

## TERMS OF SERVICE AND LICENSE AGREEMENT

# BETA PROGRAM

This Beta Program License Agreement (the "Agreement") is an addendum to the Master Service Agreement as incorporated by reference. This Agreement is made between Fonality, Inc., (a/k/a "NetFortris") a Delaware corporation, with its principal place of business located at 5340 Legacy Drive, Suite 155, Plano, TX 75024 USA ("NetFortris") and you ("Customer") for the purpose of testing a beta version of certain NetFortris software or service commonly known as Comm-unitY (the "Service").

### 1. NATURE OF AGREEMENT

Customer understands and acknowledges that the Service is a pre-release of NetFortris software that is not generally available for distribution or sale at the time it is made available to Customer and may contain updates, enhancements, improvements and other modifications to the generally available production versions of the Service. The Service shall be used by Customer for testing purposes only and within the parameters as mutually determined by the parties. The purpose of the Beta Program ("Program") shall be to facilitate the commercial compatibility of the Service and to obtain information about Customer's experience with such. In no event shall NetFortris be obligated to provide the Customer a copy, an instance or access to the resulting service of the ultimate commercial release version of the Service. NetFortris is not obligated to make the Service commercially available.

### 2. FEEDBACK

a) Notwithstanding the terms of any existing non-disclosure or confidentiality agreement between Customer and NetFortris, in consideration being granted access to, and use of, the Service for testing, Customer agrees to inform NetFortris of all problems and ideas for enhancements which come to Customer's attention during the period of this Program, and hereby assigns to NetFortris all right, title and interest to such ideas and enhancements and all property rights therein including without limitation all patent, copyright, trade secret, mask work, trademark, moral right or other intellectual property rights. Customer agrees that the feedback prepared by Customer and delivered to NetFortris may be used by NetFortris for all business purposes without any further consent or accounting in the development, manufacture, marketing, and maintenance of the Service and other NetFortris products and services, including reproduction and preparation of derivative works based upon such feedback, as well as distribution of such derivative works.

b) The Customer agrees not to publish, post, upload, distribute or disseminate any inappropriate, profane, defamatory, obscene, indecent or unlawful topics about the Service in a private and public environment.

### 3. RESERVATION OF RIGHTS

NetFortris retains all right, title and interest in the Service and in all materials delivered in connection with such. Customer has no rights in the Service except that Customer is granted a limited, non-exclusive, non-transferable, and non-sublicensable license to use the Service during the Program period.

#### **4. CONFIDENTIAL INFORMATION**

- a) "Confidential Information" shall be defined to include the Service, any software, source code, object code, documentation, Program test results, and any proprietary tools, proprietary knowledge or proprietary methodologies disclosed by NetFortris to Customer. Under this Agreement, Customer shall observe complete confidentiality with respect to the Confidential Information, and shall use its best efforts and take all reasonable steps to protect such from any use, reproduction, publication, disclosure, or distribution except as specifically authorized by this Agreement. Customer shall promptly notify NetFortris of any known unauthorized use or disclosure of the Confidential Information and will cooperate with NetFortris in any litigation brought by NetFortris against third parties to protect its proprietary rights. Customer may not permit a third party access to, or use of, the Confidential Information without NetFortris's prior written authorization. Customer expressly agrees not to disclose to persons in its own organization who do not have a need to know the existence or contents of (i) the Service(s); (ii) the Program and its results, or (iii) this Agreement. Customer's reports must be marked "NetFortris Confidential". Customer further agrees to treat the Service and any other versions of the resulting or inclusive software (the "Software") as confidential and will not without the express written authorization of NetFortris (1) demonstrate, copy, sell or market the Service to any third party; or (2) publish or otherwise disclose information relating to performance or quality of the Service to any third party; or (3) modify, adapt, reverse engineer or create derivative works of the Software or otherwise translate the Service or any portion thereof.
- b) Customer may disclose Confidential Information that is required to be disclosed by order of a court of competent jurisdiction, administrative agency or governmental body, or by subpoena, summons or other legal process, or by law, rule or regulation, or by applicable regulatory or professional standards provided that prior to such disclosure, NetFortris is given reasonable advance notice of such order and an opportunity to object to such disclosure.
- c) NetFortris and Customer agree that Customer's breach of the provisions of this Agreement will cause the other Party irreparable damage for which recovery of money damages would be inadequate. Customer will, therefore, be entitled to obtain timely injunctive relief, without the posting of bond, to protect its rights under this Agreement, in addition to any and all remedies available at law.

