

## Disaster Recovery Terms of Service

**1. Definitions.** All capitalized terms not defined herein shall have the meanings set forth in the Agreement.

**Agreement:** definitive agreement executed by the Parties, these Terms, and any written amendments and attachments thereto. The Agreement may include a CapRock quotation or proposal which has been accepted by Customer.

**CapRock:** CapRock Communications, Inc.

**CapRock Rates:** CapRock's time and materials rates in effect from time to time and all third party expenses which will be billed to Customer at cost plus a 15% administrative fee. CapRock Rates are subject to change from time to time by CapRock.

**CapRock's Policies:** CapRock's Acceptable Use Policy and Fair Access Policy, each of which appear on CapRock's website at <http://www.caprock.com/terms/index.htm>.

**Coverage Period:** the period commencing upon delivery of the Equipment to Customer at the Ex-Works Site and terminating upon return of the Equipment to the Ex-Works Site.

**Customer:** any person or entity entering into an Agreement with CapRock or to which CapRock provides Services under a quotation or proposal.

**Customer Equipment Events:** collectively, (i) improper or unauthorized use of the Equipment or use not in accordance with CapRock's and/or the manufacturer's instructions and specifications, (ii) use of the Equipment in other than its intended manner, (iii) installation, de-installation, moving, removal, modification and/or maintenance of the Equipment, if such activities were not performed by CapRock or were performed without prior written authorization from CapRock, (iv) loss or damage due to Force Majeure events or (v) damage to Equipment caused by persons other than CapRock technicians or CapRock provided personnel.

**Equipment:** equipment to be provided to Customer as part of the Services.

**Ex-Works Site:** CapRock facility at which Equipment is delivered to Customer.

**Lien:** liens, charges, encumbrances or other claims which may attach to any part of the Equipment (except any placed thereon by CapRock).

**Losses:** losses, claims, demands, injuries, causes of action, liabilities and expenses (including attorneys' fees and costs) of any nature.

**Service Term:** the term of service, as set forth in the Agreement, including any renewals, during which CapRock will provide the Services. Unless otherwise stated in the Agreement, the Service Term will automatically renew on a month-to-month basis at monthly pricing unless either Party provides written notice to the other Party no less than thirty (30) days prior to the end of the applicable term.

**Service Charges:** monthly and non-recurring recurring charges for Services.

**Service Level Agreement:** Service Level Agreement attached as an exhibit to the Agreement.

**Services:** disaster recovery services and related services to be provided by CapRock, as set forth in the relevant Schedule.

**Taxes:** all applicable federal, state, local and foreign taxes or assessments, including value added, sales, use and excise taxes, universal service fund or other similar telecommunication assessments and any other fees or assessments (other than taxes or assessments based on CapRock's income).

**Terms:** these Disaster Recovery Terms of Service. "Hereof", "hereto" and "hereunder" and similar expressions mean and refer to these Terms and not to any particular section. "Section" means and refers to the specified section of these Terms.

**2. Priority of Terms.** Except as set forth in the Agreement, CapRock's provision of Services and Equipment is subject to these Terms, and the availability of Equipment and space segment. Customer agrees that these Terms shall control over any inconsistent or additional term of Customer, and that these Terms may not be amended, waived or modified except by a written document signed by CapRock. CapRock is not obligated to provide the Services until Customer has signed an Agreement. If CapRock provides Services prior to execution of an Agreement, CapRock reserves the right to invoice Customer at CapRock's monthly rate.

**3. Taxes.** Customer agrees to pay all Service Charges and other charges to CapRock free and clear of all applicable Taxes, so that the net amount received by CapRock for the Services is equivalent to the amount CapRock would have received had no Taxes been imposed. In addition, Customer agrees to pay all Taxes, surcharges, long distance charges, Public Switched Telephone Network access fees, backhaul and other such charges. If, prior to commencement of Services, Customer provides CapRock with a duly authorized exemption certificate, CapRock will exempt Customer from only the affected Taxes in accordance with applicable laws and such certificate during the period of exemption. Customer agrees to timely pay, and to indemnify, defend and hold CapRock harmless against any and all Losses arising from Customer's failure to comply with this Section.

