



## Site Survey Services Agreement

This is an agreement (“Agreement”) for Site Survey Services and related services and/or features (Services”) between you and PNG Telecommunications, Inc. d/b/a Powernet (“Powernet”). This Agreement and any Service Orders explain the terms and conditions upon which we agree to provide you Service and products or Rental CPE and you agree to accept these terms and conditions with the Service and products or Rental CPE. If there is any conflict between this Agreement and a Service Order, this Agreement shall control. Services offered by Powernet to Customer for purchase are described in this Agreement and the Service Orders executed by both parties. The Services may consist of services provided directly by Powernet and also of services procured by Powernet from third party suppliers. The words “we”, “us”, “our” or “Powernet” refers to Powernet. The words “you”, “your”, or “Customer” refers to the person who is completing this Agreement. You represent that you have been authorized to accept this Agreement on behalf of your Company.

### 1. Scope of Services

- 1.1. Powernet shall perform for and deliver to Company the Services and deliverables described in Site Survey Order form, which is incorporated by reference herein.
- 1.2. Powernet shall use reasonable commercial efforts to perform and deliver the Services. All Services will be performed at Company’s and Powernet’s facilities. Powernet agrees, while working on Company’s premises, to observe Company’s rules and policies relating to security of, access to or use of Company’s premises or any of Company’s properties, including Confidential Information, as defined below.

### 2. Term

- 2.1. This Agreement shall become effective on the date it is fully executed by both Parties and shall extend for an initial term of one (1) month unless earlier terminated in accordance with the provisions of this Section 2 or upon the mutual agreement of the Parties.
- 2.2. Either Party may terminate this Agreement by delivering written notice to Consultant at least two (2) business days in advance of the desired termination date.
- 2.3. If either Party defaults in the performance of any material provision of this Agreement, the nondefaulting party may terminate this Agreement upon notice thereof.
- 2.4. Upon expiration or termination of this Agreement, both Parties shall promptly return to the other Party (i) all records, materials, equipment, drawings and documents which are owned, leased or licensed to that Party; and (ii) any data of any nature pertaining to or incorporating any Confidential Information of Company, including copies thereof, regardless of when obtained by or made available to that Party.
- 2.5. In the event of early termination of this Agreement by Company, and conditioned upon return of all Confidential Information (as defined below), work product and property, Company shall pay Powernet its accrued but unpaid compensation for Services rendered through the time of termination and shall reimburse Powernet for expenses properly incurred and documented.
- 2.6. The expiration or termination of this Agreement for any reason shall not terminate the obligations or liabilities of the Parties under Sections 3, 4, 5, 6 and the applicable portions under this Section 2, each of which shall survive any such expiration or termination.

### 3. Compensation

- 3.1. In consideration of the Services, Company agrees to pay Powernet as set forth on the Service Order attached. Powernet will invoice Company for performance of the Services and Company shall pay such invoices within thirty (30) days of receipt of the invoice.
- 3.2. All charges for Service are net of Applicable Taxes (as defined below). Except for taxes based on Powernet's net income, Customer will be responsible for all applicable taxes that arise in any jurisdiction, including, without limitation, value added, consumption, sales, use, gross receipts, excise, access, bypass, franchise or other taxes, fees, duties, charges or surcharges, however designated, imposed on, incident to, or based upon the provision, sale or use of the Services (collectively “Applicable Taxes”).
- 3.3. Customer’s payment must be received on or before the Due Date in order for it not to be considered late. Restrictive endorsements or statements on checks accepted by Powernet will not be binding upon Powernet. Customer shall pay a “Returned Check Fee” of thirty dollars (\$30.00) for any check returned for insufficient funds.
- 3.4. If Customer fails to remit payment of all amounts by the Due Date, Powernet, in addition to other remedies available to it under this Agreement or at law, may charge Customer a late fee of the lesser of one and one-half percent (1.5%) per month or the maximum fee allowed by law of the unpaid balance which shall accrue from the Due Date of the invoice.

### 4. Limitation of Liability & Warranties

4.1. **IN THE EVENT OF ANY BREACH OF THIS AGREEMENT OR ANY FAILURE OF THE SERVICES, WHATSOEVER, POWERNET NOR ANY OF ITS SUPPLIERS SHALL BE LIABLE TO COMPANY OR OTHER THIRD PARTY FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, ACTUAL, INCIDENTAL, PUNITIVE OR ANY OTHER DAMAGES, OR FOR ANY LOST PROFITS OR ANY KIND OR NATURE WHATSOEVER, EVEN IF POWERNET OR THE SUPPLIER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND WHETHER OR NOT SUCH DAMAGES WERE FORSEEABLE.**

4.2. **POWERNET REPRESENT AND WARRANTS TO COMPANY AS FOLLOWS: (a) POWERNET HAS THE EXPERTISE, EXPERIENCE AND KNOWLEDGE TO PERFORM AND DELIVER THE SERVICES; (b) POWERNET WILL PERFORM AND**