#### **5. DISCLAIMERS & LIMITATIONS OF LIABILITY**

- a) THE SERVICE(S) AND TECHNICAL SUPPORT (IF ANY) ARE PROVIDED "AS IS" WITHOUT WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE EXCEPT AS EXPRESSLY SET FORTH HEREIN, NETFORTRIS PROVIDES THE SERVICE "AS IS" AND WITH ALL FAULTS. NETFORTRIS HEREBY EXPRESSLY DISCLAIMS, AND CUSTOMER HEREBY WAIVES, RELEASES AND RENOUNCES ALL OTHER REMEDIES, WARRANTIES, GUARANTEES, OBLIGATIONS, REPRESENTATIONS AND LIABILITIES, EXPRESS OR IMPLIED, ARISING IN FACT, LAW, EQUITY, CONTRACT, TORT, UNDER STATUTE, UNDER WARRANTY OR OTHERWISE, INCLUDING BUT NOT LIMITED TO: (A) ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, (B) ANY IMPLIED WARRANTY OR CONDITION ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING OR USAGE OR TRADE, (C) ANY OBLIGATION, LIABILITY RIGHT, CLAIM OR REMEDY IN TORT, WHETHER OR NOT ARISING FROM ACTIVE, PASSIVE OR IMPUTED NEGLIGENCE, CONTRIBUTORY NEGLIGENCE, VICARIOUS LIABILITY OR STRICT PRODUCTS LIABILITY OF NETFORTRIS AND ITS OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, AND REPRESENTATIVES, AND (D) ANY OBLIGATION, LIABILITY OR RESPONSIBILITY FOR LOSS OF SERVICE OR DAMAGE TO ANY EQUIPMENT OR PART THEREOF, NETFORTRIS DOES NOT WARRANT THAT THE SERVICE WILL BE FREE OF BUGS, ERRORS, VIRUSES OR OTHER DEFECTS, OR THAT THE SERVICE WILL BE COMPATIBLE WITH CUSTOMER'S EXISTING INTERNET CONNECTION, NETWORK, OR COMMUNICATIONS INFRASTRUCTURE OR ENVIRONMENT.
- b) IN NO EVENT WILL NETFORTRIS BE LIABLE FOR ANY DAMAGES UNDER THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO ANY COST OF COVER, ANY INCIDENTAL, INDIRECT, SPECIAL, AGGRAVATED, PUNITIVE, CONSEQUENTIAL OR SIMILAR DAMAGES OR LIABILITIES WHATSOEVER (INCLUDING, BUT NOT LIMITED TO LOSS OF DATA, INFORMATION, REVENUE, PROFIT OR BUSINESS) ARISING OUT OF OR RELATING TO THE USE OR INABILITY TO USE THE SERVICE OR OTHERWISE UNDER OR IN CONNECTION WITH THIS AGREEMENT, WHETHER

ARISING IN FACT, LAW, EQUITY, CONTRACT, TORT (INCLUDING NEGLIGENCE AS DESCRIBED ABOVE), STRICT LIABILITY, UNDER STATUTE, UNDER WARRANTY OR OTHER THEORY EVEN IF NETFORTRIS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

