



## Silver Care Plan Support, Maintenance and Service Agreement "Terms & Conditions" – Revision 1.06, February 2006

THIS IS A LEGAL AGREEMENT (the "Service Agreement") between you (Customer) and Vircom, Inc. (the "Company") with respect to the Support, Maintenance and Service Agreement (the "Terms and Conditions"). Payment of the "Service Agreement" invoice signifies the acceptance of the terms stated in the "Terms and Conditions".

### 1. Definitions

For purposes of these Terms and Conditions, the following terms shall have the following meanings:

**"Appliance"** shall mean the computer component purchased from the Company to exclusively run the modusGate appliance product.

**"Documentation"** shall mean the documents that Vircom provides to its customers in connection with the Software.

**"Hardware"** means computer and network components required to run effectively the Software, as set forth in the Documentation for the Software.

**"Major Functionality"** shall mean any additional or replacement code or Documentation for the Software provided by Vircom that adds major new capabilities or functionality and that is designated by Vircom, in its sole discretion, as a "Major Functionality". A major functionality is defined as a critical component of the Software and is crucial to the normal operation of the Product.

**"Minor Functionality"** shall mean any additional or replacement code or Documentation for the Software provided by Vircom that adds minor new capabilities or functionality, error corrections or bugs fixes and that is designated by Vircom, in its sole discretion, as a "Minor Functionality." A minor functionality is defined as a component not critical to the normal operation of the Product and generally is an annoyance to the Customer when the functionality is not working as designed.

**"Non Covered Items"** shall mean any item that may impact the normal behaviour of the Software operation but not under the control of Vircom such as but not limited to network problem, third-party software, Hardware configuration.

**"Normal Business Hours"** shall mean 9:00 am to 6:00 pm EST, Monday through Friday, excluding holidays observed by Vircom Inc. The official list of holidays is available on Vircom's website.

**"Product"** shall mean the product identified by an Activation Key on the invoice notice to the Customer from Vircom.

**"Production System"** shall mean the Software in use in a production environment excluding test environment.

**"Repair"** shall mean the repair or replacement of an Appliance part.

**"RMA Number"** means the Return Material Authorization (RMA) Number issued by Vircom from tracking materials returned to Vircom. The RMA Number is issued after all relative information has been received by Vircom and the RMA request is approved with the appropriate disposition for the material in question.



**"Software"** means computer programming code, and includes computer programs that have been licensed to Customer.

**"Software Error"** shall mean any verifiable failure of the Software to substantially conform to the Specifications for such Software. Notwithstanding the foregoing, "Software Error" shall not include any such failure that is caused by:

- (i) the use or operation of the Software with any other software or programming languages or in an environment other than that intended or recommended by Vircom,
- (ii) the use, installation or operation of the Software other than in accordance with the Specifications;
- (iii) modifications to the Software not made by Vircom.

**"Specifications"** shall mean the published specifications of the Software and Hardware, as set forth in the Documentation for the Software.

**"Workaround"** shall mean a temporary solution to a Software Error that Vircom has implemented, or enabled Customer to implement and that allows the Software to regain functionality in accordance with the Specifications.

## 2. Description

**2.1 Support Service:** The Support Service is available during Normal Business Hours. This service bundles hot fixes, patches, software upgrades, telephone and email support during Normal Business Hours and for customers with Anti-Virus and Spam protection options, 24 hour Anti-Spam definitions updates and Anti-Virus Protection Updates.

Anti-Spam and Anti-Virus updates options are licensed for the duration of the Service Agreement and will be automatically deactivated at the expiration of the current Service Agreement unless the Service Agreement is renewed.

The Customer agrees to provide Vircom Inc. with all the information that Vircom Inc. may require to reproduce and verify the problem, including logs and configuration files, and the testing and applying of Workaround and fixes.

**2.2 Support Appliance Service and RMA – when applicable:** The Support Appliance Service is available during Normal Business Hours. Vircom will replace a defective Appliance for the duration of the Term. Any Replacement shall be warranted for the remaining of the Term. This excludes Appliance that has been damaged by accident, abuse or misuse. Vircom will provide the Customer with an RMA procedure. No Appliance will be accepted without the proper RMA documentation completed.

