

XO SOFTWARE ON DEMAND CUSTOMER AGREEMENT

This Customer Agreement (“Agreement”) is between XO Communications, Inc. (“XO”) and the company or other business entity on whose behalf you are entering into this agreement (“Customer” or “You”), and states the terms and conditions under which You and Your employees, contractors or other individuals who You authorize (“Users”) will be granted access to and use of the online On-Demand Services (the “Services”) provided via this website (the “Services Site”). **BY CLICKING THE “I ACCEPT” BUTTON, YOU ACKNOWLEDGE THAT YOU HAVE READ AND AGREE TO BE BOUND BY THIS AGREEMENT AND ALL APPLICABLE LAWS AND REGULATIONS (INCLUDING EXPORT RESTRICTIONS) GOVERNING THE USE OF THE SERVICES, EFFECTIVE AS OF THE DATE THAT YOU ACCEPT THESE TERMS. IF YOU DO NOT AGREE TO THESE TERMS, DO NOT CLICK THE “I ACCEPT” BUTTON.**

1. **DELIVERY OF SERVICES.** Once You have completed Your online order form and agreed to the terms of this Agreement, including fees related to providing You Service, and XO has confirmed Your credit card payment, XO will provide You with the Services for the number of Users and the term indicated on Your online order form. XO’s fees for Services exclude taxes. You agree to pay all taxes that may apply to Your use of the Services, except for taxes based on XO’s net income. Services are delivered consistent with a Service Levels Agreement, as provided below.
2. **XO WARRANTY. THE SERVICES ARE PROVIDED ON AN “AS IS” BASIS, AND YOUR AND EACH USER’S USE OF THE SERVICES IS AT YOUR OWN RISK. XO DOES NOT MAKE, AND HEREBY DISCLAIMS, TO THE EXTENT LEGALLY PERMITTED, ANY AND ALL EXPRESS AND/OR IMPLIED WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NONINFRINGEMENT ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE, EXCEPT TO THE EXTENT THAT SUCH DISCLAIMERS ARE HELD TO BE LEGALLY INVALID. XO DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR-FREE OR COMPLETELY SECURE.**
3. **CUSTOMER OBLIGATIONS**
 - 3.1. **CUSTOMER WARRANTIES, ACKNOWLEDGMENTS AND OBLIGATIONS.** YOU WARRANT THAT: (A) YOU HAVE THE LEGAL RIGHT TO ENTER INTO THIS AGREEMENT AND PERFORM YOUR OBLIGATIONS HEREUNDER; (B) YOU AND YOUR USERS WILL USE THE SERVICES ONLY IN ACCORDANCE WITH THIS AGREEMENT AND IN COMPLIANCE WITH ALL APPLICABLE LAWS, REGULATIONS, AND THE RULES OF ONLINE CONDUCT (BELOW), AND, IN THE EVENT OF A FAILURE TO COMPLY, WILL PAY ANY RESULTING FINANCIAL DAMAGES; AND ALL (C) USERS ARE AT LEAST 18 YEARS OF AGE. YOU ACKNOWLEDGE THAT: (A) XO DOES NOT CONTROL THE CONTENT OF THE INFORMATION PASSING THROUGH THE SERVICES SITE; (B) YOU ARE SOLELY RESPONSIBLE FOR ENSURING THAT THE INFORMATION YOU AND YOUR USERS TRANSMIT AND RECEIVE COMPLIES WITH APPLICABLE LAWS, REGULATIONS AND THE RULES OF ONLINE CONDUCT; (C) YOU AND USERS MAY USE THE SERVICES FOR YOUR OWN INTERNAL BUSINESS PURPOSES ONLY, AND MAY NOT RESELL THE SERVICES TO ANY THIRD PARTIES OR USE THE SERVICES FOR THE PURPOSE OF PROVIDING ANY COMMERCIAL SERVICES TO OTHER ENTITIES; (D) NEITHER YOU NOR ANY USER MAY ATTEMPT TO ACCESS, VIEW, OR USE ANY INFORMATION OTHER THAN THAT AVAILABLE THROUGH YOUR AUTHORIZED ACCOUNT; (E) YOU WILL BE SOLELY LIABLE FOR ANY DAMAGES THAT ARISE FROM THIS BREACH OF SECURITY; AND (F) ANY USERS ATTEMPTING TO ACCESS OR TAMPER WITH THESE AREAS MAY BE SUBJECT TO PROSECUTION. YOU AGREE THAT YOU AND YOUR USERS WILL BE LIABLE FOR ANY UNAUTHORIZED USE OF THE SERVICES BY MINORS OR RESULTING FROM MISUSE OF USERS’ PASSWORDS. YOU AGREE TO PROVIDE THE EQUIPMENT REQUIRED TO ACCESS AND USE THE WORLD WIDE WEB, INCLUDING COMPUTER AND TELECOMMUNICATIONS EQUIPMENT, AND THE EQUIPMENT AND SOFTWARE NECESSARY TO UTILIZE THE SERVICES, SUCH AS ADEQUATE COMPUTER HARDWARE, MEMORY, SPEED, DATA STORAGE AND RELATED SOFTWARE. “*RULES OF ONLINE CONDUCT*” MEANS REFRAINING FROM THE FOLLOWING:

(A) POSTING OR TRANSMITTING ANY MATERIAL THAT A USER DOES NOT HAVE THE RIGHT TO POST OR TRANSMIT UNDER ANY LAW, CONTRACTUAL DUTY OR FIDUCIARY RELATIONSHIP, OR ANY MATERIAL THAT INFRINGES A THIRD PARTY'S TRADEMARK, PATENT, TRADE SECRET, COPYRIGHT, PUBLICITY, OR PRIVACY RIGHTS; (B) FRAMING OR LINKING TO XO'S WEBSITE; (C) IMPERSONATING OR MISREPRESENTING A USER'S AFFILIATION WITH ANY PERSON OR ENTITY; AND (D) ACCESSING, ATTEMPTING TO ACCESS, TAMPERING WITH OR USING NON-PUBLIC AREAS OF THE WEBSITE, XO'S COMPUTER SYSTEMS, OR THE TECHNICAL DELIVERY SYSTEMS OF XO OR ITS LICENSORS.

- 3.2. *BREACH OF WARRANTIES.* IN THE EVENT OF BREACH OF ANY OF THE FOREGOING WARRANTIES, IN ADDITION TO ANY OTHER REMEDIES AVAILABLE AT LAW OR IN EQUITY, XO WILL HAVE THE RIGHT, IN ITS SOLE DISCRETION, TO SUSPEND IMMEDIATELY ANY RELATED SERVICES. XO WILL PROVIDE NOTICE AND OPPORTUNITY TO CURE IF PRACTICABLE DEPENDING ON THE NATURE OF THE BREACH. ONCE CURED, XO WILL PROMPTLY RESTORE THE SERVICES.
4. *NONDISCLOSURE OF CONFIDENTIAL INFORMATION.* XO will not use or disclose any non-public information regarding You or Your Users ("Confidential Information"), except: (a) as expressly permitted by or required to achieve the purposes of this Agreement; (b) as required by law; and (c) to either of our attorneys, accountants and other advisors, as reasonably necessary. Confidential Information does not include information that is known to XO or the public prior to disclosure by You; or becomes known to XO or the public other than through a breach of confidentiality, including this Agreement; or is independently developed by XO. XO's use of User data will comply with XO's privacy policy, the current version of which is located at www.xo.com/legal/privacy.html ("Privacy Policy"). XO may revise the Privacy Policy periodically without notice to You.
5. *INTELLECTUAL PROPERTY.* You agree that all Services obtained via the Services Site are the property of XO and/or its licensors. All rights not granted hereunder are expressly reserved to XO or its licensors. XO or its licensors retain all rights in the Services and all related trademarks, trade names and service marks, and You acknowledge that You do not have the right to use this intellectual property except as specifically permitted in this Agreement. XO's licensors are intended third-party beneficiaries of this Agreement.
6. *LIMITATIONS OF LIABILITY*