#### **4. Services.**

(a) Customer acknowledges that the Services are disaster recovery services. Customer represents and warrants that it is purchasing the Services with the expectation in Customer's sole opinion that it may require the Services during the Service Term. Notwithstanding anything

in the Agreement to the contrary, Customer's agreement to purchase and pay for the Services is firm and irrevocable and is not subject to any condition or contingency including the occurrence of any disaster. Thus, Customer must pay for the Services even if it does not use or receive any benefit from the Services.

**(b) Use of Services.** Customer acknowledges and agrees that use of the Services is subject to CapRock's Policies. CapRock will notify Customer of any material change to such Policies. Customer shall not use (or authorize or permit any third party to use) any of the Services or Equipment for any purpose that (i) infringes the rights of others, including their privacy or publicity rights; (ii) is unlawful, threatening, abusive, defamatory, libelous, obscene, profane or indecent; (iii) is protected by copyright, trademark or other proprietary rights (unless such use is with the express written permission of the owner of such right); (iv) violates any applicable laws; or (v) unreasonably interferes with CapRock's or any underlying carrier's network or system (including without limitation, improper illumination by Customer of any satellite transponder) or the use of such system by other customers. CapRock reserves the right to immediately suspend or terminate use of the Services for, and Customer agrees to indemnify, defend and hold harmless CapRock for any Losses arising out of Customer's violation or alleged violation of this Section.

**(c) Implementation of Services.** Following execution of the Agreement and Customer's payment of the reservation fee, if applicable, CapRock will reserve, throughout the Service Term, the Equipment and, if purchased by Customer, the bandwidth necessary to provide the Services specifically for Customer. Within 6 hours following CapRock's receipt of Customer's request to implement the Services, CapRock will take appropriate action to dispatch for the installation of the Equipment and to provide the Services. Customer acknowledges and agrees that its execution of the Agreement and payment of any applicable reservation fee reserves the Equipment and bandwidth necessary to provide the Services only, and that, in addition to the limitations set forth in Section 12 hereof, CapRock shall not be liable for any Losses of Customer or any third party arising from CapRock's delay or failure to install the Equipment or to implement the Services, in whole or in part, prior to CapRock's receipt of a request for implementation from Customer. Customer agrees to indemnify, defend and hold harmless CapRock for any such Losses.

## **5. Use of Equipment.**

**(a) Title.** CapRock retains title to all Equipment; however, Customer is entitled to use the Equipment in accordance with these Terms solely to enable Customer to receive the benefits of the Services. Upon request, Customer agrees to execute any documents necessary to perfect CapRock's interest in the Equipment. Customer shall not allow any Liens to attach to any part of the Equipment. If a Lien is attached to the Equipment, Customer shall promptly release or discharge same by payment, bonding or otherwise, and shall defend, indemnify and hold CapRock harmless against any Losses caused thereby.

**(b) Care and Use.** Customer shall ensure that (i) the Equipment is used in the regular course of its business and in accordance with CapRock's and the manufacturer's operating specifications, (ii) Equipment is kept and operated in an environment suitable for its intended use (for example, the indoor units must be kept in a clean and dry environment), (iii) Equipment is not subjected to Customer Equipment Events, (iv) the Services and Equipment are not resold or rented without CapRock's prior written consent; and (v) up-to-date records and logs of the

repair, maintenance, performance and condition of the Equipment are kept. Customer shall not remove or deface any label CapRock may affix on the Equipment. All Equipment alterations, additions and replacements become the property of CapRock. Customer shall, at no cost to CapRock (i) provide the lighting, electricity, lightning protection, telecommunications connections, civil works, and inside wiring; (ii) grant or cause to be granted to CapRock or its designated representative full access rights for ingress and egress at each Equipment Location, and (iii) provide all offshore transportation from the helipad or port to and from each Customer location. If Customer connects its own equipment to CapRock's network, Customer must ensure that such equipment is compatible with and does not harm, impair or interfere with the technical integrity of the Services, CapRock's network, its suppliers' networks or any other CapRock services or customers.

