

NYSERNet VIRTUALIZATION ORDER FORM (Terms and Conditions)

The undersigned End User (the "End User") hereby submits this NYSERNet Virtualization Order Form (the "Order Form" or "Agreement") to evidence End User's agreement for deployment of the licenses and/or purchase the VMWare services described on Attachment 2.

The parties agree as follows:

Upon payment of the applicable fees by End User, and subject to the terms of this Order Form and the VMware End User License Agreement ("EULA"), End User is acquiring deployment of one or more licenses for software or products provided by VMware, Inc. (the "Software") and/or corresponding technical support and subscription services (the "Services"). If End User is acquiring deployment of Software, NYSERNet shall forward to VMware an order to release license "Key(s)" to End User to allow End User to download the Software. In order to obtain deployment of the licenses for Software, End User shall execute or otherwise accept the EULA in the form required by VMware. End User shall have the right to use the deployed license of Software on terms permitted by the EULA and subject to the restrictions contained in the Agreement between NYSERNet and VMware, which establishes the terms on which NYSERNet can deploy licenses of Software and make available Services to End User (the "ELA"). The ELA restrictions are attached as Attachment 1. NYSERNet shall retain ownership of all licenses deployed hereunder subject to transfers subject to the ELA. With respect to Services, two options are available: Option 1 is the deployment of license(s) for Software, which includes the license and Service for the Software shown in Section A of Attachment 2. All Service acquired under this Order Form is at the VMware Production Support level as shown on Attachment 2. Option 2 is a conversion program where End User can convert its service for an existing VMware software license held by End User to the Services under the Maintenance Renewal portion, Section B of Attachment 2, and is only available for the software described therein.

Other Terms and Conditions

1. Payment and Invoicing

- A. All billing under this Agreement will be in advance and invoiced upon notification by NYSERNet that this Order Form has been accepted.
- B. End User shall pay to NYSERNet the amounts set forth in Attachment 2 for the Software and Services purchased under this Order Form.
- C. Payment is due within thirty days of receipt of invoice. Interest charges of one percent (1%) per month or the highest rate permitted by law, whichever is less, will accrue daily on all past due amounts.
- D. Pursuant to Section 2 below, NYSERNet may terminate this Agreement or EULA with ten days written notice and demand End User to no longer use the Software or Service, upon the failure of End User to pay charges when due. Such termination or denial will not relieve End User of responsibility of the payment of all unpaid charges, plus reasonable interest and any cost and expenses of collection, including, without limitation, reasonable attorneys fees.

2. Term and Termination

The initial term of this Agreement shall commence on the date this Agreement is executed by both parties and shall continue for the term set forth in Attachment 2 or is otherwise terminated pursuant to this Agreement or the terms of the EULA.

NYSERNet may terminate this agreement upon 30 days' notice for End User's failure to pay invoices when due or immediately for material breach by End User of any other term of this Agreement or the

EULA in which event NYSERNet may demand End User no longer use any Software and/or Services deployed or purchased under this Agreement.

3. Limitation of Liability

End User acknowledges that all Software and Services are provided by VMWare and agrees that the deployment of any license or the purchase of any Software or Service is by way of pass through by NYSERNet for the benefit of End User in order to allow End User to receive a discounted price. Except any rights or warranties expressly provided by VMWare to End User for which End User shall look solely to VMWare, NYSERNet MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. NYSERNet SHALL NOT BE LIABLE TO END USER FOR ANY LOSS OF DATA, LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION OR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY, CONSEQUENTIAL OR OTHER FORM OF MONEY DAMAGES. End User hereby agrees to defend, indemnify and hold NYSERNet and its directors, officers, members, employees for any claim or loss arising from or relating to misuse or unauthorized use of any Software or Service deployed or purchased under this Agreement or any breach or violation of the EULA, the ELA, or any harm or loss caused, by End User or it officers, directors, employees or any users of any Software or Service.

4. Compliance with Applicable Law and Other Obligations

End User must comply with all laws, regulations, and policies applicable to their use of the Software or Service, including, without limitation, U.S. export laws concerning use of the Software or Service

5. Governing Law and Jurisdiction

This Agreement shall be subject to and construed in accordance with the laws of the State of New York. Any action based in whole or in part on this Agreement must be brought in a court of competent jurisdiction in New York.

6. Entire Agreement; Amendments

This Agreement, the Exhibits and the EULA constitute the entire agreement between the parties and supersedes all prior agreements and understandings with respect to the same subject matter. This Agreement may not be modified by, and shall supersede any additional or contradictory term or condition of, any current or future purchase order from End User unless NYSERNet expressly agrees otherwise in writing. No amendment or modification of this Agreement shall be effective unless in writing and signed by both parties.

_____	NYSERNet.org, Inc.
Customer	
By:	By:
_____	_____
Authorized Signature	Authorized Signature
_____	_____
_____	_____
Type (Print) Name and Title	Type (Print) Name and Title
_____	_____
Date	Date

NYSERNet VIRTUALIZATION ORDER FORM
Attachment 1
Limitations on User of Software

1. This Order Form does not grant any rights for End User to:
 - (i) allow or permit any affiliate, other group, state or local government agency, non-profit, or federal or federally run institutions or organization to Deploy, access or use the Software, except as otherwise expressly set forth herein, or
 - (ii) allow or permit any commercial entity to Deploy, access or use the Software, or
 - (iii) operate the Software as part of any business operation for which End User permits any use of or access to the Software by any third party, or
 - (iv) operate the Software on behalf of or for the benefit of any third party, including the operation of any service that is accessed by a third party, or
 - (v) Deploy or use the Software in respect to the business of any corporation or other entity which becomes a part of the business of End User as a result of an Extraordinary Corporate Transaction (as defined herein), or
 - (vi) Deploy or use the Software in respect to the business of any third party corporation or other entity which purchases a part or all of the business of End User by way of divestiture, acquisition, or similar transaction.

“**Extraordinary Corporate Transaction**” means any merger, acquisition, consolidation, reorganization, change of control, sale of substantially all assets or other similar transaction, whether in one transaction or in a series of related transactions, involving: (1) End User, and (2) any third party corporation or other entity.

2. This Order Form and any rights or obligations of End User under it may not be assigned or otherwise transferred by End User, in whole or in part, whether voluntary or by operation of law, including by way of sale of assets, merger or consolidation, without the prior written consent of NYSERNet and VMware, and any attempt to assign this Order Form by End User without such consent shall be null and void and of no force and effect. For purposes of this paragraph: (i) the acquisition by any person, entity or group directly or indirectly, of beneficial ownership of more than fifty percent (50%) of the total voting power of the capital stock or other securities of the End User; or (ii) any merger, consolidation, change of control or similar transaction by the End User with or into any person or entity (even if the End User is the surviving entity) other than in a transaction in which the holders of a majority of the outstanding voting stock prior to such transaction continue to hold majority of the outstanding voting stock of the surviving or continuing entity following such transaction, shall each constitute an assignment for which the prior written consent of NYSERNet and VMware is required.
3. The Software may not be used outside the United States or otherwise as restricted by the EULA.
4. Ownership of Software may be transferred by NYSERNet only in accordance with provisions of the ELA which provide as follows: “Customer may transfer licenses acquired under this ELA to its Member Organizations upon expiration of the ELA Period or 366 days after Deployment of software by a Member Organization, provided Customer and the Member Organization follow VMware’s license and assignment transfer process and execute VMware’s standard license and assignment transfer form....” .