ARNOLD & PORTER

Managing Performance with Benchmarks and Service Levels

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MANAGING PERFORMANCE WITH BENCHMARKS AND SERVICE LEVELS

I. INTRODUCTION

Service levels and benchmarking help to assure good service at reasonable cost as technology and customer requirements evolve.

A. SERVICE LEVELS

Service levels are quantitative measures of performance, such as system availability and user satisfaction. Unexcused failures may oblige the supplier to pay liquidated damages. Service levels serve several purposes:

- Set expectations, on both sides, at the outset.
- Deter, and compensate the customer for, poor performance.
- Assure attention to customer priorities.
- Help both sides to identify incidents and trends, manage performance, and when necessary, take corrective action.

B. BENCHMARKING

Benchmarking is an assessment of quality and cost against the marketplace. Customers want assurance that, during the contract term, quality and costs meet evolving market standards. Historically, computing performance has improved, even as costs have declined. Benchmarking engages an independent firm to measure charges and performance against prevailing market standards. Sometimes the supplier must meet the market or risk early termination.

This paper examines benchmarking and service levels, their application to both IT and business process outsourcing, key terms, and their relationship with other provisions of an outsourcing contract.

II. SERVICE LEVEL BASICS FOR IT

Some years ago, corporate IT departments began to document, measure and report performance to their internal customers. These internal commitments were called "service level agreements." The practice spread to commercial outsourcing.[1] Outsourcing contracts often include dozens of service levels. At least a few are usually labeled "critical" and cost the supplier money if they are missed. Others are measured and reported for management purposes, but have minimal, if any, financial consequences. Serious failures must be investigated, in order to determine causes and (hopefully) prevent recurrence.

A. COMMON METRICS

Service level schemes vary, depending upon the scope and scale of the contract, customer requirements and other factors. Generally, they are objective, quantifiable, repeatable measures of matters within the supplier's responsibility, such as the performance of systems, the resolution of incidents or service requests, or the volume and accuracy of transactions and other outputs. The following examples illustrate some of this variety, and are fairly typical (but by no means exhaustive).

1. Computing and Network Services

- *Availability of systems*, typically measured as a percentage of scheduled availability, excluding maintenance windows and other scheduled downtime. There may be separate measurements for various computing platforms or for specific applications. Precise definitions are essential. Availability may mean availability of a computer and operating system, or availability of applications with relevant data. It may be measured on an average basis (e.g, for all servers) or for individual machines, or both. It may be measured at the host computer, or across a network. [2]
- *Network availability*, also expressed as a percentage of scheduled availability, and with precise definitions for the network and measurements.
- *Response time* for particular computing functions, measured at the host computer or across a network.
- *Response time for repairs*, measuring the time required for technicians to respond to incidents, generally classified according to severity (e.g., X%

[1] The term persists, although specific service levels are not, strictly speaking, agreements and the tables and metrics appended to outsourcing contracts are not separate contracts. Nonetheless, people commonly refer to "service level agreements" or "SLAs."
[2] *See §III. C. , infra.*

of Priority 1 Incidents within one hour; Y% of Priority 2 Incidents within two hours).

- *Resolution time*, meaning actual time not merely to respond, but to repair. Resolution time is measured and reported in much the same way as time to repair, but with longer times (e.g., respond within 1-2 hours, and finish repairs within one business day).

2. Desktop Services

- *Completion of moves, adds and changes* ("MACs"), measured as a percentage completed on schedule.
- *Installations* of systems, or setup for new users, also measured as a percentage completed on schedule.
- *Inventory accuracy*, measured by periodic reconciliation against physical inventory, expressed as a percentage.
- *Response and resolution times* for repairs and incidents (as described above).

3. Help Desk

- *Average speed to answer*, measuring the percentage of calls answered by a live analyst within a time limit (e.g., X% within Y seconds).
- *Call abandonment*, measuring the percentage of callers who hang up rather than remain "on hold" in a queue (e.g., not more than X% of calls).
- *First call resolution*, measuring the percentage of problems resolved through a single call to the help desk, expressed as a percentage of calls. Calculations may exclude calls incapable of resolution in a single call, such as those requesting dispatch of a technician or multiple calls about a single outage.

4. User Satisfaction

Many customers consider user satisfaction exceptionally important. For suppliers, user satisfaction and surveys can be touchy, because users' opinions are (inevitably) subjective. Some expressed dissatisfaction may reflect annoyance with the disciplines and processes imposed by outsourcing, or with the decision to outsource, rather than the quality of the service. Surveys are often conducted by outside firms, using questions approved by both sides, and measuring satisfaction against a baseline assessment conducted before or shortly after the contract was signed. Some surveys deal separately with ordinary users, the customer's IT organization, and its executives. Often, questionnaires are developed jointly, or at least with approval from the other party.

5. Transactions

Transactions – such as shipments, deliveries or payments – can be excellent measures of performance, since they reflect actual impact upon the business, and often capture performance of several related functions. Punctual delivery of shipping instructions to a warehouse, for example, may require efficient operation of servers, applications, networks, user workstations, and so on. If everything works, a very high percentage of customer orders should reach the warehouse on time. Calibration should reflect the performance of the least reliable element in the chain. However, since these metrics are specific (even unique) to particular companies, they may be difficult to compare against any industry standards. On the other hand, because some of these activities are critical to the customer's business, failures may justify substantial financial consequences.

B. MEASUREMENT AND REPORTING

Service levels are measured and reported periodically, usually monthly or quarterly. Some are measured during business hours or other peak periods, and others are measured around the clock, seven days a week (excluding agreed maintenance periods). Many are measured automatically. Sophisticated equipment, for example, tracks calls to the help desk, their duration, the time to answer and other particulars. The supplier's trouble-ticket or tracking software for help desk calls will report when calls are received and incidents resolved. Many computers produce regular measurements and reports of their performance. Suppliers generally provide much of this data to the customer in monthly reports. Ideally, measurements should be objective, automatic and inexpensive to obtain. Often the data is equally available to both sides, or can be provided to the customer's management in real time on a read-only basis. In all cases, the parties should satisfy themselves that performance can be measured easily, inexpensively and accurately.

C. ESTABLISHING SERVICE LEVELS

To negotiate effective service levels, the customer must first decide what matters to its business, and how relevant performance can be measured. Preparation should begin long before a contract is awarded, with thorough analysis of the company's present performance and needs, and users' preferences. Surveys of user satisfaction before outsourcing provide a good yardstick for measuring a supplier's performance, and help the customer to know its own collective mind: What works well? Where is improvement needed? What matters most to individual users, senior management, or leaders of key business units? Armed with this information, the customer's negotiating team is better prepared to propose and negotiate service levels with prospective suppliers of outsourced services.