- 6.1. *CONSEQUENTIAL DAMAGES WAIVER.* TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, IN NO EVENT WILL XO OR ITS LICENSORS BE LIABLE OR RESPONSIBLE TO YOU OR ANY USER FOR ANY TYPE OF INCIDENTAL, PUNITIVE, INDIRECT OR CONSEQUENTIAL DAMAGES OR LIABILITY THAT MAY ARISE OUT OF THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, LOST REVENUE, LOST PROFITS, LOST GOODWILL, REPLACEMENT GOODS, LOSS OF TECHNOLOGY, RIGHTS OR SERVICES, LOSS OF DATA, OR INTERRUPTION OR LOSS OF USE OF SERVICE OR EQUIPMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER ARISING UNDER THEORY OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE. XO ASSUMES NO RESPONSIBILITY FOR LOSS, DAMAGE OR MODIFICATIONS TO USER DATA.
- 6.2. *LIMITATION OF LIABILITY.* EXCEPT FOR THE INDEMNITY OBLIGATIONS IN SECTION 7, XO'S TOTAL LIABILITY ARISING OUT OF THIS AGREEMENT UNDER ALL THEORIES OF LIABILITY SHALL BE LIMITED TO THE FEES ACTUALLY PAID BY YOU TO XO DURING THE TWELVE MONTHS PRECEDING ANY CLAIM, NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. THE PARTIES ACKNOWLEDGE THAT XO HAS SET ITS PRICES AND ENTERED INTO THIS AGREEMENT IN RELIANCE UPON THE LIMITATIONS OF LIABILITY AND THE DISCLAIMERS OF WARRANTIES AND DAMAGES SET FORTH HEREIN, AND THAT THESE TERMS FORM AN ESSENTIAL BASIS OF THE BARGAIN BETWEEN THE PARTIES.

7. INDEMNIFICATION

- 7.1. *CUSTOMER INDEMNIFICATION.* YOU AGREE TO INDEMNIFY, DEFEND AND HOLD XO HARMLESS FROM AND AGAINST ANY AND ALL COSTS, DAMAGES, LIABILITIES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, REASONABLE ATTORNEYS' FEES (COLLECTIVELY, "COSTS") RESULTING FROM ANY SUIT, ACTION OR PROCEEDING ("ACTION") BROUGHT AGAINST XO OR ITS LICENSORS ARISING FROM (I) YOUR OR ANY USER'S USE OF ANY PART OF THE SERVICES OR THE SERVICES SITE OTHER THAN IN ACCORDANCE WITH THE TERMS OF THIS AGREEMENT OR (II) YOUR BREACH OF ANY MATERIAL TERM OF THIS AGREEMENT.
- 7.2. *XO INDEMNIFICATION.* XO WILL INDEMNIFY, DEFEND AND HOLD YOU HARMLESS FROM AND AGAINST ANY AND ALL COSTS RESULTING FROM (I) ANY ACTION BROUGHT AGAINST YOU OR USERS BY A THIRD PARTY ALLEGING INFRINGEMENT OR MISAPPROPRIATION OF ANY INTELLECTUAL PROPERTY RIGHT RELATING TO THE DELIVERY OF THE SERVICES (UNLESS CONTRIBUTORILY CAUSED BY YOU OR ANY USER) OR (II) XO'S BREACH OF ANY MATERIAL TERM OF THIS AGREEMENT.
- 7.3. *NOTICE.* EACH PARTY'S INDEMNIFICATION OBLIGATIONS HEREUNDER SHALL BE CONDITIONED UPON (I) RECEIVING PROMPT WRITTEN NOTICE OF THE EXISTENCE OF ANY ACTION; (II) HAVING THE RIGHT TO CONTROL THE DEFENSE OF SUCH ACTION; AND (III) RECEIVING FULL COOPERATION OF THE INDEMNIFIED PARTY IN THE DEFENSE THEREOF. THE INDEMNIFIED PARTY MAY PARTICIPATE IN THE DEFENSE OF ANY ACTION AT ITS OWN EXPENSE.