**2.1.1** Vircom standard policy is to replace defect material. Special circumstance may dictate other actions.

**2.1.2** Vircom will acknowledge RMA request within 1 business day of receipt.

**2.1.3** Approved RMA request are to be processed on the following business days (Excluding Holidays).

**2.1.4** Materials damage during shipping must be reported to Vircom within 72 hours from receipt of the shipment. The shipping damage report must include: PO number and part number (from the shipping packing list) and complete information about the damage.

**2.1.5** Shipments missing parts or components should be reported to Vircom within 2 weeks from receipt of the shipment. The following information must be included when reporting missing parts: PO number and part number (from the shipping packing list) and complete information about the missing parts or components.

**2.1.6** Standard warranty terms. Full replacement for materials and workmanship defects for the duration of the Service Agreement and renewal for a maximum of 60 months from the original purchase date.



**2.3 RMA Return Shipment Procedure and Policy – when applicable.** Upon receiving replacement materials, the Customer is responsible to return defective materials to a Vircom repair facility within 15 days.

All returns are subject to inspection.

All returned merchandise must be in the original factory condition, including all packaging materials, inserts and manuals. A fee will be incurred for replacement of damaged, altered, missing, written-on or taped-on contents or cartons. Vircom reserves the right to refuse any such return.

Return merchandises are expected to be in a shipping box with ample packing materials, and tape securely to reduce the risk of damage. The RMA number issued by Vircom is to be clearly stated on the outside of the shipping carton. All unauthorized returns will be refused. Return product should be accompanied with a label stating the specific reason for the return.

Return merchandises are expected to be sent freight prepaid. We recommend that you use UPS Ground Service 'Insured'. COD or freight-collect shipments will be declined. No goods will be accepted for exchange or return without authorization.

**2.4 Standard Procedure for RMA Request – when applicable.** Contact Vircom technical support to report any problems related to your Appliance. At such time, Vircom Technical Support will validate the problem and notify you of the process of returning the Appliance.

### 3. Support Eligibility

**a. Product Software Version and Operation.** Vircom requires that in order to obtain support, the Hardware must contain the most current or immediately previous Major release of Vircom Software. In order to correct or troubleshoot certain Software Errors the Customer may be required to update the version of the Software it has installed to the most current shipping release of the Software. Software, which has been modified without Vircom's prior written approval, is not eligible for support. To obtain Major/Minor functionality, Customer must have a valid and active support plan for the Product.

**b. Non Covered Items.** Customer agrees that Non Covered Items are not covered by the standard Silver Support Service and Customer shall pay Vircom an hourly rate as described in section 11. Such work shall be pre-authorized in written by Customer and be executed by Vircom employees only if such work doesn't impact the ability of Vircom in helping other Customers

**c. Supported operating systems.** Vircom shall offer support for operating systems that meet the Specifications as described in the Documentation.

### 4. Priority Definitions and Response Times.

Vircom will use commercially reasonable efforts to provide the Customer written acknowledgement of a request for support or an initial call back response to all Customer calls within the Initial Response Time defined in Table 1. Vircom and the Customer agree with the classification of a request (see below) and the request will be handled according to its priority level. Customer agrees that Vircom may during holidays offer limited service.

Priority Level	Description	Initial Response Time	Vircom Commitment
1-Critical	A [1-Critical] problem causes your Product on a Production System to become completely unavailable.	1 hour	Customer and Vircom will commit the necessary resources based on the support program and options to resolve the Software Error or obtain a workaround until the Product is functional.
2-High	A [2-High] problem substantially impairs the operation of your Product or causing significant business impact to your operations on a Production System.	4 hours	Vircom will provide services during Normal Business Hours until the Software Errors is restored or a suitable workaround is found
3-Normal	A [3-Normal] problem does not substantially impair System operation while most Major / Minor functionalities remain available.	8 hours	Vircom will provide services during Normal Business Hours and use reasonable efforts to resolve the Software Error or provide a fix within a future maintenance release or patch.
4-Low	A [4-Low] problem does not impair Product operation. It is non-conforming behaviour that can be avoided or ignored. General questions, configuration or enhancement request are normally classified as [4-Low].	48 hours	Vircom will provide services during Normal Business Hours for Minor Functionality or enhancement request and will be corrected them in a manner and within a time frame as determined by Vircom in its sole discretion.

