



# Monterey County

168 West Alisal Street,  
1st Floor  
Salinas, CA 93901  
831.755.5066

## Board Order

Agreement No.: A-12812

Upon motion of Supervisor Armenta, seconded by Supervisor Parker and carried by those members present, the Board of Supervisors hereby:

- a. Approved and authorized the Auditor-Controller to execute a CenturyLink Loyal Advantage Agreement ("Master Agreement"), with CenturyLink Communications, LLC, in an aggregate amount not to exceed \$2,700,000 over the three year period from August 2015 to July 2018, providing Disaster Recovery, Data Center and Managed Services for the Enterprise Resource Planning (ERP) System, and Co-location and Disaster Recovery Services for Natividad Medical Center;
- b. Authorized the Office of the Auditor-Controller (AC) to serve as the primary contract holder to the Master Service Agreement, and subordinate service level agreements (SLAs) which are a part of the Master Agreement; and
- c. Approved an increase for ERP appropriations totaling \$394,000 in Systems Management, 001-1110-8373 Appropriation Unit AUD001 offset by an increase in Interfund Reimbursements 001-1110-8373-7304, and the transfer of appropriations in the amount of \$272,000 from General Fund Contingencies, 001-1050-8034 Appropriation Unit CAO020 to Systems Management, 001-1110-8373 Appropriation Unit AUD001 (4/5ths Vote Required).

PASSED AND ADOPTED on this 21st day of July 2015, by the following vote, to wit:

AYES: Supervisors Armenta, Phillips, Salinas, Parker and Potter  
 NOES: None  
 ABSENT: None

I, Gail T. Borkowski, Clerk of the Board of Supervisors of the County of Monterey, State of California, hereby certify that the foregoing is a true copy of an original order of said Board of Supervisors duly made and entered in the minutes thereof of Minute Book 78 for the meeting on July 21, 2015.

Dated: July 23, 2015

File ID: 15-0783  
STATE OF CALIFORNIA  
COUNTY OF MONTEREY

Gail T. Borkowski, Clerk of the Board of Supervisors  
County of Monterey, State of California

I, Gail T. Borkowski, Clerk of the Board of Supervisors, do hereby certify the foregoing to be a full, true and correct copy of the original

BOARD ORDER

on file in my office

Denise Hancock  
Deputy

Witness my hand and seal of the Board of Supervisors.

This 23rd day of July 2015

GAIL T. BORKOWSKI  
Clerk of the Board of Supervisors

By: Denise Hancock Deputy

seal



# Monterey County

168 West Alisal Street,  
1st Floor  
Salinas, CA 93901  
831.755.5066

## Board Report

Legistar File Number: 15-0783

July 21, 2015

Introduced: 7/7/2015

Current Status: Scheduled PM

Version: 1

Matter Type: General Agenda Item

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### RECOMMENDATION:

It is recommended that the Board of Supervisors:

- a. Approve and authorize the Auditor-Controller to execute a CenturyLink Loyal Advantage Agreement ("Master Agreement"), with CenturyLink Communications, LLC, in an aggregate amount not to exceed \$2,700,000 over the three year period from August 2015 to July 2018, providing Disaster Recovery, Data Center and Managed Services for the Enterprise Resource Planning (ERP) System, and Co-location and Disaster Recovery Services for Natividad Medical Center; and
- b. Authorize the Office of the Auditor-Controller (AC) to serve as the primary contract holder to the Master Service Agreement, and subordinate service level agreements (SLAs) which are a part of the Master Agreement; and
- c. Approve an increase for ERP appropriations totaling \$394,000 in Systems Management, 001-1110-8373 Appropriation Unit AUD001 offset by an increase in Interfund Reimbursements 001-1110-8373-7304, and the transfer of appropriations in the amount of \$272,000 from General Fund Contingencies, 001-1050-8034 Appropriation Unit CAO020 to Systems Management, 001-1110-8373 Appropriation Unit AUD001 (4/5ths Vote Required).

### SUMMARY/DISCUSSION:

In October 2000, an outside audit supported the Auditor-Controller's earlier request for disaster recovery and data center redundancy, and recommended that these services be acquired to provide security to the County's mission critical systems in the event of a systemic failure or, a natural catastrophe.

After years of efforts to obtain disaster recovery and redundant data center services through County resources, the Auditor-Controller opened a Request for Proposal (RFP#10500) in October 2014 to acquire these services. Both County ITD and external vendors were invited to respond. Upon completion of the County's RFP protocols and processes, CenturyLink Technology Solutions (CTL) was recommended as having the best solution for meeting all requirements defined in the RFP. The RFP sought proposals for both "co-location" (a secure secondary or redundant off-site location away from the physical risks to which the County facilities may be susceptible) and "managed" services. Managed service includes the maintenance of equipment, redundancy, and security services at an off-site location, but does not involve the actual performance of County ERP-specific functions, such as payroll processing and accounts payable.

The County's Enterprise Resource Planning (ERP) system includes multiple components that support AC functions integral to the County's operations. These mission-critical functions include all general accounting functions (as the County system of record), creation and distribution of bi-weekly payroll for employees, disbursement and payment of contracts and purchasing, management of County assets and debt, and performance of internal audits. Accordingly, it is imperative that the County have both redundancy in its electronic data, and a disaster recovery plan to guard against major disruptions, such as those caused by earthquakes or malware. Currently, without significant disaster recovery or data center redundancy, operational continuity of these critical County functions is jeopardized, placing the County at significant risk for the non-payment of services, should the ERP system fail.