- c) The Service may not be at the level of performance, compatibility or reliability of generally available NetFortris products and services. The Service may not operate correctly and may be substantially modified prior to first commercial shipment. The entire risk arising out of the use or performance of the Service remains with Customer. Customer understands and agrees that NetFortris makes no representation or warranties regarding use of the Service. The Customer should not, under any circumstances, use the Beta pre-release NetFortris software provided under the Program in a production environment. Customer will use Comm-unity Beta Service parallel to its existing telephony system.
- d) NetFortris agrees to use its reasonable efforts to correct errors associated with the Service within a reasonable time.
- e) NetFortris shall have the right (but not the obligation), at its sole discretion, to update the Service and/or provide Customer with updates, modifications, and/or patches to the Service to address issues such as security, interoperability, and performance (collectively "Updates"). Any Updates provided by NetFortris are subject to all of the terms and conditions in this Agreement. NetFortris may deliver, at any time and without notice to Customer, automated Updates to Customer's computer system or other device upon which the Service is installed. By using the Service, Customer consents to such automated updating. Customer's use of the Updates shall be governed by the terms of this Agreement.

## **6. TERMINATION**

- a) Due to the roll back constraints outlined in 5(f), above, Customer understands that roll back to prior versions may not be possible and, therefore that NetFortris may not be able to grant the Customer's request to terminate Customer's participation in the Program without data loss or other potential system damage.
- b) Should a Customer wish to terminate participation in the Program, the Customer must provide NetFortris with written notice of this intent. NetFortris will then remove the Customer from the Program effective the next Program testing cycle provided that testing has not already commenced.
- c) In all cases of termination, the Customer is obliged to delete or destroy all Confidential Information including but not limited to confidential files and data in a way that guarantees non-recoverability and, upon demand by NetFortris, to confirm the complete removal through a declaration in lieu of oath. Customer must also return any hardware or devices in its possession.

## **7. GENERAL**

- a) This Agreement shall be governed, construed and enforced in accordance with the laws of the United States of America and of the State of Texas. Any notice required by this Agreement shall be given by prepaid, first class, certified mail, return receipt requested to above address or such other address as may be given from time to time under the terms of this notice provision.
- b) Except for a contemporaneous statement of work that may accompany the Service and Program, this Agreement constitutes the entire agreement between the parties for the Service and all other prior negotiations, representations, agreements, and understandings are superseded hereby. No agreements altering or supplementing the terms hereof may be made except by means of a written document signed by the duly authorized representatives of the parties.
- c) Customer shall comply with all applicable federal, state and local laws, regulations, and ordinances in connection with its activities pursuant to this Agreement.
- d) Failure of NetFortris to enforce a right under this Agreement shall not act as a waiver of that right or the ability to later assert that right relative to the particular situation involved.
- e) If any provision of this Agreement shall be found by a court to be void, invalid or unenforceable, the same shall be reformed to comply with applicable law or stricken if not so conformable, so as not to affect the validity or enforceability of this Agreement.

f) NETFORTTRIS RESERVES THE RIGHT TO CHANGE THESE TERMS AND CONDITIONS FROM TIME TO TIME AS IT SEES FIT AND THE CUSTOMER'S CONTINUED USE OF THE SERVICE WILL SIGNIFY THEIR ACCEPTANCE OF ANY ADJUSTMENT TO THESE TERMS. ANY CHANGES TO THE AGREEMENT WILL BE POSTED IN THIS LIVING DOCUMENT LOCATED ON THE WEBSITE ([WWW.NETFORTTRIS.COM/TERMS-OF-USE](http://WWW.NETFORTTRIS.COM/TERMS-OF-USE)). CUSTOMERS ARE THEREFORE ADVISED TO RE-READ THIS STATEMENT ON A REGULAR BASIS. CONTINUED USE OF THE SERVICE FOLLOWING THE POSTING OF MODIFICATIONS WILL CONSTITUTE YOUR ACCEPTANCE OF THE REVISED TERMS AND CONDITIONS.

Customer: \_\_\_\_\_

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**NetFortris**

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_