8. **TERMINATION.** Either party may terminate the Services at any time. XO may also terminate or suspend any and all Services immediately, without prior notice or liability, if You breach any of the terms or conditions of this Agreement. Any fees paid hereunder, including those pre-paid, are non-refundable. You agree to terminate Services before such date that charges incur for the following prepaid term. XO will not be liable to You for termination or expiration of any Service or of this Agreement in accordance with its terms, or in the event that any of the Services is terminated or not renewed by XO or its licensors. The following provisions will survive expiration or termination of this Agreement: Sections 3, 4, 6, 7, 8, 10, and 11.
9. **ADDITIONAL TERMS/MODIFICATION.** Any modifications to this Agreement, with the exception of reasonable updates to XO's Privacy Policy that do not materially alter XO's obligation to maintain the privacy of Your data, to which You hereby consent, must be made in a writing executed by both parties. You acknowledge that XO's licensors may require You to agree to additional terms upon registration to use Services licensed by them.

10. DISPUTE RESOLUTION PROCESS

- 10.1. The parties agree to use the dispute resolution procedures set forth in this Section 11 with respect to any controversy or claim arising out of or relating to the Agreement or its breach, except that XO may elect to litigate the following types of controversies or claims: (i) action seeking a temporary restraining order or injunction, or (ii) a suit to compel compliance with this dispute resolution process, (iii) Customer's non-compliance with publicity provisions, or (iv) billing or payment disputes or collections matters.
- 10.2. Either party may submit a dispute to binding arbitration for resolution by a single arbitrator with a professional arbitration service mutually agreeable to the parties after furnishing the other party ten (10) days prior written notice. If the parties cannot agree on an arbitration service, the arbitration will take place pursuant to the American Arbitration Association ("AAA") Commercial Arbitration Rules and Mediation Procedures. The parties shall bear equally the costs of arbitration, including the fees and expenses of the arbitrator. Each party shall bear the cost of preparing and presenting its case, which will be heard at a mutually agreeable site in Fairfax County, Virginia.

- 10.3. This Section 11 and the arbitrator's authority to grant relief shall be subject to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, et seq. ("FAA"), the provisions of this Agreement, and the AAA Code of Ethics for Arbitrators in Commercial Disputes. The arbitrator shall have no power or authority to make any award that provides for punitive or exemplary damages or damages otherwise limited or excluded in the Agreement. The arbitrator's decision shall be final and binding. The award may be confirmed and enforced in any court of competent jurisdiction. The FAA shall govern all post-award proceedings.