## 5. Customer Care.

**Downloads, updates and emergency information.** Vircom will use commercially reasonable efforts to provide details on current version, patches or any other information critical to Customer by accessing the "My Vircom" secure website. When an emergency situation is detected and impacts a majority of Customers, a warning will be sent to Customers who joined Vircom mailing lists and information be posted on Vircom website.

**Web Support.** Vircom will use commercially reasonable efforts to provide online Web support 24 hours a day, 7 days a week. This provides access to Major/Minor Functionality, and patch releases of the Vircom Product available to Customer based on the current contracted service and options. Additional information such as a technical knowledge base document is generally available to Customers via Vircom support website.



**Email and Telephone Support.** Email and Telephone support is provided through Vircom Technical Support who will document, assign or respond to the request within the timeframe specified in section 4 and based on current Support Program and options contracted by Customer.

**Processing your request.** All requests are processed based on the order they are received and priority as defined in Section 4 and on the Customer current Support Program and options contracted. Communication with customer may be carried out over email or telephone and all communications between Customer and Vircom shall reference the ticket number.

**Customer Escalation Request.** During Normal Business Hours Customer may contact Vircom support at anytime to inquire the status of a request by providing the ticket number. If the Customer is not satisfied with the current process and feels it is necessary to escalate the request, Customer shall notify the support dispatcher and explain why the request should be escalated. The support dispatcher will then notify the support manager who will take ownership and responsibility of the request. Customer may also contact Vircom Support and ask to speak directly with the support manager.

**Enhancement Request.** Enhancement request shall be directly submitted to Product Management at request@vircom.com. Enhancement request will be reviewed and customer notified of Vircom decision. When submitting your enhancement request, please describe the function, look and feel and how such enhancement will be beneficial to your company.

**Mailing Lists.** Customer can join, for free, Vircom's mailing lists. Mailing lists are grouped by Products and provide valuable information to all customers. The mailings lists are not monitored by Vircom and Vircom shall not be held responsible for wrong usage or misconduct by customers. For additional information about mailing list, please visit Vircom's website.

## **6. Anti-Spam Liability Limitation.**

Vircom shall provide to licensed Customer Anti-Spam definition updates. Customer agrees that the percentage of catching rate and false-positive is not guaranteed and may fluctuate over time.

## **7. Anti-Virus Liability Limitation.**

Vircom shall provide to license Customer latest Anti-Virus signature file as made available by third-party Anti-Virus Technology Providers. Vircom takes no responsibility in the content of such Anti-Virus signature file and doesn't guarantee all Viruses or other type of malicious code will be detected. Vircom will make all necessary effort to escalate Viruses or any other malicious code to third party Anti-Virus Technology Provider for quick resolution.

## **8. Modification of current Terms and Conditions.**

Vircom may from time to time modify the content of the services or any condition of this agreement, by giving Customer a minimum of thirty (30) days notification. No notice will be required if the content of services or any condition of this Service Agreement remains noticeably the same and the applicable fees are not affected during the term of the Service Agreement.

## **9. Usage of the Software.**

Usage of Software is governed by the Software License Agreement. Vircom may terminate this Service Agreement if Customer fails to comply with its terms and conditions.

## **10. Transfer.**

The Customer cannot transfer its rights and obligations under these Terms and Conditions, without Vircom's prior written consent. Vircom may transfer or subcontract its right and obligations under these Terms and Conditions to another person at any time without the Customer's consent.



## 11. Financial Consideration.

**a. Fees in consideration of the Service Agreement.** Customer shall pay Vircom the fees in the amounts and in accordance with the payment terms set forth in the invoice for the current term.

**b. Extra Fees.** Customer shall pay Vircom an hourly rate for Non Covered Items during Normal Business Hours of \$200 per hour or a per diem rate of \$1,200. On Saturdays, Sundays and statutory Holidays the rate of \$250 per hour or a per diem rate of \$1,500. Such work shall be pre-authorized in written by Customer.

**c. Taxes.** Customer shall, in addition to the other amounts payable under these Terms and Conditions, pay all applicable sales, use, value added or other taxes, federal, state or otherwise, however designated, which are levied or imposed by reason of the transactions contemplated by these Terms and Conditions, excluding only taxes based on Vircom' net income. Customer shall indemnify and hold harmless Vircom from all claims and liability arising from Customer's failure to report or pay any such taxes, duties and assessments.