In addition to the ERP requirements, the RFP also included co-location services for Natividad Medical Center (NMC) whose operational systems also require a high degree of reliability and continuity. By consolidating AC and NMC requirements into a single agreement, the County will benefit from economies of scale; and enable the AC and NMC to implement a long-term strategy for managing and ensuring business continuity of their respective systems.

The NMC data center presently operates within hospital space classified for patient care, and does not fully comply with the requirements set by the Office of Statewide Health Planning and Development (OSHPD) under whose jurisdiction NMC falls. These OSHPD requirements stipulate that the data center be fully earthquake proof, and that fire suppression, preferably with a pre-action system, be in place. In order to bring the NMC data center into OSHPD compliance, and to ensure continuity of its operations, NMC has provided written commitment to support and fund this disaster recovery and co-location data center effort (see Attachment 1).

The selection of CTL is based on the company's past performance with similar government and healthcare organizations, and the ability to scale its offerings to County-specific requirements. CTL is a Fortune 500 company providing disaster recovery, data, voice, co-location, and managed services, to business and government clients worldwide. Its 58 data center locations provide geographic diversity for redundancy, IT asset protection and equipment failover, and are seismically engineered to mitigate the impact of potential earthquake activity.

As part of this process, and before coming to any recommendation, the potential impact to existing employees resulting from the development of adequate redundancies and disaster recovery was considered. No existing jobs are threatened as a result of the County entering into

a contract with an outside provider for either co-location or managed services. Managed services will not eliminate the ITD staff members who are currently dedicated to supporting the application-specific requirements of the ERP system. This information was conveyed to represented employees in conversations between SEIU representatives and the AC Office.

Upon approval from the Board of Supervisors, it is anticipated that the services will start August 2015, and redundant data center, managed co-location and disaster recovery solutions will be fully operational within 90 days of initiation.

OTHER AGENCY INVOLVEMENT:

The RFP was prepared in cooperation with Contracts/Purchasing, Natividad Medical Center, and the County Administrative Office. The Agreement was the subject of negotiations including both Risk Management and County Counsel, and they have each approved the Agreement as to form. This proposal was previously presented to both the Capital Improvements Committee, and the Budget Committee.

FINANCING:

Requesting approval for a County commitment to a three-year contract for disaster recovery, data center, and co-location based on AC and NMC requirements. The first-year cost for ERP managed services, setup and installation will be approximately \$667,524; and decrease to \$644,184/yr. for the subsequent two years. An amount of \$394,000 is being reimbursed from Fund 403-Capital Projects Automation for the first year of ERP costs, with the remaining \$272,000 to be offset by General Fund Contingencies, which is sourced with one-time funding. The FY 2015-16 budgeted General Fund Contingencies is \$5,399,351. Thus far, transfers from General Fund Contingencies in the amount of \$380,406 have been approved by the Board in FY 2015-16. With this requested action, the remaining General Fund Operational Contingencies budget would be \$4,746,945

First-year costs for NMC co-location and setup will be approximately \$164,087, with subsequent service years decreasing to \$147,669/yr. Subsequent years' funding will be included in the appropriate department's budget. Funds for the initial year of NMC costs are already budgeted and approved within the 2015/2016 fiscal year.

Prepared by: Flo Zeuthen, ERP Project Manager, Auditor-Controller's Office, 755-5039  
Approved by: Michael J. Miller, CPA, CISA, Auditor-Controller, Auditor-Controller's Office,  
755-5040

Attachments:  
CenturyLink Loyal Advantage Agreement

CENTURYLINK® LOYAL ADVANTAGE® AGREEMENT

This CenturyLink Loyal Advantage Agreement ("Agreement") is between CenturyLink Communications, LLC f/k/a Qwest Communications Company, LLC ("CenturyLink") and County of Monterey ("Customer") and is effective on the date it is last signed by the parties below ("Effective Date"). This Agreement must be fully executed on or before July 31, 2015. If the Agreement is not fully executed by July 31, 2015, CenturyLink's offer for Customer to accept this Agreement expires, and which may be extended by CenturyLink in its reasonable discretion. Using CenturyLink's electronic signature process for the Agreement is acceptable.

County of Monterey  
*Michael J. Miller*  
Authorized Signature  
MICHAEL J. MILLER  
Name Typed or Printed  
Auditor/Controller  
Title  
July 21, 2015  
Date

CENTURYLINK COMMUNICATIONS, LLC  
*Jacob Darfler*  
Authorized Signature  
Jacob Darfler  
Name Typed or Printed  
Manager of Offer Management  
Title  
7/15/2015  
Date

Customer's address for notices: County of Monterey, 168 W. Alisal Street, 3d Floor, Salinas, CA 93901  
Customer's facsimile number (if applicable):  
Person designated for notices:

1. **Services.** Customer is purchasing the products and services ("Services") in service exhibits ("Service Exhibits") attached to the Agreement. The parties agree that any notation to the "CenturyLink Total Advantage Agreement" on the Service Exhibits will be disregarded and such exhibits will be governed by the Agreement. For an interim period of time until all work is completed to update the Service Exhibits, Tariffs and other terms and conditions incorporated by attachment or reference into this Agreement, all references to Qwest Communications Company, LLC mean CenturyLink Communications, LLC. The Service Exhibits attached to the Agreement as of the Effective Date and incorporated by this reference are shown below. Customer's consent to any Services is made only by formal approval by the Monterey County Board of Supervisors which consent shall be included with each Service Order, SOW, or Amendment; no other form of consent is authorized.