Where possible, service levels should be fixed before the contract is signed, rather than afterward. Customers want tangible commitments to quality while they retain negotiating leverage, before an outsourcer assumes responsibility for operations. Quality costs money, so suppliers need to know what standards will apply before prices are fixed. Neither party will want to begin the relationship with a debate. There are several possible bases for calibration of service levels, including:

- The customer's own operations, if adequately documented. This measure is generally most appropriate where the supplier takes over existing operations, and keeps them in place – if existing quality is good. Where current operations are inefficient, historic data may set the bar too low. Sometimes, historic data is incomplete or missing.
- The supplier's own standards for services delivered to other customers. This is particularly appropriate for operations transferred to the supplier's service center. If the supplier's help desk routinely answers 80% of help desk calls within 60 seconds, the customer will expect comparable performance.
- Market standards, established as presumptive service levels, and validated during a transition period. Preliminary service levels are fixed at levels the parties think achievable, then measured during the transition period. If they are consistently achieved, they become effective after the transition period. If not, the supplier recommends corrective action, which may require investment by the customer. If the customer declines to make those investments, service levels are fixed at levels that can be consistently achieved. This method is often suggested when historic data are lacking.

- As a last resort, service levels can be agreed upon after signing, but the customer's negotiating leverage diminishes when the outsourcer assumes responsibility for operations. Where the parties disagree, mediation or other expert intervention may help, and in the worst case, the contract may permit early termination if satisfactory service levels cannot be agreed – but such a drastic, disruptive remedy will rarely be attractive.

D. CLASSIFYING SERVICE LEVELS

Of the dozens of service levels commonly measured and reported, only a few are usually identified as "critical service levels" that, if missed, expose the supplier to financial liability – generally because failures would have serious effects upon the business. Network outages and failures of key systems that disrupt production exemplify the kinds of service levels often classified as "critical."

In practice, critical service levels are rarely missed. Suppliers pay attention to critical services (at least in part because of the financial consequences), and never sign up for standards they cannot routinely meet.

Difficulties more often arise with services of lesser importance, where mediocrity may irritate users, but cannot seriously disrupt the customer's operations (or, except in extreme cases, constitute material breach sufficient to justify default termination). Long delays at the help desk, interruptions in electronic mail, bungled service calls and other such irritants can cause almost as much frustration as more serious, but rare, failures of major systems. To police this risk, the form attached has a second category: "standard service levels" that are measured and reported monthly, but bear only modest financial consequences. If the same standard service level is missed repeatedly, or large numbers are missed (X failures in any single month, or Y failures within any Z consecutive months), the supplier must pay a modest amount as liquidated damages. The principle is familiar to any motorist: parking tickets cost less than speeding, but are not free.

Sometimes service levels are classified in tiers, with minimums (which cannot be missed without consequences), normal or expected service levels (par, expected every month), and more aggressive targets (which might, if exceeded, permit the supplier to collect incentive payments or "bank" credit against future failures).[3] Thus 99.9% availability may be the target, 99% the norm, and 98% the minimum, below which credits are paid.

Finally, incidents or failures are often classified according to priority or severity. Formulations vary, but usually there are at least three classes: (i) the most serious outages that shut down business operations, (ii) those affecting groups of users that disrupt but do not stop operations, and (iii) incidents affecting isolated users.

E. SERVICE CREDITS

All failures should be investigated, reported and reviewed for appropriate corrective action. Failures to meet critical service levels cost money (unless they are excused as consequences of *force majeure* events or the customer's acts and omissions).[4] Business people commonly refer to these payments as "penalties." Most contracts refer to these payments as "credits" and treat them as liquidated damages.[5]

The amount paid may be a lump sum, a percentage of the monthly charge, or the product of a more complex formula. However determined, the amount involves implicit or explicit weighting based upon the importance of a particular function or service to the customer's business. The more significant the failure, the more it will cost. Repeated or multiple failures may cost even more (for example, if the same failure recurs, or more than one critical service level is missed in a single month).

The accompanying form computes credits as percentages of an "amount at risk" available for payment of credits, expressed as a percentage of the supplier's monthly charge. Thus, if 10% of the bill is "at risk" and a particular service level bears a 40% credit percentage, the credit paid for a failure would be 40% of the 10% at risk, or 4% of the monthly charge.

However the credits may be calculated, potential exposure is typically circumscribed by limits upon:

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[3] The reader should bear in mind that complexity here, and in the calculation of credits, complicates reporting and administration for customer as well as supplier. Complex, sophisticated structures are not always worth the time and trouble.

[4] *See II. F. , infra, concerning excused failures.*

[5] A few practitioners characterize these payments as "fee reductions," but there is little practical difference.

- *Total Payments.* This is the supplier's maximum financial exposure, typically expressed as a percentage of the monthly charge. The outsourcer could miss several service levels, but never pay more in credits than this ceiling.[6] Negotiated ceilings commonly approximate the supplier's expected profit margin.
- *Numbers of Critical Service Levels.* Many service levels may be measured and reported, but usually only a few bear significant financial exposure. The appropriate number will vary with scope, scale and other circumstances, but does not often exceed 10-15, and may be less.
- *Individual Credits*. No single failure can cost more than an agreed percentage of the monthly charge, typically a fraction of the monthly maximum or amount at risk.
- *Gross Amount – All Credits.* The potential total of all credits will generally exceed the monthly maximum, but not a higher aggregate ceiling. For example, if there were ten critical service levels, averaging 3% of the supplier's monthly charge, the aggregate maximum would be 30% of the monthly charge (subject, of course to the monthly maximum).

Taken together, these limitations assure that credits "bite" but are not punitive. A contract might provide, for example, that: (i) there can be no more than ten critical service levels, (ii) totaling 30% of the monthly charge; (iii) payments in any single month cannot exceed 10% of the monthly charge; and (iv) no single credit can exceed 5% of the monthly charge. Where the contract structure is based upon largely separate categories (or "towers," as they are known) of service (such as mainframe, midrange, and desktop) these calculations could be based upon charges for relevant services, rather than the supplier's total charge.[7]

Credits may be the sole remedy, or at least the sole monetary remedy, for unexcused failures to meet service levels. However, customers commonly (and appropriately) reserve the right to recover their full damages (up to negotiated

6 Numerous, serious failures might, of course, constitute material breach and justify default termination of the contract. In such circumstances, the customer may usually recover its full damages (less any service credit payments), subject to contractual limits on liability. Most outsourcing contracts limit total liability to a fixed sum or formulaic limit, subject to some narrow exceptions for such things as willful misconduct, and preclude recovery of consequential damages.

