

## MASTER SERVICES AGREEMENT

### General Terms and Conditions

This Master Services Agreement (“MSA”) is made and entered into as of \_\_\_\_\_, 201\_\_ (“Effective Date”), by and between **Tysons Enterprise West, LLC** DBA Element Critical (“Element Critical”), and \_\_\_\_\_ (“Customer”) and governs Services(s) purchased by Customer under an Order. Customer and Element Critical may be referred to collectively as “Parties” or individually as a “Party”. This MSA incorporates these **General Terms and Conditions** and **Service Level Agreement (“SLA”)**, and are collectively referred to the “Agreement”,

1. **SERVICES.** Element Critical will provide Customer the services described herein (the “Services”) and set forth in each Element Critical sales order (an “Order”). Unless otherwise set forth in this Agreement or an Order, Customer is solely responsible for all costs and expenses to provide all equipment, hardware, and cabling required to use the Services.

### 2. LICENSE GRANT

a. **License Grant.** Subject to the terms of this Agreement, Element Critical grants Customer a nonexclusive, revocable, and non-transferable right and license to use the Services set forth in an Order during the applicable Order Term (defined in Section 3). Customer shall comply with all applicable laws, rules, policies, procedures and regulations relating to its use of the Services. If Customer, or a third party through Customer, violates any of the foregoing prohibitions, Element Critical may suspend the Services and/or terminate this Agreement or any Order(s).

b. **Limitations.** Customer agrees that this is a services agreement and is not intended to and does not constitute a lease of any real or personal property or grant any other real property interest. Customer may only access and use the Services subject to any restrictions specified herein and in the applicable Order(s). Customer will comply with Element Critical’s Data Center Policies and Procedures (“Policies”), provided to Customer and found on line at [www.elementcritical.com/policiesandprocedures](http://www.elementcritical.com/policiesandprocedures), and incorporated herein by reference. Element Critical may reasonably modify the Policies from time to time effective upon notice. Subject to the terms of this agreement, Customer may resell the Services, provided that the purchaser agrees in writing to be bound by this agreement. Customer will be responsible and liable for all acts or omissions of Customer’s agents, employees, consultants, contractors or partners and for any equipment or services not provided by Element Critical. Customer will indemnify, defend and hold harmless Element Critical from any and all liability, loss, damages, costs and expenses (including reasonable attorneys’ fees and expenses) for third-party claims brought by, arising from or related to Customer’s end users, customers, agents, employees, consultants, contractors or partners and for any equipment or services.

### 3. TERM

a. **Term.** The term of this Agreement (“Term”) shall commence on the Effective Date or, in the absence of signature of this Agreement, the last signature date on a corresponding Sales Order and shall expire at the date of termination or expiration of the last Order. The term of each Order (“Order Term”) commences on the Service Commencement Date (defined in Section 4) and continues for the stated term. Except

as otherwise provided in an Order, an Order Term shall automatically renew upon the expiration of the then current Order Term for additional periods of one year.

b. **Cancellation of Auto-Renewal.** Except as otherwise provided in an Order, either Party may cancel automatic renewal of an Order Term by providing at least 60 days notice prior to the expiration of the then current Order Term. Customer’s notice of cancellation described in the preceding sentence does not terminate Services, but instead converts the Order upon the expiration of the existing Order Term to a month-to-month term with an increase of 50% of the Fees. To be effective, Customer must submit the cancellation request in writing to [billing@elementcritical.com](mailto:billing@elementcritical.com) or to Billing at the address specified herein for notice. Element Critical’s notice of cancellation will terminate the Services effective upon the expiration of the then current Order Term.

### 4. PAYMENT TERMS

a. **Service Commencement Date.** Service Fees will accrue from the date designated in the Order as the Billing Start Date or if no date is designated in the Order, then the date on which the Service is delivered (“Service Commencement Date”). All Services are deemed accepted upon delivery.

b. **Fees and Adjustments.** Element Critical invoices Fees monthly in advance except for usage based services which are invoiced monthly in arrears. During the term specified in the Order and any automatic renewal Term, Services are subject to an annual rate increase equal to 3% of the annual contract value.