CenturyLink TS Service Exhibit

2. **Term.** Customer selects the following "Initial Term" of the Agreement: three year ("Initial Term"), 600053 code.. The Initial Term begins on the Effective Date. At the end of the Initial Term, the Agreement will automatically renew for consecutive renewal periods equal to the Initial Term (a "Renewal Term") if not terminated earlier in accordance with the Agreement. The Initial Term and each Renewal Term are referred to as the "Term."

3. **Rates.** Unless specified otherwise in a Service Exhibit, Services will receive the applicable rates specified in a Service Exhibit, valid Order Form, or CenturyLink-approved quote form, for the duration of the Initial Term. CenturyLink reserves the right to modify rates after the conclusion of each Service's minimum service period upon not less than 30 days' prior written notice to Customer; provided that CenturyLink may reduce the foregoing notice period or modify rates or discounts prior to the conclusion of the minimum service period, as necessary, if such modification is based upon Regulatory Activity. CenturyLink also reserves the right to modify rates when the Agreement renews to the rates that are in effect at that time. If Regulatory Activity causes an increase in the rates for Customer's ordered Services that materially and adversely affects Customer, then Customer may terminate the affected Service upon 30 days' prior written notice to CenturyLink without liability for Cancellation Charges for the affected Service, provided, however that Customer: (a) provides such notice within 30 days after the increase occurs; and (b) provides CenturyLink 30 days to cure such increase. If Customer does not provide CenturyLink such notice during the time permitted in this Section, Customer will have waived its right to terminate the affected Service under this Section.

4. **Payment.** CenturyLink may begin invoicing for specific Services as specified in the applicable Service Exhibit. Customer must pay CenturyLink all charges within 30 days after the invoice date. Any amount not paid within 15 days of when due is subject to late interest at the lesser of 1.5% per month or the maximum rate allowed by law. In addition to payment of charges for Services, Customer must also pay CenturyLink any applicable Taxes assessed in connection with Services. Taxes may vary and are subject to change. If Customer is exempt from any Tax, it must provide CenturyLink with an appropriately completed and valid Tax exemption certificate or other evidence acceptable to CenturyLink. CenturyLink is not required to issue any exemption, credit or refund of any Tax payment for usage before Customer's submission of valid evidence of exemption. Customer may access its invoices and choose paperless invoices online through CenturyLink Control Center located at controlcenter.centurylink.com. If Customer does not choose paperless invoices through Control Center, CenturyLink may in its discretion assess a \$15 MRC for each full paper invoice provided to Customer or a \$2 MRC for each summary/remit only (where available) paper invoice provided to Customer. Those charges will not apply to an invoice that is not available through Control Center. Customer's payments to CenturyLink must be in the form of electronic funds transfer (via wire transfer or ACH), cash payments (via previously-approved CenturyLink processes only), or paper check. CenturyLink reserves the right to charge administrative fees when Customer's payment preferences deviate from CenturyLink's standard practices.

5. **Confidentiality.** Except to the extent required by an open records act or similar law, neither party will, without the prior written consent of the other party: (a) disclose terms of the Agreement which are considered proprietary; or (b) disclose or use (except as expressly permitted by, or required to achieve the purposes of, the Agreement) the Confidential Information of the other party. CenturyLink acknowledges that Customer is a public entity and certain basic terms of the Agreement may not be considered proprietary, including but not limited to base prices, term and insurance and indemnification provisions. Each party will use reasonable

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efforts to protect the other's Confidential Information, and will use at least the same efforts to protect such Confidential Information as the party would use to protect its own. CenturyLink's consent may only be given by its Legal Department. A party may disclose Confidential Information if required to do so by a governmental agency, by operation of law, or if necessary in any proceeding to establish rights or obligations under the Agreement. CenturyLink will not be deemed to have accessed, received, or be in the possession of Customer Confidential Information solely by virtue of the fact that Customer transmits, receives, accesses or stores such information through its use of CenturyLink's Services.

**6. CPNI.** CenturyLink is required by law to treat CPNI confidentially. Customer may withdraw its authorization at any time by informing CenturyLink in writing. Customer's decision regarding CenturyLink's use of CPNI will not affect the quality of service CenturyLink provides Customer.

**7. Use of Name and Marks.** Neither party will use the name or marks of the other party or any of its Affiliates for any purpose without the other party's prior written consent. CenturyLink's consent may only be given by its Legal Department.

**8. Disclaimer of Warranties.** EXCEPT AS EXPRESSLY PROVIDED IN THE AGREEMENT, APPLICABLE SERVICE LEVEL AGREEMENT OR SERVICE EXHIBIT, ALL SERVICES AND PRODUCTS ARE PROVIDED "AS IS." CENTURYLINK DISCLAIMS ALL EXPRESS OR IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO ALL WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. EXCEPT AS EXPRESSLY PROVIDED IN SERVICE LEVEL AGREEMENTS OR SERVICE EXHIBITS CENTURYLINK MAKES NO WARRANTIES OR REPRESENTATIONS THAT ANY SERVICE WILL BE FREE FROM LOSS OR LIABILITY ARISING OUT OF HACKING OR SIMILAR MALICIOUS ACTIVITY, OR ANY ACT OR OMISSION OF THE CUSTOMER.