7 Calculations based on charges usually exclude one-time or project charges (e.g., for implementation of a new system, or outfitting a new location).

limits on liability) where those failures constitute or contribute to material breach of the entire agreement. In cases of material breach or default termination, the customer will want to recover more than the comparatively modest service credits.

F. EXCUSED FAILURES

Not all failures are the supplier's fault. Accordingly, no credits should be paid for failures beyond the supplier's control, such as:

- *Force majeure* events (excluding, of course, failures to have or use normal precautions, such as backups, emergency power, fire suppression systems and the like). Contracts may excuse interruptions and other failures to meet service levels after an actual emergency, while operating from an emergency or recovery site.
- Acts or omissions of the customer, its employees, agents and contractors, such as:
    - User errors,
    - Violations of law,
    - Breaches of the agreement (including failures to discharge customer responsibilities),
    - Breaches of agreements with third parties,
    - Infringements,
    - Reductions requested or approved by the customer,
    - Customer failures to take corrective action, or make necessary investments that are reasonably necessary to keep its systems, capacity and the like up-to-date, and
    - Unexpected surges in demand.

Not all of these are standard, and exceptions may be heavily negotiated, but most contracts limit the outsourcer's responsibility and exposure to matters within its reasonable control.

III. REFINEMENTS & SUBTLETIES

A. SERVICE LEVEL ADJUSTMENTS

Technology, business requirements and much else will evolve during the contract term. Performance standards improve. Many PC users remember when “ancient” 286, 386 or 486 chips were greyhounds. How then can a customer keep pace, and have confidence that service represents current standards? Contracts often require suppliers to use current, or near-current systems, but they may also contemplate, and even require, changes in specific measures of quality, including service levels.

1. Adjustment by Agreement

Outsourcing contracts normally contemplate periodic (and at least annual) joint reviews of service level performance and possible adjustment by mutual agreement, often through approved changes. Sometimes these exercises are forgotten or overlooked after the contract is signed and filed away. Major changes, such as the introduction of new systems, often involve adoption of appropriate service levels, or substitutions for or adjustments of service levels. However, these kinds of changes require agreement. They are not automatic, and some may affect charges.

2. Adjustment by Customer Discretion

Contracts may allow the customer to make modest adjustments (for example, to increase the amount of a particular credit) or to substitute non-critical and critical service levels, within limits. Suppliers may accept this kind of flexibility so long as overall risk is adequately contained. For example, a contract might allow the customer, once or twice a year, to adjust a limited number of service levels, or to re-designate some secondary service levels as critical, provided: (i) the monthly ceiling remains in place, (ii) the aggregate total of all potential credits remains fixed, and (iii) the total number of critical service levels does not exceed an agreed figure.

3. “Ratchets” and “Escalators”

Customers increasingly seek assurances that service will improve during the contract term. An agreed plan to upgrade technology may, for example, justify a schedule of progressive improvements. Occasionally, contracts automatically adjust service levels to reflect actual, sustained improvements in performance. If so, the suppliers will tend to insist upon some margin for error, or ceiling upon potential requirements. Otherwise several months of exceptional performance could become an overly aggressive standard. Even the late Ted Williams hit .406 only once. Some assured improvements may be conditioned upon customer investments in its systems and infrastructure, or other dependencies.

B. SUPPLIER INCENTIVES

Suppliers often propose offsetting incentives, partly in hopes of mitigating their risks. These may take many forms, including the following:

- Cash payments for superior performance, such as consistent achievement of service levels, or more aggressive "target" levels;
- Non-cash "credits" against future failures based on consistent achievement of service levels; and
- "Earn-backs" that erase or forgive credits if failures are corrected in the months following a failure.

Many variations are possible. The greater the supplier's exposure, the greater its interest in incentives, earn-backs or other mitigation of that exposure. Sophisticated customers may tie incentives to tangible benefits to the business, such as more rapid collections or shipments. The difference between 99.5% and 99.9% availability of an e-mail server may not translate into any benefit to the customer's business. However, sustained superior performance across all service levels may justify incentive payments, on the theory that a supplier who routinely meets or exceeds all service levels is likely to be performing well.

C. DEFINITIONS –THE DEVIL IN THE DETAILS

Pains should be taken defining service levels, and especially the ways in which they are measured. For example:

System availability may mean availability of the operating system or applications, with or without relevant data, measured at the host computer, or across a network.

Server availability may be measured in the aggregate (e.g., total time for all servers, less outages). If there are hundreds of servers, one or two could fail frequently without affecting average availability. Many customers propose aggregate and individual parameters (e.g., 99% availability on average, but no more than X hours of unscheduled downtime for any one machine). Sometimes servers are grouped according to their importance, with tougher standards for machines that host critical applications. Downtime excludes regular maintenance periods (commonly scheduled during off-peak periods, such as the small hours of weekend mornings).

Calls to the help desk may mean telephone calls (measured by automatic equipment), or may include facsimiles, e-mail messages and web inquiries. Each may be measured somewhat differently. Measurements of response time, repair time and the like commonly commence when a help desk analyst logs the inquiry into its tracking software by opening a "trouble ticket."

First call resolution commonly excludes requests to dispatch technicians or other calls incapable of resolution in a single call, such as those transferred to a customer or third-party support organization.

Multiple failures attributable to a single outage (such as failure of one computer or telecommunications device) generally count as one incident. Similarly, if two credits might be paid for one incident, only the greater is typically paid.

Time measurements may exclude travel time (when technicians drive to remote locations), or time lost while waiting for a user to confirm that work has been satisfactorily completed. Measurements of completion or resolution time often permit the outsourcer to mark a trouble ticket or service request as complete if it believes the work is done, and the user is unavailable to accept or approve the work.

Users or "seats" may mean individuals (generally employees and others eligible to receive service) or may mean networked computers.

Some definitions may vary when used for service levels, as opposed to billing. For example, the customer may pay for all inquiries to the help desk, but some service levels or metrics may apply only to telephone inquiries (excluding e-mail, facsimiles and the like). Some call counts exclude multiple calls about a single outage.