c. **Payment of Fees.** Except for Fees then being disputed in good faith pursuant to Section 4(d) and as to which Customer has notified Element Critical that Customer is disputing, Customer shall pay all fees, charges, Taxes, duties, surcharges, expenses, disconnect and third party service charges invoiced by Element Critical (collectively, “Fees”) in U.S. dollars to the designated address within 30 days following the invoice date. Customer will be liable for Service Fees for the full term specified in each Order.

d. **Disputed Fees.** In the event of a billing dispute, Customer shall provide a summary of the dispute in writing together with supporting documentation to [billing@elementcritical.com](mailto:billing@elementcritical.com) or to Billing at the address specified herein for notice. However, Customer must pay all undisputed amounts. Element Critical will investigate the claim and make a determination resolving the dispute. In the event that an invoice exceeds the monthly recurring charges (“MRC”) of the

Services ordered, Customer may withhold the disputed portion that exceeds the MRC. Customer must submit a dispute within 180 days of the date of the invoice on which the disputed amount appears. Customer waives all rights to dispute charges after this 180 day period. Element Critical shall not back bill for any unbilled Fees that accrued more than 180 days prior to an invoice date.

**e. Late Fees.** Except as provided in Section 4.2(d), Fees are due in full as and when stated, without rights of setoff. Undisputed Fees not received when due bear interest at the lesser of (i) 1½% per month or (ii) the maximum amount allowable by law, commencing upon the payment due date. If Customer is late in paying any undisputed Fees, Element Critical may, in its discretion: (i) require a deposit or other undertaking or security to ensure that Customer satisfies its payment obligations, regardless of whether Customer has cured the late payment and (ii) suspend Services (as provided below) and/or terminate this Agreement or any Order(s) (as provided in Section 5). Customer is liable for all costs of collection, including, without limitation, attorneys' fees and costs.

**f. Service Suspension.** Element Critical may suspend the provision of Services, deny access to and the removal of Customer's equipment from the Element Critical data center, if Customer fails to pay undisputed Fees owed under this Agreement within 60 days of the invoice date. Element Critical will continue to charge Customer for Services during any period of suspension.

**g. Taxes and Pass Through Charges.** All amounts payable by Customer to Element Critical under an Order exclude Taxes. Excluding taxes based on Element Critical's net income, Customer is responsible for paying all taxes related to (i) provision of the Services, (ii) Customer's activities and operation, and (iii) taxes imposed by any governmental or other authority ("**Taxes**") as well as, any rate increases for third party services and products including power, relating to Customer's receipt or use of the Services. Element Critical will pass through Taxes and any such rate increases and Customer shall indemnify for any losses or liabilities incurred by Element Critical for any Taxes or rate increases paid by Element Critical on behalf of Customer.

## 5. TERMINATION

**a. Termination upon Expiration.** Except as provided in an Order or herein, either Party may disconnect Services and terminate an Order upon the expiration of the Order Term by providing at least 60 days' notice prior to the expiration of the Order Term. To be effective, the cancelling Party must Customer must submit the cancellation request in writing to [billing@elementcritical.com](mailto:billing@elementcritical.com) or to Billing at the address specified herein for notice.

**b. Termination for Cause.** Either Party may terminate this Agreement or any Order by giving written notice to the other Party if the other Party materially breaches this Agreement or such Order, as applicable, and fails to cure the breach within 30 days following receipt of written notice from the non-breaching Party (excluding any breaches relating to the payment of Fees,

which shall not require further notice as to due date). Either Party may terminate this Agreement for cause immediately if the other Party becomes unable to pay its debts as they become due, undergoes judicial management, commences the process of liquidation, becomes insolvent or makes an assignment for the benefit of creditors, or if a trustee is set up to administer a substantial portion of the other Party's assets or business.

**c. Termination Following Suspension of Services.** In the event that Customer's Services are suspended for failure to timely pay any undisputed Fees pursuant to Section 4, or for any other reason, and such suspension continues for more than 30 days, Element Critical may, without further notice and obligation to Customer, terminate this Agreement and any Orders.

**d. Effect of Termination by Either Party.** On or before termination of this Agreement or any Order for any reason other than Termination upon Expiration in Section 5(a) or Termination for Cause in Section 5(b) by Customer, Customer shall remove all of Customer's equipment and shall immediately pay to Element Critical (i) Fees for all Services provided through the date of termination and (ii) if termination is due to breach by the Customer, 100% of the Fees Customer would have had to pay through the end of the Order Term for all terminated Orders. Customer agrees to pay all amounts owing on or before the termination date. Rights and obligations which by their nature continue after the termination or expiration of this Agreement, including, but not limited to, those found in Sections 4, 5, 6, 7 and 8, shall survive and continue after the termination or expiration of this Agreement, and shall bind the parties, their successors, heirs and permitted assigns.