**9. Limitations of Liability.** The remedies and limitations of liability for any claims arising between the parties are set forth below.

**9.1 Consequential Damages.** EXCEPT FOR WILLFUL OR INTENTIONAL MISCONDUCT OF A PARTY AND EXCEPT FOR AN INDEMNIFICATION CLAIM FOR THIRD PARTY CLAIMS, NEITHER PARTY OR ITS AFFILIATES, AGENTS, OR CONTRACTORS IS LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL, OR PUNITIVE DAMAGES OR FOR ANY LOST PROFITS, LOST REVENUES, LOST DATA, LOST BUSINESS OPPORTUNITY, OR COSTS OF COVER. THESE LIMITATIONS APPLY REGARDLESS OF THE LEGAL THEORY UNDER WHICH SUCH LIABILITY IS ASSERTED AND REGARDLESS OF FORESEEABILITY. THE FOREGOING SHALL NOT LIMIT ANY RIGHTS OR REMEDIES EXPRESSLY SET FORTH IN ANY SERVICE LEVEL AGREEMENT.

**9.2 Claims Related to Services.** For Customer's claims related to Service deficiencies or interruptions that are not caused by the willful misconduct of CenturyLink, its employees or agents, Customer's exclusive remedies are limited to: (a) those remedies set forth in the SLA for the affected Service or (b) the total MRCs or usage charges paid by Customer for the affected Service in the one month immediately preceding the event giving rise to the claim if an SLA does not exist for the affected Service. The foregoing shall not apply to breaches of unrelated obligations under the Agreement such as infringement, confidentiality, etc.

**9.3 Personal Injury; Death; Property Damages.** For claims arising out of personal injury or death to a party's employee, or damage to a party's real or personal property, that are caused by the other party's negligence or willful misconduct in the performance of the Agreement, each party's liability, to the extent permitted by law, is limited to proven direct damages.

**9.4 Total Damages.** For all other claims arising out of the Agreement, each party's maximum liability will not exceed in the aggregate the total MRCs and usage charges paid by Customer to CenturyLink under the Agreement in the three months immediately preceding the event giving rise to the claim ("Damage Cap"). The Damage Cap will not apply to a party's willful or intentional misconduct, obligations under the Responsibilities; Indemnification Section below or Customer's payment obligations under the Agreement, provided that with respect to each party's indemnification obligations set forth in Sections 10.2(a) and 10.2(b) for negligent acts or negligent failures to act, each party's maximum liability to indemnify, including consequential or indirect damages, will not exceed in the aggregate, TEN MILLION DOLLARS (\$10,000,000).

**9.5 Intellectual Property Infringement.** CenturyLink will, at its own expense, defend Customer against any claim, demand or suit made or brought against Customer by a third party alleging that any use of CenturyLink Service as allowed under this Agreement infringes or misappropriates the valid United States patent rights of a third party issued or in effect on the Effective Date and/or the effective date of any future Service Order or SOW (with respect to the Services set forth therein), and CenturyLink will pay any costs of settlement or any damages finally awarded against Customer. CenturyLink will not have any obligation under this Section if a claim arises from: (a) the combination, use or operation of any Services with any third party service or product, (b) any modification of the Services made by any party other than CenturyLink, (c) use by Customer other than the then current unaltered release of any software used in the Services, (d) use or operation by Customer or its agents or contractors of the Service other than in accordance with this Agreement and all instructions and documentation provided by CenturyLink, (e) services for which Customer controlled the design of such services or (f) Customer supplied content, data, or other information. CenturyLink's obligations are expressly conditioned upon the following: (g) that Customer will promptly notify CenturyLink in writing of any allegation or notice of alleged infringement; (h) that CenturyLink will have sole control of the defense or settlement; (i) that Customer will cooperate with CenturyLink in a reasonable way to facilitate the settlement or defense. If any CenturyLink Service becomes, or in CenturyLink's opinion is likely to become, the subject of a claim of infringement, CenturyLink will, at its option: (j) procure for Customer the right to continue using the applicable Service; (k) replace or modify the Service to provide Customer with a non-infringing Service that is functionally equivalent in all material respects; or (l) if (j) or (k) are not reasonably achievable by CenturyLink, terminate provision of the affected Service. Any third party system, CPE, equipment or software provided under this Agreement are provided without any obligation of CenturyLink to defend for any infringement or misappropriation. This Section provides the sole and exclusive obligations and remedies of the parties in connection with any third party claim, suit or other demand of infringement or misappropriation of third party proprietary rights in connection with any Services

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provided under this Agreement.

**10. Responsibilities; Indemnification.**

**10.1 Personal Injury/Property Damage.** To the extent permitted under law, each party agrees to be responsible to the other party, its Affiliates, agents, and contractors against all third party claims for damages, liabilities, or expenses, including reasonable attorneys' fees, arising directly from performance of the Agreement and related to personal injury or death, or damage to personal tangible property that is alleged to have been caused by the negligence or willful misconduct of the responsible party. To the extent permitted under law, Customer also agrees to be responsible for all third party claims for damages, liabilities, or expenses, including reasonable attorneys' fees against CenturyLink, its Affiliates, and contractors, to the extent related to the modification or resale of the Services by Customer or End Users, or any AUP violation.

