



Application Support Services End User Agreement

This **APPLICATION SUPPORT SERVICES END USER AGREEMENT** (this "**End User Agreement**") is entered into by and between Flexential Corp., a Delaware corporation formerly known as Peak 10, Inc. or one of its affiliated entities including without limitation Flexential Colorado Corp., a Colorado corporation formerly known as ViaWest, Inc. ("**Flexential**") and the entity purchasing the Application Support Services (as defined below) ("**Customer**") pursuant to a written agreement with Flexential. This End User Agreement is made a part of that certain Master Services Agreement, or other written agreement, pursuant to which Customer receives information technology services from Flexential (the "**MSA**").

1. **Definitions.** Capitalized terms not defined herein shall have the meaning set forth in the MSA. The "**Application Support Services**" means those services designated as Application Support Services in the applicable Exhibit A or Change Order. "**Third Party Products**" means third party hardware and/or software identified on an Exhibit A or Change Order as being provided by Flexential to Customer.
2. **End User Agreement.** To provide the Application Support Services, Flexential may utilize one or more third party service providers (each, a "**Provider**"). For purposes of this End User Agreement, the term "Flexential" includes any "Provider". Customer's use of the Application Support Services is subject to the following terms and conditions.
 - a. **Cooperation.** Customer will provide reasonable cooperation to Flexential and/or Provider to assist in provisioning of the Application Support Services.
 - b. **Indemnification.** In addition to its indemnification obligations in the MSA, Customer shall defend, indemnify and hold harmless Flexential, and any Provider and their respective officers, directors and employees (collectively, the "**Indemnified Parties**") against any and all losses, costs, obligations, liabilities, settlement payments, fines, penalties, damages, expenses or other charges, (collectively, a "**Loss**" or "**Losses**") that such Indemnified Parties incur, to the extent that such Loss (i) arises out of any material breach by Customer of any provision of this End User Agreement or the MSA; (ii) Customer's negligence or willful misconduct; (iii) Customer's illegal use of the Application Support Services; and/or (iv) arises out of or relates to any claim that materials or specifications provided by Customer violate, infringe or misappropriate any U.S. published patent, copyright or trademark of any third party.
 - c. **Return of Property.** in the event of termination of the Application Support Services, this End User Agreement and/or the MSA for any reason, Customer shall immediately return to Flexential all software, access keys, equipment, and any other property provided to Customer.
 - d. **Warranties and Disclaimers.** Flexential warrants that Application Support Services will be provided in a good, professional and workmanlike manner. In addition to all disclaimers in the MSA, Flexential expressly disclaims all implied warranties or conditions of merchantability or fitness for a particular purpose, as well as all warranties that may arise from course of dealing, course of performance or usage of trade. Third-Party Products are provided "as is," without warranty of any kind, expressed or implied. In no event shall Flexential be liable for any damages or other liability, whether in contract or otherwise, arising from, out of or in connection with the Third Party Products or the use thereof.
 - e. **Limitation on Damages.** In no event shall either party be liable to the other for any speculative, indirect, special, punitive or consequential damages, including but not limited to lost profits or lost revenue, even if advised in advance of the possibility of such damages, in connection with performance under this End User Agreement. In no event shall Flexential's or a Provider's liability in connection with the Application Support Services exceed the amount paid by Customer to Flexential for the Application Support Services within the immediately preceding twelve (12)-month period.
 - f. **Intellectual Property.** All trademarks, service marks, patents, copyrights, trade secrets and other intellectual property rights in or relating to any materials provided by Customer to Flexential or a Provider (collectively "**Materials**") hereunder are and will remain the exclusive property of Customer or its suppliers, whether or not specifically recognized or perfected under applicable local law. Customer will own all rights in all derivative works of the Materials and any copy, translation, modification, adaptation or derivative work of the Materials provided Flexential has been paid in full by Customer. All trademarks, service marks, insignia, symbols, or decorative designs, trade names, domain names, and other symbols and devices associated with a Provider's products ("**Provider Marks**") are the sole property of the Provider in question. Customer acknowledges and agrees that it: (i) has no right to use the Provider Marks without the applicable Provider's prior written consent; and (ii) will take no action which might derogate from the Provider's rights in, ownership of, or the goodwill associated with such Provider Marks. Upon payment in full of all amounts due for the applicable Application Support Services, Flexential grants to Customer and Customer accepts a non-exclusive, non-sublicensable, non-transferable, perpetual, paid-up, royalty-free license to

use, copy, modify, translate, configure, adapt and prepare derivative works of the Application Support Services and any work product(s) or deliverable(s) provided as part of the Application Support Services, all provided that Customer does not resell such materials.

- g. Confidentiality. Information disclosed by a Provider to Customer in connection with the delivery of the Application Support Services will be considered confidential information and will be treated as set forth in the MSA.
 - h. Data. The Application Support Services may include access to Customer's data. Customer will not provide Flexential or Providers any access to any regulated data, including, without limitation, protected health information as defined in the Health Insurance Portability and Accountability Act, or personally identifiable information. If Customer desires to provide access to any such regulated information, Customer will promptly notify Flexential in advance and the parties will either agree to an appropriate modification to this End User Agreement and/or the MSA or Flexential will cease providing the Application Support Services. If Customer provides access to such regulated data in violation of this Section, Customer acknowledges and agrees that neither Flexential nor any Provider assume any liability with respect to such data and such access will be considered a breach by Customer of this End User Agreement.
3. **Conflict**. Except as otherwise provided herein, in the event any term or condition of this End User Agreement shall conflict with or be inconsistent with any term of the MSA or any other amendment or exhibit to the MSA, the terms of this End User Agreement will control. All other terms and conditions of the MSA and any other amendment or exhibit to the MSA shall remain in full force and effect.