**6. Risk of Loss; Shipment.** Equipment shall be delivered to Customer Ex-Works (per Incoterms 2000) at the Ex-Works Site. Customer shall bear all risk of loss or damage to the Equipment from any cause whatsoever and is responsible for obtaining and paying for insurance (or equivalent coverage in the case of self-insurance), including all risk insurance and, for trailerized units, automobile liability insurance, for full replacement value of the Equipment and damage to third parties while operating or transporting the Equipment during the Coverage Period. By executing the Agreement or using the Services, Customer represents that it has, as applicable, either purchased the required insurance coverage for the Equipment or has adequate independent financial strength to bear the risk of loss or damage to Equipment. If any loss or damage to the Equipment occurs, Customer shall immediately notify CapRock and CapRock shall either repair or replace the damaged Equipment, at CapRock's option, and Customer shall promptly pay any invoice for such costs or, in the event of a total loss, for the Equipment's full replacement value. If such loss or damage occurs, CapRock shall have the option to replace Equipment or terminate the Agreement; however, no loss or damage shall relieve Customer of any obligations hereunder. Unless otherwise stated in the Agreement, Customer is responsible for providing and paying for all freight forwarder, shipping, customs, import/export and related costs for shipments of Equipment to and from Customer's specified destinations and the Ex Works Site. If the Agreement states that CapRock will arrange for such services, Customer agrees to pay all such costs plus related charges at CapRock Rates.

**7. Personnel and Third Party Charges.** Unless otherwise provided in the Agreement, Customer shall pay all costs of installation and commissioning, re-installation at another Equipment Location, maintenance, repair, and decommissioning and removal of the Equipment, including travel and standby time at CapRock Rates. CapRock Rates include basic standard test equipment assigned to CapRock's service technicians; however, CapRock will bill Customer separately for use of specialized test equipment, if required. Charges for labor shall commence from the date and time of leaving CapRock's facility and shall terminate on the date and time of return to such facility. If Customer does not provide travel, food and accommodation for CapRock's personnel, Customer agrees to pay such costs at CapRock Rates.

**8. Payment Terms.** Customer agrees that Services Charges will commence as of the date of execution of the Agreement or as otherwise stated in the Agreement and shall terminate on the

date upon which the Equipment is returned to the Ex-Works Site. Customer shall pay all invoices in U.S. dollars, without offset, deduction or withholding, within thirty (30) days of date of invoice. Amounts due are considered paid when CapRock receives collected funds. Invoices not paid by the due date shall accrue interest from the due date until paid at a rate equal to the lesser of 1-1/2% per month or the maximum rate allowed by applicable laws. In the event Customer disputes any invoice, in whole or in part, Customer shall pay the undisputed portion and shall notify CapRock in writing no less than 15 days after receipt of invoice of Customer's intention to defer payment of the disputed portion. Such notice shall include the reasons for non-payment and, in the event of a claim due, evidence to establish such claim. Any such dispute shall be resolved in accordance with the dispute resolution provisions hereof.

**9. Security Deposit.** CapRock's delivery of any Services and Equipment is expressly conditioned upon CapRock's approval of Customer's creditworthiness. CapRock may, at its sole discretion and at any time, require Customer to pay a security deposit to be held by CapRock and applied to charges due in the event of default by Customer. CapRock may require Customer to increase the amount of such deposit at any time CapRock determines, in its sole discretion, that such increase is necessary to provide adequate assurance of payment.

#### **10. Limited Warranty and Repair of Equipment.**

**(a) Limited Warranty of Services.** CapRock warrants that it will perform the Services in a good and workmanlike manner consistent with applicable industry standards and practices.

**(b) Repair of Equipment.** CapRock is not the manufacturer of any Equipment. However, CapRock will pass through the original manufacturer's warranties to Customer to the extent it is able to do so. Unless otherwise specified in the Agreement, the Services include parts and on-site labor (except travel and standby time and third party expenses, which will be billed to Customer at CapRock Rates) for repairs to the Equipment due to defects and normal wear and tear during the Service Term. This repair obligation does not apply in cases in which CapRock determines that the Equipment has been subjected to Customer Equipment Events.