**10.2 General Indemnification.**

(a) Notwithstanding anything to the contrary in the Agreement, CenturyLink shall indemnify, defend, and hold harmless Customer, its officers, agents and employees from any third party claim, liability, loss, injury or damage arising out of, or in connection with, performance of this Agreement and caused by the willful or negligent act or negligent failure to act of CenturyLink and/or its agents, employees or sub-contractors, excepting only loss, injury or damage caused by the comparative negligence or willful misconduct of employees, agents or subcontractors of the Customer.

(b) Subject to the provisions of Section 9.5 (Intellectual Property Infringement), Customer shall indemnify, defend, and hold harmless CenturyLink, its officers, agents and employees from any third party claim, liability, loss, injury or damage arising out of, or in connection with, Customer or its End Users' use of the Services and caused by the willful or negligent act or negligent failure to act of Customer and/or its End Users, excepting only loss, injury or damage caused by the comparative negligence or willful misconduct of employees, agents or subcontractors of CenturyLink.

**10.3 Indemnification Procedures; Insurance Coverage.** The indemnification obligations of each party ("Indemnifying Party") to the other party ("Indemnified Party") under this Agreement with respect to any third party claim is contingent upon the Indemnified Party (i) promptly notifying Indemnifying Party of the claim, except that any failure to provide such notice shall only limit the Indemnifying Party's obligations to the extent such failure adversely affects the Indemnifying Party's ability to defend the claim, (ii) giving the Indemnifying Party sole control over the defense and settlement of the claim, except that the Indemnifying Party shall obtain the prior written consent from the Indemnified Party to any settlement that does not include a complete release of such Indemnified Party, and the Indemnified Party shall be entitled to participate with legal counsel of its own selection and at the Indemnifying Party's expense in any proceeding where there is any conflict of interest between the Indemnifying Party and Indemnified Party, and (iii) providing the Indemnifying Party with information and reasonable cooperation and assistance in connection with such defense and settlement. The indemnification obligations of an Indemnifying Party are not contingent on the availability of insurance coverage to the Indemnifying Party for any third party claims that the Indemnifying Party is required to indemnify under the terms of this Agreement.

**11. Termination.**

**11.1 Service.** Customer may terminate an individual Service or a Service Exhibit: (a) in accordance with the individual Service Exhibit's term requirements with 60 days' prior written notice to CenturyLink ("Notice of Non-Renewal"), or (b) for Cause. CenturyLink may terminate an individual Service or a Service Exhibit ("Termination for Convenience") (a) in accordance with the individual Service Exhibit's term requirements with 180 days' prior written notice to Customer, or (b) for Cause. If Service or a Service Exhibit is terminated by Customer for Convenience or by CenturyLink for Cause, then Customer will pay Cancellation Charges. It is expressly agreed and understood that a Notice of Non-Renewal by Customer is not a Termination for Convenience.

**11.2 Agreement.** Customer may terminate the Agreement and all Services by: (a) providing written notice to CenturyLink of its intention not to renew the Agreement at least sixty (60) days prior to the expiration of the then current Term, or (b) for Cause. CenturyLink may terminate the Agreement and all Services by: (i) providing written notice to Customer of its intention to not renew the Agreement at least 180 days prior to the expiration of the then-current Term, or (ii) for Cause. It is expressly agreed and understood that a Notice of Non-Renewal by Customer is not a Termination for Convenience. Cause to terminate an individual Service Exhibit will not constitute Cause to terminate the Agreement; rather, Cause to terminate the entire Agreement for Service-related claims will exist only if Customer has Cause to terminate all or substantially all of the Services under the applicable SLA, Service Exhibit, RSS or Tariff. If the Agreement is terminated by Customer for Convenience or by CenturyLink for Cause prior to the conclusion of the Term, then Customer will pay the higher of: (1) the Early Termination Charge or (2) the total Cancellation Charges that apply for terminating all CenturyLink Services at the time the Agreement is terminated.

**11.3 Unpaid Charges.** Customer will remain liable for charges accrued but unpaid as of the termination date.

**12. Non-Appropriations.** Customer's payments to CenturyLink under this Agreement are funded by local, state and federal governments. If funds from local, state and federal sources are not obtained and continued at a level sufficient to allow for the Customer's purchase of the services indicated in this Agreement, Service Exhibits, Service Level Agreements or similar documents, then Customer may give written notice of this fact to CenturyLink, and the obligations of the parties under this Agreement shall terminate without charge immediately, or on such date thereafter as Customer may specify in its notice, unless in the meanwhile the parties enter into a written amendment modifying this Agreement. Customer agrees to use its best efforts to seek and acquire sufficient appropriations and to provide CenturyLink with no less than sixty (60) days' notice of non-appropriations. Notwithstanding the above, Customer agrees it will not use non-appropriations as a means of terminating this Agreement in order to acquire functionally equivalent products or services from a third party.

**CENTURYLINK® LOYAL ADVANTAGE® AGREEMENT****13. Miscellaneous.**

**13.1 General.** The Agreement's benefits do not extend to any third party (e.g., an End User). If any term of the Agreement is held unenforceable, the remaining terms will remain in effect. Except for time requirements as specifically stated in a Service Exhibit or SLA, neither party's failure to exercise any right or to insist upon strict performance of any provision of the Agreement is a waiver of any right under the Agreement. The terms and conditions of the Agreement regarding confidentiality, the Responsibilities Section, limitation of liability, warranties, payment, dispute resolution, and all other terms of the Agreement that should by their nature survive the termination of the Agreement will survive. Each party is not responsible for any delay or other failure to perform due to a Force Majeure Event.

