

# COMVERGE, INC.

## FORM 10-K (Annual Report)

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Address 5390 TRIANGLE PARKWAY  
SUITE 300  
NORCROSS, GA 30092  
Telephone 678-392-4954  
CIK 0001372664  
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UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

FORM 10-K

(Mark One)

Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

For the fiscal year ended December 31, 2011

or

Transition Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

For the transition period from \_\_\_\_\_ to \_\_\_\_\_

Commission File Number: 001-33399



Comverge, Inc.

(Exact name of Registrant as specified in its charter)

Delaware

(State or other jurisdiction of  
incorporation or organization)

22-3543611

(IRS Employer  
Identification No.)

5390 Triangle Parkway, Suite 300  
Norcross, Georgia

(Address of principal executive offices)

30092

(Zip Code)

(678) 392-4954

(Registrant's telephone number including area code)

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	Name of Exchange on Which Registered
Common stock, par value \$0.001	Nasdaq Global Market

Securities registered pursuant to Section 12(g) of the Act:

Title of Each Class

Not Applicable

Indicate by check mark if the Registrant is a well-known seasoned issuer as defined in Rule 405 of the Securities Act. Yes  No

Indicate by check mark if the Registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes  No

Indicate by check mark whether the Registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes  No

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files).

Yes  No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of the Registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

Indicate by check mark whether the Registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer  Accelerated filer  Non-accelerated filer  (Do not check if a smaller reporting company)

Smaller Reporting Company

Indicate by check mark whether the Registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes  No

The aggregate market value of shares of the Registrant's common stock, par value \$0.001 per share, held by non-affiliates of the Registrant on June 30, 2011, the last business day of the Registrant's most recently completed second fiscal quarter, was \$71,680,326 (based on the closing sales price of the Registrant's common stock on the Nasdaq Global Market on such date).

At March 9, 2012, there were 27,552,580 shares of the Registrant's common stock outstanding.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the Registrant's Proxy Statement for the 2012 Annual Meeting of Stockholders are incorporated herein by reference in Part III of this Annual Report on Form 10-K to the extent stated herein. Such Proxy Statement will be filed with the Securities and Exchange Commission within 120 days of the Registrant's fiscal year ended December 31, 2011.

**Comverge, Inc.**  
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## **DISCLOSURE REGARDING FORWARD-LOOKING STATEMENTS**

This Annual Report on Form 10-K and the documents incorporated into this Annual Report on Form 10-K by reference contain forward-looking statements. These forward-looking statements include statements with respect to our financial condition, results of operations and business. The words “assumes,” “believes,” “expects,” “budgets,” “may,” “will,” “should,” “projects,” “contemplates,” “anticipates,” “forecasts,” “intends” or similar terminology identify forward-looking statements. These forward-looking statements reflect our current expectations regarding future events, results or outcomes. These expectations may not be realized. Some of these expectations may be based upon assumptions or judgments that prove to be incorrect. In addition, our business and operations involve numerous risks and uncertainties, many of which are beyond our control, which could result in our expectations not being realized, cause actual results to differ materially from our forward-looking statements and/or otherwise materially affect our financial condition, results of operations and cash flows. Please see the section below entitled “Risk Factors” for a discussion of examples of risks, uncertainties and events that may cause our actual results to differ materially from the expectations we describe in our forward-looking statements. You should carefully review the risks described herein and in other documents we file from time to time with the Securities and Exchange Commission, including Quarterly Reports on Form 10-Q to be filed in 2012. We caution readers not to place undue reliance on any forward-looking statements, which only speak as of the date hereof. Except as provided by law, we undertake no obligation to update any forward-looking statement based on changing circumstances or otherwise.

### **Part I**

#### **Item 1. Business**

##### **Business Overview**

We are a leading provider of intelligent energy management, or IEM, solutions that empower utilities, commercial and industrial customers, and residential consumers to use energy in a more effective and efficient manner. IEM solutions build upon demand response, enabling two-way communication between providers and consumers, giving all customer classes the insight and control needed to optimize energy usage and meet peak demand. Beyond reducing the energy load, this approach reduces cost for the utility or grid operator, integrates other systems and allows for the informed decision-making that will power the smart grid.