**DELIVER THE SERVICES IN ACCORDANCE WITH THE SERVICE ORDER AND (c) POWERNET WILL PERFORM AND DELIVER THE SERVICES IN ACCORDANCE WITH ALL APPLICABLE LAWS, ORDINANCES, REQUIREMENTS, DIRECTIONS, RULES, STATUTES, REGULATIONS OR LAWFUL ORDERS OF ANY GOVERNMENTAL AUTHORITY OR AGENCY. OTHER THAN THE FOREGOING WARRANTIES, POWERNET MAKES NO OTHER WARRANTIES WITH RESPECT TO THE SERVICE OR ITS PERFORMANCE UNDER THIS AGREEMENT INCLUDING ANY EXPRESS OR IMPLIED WARRANTIES AS TO MERCHANTABILITY OR FITNESS FOR PARTICULAR OR SPECIAL PURPOSE. NO WARRANTY IS MADE OR PASSED ON WITH RESPECT TO ANY THIRD PARTY SERVICE.**

4.3. Force Majeure. Neither Party will be liable to the other Party for any delay or failure to perform its obligations hereunder if such delay or failure is caused by an event (other than a failure to comply with payment obligations) beyond the reasonable control of the Party, whether foreseen or unforeseen. Acts and events deemed to be Force Majeure Events include but are not limited to: act of God, fire, flood, labor strike, sabotage, fiber cut, material shortages or unavailability or other delay in delivery not resulting from the responsible Party's failure to timely place orders therefore, war or civil disorder, earthquake, hurricane, tornado or terrorist act. The Party claiming relief under this Section shall notify the other in writing of the existence of the Force Majeure Event and shall be excused on a day-by-day basis to the extent of such prevention, restriction or interference until the cessation of such Force Majeure Event.

**5. Indemnification**

5.1. Each Party shall defend, indemnify and hold harmless the other Party and their respective officers, directors, employees, suppliers, licensors, contractors and agents against and from any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated, including without limitation, all reasonable costs and expenses incurred including all reasonable litigation costs and attorneys' fees arising out of or relating to claims, complaint, action, proceeding or suit of a third party (including any investigation by a governmental agency or authority), that arise or relate in whole or part to (i) the gross negligence or willful misconduct of the indemnifying Party, its employees, agents, contractors, licensors or suppliers or (ii) the resale of the Services by the indemnifying Party.

5.2. The indemnified party promptly shall notify the indemnifying party of any claims that are subject to indemnification. The indemnified party shall have the right, at its own expense, to participate either directly or through counsel in any litigation or settlement negotiations. The indemnified party shall provide reasonable assistance and cooperation in such defense at the indemnifying party's expense. The indemnifying party shall not agree to any settlement without the written consent of the indemnified party and such consent shall not be unreasonably withheld. The indemnification provided herein shall survive the termination of this Agreement.

**6. Confidential Information**

Each party agrees to maintain in strict confidence the terms and conditions, including pricing, contained in this Agreement or any Service Order and all plans, designs, drawings, trade secrets, business and other proprietary information of the other party which is disclosed pursuant to this Agreement ("Confidential Information"). Neither party shall disclose to any third party such Confidential Information without the express written consent of the other. No obligation of confidentiality shall apply to disclosed information which the recipient (i) already possessed without obligation of confidentiality, or (ii) develops independently, or (iii) rightfully receives without obligation of confidentiality from a third party, or (iv) must disclose due to reasons prescribed by law or due to court or official orders. The recipient shall immediately notify the other party of any disclosures made pursuant to this Section. Each party acknowledges that a breach or threatened breach of this Section may cause irreparable harm, which cannot be adequately compensated by monetary damages. Accordingly, in the event of any such breach or threatened breach, the Party that threatened to make or made the unauthorized disclosure consents to equitable relief, including temporary restraining orders or preliminary or permanent injunctions, in addition to any other remedies that the Party to which the Confidential Information belongs is entitled.

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.

**7. Notice Information**

All notices required or given under this Agreement shall be directed to Powernet at the address set forth below and the customer in the address contained Service Order. Such notices shall be deemed delivered (i) upon delivery (which can be confirmed) if sent by a recognized courier service; or (ii) the next business day when sent by facsimile (with a hard copy sent by mail) and sending Party's receipt of a transmission confirmation or (iii) when sent by confirmed email.

<b><u>Powernet's Contact</u></b>	<b><u>Powernet's Legal Contact</u></b>
Name: Network Service Director	Name: General Counsel
Address: 8805 Governor's Hill Drive, Suite 250 Cincinnati, OH 45249	Address: 8805 Governor's Hill Drive, Suite 250 Cincinnati, OH 45249
Facsimile: 877-813-7419	Facsimile: 513-645-4960
Email: Servicemanagement@powernetco.com	Email: legal@powernetco.com

**8. 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 by a single arbitrator experienced in the matters at issue and selected by the Parties 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.