**13.2 Conflicts Provision.** If a conflict exists among provisions within the Agreement, the following order of precedence will apply in descending order of control: Service Exhibit, the Agreement, and any Order Form. If Services are provided pursuant to a Tariff, RSS, or ISS as described in the applicable Service Exhibits, the order of precedence will apply in the following descending order of control: Tariff, Service Exhibit, the Agreement, RSS, ISS, and Order Form.

**13.3 Independent Contractor.** CenturyLink provides the Services as an independent contractor. The Agreement will not create an employer-employee relationship, association, joint venture, partnership, or other form of legal entity or business enterprise between the parties, their agents, employees or affiliates.

**13.4 ARRA.** Customer will not pay for the Services with funds obtained through the American Recovery and Reinvestment Act or other similar stimulus grants or loans that would obligate CenturyLink to provide certain information or perform certain functions unless each of those obligations are explicitly identified and agreed to by the parties in the Agreement or in an amendment to the Agreement.

**13.5 HIPAA.** CenturyLink does not require or intend to access Customer data in its performance hereunder, including but not limited to any confidential health related information of Customer's clients, which may include group health plans, that constitutes Protected Health Information ("PHI"), as defined in 45 C.F. R. §160.103 under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA Rules"). To the extent that any exposure to PHI is incidental to CenturyLink's provision of Service and not meant for the purpose of accessing, managing the PHI or creating or manipulating the PHI, such exposure is allowable under 45 CFR 164.502(a)(1)(iii).

**13.6 Installation, Maintenance and Repair**

(a) Provision of Services is subject to availability of adequate capacity and CenturyLink's acceptance of a complete Order Form.

(b) Customer will reasonably cooperate with CenturyLink or its agents to install, maintain, and repair Services. Customer will provide or secure at Customer's expense appropriate space and power; and rights or licenses if CenturyLink must access the building of Customer's premises to install, operate, or maintain Service or associated CenturyLink equipment. CenturyLink may refuse to install, maintain, or repair Services if any condition on Customer's premises is unsafe or likely to cause injury.

(c) Customer is responsible for any facility or equipment repairs on Customer's side of the demarcation point. Customer may request a technician dispatch for Service problems. Before dispatching a technician, CenturyLink will notify Customer of the dispatch fee. CenturyLink will assess a dispatch fee if it determines the problem is on Customer's side of the demarcation point or was not caused by CenturyLink's facilities or equipment on CenturyLink's side of the demarcation.

**13.7 Governing Law; Dispute Resolution.**

(a) **Billing Disputes.** If Customer disputes a charge in good faith, Customer may withhold payment of that charge if Customer makes timely payment of all undisputed charges when due and provides CenturyLink with a written explanation of the reasons for Customer's dispute of the charge within 90 days after the invoice date of such amount. If CenturyLink determines, in its good faith, that the disputed charge is valid, CenturyLink will notify Customer and within five business days after CenturyLink's notification Customer shall either (i) pay the charge and accrued interest, or (ii) request escalation of the dispute in accordance with the Billing Dispute Resolution and Escalation Process set forth below.

(b) **Governing Law; Forum.** The Agreement will be governed by the laws of the State in which the Customer's principal office is located without regard to its choice of law principles. Any legal proceeding relating to the Agreement will be brought in a U.S. District Court, or absent federal jurisdiction, in a state court of competent jurisdiction, in Monterey, California.

(c) **Waiver of Jury Trial and Class Action.** Each party, to the extent permitted by law, knowingly, voluntarily, and intentionally waives its right to a jury trial and any right to pursue any claim or action relating to the Agreement on a class or consolidated basis or in a representative capacity. If for any reason the jury trial waiver is held to be unenforceable, the parties agree to binding arbitration for any dispute relating to the Agreement under the Federal Arbitration Act, 9 U.S.C. § 1, et. seq. The arbitration will be conducted in accordance with the JAMS Comprehensive Arbitration Rules. Judgment upon the arbitration award may be entered in any court having jurisdiction.

(d) **Limitations Period.** Any claim relating to the Agreement against CenturyLink must be brought within two years after the claim arises other than Customer disputing an amount in an invoice, which must be done by Customer within 90 days after the invoice date of the disputed amount. Any claim against the Customer (County of Monterey) must be made within one (1) year after the claim arises, and, to the extent required by applicable law, must comply with the California Claims Act, including California Government Code section 910 (contents) and Government Code sections 915 – 915.4 (manner of presentation). This limitations period shall not apply to a dispute involving an amount in an invoice, which must be made within 90 days after the invoice date.

(e) **Billing Dispute Resolution and Escalation Process.** In the event a determination regarding a dispute is not agreed by the parties, such matter shall be referred for resolution as follows: (i) to senior manager or equivalent officer for discussion and resolution for a period of ten (10) business days, beginning no later than the last day of any requisite review, notice or cure period; and (ii)



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thereafter to the parties' executives or designated representatives, for discussion and resolution for a period of ten (10) business days, beginning no later than the last day of the first level escalation process.

The identified representatives shall meet in good faith to attempt to resolve such matter as provided below. The representatives are subject to change with reasonable notice. During discussions, each party shall honor the other's reasonable requests for information which is not privileged and which relates to the dispute or claim. Thereafter, if, and only if, the parties are not able to resolve the invoice dispute after ten (10) business days, either party may pursue other available remedies, including legal proceedings in order to resolve the invoice dispute. Nothing herein shall limit or restrict any other obligation of a party to perform their obligations under this Agreement.

