. **Installation.** Products shall be installed by Powernet or a third party authorized by Powernet. Customer shall pay the installation fee included on the attached Powernet Equipment Order. At Customer's sole cost and expense, Customer shall insure that products are placed in an environment that conforms to the manufacturer's specifications and requirements and will bear all cost and expense for any additional necessities required for installation. Powernet shall not be liable for any damage to Customer's owned or leased equipment or software existing prior to the installation of the products.
10. **Warranty.** Powernet will pass on the manufacturer's warranty, if any, for each new product purchased pursuant to this Agreement. Except as specifically provided in a written warranty statement provided with the products, **POWERNET MAKES NO OTHER EXPRESS OR IMPLIED WARRANTIES AND ALL OTHER WARRANTIES ARE SPECIFICALLY EXCLUDED, INCLUDING ANY WARRANTY AS TO MERCHANTABILITY OR FITNESS FOR PARTICULAR OR SPECIAL PURPOSES. POWERNET SHALL UNDER NO CIRCUMSTANCES BE LIABLE TO CUSTOMER OR ANY THIRD PARTY FOR ANY SPECIAL, EXEMPLARY, PUNITIVE, INCIDENTAL OR CONSEQUENTIAL DAMAGES REGARDLESS OF THE CAUSE.** Powernet's sole liability shall be discharged by replacing or repairing any part or parts which may prove defective under normal and proper use, within the effective period of the warranty, if any, if shown to be defective by proper evidence submitted to Powernet. In the event any parts and/or structural components or appurtenances of a product are altered or modified by Customer without the express written consent of Powernet, any and all warranties shall immediately cease and terminate. Customer acknowledges and agrees that these limited remedies provided by Powernet shall constitute the entire warranty provided for the products and any breach thereof.
11. **Product Returns.** Products shall not be returned to Powernet without its written consent. All costs of return shall be the responsibility

of Customer.