## 12. Term and Termination.

**a. Term.** The term of this Agreement shall correspond to the term set forth in the Vircom invoice.

**b. Termination.** Either party shall have the right to terminate the Support Agreement in the event: (i) the other party materially breaches any provision of these Terms and Conditions which breach is not cured within thirty (30) days of written notice to the other party; or

(ii) the other party

(A) voluntarily enters into proceedings in bankruptcy or insolvency;

(B) makes an assignment for the benefit of creditors;

(C) has petition filed against it under a bankruptcy law, a corporate reorganization law, or any other law for relief of debtors or similar law analogous in purpose or effect, which petition is not dismissed within one hundred and twenty (120) days of filing thereof; or

(D) enters into liquidation or dissolution proceedings or a receiver is appointed with respect to any assets of the other party, which appointment is not vacated within one hundred and twenty (120) days; or

(E) the Support Agreement shall be automatically terminated in the event the license granted in the Software License Agreement is breached.

## 13. Proprietary Rights.

Any corrections, additions or modifications to the Software or Documentation effected or delivered by Vircom to Customer, including without limitation any Major Functionality, Minor Functionality or Workarounds, shall be deemed part of the Software and subject to all of the provisions of the Service Agreement

## 14. Warranty.

VIRCOM WARRANTS THAT SERVICE(S) PROVIDED SHALL BE PERFORMED IN A WORKMANLIKE AND COMPETENT MANNER. UNLESS A SPECIFIC WARRANTY EXTENSION SERVICE IS PURCHASED, THE PROVISION OF SUPPORT SERVICES DOES NOT EXTEND, MODIFY OR ENHANCE THE ORIGINAL SOFTWARE WARRANTIES. VIRCOM MAKES NO WARRANTY THAT THE SOFTWARE WILL BE ERROR FREE OR FREE FROM INTERRUPTION OR FAILURE, OR THAT IT IS COMPATIBLE WITH ANY PARTICULAR HARDWARE OR SOFTWARE. VIRCOM AND ITS SUPPLIERS MAKE NO OTHER WARRANTY, EXPRESS, IMPLIED OR STATUTORY, WITH RESPECT TO THE PRODUCTS, THE SOFTWARE, MAJOR FUNCTIONALITY, MINOR FUNCTIONALITY, WORKAROUNDS OR UPGRADE OPTIONS, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF TITLE, AVAILABILITY, RELIABILITY, USEFULNESS, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, OR ARISING FROM COURSE OF PERFORMANCE, DEALING, USAGE OR TRADE. THE PRODUCTS, SOFTWARE, MAJOR FUNCTIONALITY, MINOR FUNCTIONALITY, WORKAROUNDS AND UPGRADE OPTIONS ARE PROVIDED "AS-IS" AND VIRCOM AND/OR ITS SUPPLIERS DO NOT WARRANT THAT PRODUCTS, SOFTWARE, MAJOR FUNCTIONALITY, MINOR FUNCTIONALITY, WORKAROUNDS AND UPGRADE OPTIONS WILL MEET CUSTOMER'S REQUIREMENTS OR BE UNINTERRUPTED, TIMELY, AVAILABLE, SECURE OR ERROR-FREE, OR THAT ANY ERRORS IN THE PRODUCTS, SOFTWARE, MAJOR FUNCTIONALITY, MINOR FUNCTIONALITY, WORKAROUNDS OR UPGRADE OPTIONS WILL BE CORRECTED. WITHOUT LIMITING THE GENERALITY OF THE



FOREGOING, VIRCOM AND/OR ITS SUPPLIERS DO NOT WARRANT THAT THE PRODUCTS, SOFTWARE, MAJOR FUNCTIONALITY, MINOR FUNCTIONALITY, WORKAROUNDS OR UPGRADE OPTIONS WILL BE FREE OF VULNERABILITY TO INTRUSION OR ATTACK.