IV. BUSINESS PROCESS SERVICE LEVELS

The emerging market for business process services poses particular challenges because the market is immature. Service levels matter for the same reasons as in IT services. Customers wish to assure good performance, manage suppliers effectively, and deter poor performance. However,

- There are few accepted standards. Major suppliers of IT services offer broadly similar services: mainframe and midrange operations, network management, help desk and the rest. Over time, many metrics have obtained broad acceptance among suppliers, customers, their outside advisers, and independent firms who assess and benchmark performance, based on accumulated market data. Competing suppliers of business process services, by contrast, may offer very different solutions. There are, as yet, few (if any) established standards or sources of market data about performance, best practices and the rest.
- Many potential customers for business process services have not consistently measured performance of existing operations in such spheres as HR, logistics or other candidates for outsourcing. Even if there were good historic data, its relevance might be marginal, since outsourcing may introduce wholly new processes. Outsourcing of IT operations transfers responsibility, and operations may relocate to the supplier's facility; but fundamentally, the same applications operate on similar machines. Not so with business processes, where, for example, an internal web site and remote call center may supplant many functions formerly performed by an in-house HR department, using telephones, paper forms and manual processes.

To manage business process services with effective service levels, companies may do some combination of the following:

- Adapt familiar metrics used for IT services. Most service offerings depend upon applications of information technology, networks and the Internet. Familiar measurements of availability, response time and the rest may be very relevant. Call centers, for example, resemble the IT help desk, so the familiar measures of responsiveness – average speed to answer, first call resolution and the rest – may be useful.
- The supplier keeps records of performance at its service centers, and should offer the same high quality to all customers.
- Key transactions – shipments, payments, payrolls and so on – can be identified, measured during an initial transition period, and then fixed as standards for the remaining term of the contract. Other metrics can also be developed, validated and agreed as part of the transition period that follows signing. In an ideal world, or a mature market, this might not be necessary, but for the immediately

foreseeable future, some collaborative effort to develop and refine service levels after signing may be unavoidable.

V. BENCHMARKING COST AND QUALITY

Competition among suppliers, advances in technology, and economic pressures have combined to increase customer interest in benchmarking, especially benchmarking with "teeth" that directly or indirectly compels suppliers to match the market. Since comparisons require ample market data, and at least rough comparability among service offerings, benchmarking is, at least for the moment, somewhat more useful for IT services than in the comparatively immature market for business process services.

A. BY WHOM?

Benchmarking reports are ordinarily prepared by specialized, independent firms (but never the supplier's competitors). Benchmarkers may be required to sign strict confidentiality agreements, so that findings are held in confidence, and any data collected are used elsewhere only on a "blind" basis without disclosing the parties.

B. WHO PAYS?

Ultimately, the customer pays, even if the supplier shares the bill for benchmarking, for all costs are presumably recovered through charges. Where costs are shared, and the parties jointly engage the benchmarker, there may be greater perceived objectivity, better cooperation, and fuller sharing of results with both sides. Whether this is advantageous may depend upon the particular situation, and one's point of view as customer or supplier.

C. "APPLES TO APPLES" COMPARISONS

Comparisons against market standards of quality and cost must be normalized to adjust for unique or unusual circumstances, including:

- *Unusual service or service level requirements*. Custom or "fail-safe" service costs more. The top tier providers of services are rarely the cheapest. They and their customers presumably perceive the difference as a cost of, among other things, overall quality and capability.

- *Overhead allocations*. Sometimes account management and other general or "cross-functional" services are separately charged, and sometimes they are allocated among various services.
- *Transfers of assets and personnel*. Many large transactions involve sales of millions of dollars worth of assets and transfers of hundreds of employees, who may be assured employment, at least for a time, with compensation comparable to that provided by the customer. These costs may be built into service charges and spread over the term of the contract; or a separate transition charge may be paid up front.
- *Volumes of service*. Competitive pressures and economies of scale mean that very large consumers of service often pay less.
- *Geography*. Charges reflect costs of hardware, software, infrastructure, bandwidth and the like (which may tend to decline over time), but also scarce professional talent (whose cost may rise, especially in some regions). Suppliers increasingly attempt to serve customers from low cost locations, at home and overseas. Nonetheless, some services must be rendered where the customer operates. If those operations are concentrated in, say, New York or San Francisco, they are likely to cost more.
- "*Financial engineering.*" Unusual discounts, credits, "loss leaders," or other incentives inconsistent with customary notions of "fair market" pricing may be recovered through service charges, and must be accounted for to assure fair comparisons.

D. CONSEQUENCES

Suppliers fairly readily agree to meet, confer and consider adjustments in service levels, corrective action or adjustments in charges. They are much more reluctant to agree to match market rates determined by an outsider, or to allow the customer an inexpensive termination if that outsider determines that contract charges exceed current market rates. Customers who press for such terms should recognize that suppliers may regard mandatory adjustments or additional termination rights as rather distasteful concessions, for which they will seek corresponding concessions from the customer.

E. PRACTICAL CONSIDERATIONS

Benchmarking has many attractions. In a business where quality has tended to rise, and costs to decline, customers seek assurances that market prices and service levels will remain competitive throughout the contract term.

In practice, benchmarking can be time-consuming, expensive and contentious. Comparisons involve fallible, debatable judgment. Even within a particular geographic region or industry, there may be wide variations among contracts. No two customers are exactly alike. Sources of market data may be less extensive and reliable than, for example, public sales records used to appraise real estate. Data from corporate IT departments must be adjusted for comparison against outsourced services. Consultants and interested parties may honestly reach different conclusions. Debate may take on a life of its own, without any consensus emerging.

Suppliers suspect the process is biased against them, if only because human nature invites benchmarkers to focus upon opportunities for savings, or for service improvements that cost money to deliver. It is fair to say that, with general improvements in technology and declines in many costs, benchmarking reports rarely recommend increases in charges (just as, in condemnation proceedings, the property owner's appraisal always exceeds the state's offer).

Customers believe that nominally fixed charges (plus cost-of-living increases) may, over time, exceed the market rates, and yield overly generous profit margins. *Ad hoc* changes, effected under time pressure, without an opportunity to "shop around," are not always priced at the most competitive rates. Both sides recognize that changes tend not only to extend scope, but to improve supplier margins.

Each side has legitimate concerns. Usually, the exercise prompts some reconsideration of charges and other financial terms. Whatever its limitations, benchmarking can be an effective catalyst for re-negotiations that raise service levels and reduce charges.