11. MISCELLANEOUS PROVISIONS

- 11.1. *Relationship Among XO, Customer and Third Parties:* The Agreement does not render XO or You the agent or legal representative of the other, nor does it create a partnership or joint venture between XO and You. Neither XO nor You shall have any right or authority to bind the other in any manner whatsoever. This Agreement confers no rights or authority of any kind on third parties, except as otherwise provided herein.
- 11.2. *Severability:* Any provision found unlawful by a court or regulator having jurisdiction shall be deemed to be severed from this Agreement, but such severance shall have no effect on the enforceability of the remaining provisions of this Agreement.
- 11.3. *Choice of Law and Venue:* This Agreement is made pursuant to, and shall be construed and enforced in accordance with, the substantive law of the Commonwealth of Virginia, without reference to its principles of conflicts of laws, and You explicitly consent to the exclusive jurisdiction and venue of either the Federal District Court for the Eastern District of Virginia or the State Courts in Fairfax County, Virginia.
- 11.4. *Non-exclusive Dealing:* The Agreement is non-exclusive. Nothing shall prevent You or XO from entering into similar arrangements with, or otherwise providing Services to, any other person or entity.
- 11.5. *Survivability:* The terms and conditions contained in this Agreement that, by their sense and context, are intended to survive the performances of the parties shall survive the completion of those performances and the Agreement's termination. These include, without limitation, the making of payments due under this Agreement.
- 11.6. *No Waiver:* No waiver of any of the provisions of this Agreement shall be binding unless made in writing and signed by the waiving party. The failure of either party to insist on the strict enforcement of any provision of this Agreement shall not be deemed to constitute a waiver of the provision, and all terms and conditions shall remain in full force and effect.
- 11.7. *Complete Agreement:* This Agreement, incorporating all the applicable documents referenced herein, represents the entire agreement between the parties with respect to Service, and supersedes all other prior agreements between the parties, whether written or oral. This Agreement may be modified only by writings executed by authorized representatives of the parties, XO changes made to referenced URL sites, or as otherwise specifically provided for between the parties. In no event shall the Agreement or any component thereof be modified, amended or affected in any way by e-mail correspondence between or among the parties' employees, agents or representatives.

12. SERVICE LEVELS AGREEMENT

12.1. Definitions.

- a) "Covered Hours" means 24 hours a day, seven days a week.
- b) "Covered Services" means, collectively, the On-Demand Services provided by XO pursuant to this Agreement.

- c) “Eligible Customer” means a current Customer that does not have an outstanding balance, which is eligible to receive service credits as described in Section 12.4 of this Agreement on behalf of an Eligible User.
- d) “Eligible User” means a User of an Eligible Customer who has reported an Outage by logging a ticket or sending an email notifying XO of the unavailability of an applicable Covered Service, and has requested a credit to the XO Helpdesk at support@xomarket.com or at the link to be conspicuously included in the resolution e-mail sent by XO to the Eligible User or provided on the XO Service Management Console for such reporting purposes within 24 hours of experiencing the disruption of service, and is therefore eligible to receive credits in accordance with Section 12.4.
- e) “Emergency Maintenance” means unscheduled maintenance that is deemed necessary by XO or XO’s licensors, each in its reasonable judgment, to maintain the integrity, security or performance of the Covered Services.
- f) “Force Majeure” means, with the exception for Your obligation to pay XO, neither party shall be liable for any failure to perform due to unforeseen circumstances or to causes beyond the party’s control, including, but not limited to, acts of God, war, riot, acts of civil or military authorities, fire, flood, earthquake, accidents, strikes, or shortages of transportation, facilities, fuel, energy, labor, or materials..
- g) “Incident” means a bug or other problem that is reported by You or that is identified by Eligible Customer, or any other error or disruption of service with respect to a Covered Service or Covered Services. Incidents may be classified as Severity 1, Severity 2 or Severity 3. Severity 1 Incidents shall be deemed to be “Outages” (as further defined below).
- h) “Outage” means a period of unavailability of a Covered Service that affects at least five percent (5%) of Customers utilizing the applicable Covered Service at the time of occurrence. Outage is measured based on Server side error rate. “Outage” excludes unavailability of a Covered Service that occurs during regular maintenance or Emergency Maintenance, is caused by a Force Majeure event, or is caused by a failure of a User system or service, none of which will be included in the calculation of the Blended Services Threshold (as defined in Section 12.3) or the calculation of Uptime for the Covered Services (as defined in Section 12.3). Severity 2 or Severity 3 Incidents shall not be considered Outages, and will not give rise to any credits.

12.2. Notice of Incident. Customer shall notify XO promptly through the XO Helpdesk of any Severity 1, 2 or 3 Incident related to the Covered Services affecting the Customer. Severity levels and Incident handling procedures are described in Table 1 below. XO shall use commercially reasonable efforts to provide a Final Resolution or work-around within the time periods specified herein. Customer shall use commercially reasonable efforts to notify XO of any known issues related to User’s or User’s service providers’ systems and services required to deliver the Covered Services to Customers.