**e. Abandoned Equipment.** Unless Element Critical otherwise agrees in writing, failure to remove equipment within thirty (30) days from the termination of the applicable Order will constitute abandonment of the equipment under the laws of the jurisdiction where the abandoned property is located. At Customer's risk and expense, Element Critical will be entitled to pursue all available legal remedies, including, without limitation: (i) immediately removing Customer's Equipment and storing it at an on-site or off-site location; (ii) shipping it to Customer at Customer's cost; or (iii) upon thirty (30) days' prior written notice to Customer, liquidating it, and retaining the proceeds.

## 6. CONFIDENTIALITY

**a. Confidentiality.** Each Party (the "**Receiving Party**") acknowledges that it will have access to Confidential Information of the other Party (the "**Disclosing Party**"). "**Confidential Information**" disclosed by one Party to the other Party includes (a) information identified by the disclosing Party, in writing or orally, as confidential at the time of disclosure; (b) information containing the disclosing Party's customer lists, customer information, technical information, pricing information, financial position, trade secrets, customer communications or proposals, or information relating to its business planning or business operations; (c) the terms of this Agreement; and (d) information that under the circumstances is reasonably understood or believed to be confidential. The Receiving Party's obligations with respect to Confidential Information of the Disclosing Party shall not apply to the extent such Confidential

Information: (a) is already known to the Receiving Party without restriction on disclosure; (b) becomes publicly available without fault of the Receiving Party; (c) is independently developed by the Receiving Party without reference to Confidential Information of the Disclosing Party; (d) was received from a third party without obligations of confidence and without breach of this Agreement; or (e) to the extent that such disclosure is required by applicable law or governmental authority.

**b. Disclosure and Use.** The Receiving Party agrees to use the Confidential Information of the Disclosing Party solely for purposes of performing its obligations and exercising its rights under this Agreement. Nothing herein shall preclude disclosure by the Receiving Party to that Party's attorneys, accountants or other employees who have a bona fide need to know the Confidential Information in connecting with the Receiving Party's performance under this Agreement. The Receiving Party shall use at least the same degree of care the Receiving Party employs with respect to its own Confidential Information, but in no event less than a reasonable standard of care take to prevent unauthorized use and disclosure of the Confidential Information of the Disclosing Party.

**c. Marketing.** Neither Party grants the other Party the right to use its trademarks, service marks, trade names, copyrights, other intellectual property rights or other designations in any promotion, publication, or press release without the prior written consent of the other Party in each case. Notwithstanding this, the Parties agree that either Party may reference entering into this Agreement and Customer's status as a Customer in its marketing materials, press releases and in sales presentations.

**d. Separate Agreement.** If the parties have executed a separate non-disclosure agreement, the term of that separate agreement shall control.

## 7. WARRANTY AND LIMITATIONS ON LIABILITY

**a. Warranty.** The Parties represent, warrant and covenant that it will comply with all applicable laws and regulations in connection with this Agreement. Element Critical represents, warrants and covenants that it shall perform the Services in a professional manner as is customary in the industry. Customer represents, warrants and covenants that it will maintain throughout the Term the legal right and authority (including regulatory consents) to operate, configure, install, maintain and repair Customer's Equipment as contemplated by this Agreement.

**b. Disclaimer of Warranties.** EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, ELEMENT CRITICAL MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED (EITHER IN FACT OR BY OPERATION OF LAW), WITH RESPECT TO THE SERVICES. ELEMENT CRITICAL EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES OR CONDITIONS, INCLUDING WITHOUT LIMITATION, EXPRESS, IMPLIED AND STATUTORY WARRANTIES THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR-FREE, OR COMPLETELY SECURE, WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ALL WARRANTIES ARISING FROM CONDUCT, COURSE OF

DEALING OR CUSTOM OF TRADE AND ALL WARRANTIES OF TITLE AND NON-INFRINGEMENT. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES SO PORTIONS OF THE ABOVE EXCLUSIONS MAY NOT APPLY, BUT ONLY TO THE EXTENT NECESSARY TO BRING THE EXCLUSION INTO COMPLIANCE. ALL SERVICES ARE PROVIDED OR PERFORMED ON AN "AS IS", "AS AVAILABLE" BASIS, AND CUSTOMER'S USE OF THE SERVICES IS SOLELY AT ITS OWN RISK.