VI. INTERPLAY WITH OTHER TERMS

Service levels and benchmarking are not negotiated in isolation. Often, they are among the most important, intensely negotiated issues, alongside scope, price, liability limits and remedies, among others. Resolution of major issues involves reciprocal concessions. Pressing for stringent service levels, substantial credits, or a tough benchmarking clause is bound to affect resolution of other issues. Negotiated concessions usually have a price. In assessing these trade-offs, one must consider the real importance of benchmarking and service levels with a clear eye.

Quality always matters. Service levels and credits, however, may not always matter quite as much as commonly supposed. Suppliers negotiate service levels energetically. Failures affect margins, and possibly the careers of the supplier's account team. Risks of failures and credits figure in the risk and cost models that suppliers use to evaluate and approve potential business. However, critical service levels are rarely missed. Suppliers *never* agree to any service levels that they cannot meet consistently. Once the contract is signed and service commences, suppliers pay attention to potential failures that might be costly. Critical failures are rare, and even when they occur, customers do not always force the issue and collect credits. Viewed in this light, large credits, or high ceilings upon the supplier's exposure may not have quite the practical importance of other issues affecting scope, quality, cost or remedies.

Similarly, suppliers dislike benchmarking, especially if compelled to match the current market or face abrupt termination. The process is imperfect, and may prove costly and contentious, although it may be a good catalyst for discussion. However, it may be less important to the customer if the contract term is relatively short, termination charges are low, or the customer is assured "most-favored" rates (that is, the lowest rates then offered to other customers for similar services).[8]

Apart from questions of overall negotiating leverage, and the fundamental truth that neither side can expect all key issues to be resolved in its favor, lawyers and clients negotiating these transactions should keep some linkages in mind, including the following:

- *Quality and Price*. Quality costs money. More stringent service levels require more support, redundant systems and so on, all at greater cost. To answer all help desk calls within 30, rather than 60, seconds, the supplier needs more analysts. To assure 99.95% availability, the supplier may need an identical machine, with applications, data and the rest ready to go on a moment's notice. For genuinely critical systems, such as patient care in a hospital, this kind of protection may be essential. Similarly, if less obviously, unusual measurements or novel service levels cost money to monitor and report. Often, the supplier's standard service, metrics and service levels may suffice, at lower cost.

- *Service Levels and Default Termination*. Serious or repeated failures to meet service levels may constitute material breach, and entitle the customer to terminate, after notice and a cure period. Default termination clauses sometimes provide that repeated or multiple failures (e.g., X critical failures in one month, Y critical failures in Z consecutive months, or total credit payments above some threshold within any twelve months) constitute material breach and grounds for

[8] "Most-favored" pricing is, if anything, at least as difficult to negotiate and assess. Customers do not necessarily need both.

termination without further opportunities to cure. It is not always easy to agree upon these figures. Customers are wary of the implication that if N failures are too many, N-1 may be tolerable, even if the parties reserve (as they should) the rights to assert that other or different combinations may or may not constitute material breach.

- *Benchmarking and Convenience Termination.* Suppliers may not agree to match rates determined by the customer's consultant. Alternatively, if charges exceed market rates, customers want to terminate for a lesser amount than the usual charge for convenience terminations. Termination charges are generally lump sums that combine (i) unamortized asset, transition, and proposal costs; (ii) shutdown costs (such as relocation of personnel, severance pay, cancellation of equipment leases, etc.); and (iii) some portion of the unearned profit on the remaining term of the contract. If the arrangement includes transfers of assets and personnel (especially transfers of assets at book value), the termination charge is correspondingly larger. Paying transition costs up front may reduce termination charges dramatically. The lower the termination charge, the easier it is for the supplier to agree to a benchmarking clause with "teeth" in the form of reduced termination charges. In the extreme case, if there were little or no termination charge, there might be little need for benchmarking. Conversely, financial engineering that disposes of hardware for book value without an accounting loss has deferred costs in the form of higher service and termination charges. However, the supplier's willingness to offer attractive initial pricing or financial concessions may depend upon a long term contract, and a corresponding opportunity for the supplier to recover its investment in the relationship. Lower termination charges, or termination rights based on benchmarks, may reduce the supplier's willingness to offer those incentives; and in turnaround situations, for example, the immediate benefits to the customer may justify longer-term commitments or some loss in flexibility.

VII. MODEL DOCUMENTS

Attached to this paper are two model documents:

- Service level schedule, meant for attachment to a master agreement for IT services. Some of the terms, such as the general performance standard and provisions for payment of credits as liquidated damages (in Section 2 of the Schedule) sometimes appear in the body of the agreement, rather than the schedules. The service levels themselves, with related percentages, amounts and other particulars, would appear in accompanying tables.

- Benchmarking clause, meant for incorporation in a master agreement for IT services.

Both documents are moderately customer-oriented. Each contains many terms that may be heavily negotiated, and must be tailored to specific situations. Neither should be considered “boilerplate” or “standard” language, suitable for all occasions. Each requires editing to adapt for business process services.

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SCHEDULE __

SERVICE LEVELS

This Schedule __ defines Service Levels for certain Services, establishes a general performance and quality standard for all Services, and describes the manner in which Service Levels and related Service Credits will be computed, reported and administered.

1. DEFINITIONS

The following capitalized terms shall have the meanings assigned. All other capitalized terms shall have the meanings stated when the terms first appear, or those assigned by the Information Technology Services Agreement ("Master Agreement").

"Amount at Risk" means, with respect to any month during the Term, _____ percent (__%) of the Monthly Charge.

"Availability (End to End)" means, with respect to a networked computer, availability of a host computer through the relevant network, stated, in both cases, as a percentage Scheduled Uptime for the relevant service or item, computed monthly as follows: Availability % = [(Number of Devices x Scheduled Minutes Available) – Total Downtime for All Devices] ÷ (Number of Devices x Scheduled Minutes Available) x 100%].

"Availability" means, with respect to a system, availability of the platform, operating system, and intended functionality and peripheral devices stated as a percentage of Scheduled Uptime for the relevant service or item, computed monthly as follows: Availability % = {[Scheduled Uptime – (Excused Downtime + Unexcused Downtime)] ÷ (Scheduled Uptime – Excused Downtime)} x 100%]).

"Average Availability" means the individual system availability computed as an average percentage using the following equation: Average Availability % = Cumulative Availability of all Systems ÷ Number of Systems.

"Business Day" means 8:00 A.M., to 5:00 PM, local time, on any Monday through Friday, excluding legal holidays.