Table 1

Trouble Severity Code	Description
Severity 1	<p>“Severity 1” event means an Outage concerning a Covered Service:</p> <ul style="list-style-type: none"> • for which a work-around has not been made available; and • that causes a critical component of the Covered Service to be inaccessible or completely inoperable for Customers.
Severity 2	<p>“Severity 2” event means an Incident concerning a Covered Service that:</p> <ul style="list-style-type: none"> • constitutes a major degradation in functionality of a critical feature of a Covered Service that causes significant inconvenience to Customers.
Severity 3	<p>“Severity 3” event means an Incident concerning a Covered Service or product</p> <ul style="list-style-type: none"> • that impacts operations or systems of at least 10% of Customers, but is not considered to severely impact Customers’ experiences; or • for which a work-around is available.

12.3. Service Levels. Uptime (as defined below) for the Covered Services shall not fall below the Blended

Services Threshold (as defined below). The Blended Services Threshold shall be calculated monthly, across all then-current Covered Services, which shall be pro rated for partial months. Notwithstanding anything to the contrary contained in this Agreement, the Blended Services Threshold shall not exceed 99.5% during the term of this Agreement.

- a) Uptime will be measured on a calendar month basis, which is the number of days in a given month multiplied by 1440 minutes (“Measurement Period”), and will be calculated based on the following formula: $(\text{Total Monthly minutes} - \text{regular maintenance minutes} - \text{Emergency Maintenance minutes} - \text{Force Majeure minutes} - \text{Outage Minutes}) / (\text{Total Monthly minutes} - \text{regular maintenance minutes} - \text{Emergency Maintenance minutes} - \text{Force Majeure Minutes}) * 100\%$.
- b) The Blended Services Threshold shall be 99.5% as of the date XO provisions Services to You.
- c) Total Uptime will be communicated to Customer via the Service Management Console.

12.4. Eligible User. In the event of XO’s failure to meet the Blended Services Threshold with respect to a Covered Service during a Measurement Period, Eligible Customers will be entitled to receive credits on behalf of Eligible Users as follows:

- a) Each Eligible Customer will be entitled to receive the Credit Percentage indicated below beside the corresponding Uptime for each Eligible User.

Uptime Percentage	Credit Percentage
< 99.5% and >= 98%	4%
< 98% and >= 97%	6%
< 97% and >= 96%	8%
< 96%	11%

- b) If the time to restore or resolve (TTR) an Outage is as described in the table below, then each Eligible Customer will be entitled to receive a percentage of the total fees paid by the Eligible Customer for such Eligible User for such Covered Service during the Measurement Period that is identified in the table below under “Credit Percentage”.

TTR	Credit Percentage
< 48 hours and > 12 hours	25%
> 48 hours	50%

- c) Credit will be applied to each Eligible Customer account for the month following the month in which the Blended Services Threshold was not met. In no event will credits payable by XO to any Eligible Customer in any given Measurement Period exceed the amounts received by XO from that Eligible Customer during the Measurement Period. Eligible Customers receiving credits pursuant to Section 12.4(b) will not be eligible to receive credits for the same Outage under Section 12.4(a) or Schedule 1 hereto.

12.5. Service Maintenance. Maintenance will be performed between 12:00 am and 8:00 am Pacific Time on weekends. XO and its service providers will be allowed Emergency Maintenance of not to exceed two (2) hours per Covered Service every week to apply patches, if required. XO will provide notice of weekend maintenance, not less than forty-eight (48) hours in advance. In the event emergency maintenance is required, XO will use reasonable efforts to provide advance notice.

12.6. Service Outages. For calculation purposes, an Outage will be measured from the time XO receives notice of such Outage from an Eligible User via the XO Helpdesk until XO has provided a Licensee approved final resolution for the Incident and restored the affected Covered Service.