**c. Limitation on Liability.** NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY OR ANY OTHER PERSON FOR ANY INCIDENTAL, INDIRECT, SPECIAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, LOSS OF BUSINESS, LOSS OF REVENUE, LOSS OF PROFITS, LOSS OF OR CORRUPTION OF DATA), REGARDLESS OF WHETHER SUCH LIABILITY IS BASED ON BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, BREACH OF WARRANTY, FAILURE OF ESSENTIAL PURPOSE OR OTHERWISE, AND EVEN IF ADVISED OF THE LIKELIHOOD OF SUCH DAMAGES. ELEMENT CRITICAL SHALL NOT BE LIABLE, IN CONTRACT, TORT OR ANY OTHER THEORY FOR: UNAUTHORIZED ACCESS, ALTERATION, THEFT, CORRUPTION OR DESTRUCTION OF OR TO CUSTOMER'S OR ITS CUSTOMERS', END USERS' OR OTHER PARTIES' COMPUTER FILES, DATABASES, NETWORK, TRANSMISSION FACILITIES OR EQUIPMENT.

**d. Cap on Liability.** NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, ELEMENT CRITICAL'S TOTAL LIABILITY TO CUSTOMER OR ANY OTHER PERSON OR ENTITY FOR ANY AND ALL CLAIMS AND DAMAGES ARISING FROM OR OUT OF THIS AGREEMENT SHALL NOT EXCEED THE FEES PAID BY CUSTOMER TO ELEMENT CRITICAL DURING THE TWELVE MONTHS IMMEDIATELY PRECEDING THE DAY THE ACT OR OMISSION OCCURRED THAT GAVE RISE TO CUSTOMER'S FIRST CLAIM. AS A FURTHER LIMITATION, ELEMENT CRITICAL'S MAXIMUM LIABILITY FOR ANY CLAIMS RELATING TO SERVICES OFFERED OR PROVIDED BY ELEMENT CRITICAL (I) FOR A NON-RECURRING CHARGE ONLY; OR (II) AS REMOTE HANDS SERVICES SHALL NOT EXCEED THE AMOUNT OF THE SERVICE FEE FOR SUCH SERVICE PROVIDED ON THE OCCASION GIVING RISE TO THE CLAIM.

## 8. MISCELLANEOUS PROVISIONS

**a. Amendment.** Any amendment to this Agreement or an Order will only be effective if mutually agreed in writing and executed by the authorized representatives of both Parties.

**b. Assignment.** Customer will not have the right to assign this Agreement without Element Critical consent. However, either Party may assign its rights, duties and obligations hereunder, without approval of the other Party, to a party that succeeds to all or substantially all of its assets or business

(whether by sale, merger, operation of law or otherwise), so long as the assignee agrees in writing to be bound by this Agreement. This Agreement shall inure to the benefit of and be binding on the Parties, and their heirs, successors and permitted assigns.

**c. Construction.** Each Party agrees that it has reviewed this Agreement, and neither Party shall be considered the sole drafter of this Agreement so as to give rise to any presumption or convention regarding construction of this Agreement. Section headings and captions are for convenience only and will not be used to construe this Agreement. In the event of any conflict between this Agreement and an Order, the terms of the Order shall control. In the event of a conflict between this Agreement and an SLA, the terms of the SLA shall control.

**d. Entire Agreement.** This Agreement and all Orders, which are incorporated by this reference, constitute the entire agreement between the Parties with respect to the subject matter hereof, and there are no verbal or other agreements which modify or affect this Agreement. The Agreement supersedes and replaces all prior or contemporaneous discussions, negotiations, proposals, understandings and agreements, written or oral, made by or on behalf of Element Critical or Customer, as well as any industry custom.