The arbitration proceedings shall be confidential. Neither Party shall disclose or permit the disclosure of any information about the evidence adduced or the documents produced by the other Party in the arbitration proceedings or about the existence, contents or results of the arbitration award without the prior written consent of such other Party except in the course of a judicial, regulatory or arbitration proceeding or as may be requested by a governmental authority. Before making any disclosure permitted by the preceding sentence, the Party intending to make such disclosure shall give the other Party reasonable written notice of the intended disclosure and afford the other Party a reasonable opportunity to protect its interests as to confidentiality.

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 decision of the arbitrator will be final and may not be appealed. The arbitrator shall not act as *amiables compositeurs* or *ex aequo et bono*. Judgment on the arbitrator award may be entered by any court of competent jurisdiction including, but not limited to, any court that has jurisdiction over either of the Parties or any of their assets. The prevailing Party shall be entitled to reasonable costs and attorney’s fees.

9. **Waiver and Amendment**

The failure of either party to enforce any provision hereof on one or more occasions shall not constitute the permanent waiver of such provision. No term or provision of this Agreement shall be deemed waived and no breach or default shall be deemed excused unless such waiver or consent shall be in writing and signed by the Party claimed to have waived or consented. Any addition, deletion or modification to this Agreement shall not be binding on either Party except by written amendment executed by authorized representatives of both Parties.

10. **Interpretation**

No rule of construction requiring interpretation against the draftsman hereof shall apply in the interpretation of this Agreement.

11. **Choice of Law**

This Agreement shall, in all respects, be governed by and construed and enforced in accordance with the laws of the State of Ohio, without respect to the state’s conflict of laws 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 the Parties shall be instituted and maintained only in Hamilton County, Ohio. The Parties hereby consent to the jurisdiction and venue of such court and waive 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 Company does business or has assets, and Company 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.

12. **Integration**

This Agreement and Service Orders supercede and merge all prior agreements, promises, understandings, statements, representations, warranties, indemnities and covenants and all inducements to the making of this Agreement relied upon by either Party hereto, whether written or oral. No statement or agreement, written or oral, made before execution of this Agreement or any respective Service Order shall vary or modify the written terms hereof in any way whatsoever.

13. **Counterparts**

This Agreement may be executed in several counterparts, each of which shall constitute an original, but all of which shall constitute one and the same instrument.

14. **Survival**

No termination of this Agreement shall affect the rights or obligations of either Party: (i) with respect to any payment for Services rendered before termination; (ii) liability for charges incurred by a Party to third parties for the provision of Services to the other Party or (iii) pursuant to other provisions of this Agreement that, by their sense and context, are intended to survive termination of this Agreement, including without limitation, indemnification, limitation of liability, confidentiality, governing law and forum selection

15. **Severability**

If any term or provision of this Agreement shall, to any extent, be determined to be invalid or unenforceable by a court or body of competent jurisdiction, then both Parties shall be relieved of all obligations arising under such provision and this Agreement shall be deemed amended by modifying such provision to the extent necessary to make it valid and enforceable while preserving its intent.

16. **Assignment**

Neither Party shall assign or otherwise transfer its rights or obligations under this Agreement without the prior written consent of the other Party, which shall not be unreasonably withheld. However, either Party may assign the Agreement to any entity controlled by, under the same control as, or controlling said Party and in connection with any merger, consolidation, recapitalization or reorganization, involving in each case the sale of all or substantially all of the capital stock or assets of such Party or any parent, subsidiary or commonly-owned corporation of such Party without the other Party's consent, provided that (a) the assigning Party has paid all outstanding invoices in full, (b) the assigning Party promptly notifies the other Party of such assignment or transfer, and (c) the assignee agrees to be bound by the terms of this Agreement. Any such assignment or transfer of a Party's rights or obligations without the other Party's consent or as permitted above shall constitute a default of a material obligation.

17. **Business Relationship**

This Agreement shall not create any agency, employment, joint venture, partnership or fiduciary relationship between the Parties. Neither Party shall have the authority to, nor shall either Party attempt to, create any obligation on behalf of the other Party.

18. **No Third Party Beneficiaries**

This Agreement shall be binding upon the Parties, their successors, and assigns. The terms, representations, warranties and agreements of the Parties set forth in this Agreement are not intended for, nor shall they be for the benefit of or enforceable by, any person or entity that is not a Party to this Agreement, including, without limitation, a Party's Affiliates and End Users. "End User(s)" mean a Party's end-users or customers or any other third parties who utilize or access the Services.

19. **Costs and Attorneys' Fees**

If a proceeding is brought for the enforcement of this Agreement or because of any alleged or actual dispute, breach, default or misrepresentation in connection with any of the provisions of this Agreement or the Services, the prevailing Party shall be entitled to recover reasonable attorney's fees and other reasonable costs and expenses incurred in such action or proceeding in addition to any other relief to which such Party may be entitled.