"Call" means any inquiry, request for service or problem submitted to the Help Desk for assistance (by telephone, facsimile or electronic mail) by an End User. Calls exclude (i) calls for systems status recording, (ii) calls routed through the Help Desk as a pass-through function (e.g., calls logged by the Help Desk and then transferred to designated Customer or external organizations), (iii) follow-up calls for problem updates or closure, and (iv) multiple calls placed pertaining to a single Incident.

"Call Abandonment Rate" means the percentage of telephone calls to the Help Desk that are abandoned after the system status message on the automatic call director ("ACD") but before an analyst answers the call, expressed as a percentage of the total number of telephone calls to the Help Desk during the relevant month or other measurement period.

"Closure" occurs (or a Trouble Ticket is "Closed") when Supplier confirms with the End User that a Trouble Ticket or Service Request has been Resolved. If the End User indicates that the problem is not Resolved, or a work-around put in place, during these communications with the Help Desk, then the Trouble Ticket or Service Request remains open and is not Resolved. If Supplier reasonably believes that the Trouble Ticket or Service Request has been Resolved, and has made three (3) attempts to contact the End User during Business Days to obtain Closure and has not been able to communicate with the End User regarding the Trouble Ticket or Service Request, then Supplier may Close the Trouble Ticket or Service Request as of the time Supplier restored service or completed the Service Request, subject to its being reopened if the End User subsequently notifies Supplier that the problem is not Resolved. The interval between the time Supplier first attempts to contact the End User to obtain Closure and the time (prior to the third attempt to contact the End User) Supplier actually contacts the End User shall not be counted for any Service Level measurement purpose.

"Critical Fault" means an unexcused failure to meet a Critical Service Level.

"Critical Service Level" means each of the required levels of performance so designated in the accompanying table.

"Downtime" means that period of time when a system or application is not available for normal business use.

"End User" means a Customer employee, contractor or other person authorized to receive Services (specifically excluding Supplier staff and subcontractors engaged in the performance of Services).

"Excused Downtime" shall mean periods of time when (i) mutually agreed upon scheduled maintenance actually occurs (generally within agreed Maintenance Windows), (ii) Customer requests an outage, or (iii) time attributable to Incidents excused by Section 2.4(e), below.

"Fault" means an unexcused failure to meet a Critical Service Level or a Standard Service Level. (Faults are excused only for the reasons described by Section 2.4(e), below.)

"First Call Resolution" means the percentage of Calls Resolved while the End User is on the phone with his/her initial call. The following conditions apply to calculation of First Call Resolution:

- Calls are considered Resolved on first call if the problem, or question, or request for information or service is satisfied while the End User is still on the line during the initial call to the Help Desk.

- Calls are considered unresolved on first call if: (i) a follow-up call to the End User or a return call by the End User to the Help Desk is required; or (ii) the Trouble Ticket is dispatched to another Supplier service organization.

- Calls requiring dispatch of a technician for hardware repair or MAC support shall be excluded from calculations of First Call Resolution.

- Calls that are properly passed through to a Customer retained functions such as [examples] are excluded from calculations of the First Call Resolution.

"Incident" means a single event or series of substantially contemporaneous related events that result in the occurrence of one or more Faults.

"Monthly Charge" means, with respect to any month during the Term, the total amount of the charges (excluding only project charges, reimbursable expenses, project charges, pass-throughs, and taxes) to be paid by Customer to Supplier for Services during that month.

"Measurement Period" means monthly, unless otherwise stated in the Agreement or agreed by the Parties.

"Problem Response Time**"** means the elapsed time between registration of a problem into Supplier's problem tracking system (e.g., through automatic notification, Help Desk call, or through on-site Supplier Personnel) and the commencement of resolution efforts. Supplier shall register all problems into its problem tracking system either on a real time basis or promptly after receipt.

"Problem Resolution Time" means the elapsed time between registration of a problem into Supplier's problem tracking system and the successful Resolution (as defined below) of the problem. Supplier shall register all problems into its problem tracking system either on a real time basis or promptly after receipt.

"Resolution" or "Resolve" means the elapsed time between the time that a problem is registered in Supplier's problem tracking system and the time that Supplier restores service or completes the Service Request, measured in accordance with the definition of Closure, as described above. All relevant Service Level elapsed times are based on this definition of Resolution.

"Scheduled Uptime" shall mean that period of time (days of the week and hours per day) during which a service or item is designated to be available to Customer for normal business use. Such Scheduled Uptime will be identified as part of the Service Level.

"Service Credit" means (i) with respect to Critical Faults, the amount determined by multiplying the Amount at Risk for the month in which the Fault occurs by the Service Credit Percentage for the applicable Critical Service Level, and (ii) with respect to the combinations of Standard Faults described by Section 6.3, below, __ percent (__%) of the Amount at Risk for the month in which the last relevant Standard Fault occurs. (For convenience, these two categories of Service Credits are sometimes referred to below as "Critical Service Credits" and "Standard Service Credits," respectively.)

"Service Credit Percentage" means, with respect to any Critical Service Level, the percentage of the Amount at Risk to be paid as a Service Credit for failure to meet the Critical Service Level.

"Service Level" means each of those levels of performance (e.g., Availability) specified by the accompanying Tables, below. (Service Levels may be designated as "Standard" or "Critical" and references to Service Levels include both categories.)

"Speed of Answer" means the elapsed time, measured in seconds, between the End User's connection to the Help Desk's ACD unit and the time when an analyst answers the telephone call.

"Standard Fault" means an unexcused failure to meet a Standard Service Level.

"Standard Service Levels" means Service Levels that are not Critical Service Levels.

"Transition Period" means, for purposes of this Schedule, the six (6) month period commencing [date] and ending [date].

"Trouble Ticket**"** means the document opened by the Supplier at the first report of a problem and tracked until Closure upon Resolution of the problem.

2. GENERAL PROVISIONS

2.1. Service Levels

This Schedule __ contains Service Levels for certain specified Services. With respect to each Service which has an associated Service Level, Supplier shall provide that Service throughout the Term in a manner which meets or exceeds the associated Service Level.

2.2. Periodic Review

Within six (6) months after the Effective Date and at least annually thereafter, the Parties shall jointly review the Service Levels and adjust them to reflect any improved performance capabilities associated with advances in the technology and methods used to perform the Services. The Parties acknowledge that they expect the Service Levels identified in this Schedule to increase continuously throughout the Term by mutual agreement, and that they expect jointly to identify and add additional Service Levels to Schedule during the Term. Throughout the

Term, Supplier shall identify and notify Customer of commercially reasonable methods of improving the Service Levels.