**e. Force Majeure.** Except for Customer's obligation to pay amounts owed under this Agreement, neither Party will be liable for any loss, damage or delay resulting from any event beyond such Party's reasonable control or other events of force majeure. "Force majeure" includes, without limitation, acts of God, strike, lockout or other industrial disturbance, acts of war, terrorism, blockade, public riot, civil disturbance or unrest, lightning, fire, storm, flood, hurricane, earthquake, tsunami, tornado, explosion, governmental restraint or unavailability of equipment and any other cause beyond the reasonable control of the Party. Each Party will promptly notify the other upon becoming aware that such event has occurred or is likely to occur and will use commercially reasonable efforts to minimize any resulting delay in or interference with the performance of its obligations under this Agreement. If such event continues for more than 60 days, either Party may terminate this Agreement.

**f. Governing Law.** This Agreement shall be governed and construed by the laws of the state of Delaware, without regard to its conflict of laws principles.

**g. Insurance.** Each Party agrees to keep in full force and effect during the Term of this Agreement (i) commercial general liability insurance with individual policy limits of not less than \$1,000,000 per occurrence, and \$2,000,000 in the aggregate; (ii) worker's compensation insurance covering such Party's employees in an amount not less than required by law; and (iii) all risk property insurance on a replacement cost basis. Customer's insurance shall be primary over Element Critical's. Customer waives and shall require its insurers to waive any rights of subrogation on all policies referenced above.

**h. Notices.** All notices, consents, approvals or other communications required by this Agreement will only be effective if in writing and sent by (i) certified or registered mail, postage prepaid; (ii) overnight delivery requiring a signature

upon receipt; (iii) delivery by hand; or (iv) electronic mail to the Parties at the respective addresses in this Agreement or as otherwise designated in writing by the Parties. Notices are effective (a) three business days after deposit in the mail, (b) the next day if delivered by commercial overnight courier, and (c) the same day if delivered electronically.

**i. No Waiver; Severability.** The failure on the part of either Party to exercise any right or remedy hereunder will not operate as further waiver of such right or remedy in the future. The provisions of this Agreement are severable. If any provision is determined invalid, illegal or unenforceable, in whole or in part, then such provision shall be modified so as to be enforceable to the maximum extent permitted by law. If such provision cannot be modified to be enforceable, the provision shall be severed from this Agreement to the extent unenforceable. The remaining provisions and any partially enforceable provisions shall remain in full force and effect.

**j. No Third Party Beneficiaries.** No person or entity, other than the Parties shall be a direct or indirect beneficiary of, or shall have any direct or indirect cause of action or claim in connection with, this Agreement.

**k. Relocation.** If it is necessary for Element Critical's efficient use of the data center to relocate Customer to another area in the data center, the Parties agree to work together in good faith to facilitate such relocation. Customer shall be provided not less than at least 60 days prior written notice and the reasonable out of pocket moving costs for any such relocation by Element Critical shall be Element Critical's responsibility. Element Critical will use commercially reasonable efforts to minimize and avoid any interruption in Services during a relocation.

**l. Estoppel Certificates.** Within ten (10) days after receipt of request from Element Critical, Customer will execute and deliver to Element Critical a written estoppel certificate in a form prepared by Element Critical certifying: (i) that this Agreement is unmodified and in full force and effect (or, if modified, specifying modification(s)); (ii) the commencement date and the expiration date of the Term of this Agreement and/or any Customer Order Form; (iii) the absence or status of any rights of Customer to alter the Term or to license additional space; (iv) the date to which recurring charges and any other charges have been paid; (v) that, to the best of Customer's knowledge, there are no uncured breaches or defaults on the part of Element Critical under this Agreement, or stating the nature of any uncured breaches or defaults; and (vi) any other information reasonably requested by Element Critical.

**n. Subordination.** All rights of Customer hereunder are and shall be subject and subordinate in all respects to all security interests on, in, and with respect to the data center and in the assets of Element Critical. This Section shall be self-operative and no further instrument or subordination shall be required. In confirmation of such subordination, Customer shall promptly execute, acknowledge, and deliver any instrument that Element Critical may require to evidence such subordination. Customer covenants and agrees not to execute any security agreements, Uniform Commercial Code financing statements, chattel mortgages, conditional bills of sale, leases, or other title

retention agreements, or any modifications, extensions, replacement or amendments thereto, in connection with the purchase of, or covering or affecting, any fixtures, equipment, or personal property used at the data center, except to the extent the same relate only to Customer owned equipment: (a)

which does not constitute a fixture or part of the data center under applicable laws; and (b) the removal of which will not damage the data center.