**(c) 911 and Other Emergency Services. CUSTOMER ACKNOWLEDGES THAT THE EQUIPMENT AND THE SERVICES PROVIDED BY CAPROCK ARE NOT CAPABLE OF SERVICING 911 EMERGENCY CALLS OR CALLS TO ANY OTHER UNIVERSAL EMERGENCY TELEPHONE NUMBER (UETN) SUCH AS 112 IN EUROPE, AND THAT GEOGRAPHIC LOCATION AND/OR CALL-BACK NUMBER INFORMATION WILL NOT BE FORWARDED TO AN EMERGENCY CENTER OR PUBLIC SAFETY ANSWERING POINT (PSAP). THEREFORE, CUSTOMER SHOULD MAINTAIN AN ALTERNATE MEANS OF CALLING EMERGENCY SERVICES. CUSTOMER AGREES THAT CAPROCK WILL HAVE NO LIABILITY TO CUSTOMER OR ANY THIRD PARTY FOR CUSTOMER'S OR ANY THIRD PARTY'S USE OF EQUIPMENT FOR ANY EMERGENCY SERVICES.**

**(d) THIS SECTION CONSTITUTES CUSTOMER'S SOLE REMEDY IN CONNECTION WITH SERVICE OR EQUIPMENT FAILURES OR DEFECTS. EXCEPT FOR THE WARRANTIES IN THIS SECTION, CAPROCK MAKES NO OTHER WARRANTIES, EXPRESS**

OR IMPLIED, INCLUDING WARRANTIES OF INFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

**11. Force Majeure.** CapRock shall make reasonable efforts to meet delivery and performance dates, but CapRock shall not be liable for any loss, damage, delay or failure to perform, in whole or in part, resulting from any cause beyond CapRock's reasonable control including, but not limited to: acts of God; acts or omissions of Customer or third parties; acts of terrorism; war; explosion; accidents; fires; floods; severe weather conditions; atmospheric or topographical considerations; strikes; insurrections; riots; embargoes; delays in transportation; inability to obtain supplies; or requirements, orders or regulations of any applicable government authority or any other civil or military authority. In the event of any such delay, CapRock shall be given a reasonable extension of time to complete performance. Force majeure shall not excuse Customer's delay in payment of, or failure to pay, any amounts due.

**12. Limitation of Liability.** NEITHER PARTY, NOR ANY OF ITS AFFILIATES, SHALL BE LIABLE TO THE OTHER PARTY OR ANY THIRD PARTY FOR ANY INCIDENTAL, SPECIAL, PUNITIVE, CONSEQUENTIAL, EXEMPLARY OR INDIRECT DAMAGES IN CONNECTION WITH THE SERVICES OR THE EQUIPMENT, INCLUDING LOSS OF ACTUAL OR ANTICIPATED REVENUES OR PROFITS, OR LOSS OF USE OR BUSINESS, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE AGGREGATE LIABILITY OF CAPROCK TO CUSTOMER OR TO ANY THIRD PARTY SHALL BE LIMITED TO THE TOTAL AMOUNT PAID OR PAYABLE BY CUSTOMER TO CAPROCK FOR THE SERVICE WHICH IS THE SUBJECT OF THE CLAIM FOR THE MONTH IMMEDIATELY PRECEDING THE CLAIM.

**13. Confidential Information.** Customer shall keep all confidential and proprietary information of CapRock, including techniques, specifications, drawings, engineering data, technical designs and software provided to Customer, confidential and shall ensure that all its representatives and employees shall abide by the terms of this provision as though it were binding upon each of them. Customer shall return such data and all copies to CapRock upon the earlier of CapRock's request or termination or expiration of the Agreement.

#### **14. Termination.**

**(a) Termination by Customer.** Customer may terminate the affected Services (i) for chronic failure of such Services in accordance with the terms of the Service Level Agreement, (ii) on thirty (30) days prior written notice to CapRock if CapRock's supplier of satellite capacity, terrestrial circuits or microwave service fails to provide the level of service required under the Agreement for any reason, and no alternate service is available within thirty (30) days following such third party's failure. If Customer terminates the Services, Customer agrees to timely pay CapRock's invoice for (1) all outstanding charges through the date of termination and (2) all decommissioning costs for removal of the Equipment. The Agreement will be deemed terminated by Customer upon return of Equipment to CapRock's premises.