2.3. Measurement and Monitoring

Supplier shall implement any measurement and monitoring tools and procedures necessary to measure its performance of the Services and compare such performance to that required by the Service Levels. Upon Customer's request, Supplier shall provide Customer, its auditors and other authorized representatives with any information and access to the measurement and monitoring tools necessary to verify compliance by Supplier with the Service Levels.

2.4. Failures to Meet Service Levels

(a) Supplier acknowledges that its failure to meet one or more Service Levels may have a material adverse effect on the business and operations of Customer and that the actual amount of damage sustained by Customer because of such a failure would be impracticable or extremely difficult to fix. Accordingly, when Supplier fails to meet Service Levels for reasons other than those specified below ("Faults"), Customer shall have the option, but not the obligation, to recover the applicable amount determined in accordance with this Schedule and the accompanying Tables ("Service Credits") as liquidated damages.

(b) Payment of Service Credits constitutes Customer's sole monetary remedy for such Faults, unless they constitute or relate to material breach; and in such cases, after giving notice and allowing any applicable time to cure, Customer may recover its full damages (less Service Credits actually paid) subject to the applicable limitations upon Supplier's liability. Supplier acknowledges that the Service Credits are reasonable under the circumstances existing as of the date of this Agreement, and reasonable estimates of Customer's actual damages. Customer reserves all rights to obtain non-monetary remedies available under this Agreement, applicable law, or in equity, whether or not Customer exercises its option to recover Service Credits.

(c) Supplier shall pay Service Credits to Customer in cash within thirty (30) days after the end of the month in which such failure occurred or, at Supplier's option, Supplier may deduct the Service Credits from the next succeeding invoice or other amounts due to Supplier. Amounts due upon expiration or termination of this Agreement shall be paid in cash.

(d) Each time Supplier fails to meet a Service Level, Supplier shall: (i) promptly investigate the root cause(s) of the failure and deliver to Customer a written report identifying the root cause(s); (ii) use its best efforts to correct the problem and to begin meeting that Service Level as soon as practicable; and (iii) at Customer's request, advise Customer of the status of such corrective efforts.

(e) Supplier shall not be liable to pay Service Credits for any failure to meet a Service Level to the extent that such failure is directly attributable to: (i) a Force Majeure Event, (ii) breaches of this Agreement by Customer, or (iii) acts or omissions of Customer or its agents, employees or contractors not contemplated or permitted by the Agreement (excluding agents, employees or contractors under the supervision of Supplier).

2.5. General Performance Standard

Whether or not a specific Service Level applies, Supplier shall perform all Services in a diligent, workmanlike and professional manner with a level of accuracy, quality, completeness, timeliness, responsiveness and efficiency that at least equals the standards of other sophisticated companies providing similar services. This Section shall not be deemed to alter or enlarge any Service Level.

3. CLASSIFICATION OF INCIDENTS

3.1. Severity Levels

The Help Desk shall classify all Incidents in accordance with the severity levels in the accompanying tables.

3.2. Reclassification of Incidents

Customer's Account Executive (or his or her designee) may, in his or her reasonable discretion, reclassify any Incident based upon the importance of a particular Incident or component, or the actual or potential impact upon Customer's operations. If Customer reclassifies any Incident into a higher category, time calculations for the higher category shall commence upon receipt of notice of reclassification (which may be given by telephone, facsimile or electronic mail to the Help Desk supervisor then on duty). If the Supplier Account Executive disagrees with any such reclassification, and is unable promptly to resolve the matter to mutual satisfaction, then the dispute may be resolved, at either Party's initiative, pursuant to Article __ of the Master Agreement concerning disputes.

4. EFFECTIVENESS AND VALIDATION OF SERVICE LEVELS

4.1. Timing

All Service Levels for all Categories of Service shall be measured and reported beginning on the Commencement Date (or as soon thereafter as technically feasible) but shall not otherwise be effective (and no Service Credits shall be payable for Faults) until (i) the date specified on by the accompanying table; or (ii) for Service Levels validated pursuant to Section 4.2, below, when agreed or otherwise determined in accordance with that Section; or (iii) for those Service Levels subject to a corrective action plan, then ninety (90) days after approval of the plan by Customer, and in any event no later than [date].

4.2. Validation of Preliminary Service Levels

(a) The Parties expect and intend that Service Levels are consistently achievable using the systems and environments available on the Commencement Date (or for environments that transfer to Supplier facilities, relevant Supplier environments) if used in accordance with the practices used in well-managed operations performing similar services ("consistently achievable"). Certain of the Service Levels not previously documented are designated by the accompanying tables as "subject to validation" and/or Preliminary Service Levels. In those cases, and no others, Preliminary Service Levels shall be validated in accordance with this Section.

(b) If Supplier reasonably believes during the Transition Period, based on its evaluation of Customer's former operations, Customer's systems and environments, or other relevant criteria, that any of the Preliminary Service Levels is not consistently achievable, it shall promptly give written notice to Customer proposing: (i) the Service Levels Supplier believes to be consistently achievable; and (ii) the additional resources, changes in practices or other measures that Supplier recommends in order consistently to achieve the Preliminary Service Levels. The Parties shall thereafter meet, confer and negotiate in good faith in order to agree upon a corrective action plan.

(c) If the Parties are unable to agree promptly upon Service Levels or a corrective action plan, then any and all Preliminary Service Levels not then determined shall be determined in accordance with Article __ of the Master Agreement concerning disputes.

(d) To the extent that Customer declines to take corrective measures within its responsibility that are recommended by Supplier and reasonably necessary in order to consistently achieve the Preliminary Service Levels, then Preliminary Service Levels shall be equitably adjusted to fix Service Levels that are consistently achievable and if not determined by agreement within a reasonable time, they may be determined in accordance with Article __ of the Master Agreement, concerning disputes.

(e) Preliminary Service Levels to which Supplier makes no objection by timely notice, as provided above, shall be effective when specified by the accompanying table or, if no date is specified, then [date].[9]

4.3. Service Level Adjustments and Additions

(a) Service Levels for new Services, systems or functions ("New Service(s)") shall be determined by mutual agreement through the relevant Change Orders, and, if necessary and agreed upon, validation during the first six (6) months of production use, in accordance with the procedure and standards described by Section 4.2, above, concerning validation of Preliminary Service Levels. To the extent a New Service replaces, or

[9] Typically, the end of transition.

upgrades, an existing Service, relevant Change Orders or other contract documents shall take into account any desired Service Levels.