**IN WITNESS WHEREOF**, the undersigned parties have caused this Agreement to be executed by their duly authorized representatives, effective as of the Effective Date. This Agreement may be executed in duplicate and either copy or both copies are considered originals.

<b>Customer Name:</b>	<b>Tyson's Enterprise West, LLC DBA Element Critical</b>
<b>Signature:</b>	<b>Signature:</b>
<b>Name:</b>	<b>Name:</b>
<b>Title:</b>	<b>Title:</b>
<b>Email:</b>	<b>Email:</b>
<b>Signature Date:</b>	<b>Signature Date:</b>
<b>Address for Notice Purposes:</b> Customer Name: Address: Attention:	<b>Address for Notice Purposes:</b> Element Critical 7990 Quantum Drive Vienna, VA 22182 U.S.A. Attention: Corporate Controller With a copy to: General Counsel

## ATTACHMENT 1 - SERVICE LEVEL AGREEMENT

The purpose of this Service Level Agreement (“SLA”) is to define the measurable performance levels for the provision of Element Critical Services and specify remedies available to Customer if Element Critical fails to achieve these levels. Element Critical will use commercially reasonable efforts to provide the Services in accordance with the Service Levels set forth below.

### 1. Service Level Policies.

- (a) A violation of this SLA will not constitute a default under the MSA. In the event Element Critical does not meet the performance level in the Service Level Agreement set forth in this Attachment 1 (“**Service Levels**”), as Customer’s sole and exclusive remedy, and Element Critical’s sole liability for not meeting the performance objective, Element Critical shall provide the Service Level Credits in the manner specified in the SLA (“**Service Level Credits**”). Element Critical will process Service Level Credits for failures to satisfy a Service Level (“**Events**”) as set forth in the applicable SLA. Customer waives all remedies other than those expressly set forth in this SLA.
- (b) Once an event begins, it continues until it is resolved by Element Critical. Intermittent failures during which Service Levels may fluctuate do not give rise to multiple Service Level Credits or constitute multiple Events under section 5. For clarity, in no case can the same failure to maintain the Service Levels with the same cause constitute more than one event per 24 hour period.
- (c) If an Event has occurred which qualifies for a Service Level Credit, Customer must notify Element Critical via [billing@elementcritical.com](mailto:billing@elementcritical.com) or to Billing at the address specified herein for notice, and provide details pertaining to the Event within 30 days of the occurrence. If Customer does not notify Element Critical within the required time period, Customer forfeits any right to claim that a Service Level Credit is due. For the purpose of calculating whether a Service Level Credit may be due, and the duration of an Event, Element Critical will calculate time periods beginning from the earlier of (a) Element Critical’s actual awareness of the event; or (b) the point where Element Critical should reasonably have been aware of the event until the point where Element Critical has resolved the Event. Unless otherwise noted, the performance objective will be based on the full calendar month of Service since the last renewal period in which the Event occurs. The maximum Service Level Credits that may be earned for any calendar month shall not exceed 100% of the portion of the MRC of the affected Services stated in the Order. Any excess Service Level Credits are forfeited and shall not be carried over to future months.
- (d) Except as otherwise expressly provided in this SLA, Element Critical shall not in any way be liable or responsible to Customer for any loss, damage or expense which Customer may sustain or incur as a result of the unavailability of or interruption in any Service Level, the unavailability or interruption in the supply of electric current, a change in the quantity or character or nature of such current, fluctuations in the temperature or humidity, any Unauthorized Access, or the unavailability of or interruption in any cross connection. Except as otherwise expressly provided in this SLA, any such change, interruption or unavailability shall not constitute an actual or constructive eviction, in whole or in part, or entitle Customer to any abatement or diminution of, or relieve Customer from any of its obligations under the Agreement, or impose any liability upon Element Critical or its agents, by reason of inconvenience or annoyance to or interruption of Customer’s business, or otherwise. A breach under this SLA shall not constitute a default under the Agreement.
- (e) Notwithstanding anything to the contrary herein, (x) if one or more Service Level failures arise out of any other Service Level failure, all such interruptions and failures shall be collectively treated as a single Service Level failure for purposes of this Agreement, and all credits shall be determined based upon the single applicable Service Level failure with the highest credit; and (y) subject the foregoing clause (x), in the event that one occurrence or set of circumstances gives rise to credits under more than one (1) Section of this SLA, only the largest credit shall be available to Tenant.