**(b) Termination by CapRock.** CapRock may immediately suspend or terminate this Agreement and the Services without liability (i) if Customer defaults in any of its obligations hereunder and fails to cure such default within thirty (30) days (fifteen (15) days in the case of a payment default) following receipt of notice from CapRock, but subject to CapRock's right to immediately terminate the Services as provided herein, (ii) if the Services are used for any purpose or in any manner that violates CapRock's Policies, (iii) if CapRock is unable for more than thirty (30) days to perform the Work as a result of Force Majeure or (iv) if any court or arbitral order or order of any public authority or change in any applicable laws prevents CapRock from providing the Services or has a materially adverse effect on the economic benefits accruing to CapRock hereunder. In the event of any such termination under this Section 14(b), Customer agrees to timely pay CapRock's invoice for (1) all outstanding charges through the date of termination, (2) an amount equal to the Service Charges accelerated for the remainder of the Service Term or renewal term (unless terminating pursuant to Sections 14(b)(iv)), (3) all decommissioning costs for removal of the Equipment and (4) any costs and related expenses incurred by CapRock in connection with such default (including third party charges, attorney's fees, court costs, and collection agency fees).

**(c) Termination by Either Party.** Either party may immediately terminate the Services at any time, with Customer being liable for all outstanding charges through the date of termination and all costs of decommissioning and removal of the Equipment, if the other party seeks protection under any bankruptcy, insolvency, receivership, trust deed, creditors arrangement, composition or comparable proceeding, or if any such proceeding is instituted against the other party and not dismissed within sixty (60) days. A Customer insolvency shall be considered a default pursuant to Section 14(b)(i), but without the requirement of notice and cure period.

**(d) Return of Equipment.** On the expiration or termination of the Service Term for any reason, Customer shall (i) promptly coordinate with CapRock for de-installation and removal of the Equipment by CapRock and for the return of such Equipment at Customer's risk and expense to the location designated by CapRock, (ii) immediately cease use of the Services and Equipment, and (iii) pay CapRock's invoice for all charges payable in accordance with these Terms or the Agreement. Equipment shall be in the same condition, fair wear and tear expected, as when received by Customer. Customer shall pay for any repair or alterations necessary to restore the Equipment to such condition.

**15. Remedies.** The remedies provided under these Terms or the Agreement are cumulative and in addition to any other rights or remedies either Party may have at law or in equity or under these Terms or the Agreement. Nothing contained in these Terms or the Agreement, including alternative dispute resolution, shall be deemed to preclude either party from seeking injunctive relief, if necessary, in order to prevent the other from willfully or intentionally breaching its obligations under these Terms or the Agreement or to compel the other to perform its obligations hereunder.

**16. Compliance with Laws.** Each Party shall obtain and maintain all required licenses, titles, registrations, authorizations and permits necessary for its operations , provision and receipt of

the Services, transmission and receipt of signals, use of the Equipment, or as otherwise necessary for the performance of its obligations under these Terms and the Agreement. Notwithstanding the foregoing, unless otherwise stated in the Agreement, Customer shall (i) obtain and maintain all licenses, permits, temporary permits and authorizations required by applicable laws for its receipt of the Services, transmission and receipt of signals, and use of the Equipment, including, but not limited to, obtaining any required VSAT license from the pertinent regulatory body to receive the Services at the Equipment Location, although CapRock may offer assistance in obtaining such license at the cost to be specified to Customer, (ii) obtain all necessary permits for ingress and egress and transportation, on private or public land, necessary for CapRock's personnel to access the Equipment for the installation, operation, maintenance, repair and removal of the Equipment; and (ii) obtain all required and applicable permits, licenses, visas and other immigration requirements and customs clearances for the Equipment, Services and CapRock's personnel. In addition, unless otherwise stated in the Agreement, Customer shall be responsible for the importation of the Equipment and subsequent exportation after the expiration of the Service Term or other termination of the Services, and for all tariffs, duties, taxes and fees relating to such importation and exportation. Furthermore, to the extent applicable, each party is responsible for complying with all applicable laws, including without limitation, those relating to earth stations on vessels and the import/export/re-export and operation of Equipment. Customer acknowledges and agrees that, in order to comply with applicable laws, CapRock may be required, without notice to Customer, to respond to and cooperate with requests, inquiries and/or investigations from governmental authorities concerning Customer and/or use of the Services at an Equipment Location. Each party shall indemnify, defend and hold the other party harmless from any Losses arising from its failure to comply with this Section.