### 15. Availability of Services and Maintenance.

YOU HEREBY ACKNOWLEDGE THAT THE SOFTWARE MAY NOT BE AVAILABLE OR MAY BECOME UNAVAILABLE DUE TO ANY NUMBER OF FACTORS INCLUDING, WITHOUT LIMITATION, PERIODIC SYSTEM MAINTENANCE, SCHEDULED OR UNSCHEDULED, FORCE MAJEURE, TECHNICAL FAILURE OF THE SOFTWARE, TELECOMMUNICATIONS INFRASTRUCTURE, OR DELAY OR DISRUPTION ATTRIBUTABLE TO VIRUSES, DENIAL OF SERVICE ATTACKS, INCREASED OR FLUCTUATING DEMAND, ACTIONS AND OMISSIONS OF THIRD PARTIES, OR ANY OTHER CAUSE REASONABLY BEYOND THE CONTROL OF THE COMPANY.

### 16. Miscellaneous.

**a. Assignment.** Service Agreement shall be assignable by either party only in connection with a permitted assignment of the Software License Agreement. The terms and conditions shall be binding upon and inure to the benefit of the parties to it and their respective heirs, successors, assigns and legal representatives.

**b. Entire Agreement.** These terms and conditions supersede all prior communications, transactions, and understandings, whether oral or written, and constitute the sole and entire terms between the parties pertaining to the matters addressed in the Service Agreement.

**c. Provisions.** If any of the provisions of these terms and conditions are held to be invalid under any applicable statute or rule of law, they are, to that extent, deemed omitted and the remaining provisions shall continue in full force and effect.

**d. Governing Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the province of Quebec, Canada. The parties agree to institute any claim or legal proceeding arising from the present agreement in the judicial district of Montreal, Quebec, Canada.

**e. Waiver.** No failure or delay (in whole or in part) on the part of either party to exercise any right or remedy hereunder shall operate as a waiver thereof or effect any other right or remedy. All rights and remedies hereunder are cumulative and are not exclusive of any other rights or remedies provided hereunder or by law. The waiver of one breach or default or any delay in exercising any rights shall not constitute a waiver of any subsequent breach or default. No modification, addition or deletion, or waiver of any of these terms and conditions shall be binding on either party unless made in a non-preprinted agreement clearly understood by both parties to be a modification or waiver, and signed by a duly authorized representative of each party.

**f. Force Majeure.** Neither party shall be liable for any failure to perform or delay in performance of its obligations hereunder caused by circumstances beyond its reasonable control or which make performance commercially impractical, including, but not limited to, fire, storm, flood, earthquake, explosion, accident, acts of a public enemy or rebellion, terrorism, insurrection, riot, civil commotion, strikes or other labor disputes, sabotage, epidemic, quarantine, restrictions, transportation embargoes, Acts of God, acts of any government or any agency thereof, judicial action and any other such external circumstances. In the event of such delay, delivery dates shall be appropriately adjusted.

**g. Language of choice.** The parties have agreed that this agreement be written in English. Cette entente a été rédigée en anglais à la demande des parties.

### 17. Limitation of Liability.

THE COMPANY'S SOLE LIABILITY HEREUNDER SHALL BE LIMITED TO DIRECT, OBJECTIVELY MEASURABLE DAMAGES. IN NO EVENT SHALL VIRCOM HAVE ANY LIABILITY FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, INCIDENTAL, OR SPECULATIVE DAMAGES WHETHER ARISING UNDER CONTRACT, TORT, OR STATUTE, INCLUDING WITHOUT LIMITATION, LOSS OF USE, BUSINESS INTERRUPTIONS, LOSS OR CORRUPTION OF



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DATA, CLAIMS OF INFRINGEMENT, LOSS OF GOOD WILL AND LOSS OF PROFITS, IRRESPECTIVE OF WHETHER VIRCOM HAS ADVANCE NOTICE OF THE POSSIBILITY OF SUCH DAMAGES. VIRCOM 'S TOTAL LIABILITY FOR ALL CLAIMS ARISING HEREUNDER SHALL BE LIMITED TO THE FEES PAID TO VIRCOM FOR THE APPLICABLE SERVICE DURING THE TWELVE MONTHS. THE PARTIES ACKNOWLEDGE THAT THESE LIMITATIONS ON POTENTIAL LIABILITIES WERE AN ESSENTIAL ELEMENT IN SETTING CONSIDERATION UNDER THIS AGREEMENT, AND SHALL BE ENFORCEABLE TO THE MAXIMUM EXTENT ALLOWED BY APPLICABLE LAW.