2. SLA Exclusions. Service Levels and Service Level Credits apply only to Customer and not to any customers of Customer or to any other party. Customer is not entitled to any Service Level Credit if Customer (a) has not paid all undisputed Fees due, (b) is in breach of this Agreement, or (c) has failed to provide Element Critical appropriate access to enable Element Critical to provide Services. In addition, Element Critical shall have no liability to provide the Services in accordance with any applicable Service Level or to provide any Service Level Credits if the failure to provide the Services in accordance with the Service Level is due, to any of the following:

- (a) **Activation Date.** Events occurring before the Service Commencement Date.
- (b) **Element Critical Internal Maintenance.** Periodic repairs, upgrades and modifications to shared core infrastructure scheduled for off-peak hours in the applicable region if Element Critical provides notice at least seven (7) calendar days in advance (“Scheduled Maintenance”).
- (c) **Customer Acts.** Matters caused by Customer acts or acts of others engaged or authorized by Customer, including without limitation, any negligence or willful misconduct or any breach of the MSA, any breach of any Element Critical’s Policies and



Procedures, and the tripping open or malfunctioning of a circuit breaker as a result of Customer or any of Customer's end users, invitees, or customers overloading the circuit.

- (d) **Customer Maintenance.** Repairs, upgrades, scheduled or Customer-requested service interruptions or modifications to a Customer Service, scheduled in advance or in connection with a previously-agreed upon routine schedule.
- (e) **Customer Provided Equipment.** Matters caused by or related to Customer provided equipment failure, malfunction or configuration changes or failure to comply with facility installation guidelines.
- (f) **False Failures.** Erroneously reported outage or issue, failures reported as a result of outages or errors of a Element Critical measurement system or failures resulting from Service monitoring or testing performed to simulate a failure.
- (g) **Non-Standard Configuration.** Matters which would otherwise be an Event but for a Customer-requested non-standard or unsupported configuration including but not limited to use of power not supported by the data center UPS system and failure to align equipment to designated hot and cold aisles. For clarity, a non-standard configuration of power would invalidate the Service Level obligations related to power but not to environmental envelope. Non-standard configurations include, without limitation, any Customer configuration which violates the standards set forth in Element Critical's Data Center Policies and Procedures or which Element Critical specifies as such at the time of ordering.
- (h) **Other.** Events arising out of Force Majeure or casualty and any access to Customer's cage, cabinet or rack that is the result of a use of a weapon or threat of legal proceeding (e.g., use of a warrant).

3. **Amendments to the SLA.** Element Critical reserves the right to amend the SLA. Element Critical shall give Customer not less than 30 days' notice of any changes in the SLA. Upon receipt of such notice, Customer shall have the right, for a period of 30 days thereafter, to terminate the affected Services if Customer disagrees with such amendment.

#### 4. **Service Performance Levels**

(a) **Provision of Services.** Element Critical will provide Customer with colocation and power services (the "**Colocation Services**") in accordance with the terms and conditions contained herein for the term set forth in the Order. If Element Critical is unable to commence providing Colocation Services by the Service Commencement Date, at Customer's request Element Critical will credit Customer's account in the amount of 5% of the setup fee (non-recurring charge or "NRC") set out in the Order for each day the Services are delivered late up to a maximum of 50% of the NRC.

(b) **Scheduled Maintenance.** Except in the case of an emergency, Element Critical will provide Customer with seven (7) calendar days' notice of Scheduled Maintenance. If Element Critical fails to provide the appropriate notice, Customer will be entitled to a credit to Customer's account in the amount of the pro-rated fee for the provision of one day of Colocation Services. Element Critical will endeavor not to perform Scheduled Maintenance more than 12 times in any calendar year and not exceed a total of 12 hours in any calendar year in any individual data center. For each data center in which Customer has a presence, Customer will be entitled to receive a credit to Customer's account in the amount of one week of pro-rated Colocation Services Fees for each Schedule Maintenance event beyond 12 and entitled to receive a credit to Customer's account in the amount of the pro-rated fee for one day of Colocation Services for each hour of Schedule Maintenance beyond 12 hours in a calendar year.