**13.8 No Resale; Security.** Customer represents that it is not a reseller of any telecommunication services provided under this Agreement as described in the Telecommunications Act of 1996, as amended, or applicable state law and acknowledges it is not entitled to any reseller discounts under any laws. CenturyLink has adopted and implemented, and will maintain, a corporate information security program designed to protect Customer information, materials and data accessed and possessed by CenturyLink from loss, misuse and unauthorized access or disclosure. Such program includes formal information security policies and procedures. The CenturyLink information security program is subject to reasonable changes by CenturyLink from time to time, provided that no change shall materially reduce the level of security provided at the time this Agreement (or applicable additional Service Order or SOW (with respect to the Services set forth therein)) was entered into. CenturyLink's standard service offerings do not include managed security services such as encryption, intrusion detection, monitoring or managed firewall. Customer is responsible for selecting and using the level of security protection needed for all Customer data stored or transmitted via the Service and using reasonable information security practices, including those relating to the encryption of data.

**13.9 Assignment.** Either party may assign the Agreement without the other party's prior written consent: (a) in connection with the sale of all or substantially all of its assets; (b) to the surviving entity in any merger or consolidation; or (c) to an Affiliate provided such party gives the other party 90 days' prior written notice and provided any assignee of a party must have a financial standing and creditworthiness equal to or better than the party assignor, as reasonably determined by the other party, through a generally accepted, third party credit rating index (i.e. D&B, S&P, etc.). Any other assignment will require the prior written consent of the other party.

**13.10 Amendments; Changes.** The Agreement may be amended only in a writing signed by both parties' authorized representatives. Any amendment must be approved by the Monterey County Board of Supervisors. Each party may, at any time, reject any handwritten change or other alteration to the Agreement. CenturyLink may change features or functions of its Services; for material changes that are adverse to Customer, CenturyLink will provide ninety (90) days' prior written notice, but may provide a shorter notice period if the change is based on Regulatory Activity. CenturyLink may amend, change, or withdraw the Tariffs, RSS, ISS or AUP, with such updated Tariffs, RSS, ISS or AUP effective upon posting or upon fulfillment of any necessary regulatory requirements.

**13.11 Websites.** References to websites in the Agreement include any successor websites designated by CenturyLink.

**13.12 Required Notices.** Unless provided otherwise in the Agreement, all required notices to CenturyLink must be in writing, sent to 1801 California St., #900, Denver, CO 80202; Fax: 888-778-0054; Attn.: Legal Dept., and to Customer as provided above. All notices are effective: (a) when delivered via overnight courier mail or in person to the recipient named above; (b) three business days after mailed via regular U.S. Mail; or (c) when delivered by fax if duplicate notice is also sent by regular U.S. Mail.

**13.13 Service Termination Notices.** Customer's notice of termination for CenturyLink QCC Services must be sent via mail, facsimile or e-mail to: CenturyLink, Attn.: GBM Disconnects, 112 Sixth St., Bristol, TN 37620, Fax: 866.887.6633, e-mail: [GBMdisconnects@CenturyLink.com](mailto:GBMdisconnects@CenturyLink.com). Such termination is effective 30 days after CenturyLink's receipt of the notice, unless a longer period is otherwise required. For Services under the Select Advantage Service Exhibit, Customer must call the customer care number specified on Customer's invoice to provide notice of termination.

**13.14 Entire Agreement.** The Agreement (including any applicable Service Exhibit, CenturyLink accepted Order Forms, and all referenced documents) constitutes the entire agreement between the parties and supersedes all prior oral or written agreements or understandings relating to the same service, ports, or circuits at the same locations as covered under the Agreement.

**13.15 Customer Insurance.** Customer represents and warrants that it is self-insured for the coverage and up to the limits set forth herein and CenturyLink agrees to accept this representation in lieu of actual coverage. In the event Customer elects to transition from self-insurance to actual coverage during the Agreement Term, Customer will (i) purchase the coverage and limits set forth herein, (ii) deliver to CenturyLink a certificate of insurance which evidences the minimum levels of insurance set forth above; and (iii) provide not less than thirty (30) days prior written notice of cancellation of any herein required policy, and (iii) cause its liability insurance provider(s) to name CenturyLink as an additional insured as its interest may appear with respect to the Agreement.

As a condition to providing Customer with physical access to the data centers and/or the placement of Customer Equipment within the data center, Customer will at all times during the term of this Agreement, and at its own cost and expense, carry and maintain the following self-insurance or insurance coverage with insurers having a minimum "Best's" rating of A VII (A-7), provided however, if local and/or regional laws stipulate higher values than those defined herein, then Customer must comply with the applicable higher value as required by law:

- (a) "All Risk" self-insurance or Property insurance covering all Customer Equipment located in the CenturyLink Premises in an amount not less than its full replacement cost;
- (b) Commercial General Liability self-insurance or insurance covering claims for bodily injury, death, personal injury, or property damage (including loss of use) occurring or arising out of the license, use or occupancy of the data center by Customer, including coverage for premises-operation, products/completed operations, and contractual liability with respect to the liability assumed by Customer hereunder. The limits of self-insurance or insurance will not be less than: (i) Each Occurrence - \$2,000,000, or local

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currency equivalent; (ii) General Aggregate - \$4,000,000, or local currency equivalent ; (iii) Products/Completed Operations - \$2,000,000, or local currency equivalent; and (iv) Personal & Advertising Injury - \$2,000,000, or local currency equivalent ;