12. **Indemnification.** Customer shall bear all risk of theft, loss or damage not caused by Powernet, for all product acquired pursuant to this Agreement. Customer agrees to indemnify, defend and hold Powernet, its officers, directors, employees and agents, harmless from all loss, liability, claims or expenses (including reasonable attorneys' fees) arising out of Customer's use of the products, including but not limited to liabilities arising from bodily injury, including death, or property damage to any person.
13. **Applicable Law.** This Agreement shall be governed by and construed in accordance with the law of the State of Ohio, without regard to its choice of law provisions. For valuable consideration, both parties acknowledge and agree that any action to enforce or interpret the terms of this Agreement or relating to the Services to be provided by Powernet shall be instituted and maintained only in Hamilton County, Ohio. Customer hereby consents to the jurisdiction and venue of such court and waives any objection to such jurisdiction and venue. In the case of a suit to collect past due payments, the Parties agree that Powernet may, in its sole discretion, bring suit in the courts of any jurisdiction where Customer does business or has assets, and Customer hereby consents to such jurisdiction. If Powernet sends Customer's account to an outside collection agency or institutes collection proceedings against Customer, Powernet has the right to charge Customer for any collection fees.
14. **Arbitration.** The Parties desire to resolve disputes arising out of or relating to this Agreement without litigation. Therefore, except for action seeking a temporary restraining order or an injunction relating to the purposes of this Agreement, or suit to compel compliance with this dispute resolution process, the Parties agree to use the following alternative dispute resolution procedures as the sole remedy with respect to any controversy or claim arising out of or relating to this Agreement or its breach. At the written request of either Party, each Party will appoint a knowledgeable representative to meet and negotiate in good faith to resolve any dispute arising out of or relating to this Agreement. The representatives shall have the discretion to determine the location, format, frequency and duration of their negotiations, and to utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations. All discussions and correspondence among the representatives shall be treated as confidential information developed for the purposes of settlement, exempt from discovery, and shall not be admissible in the arbitration described below or in any lawsuit without the agreement of the Parties. If the negotiations do not resolve the dispute within forty-five (45) days of the initial written request, the dispute shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association ("AAA"). The parties acknowledge that this Agreement is made pursuant to a transaction in interstate commerce, and that any arbitration will be governed by the Federal Arbitration Act, 9 U.S.C. sec. 1, et seq. Any court with jurisdiction may enter judgment upon the award rendered by the arbitrator. The arbitration will be held in Hamilton County, Ohio. The Parties agree that the arbitration shall proceed *ex-parte* in the event that a Party, after being duly notified refuses to participate in the arbitration. The prevailing party shall be entitled to reasonable costs and attorney's fees.
15. **Confidentiality.** Each party shall hold the information it receives in confidence, including, but not limited to, pricing, rebates, and Software or any other terms and conditions of this Agreement, and shall protect it using at least the same degree of care it uses to protect its own proprietary and confidential information and materials of like importance, but in no event may either party use less care than a reasonably prudent business person in a like or similar situation. Neither party shall disclose or permit any third person or entity access to the confidential or proprietary information of the other party without the disclosing party's prior written permission, except for each party's legal, insurance, and accounting advisors, as appropriate. Any proprietary information concerning Powernet, its products, data, documentation, services, or manufacturing processes which are disclosed to the Customer incident to the performance of this Agreement shall remain the property of Powernet, and no rights are granted to Customer to produce or have produced any such products or to practice or cause to be practiced any such processes, or reveal, disclose, or publish any such data and documentation. Powernet's confidential information may be used by Customer solely to use or service the products. Notwithstanding the foregoing, Powernet may disclose Customer Proprietary Network Information to any agent of Customer to initiate or provide Services and bill or collect for the Services.
16. **Assignment.** Customer shall not assign this Agreement without the prior written consent of Powernet, which consent shall not be unreasonably withheld.
17. **Force Majeure:** Neither party shall be responsible for delays or failure in performance of this Agreement (other than failure to pay any amounts due) to the extent that such party was hindered in its performance by any act of God, civil commotion, labor dispute, unavailability or shortages of materials or any other occurrence beyond its reasonable control.
18. **Powernet's Agents.** Customer acknowledges that it has been advised that no agent, employee or representative of Powernet has any authority to bind Powernet to any affirmation, promise, representation, or warranty concerning any of the products and, unless such affirmation, promise, representation, or warranty is specifically set forth in this Agreement, it does not form a basis of this bargain and shall not be enforceable against Powernet.
19. **Notices.** Any notice required under this Agreement shall be in writing and shall be given by certified mail, return receipt requested, postage prepaid, or guaranteed overnight delivery service to the address provided to Powernet by the other party. All notices to Powernet shall be made to:

Customer Relationship Manager
PNG Telecommunications, Inc.
8805 Governor's Hill Dr., Suite 250
Cincinnati, OH 45249

20. **Originals.** Facsimile signatures shall be accepted as original signatures. Placement of any orders or the transaction of any business by electronic medium shall be subject to the terms of this Agreement.
21. **Severability.** If any provision of this Agreement shall be unlawful, void or for any reason unenforceable, then that provision shall be deemed severable from this Agreement and shall not affect the validity and enforceability of the remaining provisions of this Agreement.
22. **Entire Agreement/Modifications.** Nothing contained in any purchase order or Customer issued document will in any way serve to modify or add any terms or conditions to the sale of product by Powernet to Customer pursuant to this Agreement. The parties agree that the terms and conditions of any order for product placed by Customer shall be governed only by the terms and conditions of this Agreement. This Agreement is the full and complete statement of the obligations of the parties relating to the subject matter hereof, and supersedes all previous agreements, understandings, negotiations and proposals. No provisions of this Agreement shall be deemed waived, amended, or modified by any party unless such waiver, amendment or modification shall be in writing and signed by a duly authorized officer of all parties.