(c) **Power Availability.** Except as otherwise stated herein, Element Critical will use commercially reasonable efforts to ensure that the critical data center power infrastructure supporting the Colocation Services will be available 100% of the time. If Customer has purchased power circuits of the same size, delivered from two different power paths and designated as primary and redundant power service ("**Redundant Circuits**") and both power services are unavailable at the same time within the Customer environment due to a failure of the data center's critical infrastructure, Customer shall be entitled 3% of the portion of the MRC for the affected Service at the point the Service became unavailable and 3% for each 60 minute increment of downtime from the point of initial violation, up to 100% of the MRC for the affected Service. Power availability will be determined by Element Critical's monitoring system at the point of demarcation. The point of demarcation for the Customer's environment for the purposes of power availability will be the power receptacle at Customer's cage, cabinet, rack or suite and does not include Customer's electrical connections within its cage, cabinet, or rack.

(d) **Environmental Envelope.** Element Critical will use commercially reasonable efforts to ensure that the supply average air temperature in the cold aisle in the Element Critical data center will remain between 64.4 and 80.6 degrees Fahrenheit, and relative humidity will remain between 25% and 65%. Such commitment does not apply during scheduled maintenance, or as requested by Customer, or to localized conditions within a particular Customer cage, cabinet, or rack. If the data center's environmental envelope falls outside the specified ranges in the aggregate in any calendar month, Customer shall be entitled 3% of the portion of the MRC for the affected Service at the point the Service fell outside the specified range and 3% for each 60 minute increment during which

the data center continues to operate outside the environmental envelope parameters from the point of the initial violation, up to 100% of the MRC for the affected Service.

**(e) Physical Security.** Element Critical will use commercially reasonable efforts to ensure that access to Customer's cage, cabinet or rack will be monitored and controlled at all times. In the event of any Unauthorized Access to Customer's cage, cabinet or rack, Customer will be entitled to 25% of the portion of the MRC for the affected Service for each such occurrence, up to 100% of such portion of the monthly recurring Colocation Services Fees for the affected Service. For determining Unauthorized Access, multiple simultaneous or concurrent event will be considered a single Unauthorized Access notwithstanding that multiple persons may have simultaneously accessed the cage, cabinet or rack in an unauthorized fashion. "Unauthorized Access" means access into Customer's cage, cabinet or rack by a person that is not (i) a person on Customer's access list delivered to Element Critical and updated pursuant to Element Critical's Policies and Procedures, (ii) an employee or contractor/subcontractor of Element Critical performing Services, (iii) an emergency responder responding to an emergency or to an event that could give rise to Element Critical liability under the SLA, or (iv) a person gaining access through a warrant or other legal process.

**(f) Cross Connect Availability.** Element Critical will use commercially reasonable efforts to ensure that cross connections will be available at all times. A cross connection is considered to be unavailable when the physical media used to provide the connection fails and is unable to support communication between the end points. In the event that a cross connection becomes unavailable, Element Critical commits to restoring the connection within 4 hours of Customer's notification of Element Critical Data Center Operations at either 408-809-5474 or NOC@Element Critical.com. Should Element Critical fail to restore the cross connection within 4 hours of notification, Customer will be entitled to receive a credit of one month's recurring revenue for the affected Service.

## **5. Service Credit Escalators and Other Remedies**

**(a) Second Event.** Element Critical will pay out Service Credits at 200% of the amounts listed above in sections 4(c), (d), (e), and (f), up to 100% of the MRC for the affected Service, for the second qualifying Event of the same Service Level with the same root cause during a calendar month.

**(b) Chronic Trouble.** Customer may terminate an Order for cause if Customer experiences "Chronic Trouble" under an applicable SLA for the Services in such Order. Chronic Trouble means Customer has experienced more than three Events with the same Service, as determined by Element Critical acting reasonably, within a 90-day period measured from the date of the first Event. Additionally, if a Service Level violation specified in sections 4(c) Power Availability or 4(d) Environmental Envelope, persist for more than 72 consecutive hours, Customer may terminate the Order containing the affected Service(s) but not this Agreement, for cause. Customer must give written notice of their intent to terminate the affected Services within 30 days of the Event or 72-hour Event triggering Chronic Trouble. Said termination will be Customer's sole and exclusive remedy for the applicable Chronic Trouble or 72-hour Event. Said termination will take effect 30 days after Customer gives Element Critical the termination notice.