(b) Critical Service Levels as of the Commencement Date are set forth in Table ___. Customer may, in its sole discretion exercise no more than [once] [twice] during any Contract Year, and upon at least ninety (90) days' prior notice to Supplier (except as set forth below) re-designate a Standard Service Level as a Critical Service Level, or re-designate a Critical Service Level as a Standard Service Level. Service Levels for New Services shall be initially designated as Standard Service Levels or Critical Service Levels pursuant to this Section. If the designation of a New Service as a Critical Service Level would result in Customer exceeding the limits in subparagraph (d), below, Customer may re-designate a Critical Service Level as a Standard Service Level on or before the date such New Service is put into production, without regard to the limitations or notice requirements in the second sentence of this paragraph.

(c) The Service Credit Percentage as of the Commencement Date for each Critical Service Level is set forth in Table ___. Customer may, in its sole discretion (subject to the limits set forth in Section 4.3(d), below), increase or decrease the then-existing Service Credit Percentage associated with any Critical Service Level no more than twice during any Contract Year (in connection with the notices given pursuant to the immediately preceding paragraph).

(d) In no event shall: (i) more than [number] Service Levels be designated as Critical Service Levels at any one time; (ii) the Service Credit Percentage for any one Critical Service Level exceed ____ percent (__%), or (iii) the aggregate Service Credit Percentages for all Critical Service Levels exceed ____ percent (___%).

5. SERVICE LEVEL REPORTS

Supplier's monthly reports shall include a report of Service Level performance in a form based upon Supplier's standard reports and approved by Customer, that includes at least the following information: (i) performance of all Service Levels (including relevant calculations), (ii) summaries of root cause analyses and corrective action required by the Agreement (which are to be reported separately, in detail, as provided above), (iii) significant changes that have occurred or are anticipated that may affect Service Level performance, (iv) management comments on Service Level performance and trends. Supplier will make all relevant information concerning Service Level and Service Credit calculations available to Customer upon request.

6. SERVICE CREDITS

6.1. Critical Service Credits

The Service Credit payable for any Critical Fault equals the Service Credit Percentage for the relevant Critical Service Level times the Amount At Risk for the month in which the Critical Fault occurred (subject to the ceiling and adjustment provided elsewhere in this Schedule). Service Credits shall be paid or credited in accordance with Section 2.4(c), above. Supplier may avoid liability for the first [number] (__) Critical Faults in any rolling twelve (12) month period by meeting or exceeding the relevant Service Level during the [number] month period immediately following each such Critical Fault.

6.2. Repeated Faults

If the same Critical Fault occurs in successive months, or more than one Critical Fault occurs in any month, then the Service Credit(s) shall be one hundred ______ percent (1__%) of the Service Credit(s) otherwise payable (subject to the limitations in Section 6.5, below).

6.3. Standard Service Credits

A Standard Service Credit shall be payable whenever:

(a) A Standard Fault occurs for the same Standard Service Level ____ (__) times within any rolling _____ (__) month period.; or

(b) ____ (__) Standard Faults occur in a single month; or

(c) ____ (__) Standard Faults occur in any rolling _____ (__) month period.

6.4. Multiple Faults from a Single Incident

All Faults attributable to a single failure of a component or similar Incident shall be considered a single Fault. If any such Incident causes a Critical Fault and one or more Standard Faults, Supplier shall be obligated to pay the Service Credit for the Critical Fault (and the Standard Fault may not be included in any aggregation of Faults pursuant to Section 6.3). If any such Incident causes two or more Faults, Supplier shall be obligated to pay the largest Service Credit payable for any single Fault attributable to the particular Incident.

6.5. Maximum Service Credits

The maximum amount payable as Service Credits for any single month shall not exceed the Amount at Risk. This limitation does not limit Customer's right to recover damages for material breach, or other remedies, subject to the notice, cure periods, limitations of liability and other applicable provisions of the Master Agreement.

6.6. Waivers

Customer may waive any Fault or failure to make any payment or allow any Service Credit, but no such waiver shall be binding or effective unless given in writing; and no such waiver shall constitute a continuing waiver of similar or other such Faults or failures. Customer may at any time direct future compliance with any waived requirement.

Model Benchmarking Clause

SECTION __ BENCHMARKING

(a) Customer may [at any time during the Term] [once in every Contract Year] measure the quality and efficiency of one or more, or all, Categories of Services using independent benchmarking services in accordance with this Section. Supplier shall cooperate with any third parties retained by Customer, at its expense, to conduct user surveys or provide benchmarking services ("Benchmarker"). Customer may not engage any of the competitors of Supplier listed on Schedule __ to provide any such services. Benchmarker shall submit its draft findings to both parties for review and comment by both Parties, consider comments received, and then deliver its final report in writing to both Parties.

(b) Supplier shall cooperate with Customer to investigate unfavorable findings and shall take all necessary corrective action in a manner mutually agreed upon by the Parties. If a Benchmarker determines that the Services are materially below market standards of quality, Supplier shall within sixty (60) days after receiving the Benchmarker's final report, prepare a written plan for review with the Steering Committee describing measures Supplier proposes to take to improve quality and meet applicable performance standards; and, upon approval of such a plan, diligently carry out the plan, and such other measures as may be agreed to improve quality.

(c) If the Benchmarker determines that Supplier's charges for Services materially exceed market rates for similar volumes of similar services (normalized, as provided below), then Supplier shall meet with the Steering Committee to discuss adjustments of its charges. If the Parties are unable to agree upon adjustments in Supplier's charges within ninety (90) days after receiving Benchmarker's final determination that Supplier's charges materially exceed market rates, then Customer may, at its option, terminate the relevant Categor(ies) of Service, or this Agreement, as appropriate, for its convenience in accordance with Section __, below, and pay [percent] of the termination charge otherwise required for such a termination. Customer's right to terminate shall expire one hundred eighty (180) days after receiving Benchmarker's final determination.

(d) For purposes of this Section, "materially exceed" shall mean total charges that exceed one hundred ___ percent (10__%) of market rates for similar volumes of similar services, performed with comparable standards of quality by competitors of Supplier or other, comparable providers of similar services in freely negotiated transactions between willing, unrelated parties acting under no particular or urgent necessity. Comparisons with market measures of quality and cost shall be normalized to account for investments in assets, transfers of personnel, variations in configurations, transition charges, reasonable overheads and profit, differences in service levels, unique or unusual Customer requirements and other, similar factors. Comparisons shall disregard unusual or uneconomic terms (such as introductory discounts and the like).