(c) In the US, Workers' Compensation self-insurance or insurance with statutory limits as required in the state(s) of operation; and providing coverage for any employee entering onto the CenturyLink Premises, even if not required by statute. Employer's Liability or "Stop Gap" insurance with limits of not less than \$100,000 each accident; and internationally, Employers' Liability self-insurance or insurance with limits of not less than \$1,000,000 USD, or local currency equivalent; and

(d) In the US, Comprehensive Automobile Liability self-insurance or insurance covering the ownership, operation, and maintenance of all owned, non-owned, and hired motor vehicles used in connection with this Agreement, with limits of at least \$1,000,000 per occurrence for bodily injury and property damage; and internationally, Automobile Liability self-insurance or insurance as required by law, covering the ownership, operation, and maintenance of all owned, non-owned, and hired motor vehicles used in connection with this Agreement.

The self-insurance or insurance limits required herein may be obtained through any combination of self-insurance, primary and excess or umbrella liability insurance. Such self-insurance or insurance will: (i) be primary and not excess of, or contributory with any other valid and collectible insurance maintained by CenturyLink; and (ii) will name CenturyLink (and its participating affiliates) as additional insured as their interest may appear with respect to this Agreement under the Commercial General Liability self-insurance or insurance. If applicable, Customer will require its subcontractors and agents to maintain self-insurance or insurance. Upon written request from CenturyLink, Customer will forward to CenturyLink certificate(s) of self-insurance or proof of such insurance.

**13.16. CenturyLink Insurance.** CenturyLink will at all times during the term of this Agreement, and at its own cost and expense, carry and maintain the following self-insurance or insurance coverage with insurers having a minimum "Best's" rating of A VII (A-7):

(a) "All Risk" self-insurance or Property insurance covering all CenturyLink equipment located in the CenturyLink Premises in an amount not less than its full replacement cost;

(b) Commercial General Liability self-insurance or insurance covering claims for bodily injury, death, personal injury, or property damage (including loss of use) occurring or arising out of the data center operations, including coverage for premises-operation, products/completed operations, and contractual liability with respect to the liability assumed by CenturyLink hereunder. The limits of self-insurance or insurance will not be less than: (i) Each Occurrence - \$5,000,000, or local currency equivalent; (ii) General Aggregate - \$25,000,000, or local currency equivalent;

(c) In the US, Workers' Compensation self-insurance or insurance with statutory limits as required in the state(s) of operation; and providing coverage for any employee entering onto the CenturyLink Premises, even if not required by statute. Employer's Liability or "Stop Gap" insurance with limits of not less than \$100,000 each accident; and internationally, Employers' Liability self-insurance or insurance with limits of not less than \$1,000,000 USD, or local currency equivalent;

(d) In the US, Comprehensive Automobile Liability self-insurance or insurance covering the ownership, operation, and maintenance of all owned, non-owned, and hired motor vehicles used in connection with this Agreement, with a combined single limit for Bodily Injury and Property Damage of not less than \$5,000,000 combined single limits and in the aggregate; and

(e) Professional and Cyber Liability Insurance for the professional services being provided, in the amount of not less than \$5,000,000 per claim and \$50,000,000 in the annual aggregate, to cover liability for any and all professional negligence, technical malfeasance, malpractice or acts, errors and omissions (e.g., which may include, but will not be limited to covering claims involving: third party business interruption and downtime in excess of 24 hours; loss or destruction of data; misappropriation, loss, adulteration or corruption of payroll information; "back door" exposure to computer virus; privacy violations; information theft; damage to or destruction of electronic information; intentional and/or unintentional release of private information; alteration of electronic information; and network security breach), made in the course of rendering professional and technical services. If professional liability & cyber liability insurance are written on a "claims-made" basis rather than an occurrence basis, CenturyLink shall, upon the expiration or earlier termination of this Agreement, obtain extended reporting coverage ("tail coverage") with the same liability limits. Any such tail coverage shall continue for at least three years following substantial completion of the project, provision of services and/or the expiration (e.g., or earlier termination) of this Agreement.

The self-insurance or insurance limits required herein may be obtained through any combination of self-insurance, primary and excess or umbrella liability insurance. If applicable, CenturyLink will require its subcontractors and agents to maintain self-insurance or insurance. Upon written request from Customer, CenturyLink will forward to Customer certificate(s) of self-insurance or proof such insurance.

Commercial general liability and automobile liability policies shall provide an endorsement naming the County of Monterey, its officers, agents, and employees as Additional Insureds with respect to liability arising out of CenturyLink's work, including ongoing and completed operations, and shall further provide that such insurance is primary insurance to any insurance or self-insurance maintained by the Customer and that the insurance of the Additional Insureds shall not be called upon to contribute to a loss covered by CenturyLink's insurance.

#### 14. Definitions.

"Affiliate" means any entity controlled by, controlling, or under common control with a party.

"AUP" means the Acceptable Use Policy incorporated by this reference and posted at <http://www.centurylink.com/legal/>.

"Cancellation Charge" means the cancellation charge described in the applicable Service Exhibit and charges incurred by CenturyLink from a third party provider as a result of an early termination.

"Cause" means the failure of a party to perform a material obligation under the Agreement, which failure is not remedied: (a) for payment defaults by Customer, within five days of separate written notice from CenturyLink of such default; or (b) for any other material