**17. Indemnification.** Each party agrees to release, defend, indemnify and hold harmless the other party and its subsidiaries and affiliates and each of their respective directors, officers, employees and agents (collectively, the "Indemnified Party") from and against any and all Losses for or on account of bodily injury, death, or damage to, loss of use of, or loss of property of the indemnifying party arising out of or relating to these Terms or the Agreement; provided, however, that CapRock's obligations in this Section shall not include, and Customer's obligations in this Section shall include, the Equipment for which Customer has specifically assumed the risk of loss. Notwithstanding any other provision of these Terms or the Agreement, Customer shall be responsible for and shall release, defend, indemnify and hold harmless the CapRock Indemnified Parties from and against any Losses arising out of Customer's violation or alleged violation of CapRock's Policies or arising out of or relating to any claims brought by any third party in connection with the Services or Equipment, regardless of whether such third party was authorized or unauthorized to use the Services. THE INDEMNITIES CONTAINED HEREIN SHALL APPLY EVEN IF CAUSED, IN WHOLE OR IN PART, BY THE JOINT, SOLE, OR CONCURRENT NEGLIGENCE, GROSS NEGLIGENCE, WILLFUL MISCONDUCT, STRICT LIABILITY OR OTHER FAULT, WHETHER ACTIVE OR PASSIVE, OF ANY PERSON OR ENTITY, INCLUDING THE INDEMNIFIED PARTY.

**18. Assignment.** Customer shall not, directly or indirectly, assign, sell, transfer (by operation of law, merger or consolidation) or otherwise dispose of any interest in the Agreement, the Equipment or the Services without the prior express written consent of CapRock. Any assignment in contravention of this Section shall be null and void.

**19. Governing Law.** This Agreement shall be deemed to have been made in the State of Texas and the laws of the State of Texas, United States, shall govern the interpretation, construction and validity of this Agreement without regard to its conflicts of law rules. Either Party may bring an action against the other Party in the federal or state courts of Harris County, Texas, and each Party hereby submits to the sole and exclusive personal jurisdiction of such courts, agrees that venue properly lies in such courts, and waives any claim that any such action should be dismissed on grounds of inconvenient forum or lack of personal jurisdiction or that any such action should be transferred to any court outside of such courts (service of process upon a Party may be effected by delivery, verified by a receipt signed by a representative of the Party served, to the address for notices to that Party set forth in the Agreement). The non-prevailing party shall bear the attorneys' fees and expenses of the prevailing party. The parties expressly agree that the terms of the United Nations Convention on Contracts for the International Sale of Goods shall not apply to these Terms.

**20. Notice.** Any written notice or communication required to be given by either party hereunder may be delivered or sent to the attention of the contact name and address specified in the Agreement by courier service (which is deemed served when delivered) or fax (which is deemed served on the business date it was received with written confirmation) or by United States certified mail, postage prepaid, return receipt requested or postage prepaid United States Express Mail (which are deemed served the next business day after posting).

**21. Miscellaneous.** Customer agrees that CapRock may include Customer's name in its customer listings. CapRock is an independent contractor of Customer, and nothing contained in these Terms or the Agreement is intended to create the relationship of principal and agent, partners or joint venturers, or fiduciary relationship between CapRock and Customer. If any provision in these Terms or the Agreement is determined to be inconsistent with or contrary to any applicable laws, with such determination being made by a court of competent jurisdiction or upon mutual agreement of the Parties, then such provision shall be fully severable and shall be deemed to be modified to the extent required to comply with applicable laws, and as so modified said provision and these Terms and the Agreement shall continue in full force and effect. The failure of either party to enforce any provision of these Terms or the Agreement shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of these Terms or the Agreement. **The provisions of these Terms or of the Agreement which by their sense and context are meant to survive the expiration, assignment or other termination of these Terms or the Agreement shall so survive.**