We provide our IEM solutions through our two reportable segments: the Residential Business segment and the Commercial & Industrial, or C&I, Business segment. The Residential Business segment sells IEM solutions to utility customers for use in programs with residential and small commercial end-use participants. These solutions include hardware, our IntelliSOURCE software and services, such as installation, participant marketing and program management. If the utility customer elects to own the IEM system, we refer to the program as a turnkey program. If we provide capacity through fully-outsourced programs, in which we typically own the underlying system, we refer to the program as a Virtual Peaking Capacity, or VPC, program. Our VPC programs are pay-for-performance in that we are only paid for capacity that we provide as determined by a measurement and verification process with our customers. The C&I Business segment provides IEM solutions to utilities and independent system operators that are managing programs or auctions for large C&I consumers. These IEM solutions are delivered through the management of C&I megawatts in open markets and VPC programs as well as through the completion of energy efficiency projects.

##### **The Converge Solution**

Our IEM solutions enable our electric utility industry customers and open market operators to address issues they confront on a daily basis, such as rising demand, decreasing supply, fluctuating commodity prices, reducing greenhouse gases and emerging government or regulatory mandates to use energy efficiency solutions to address these issues. Our IEM solutions yield the benefits described below to our commercial and industrial customers, residential customers, electric utility industry customers and open market operators.

*Improve the Developing Smart Grid through Advanced, Multi-functioning Solution Sets.* We offer our customers IEM solutions to match their needs for improving and advancing a smarter electrical grid. Our state-of-the-art IntelliSOURCE software system provides demand management functionality, enabling control of various end-use devices and systems, integration into the utility customer’s back office operational systems, and inter-operability with Advanced Metering Infrastructure (“AMI”). In conjunction with our software, our solution set includes multiple service offerings, including engineering and energy audits, project management, installation, customer acquisition marketing, and measurement and verification. These services allow our utility customers to tailor their programs to achieve better marketing penetration rates, lower installation costs, and real time verification of the functionality of their system. Our hardware products complete our solution set by offering technologically advanced functionality for various residential and C&I demand management devices. Through providing solutions to our

customers' issues, we are able to offer our own individual products and services, or integrate other companies' products into our solutions, ultimately improving the developing smart grid.

*Provide an Alternative to Building Expensive New Plants and Associated Transmission and Distribution Infrastructure.* We have the ability to reduce our utility and grid operator customers' capital expenditures and costs for electric transmission and distribution. Our solutions can be directly substituted for new power generation facilities that would otherwise be built to satisfy either peak periods of electricity demand or the expected increase in base load demand. Our IEM systems require significantly lower short-term capital expenditures than a natural gas-fired power plant, and our pay-for-performance capacity solutions often require little to no capital expenditures on the part of electric utilities. By avoiding the build-out of new generation, utilities can also avoid building the incremental new transmission and distribution assets needed to bring power from the location where it is generated to where it is consumed, thereby further reducing required capital expenditures.

*Improve System Reliability and Operational Flexibility.* Our IEM solutions enhance the reliability of the electric grid by providing the ability to reduce power consumption in specific distribution areas during times of peak energy demand and emergency conditions, thereby relieving strain on the aging grid infrastructure. With our IEM solutions, our customers gain the benefit of more reliable infrastructure and lower operating costs associated with fewer emergency maintenance and customer care issues. In addition to improving system reliability, our targeted approach focuses on specific distribution areas allowing for a more targeted approach to using and reducing energy in highly constrained areas. For example, once deployed, our VPC programs become operational, or ramp up, more rapidly than natural gas-fired power plants. Our VPC programs typically require less than five minutes to provide demand reduction. In addition, our technology enables devices to be controlled both individually and in clusters, thereby allowing those devices to be operated at the time and location (such as at a substation, circuit or feeder) required to manage localized constraints or emergency conditions.

*Save Costs for Electricity Consumers.* Certain of our IEM solutions enable residential, commercial and industrial consumers to receive time-of-use electricity price signals, thereby allowing them to match electricity use with the costs to purchase such electricity. Consumers who deploy our solutions can realize cost savings on their electric bills by using less energy, particularly during peak periods when prices are the highest, or shifting their usage to times when electricity is less expensive.

*Conserve and Create a Positive Environmental Impact.* Our IEM solutions allow electric utilities to reduce both peak and permanent load. Our demand management programs provide electric utilities with similar functionality to the peaking capacity typically provided by natural gas-fired power plants while also providing clean alternative energy. By reducing electricity demand during peak times, our demand management programs have the potential to displace older, inefficient peaking power plants and can reduce the operating time of intermediate plants. By substituting our programs for new natural gas-fired power generation facilities, utilities are able to conserve electricity and reduce greenhouse gases and pollutants.

*Enable Electric Utilities to Meet Regulatory Mandates.* Federal and state legislation over the past five years have served to stimulate the developing smart grid and has mandated that the Federal Energy Regulatory Commission and the Department of Energy provide detailed assessments and recommendations for demand response initiatives. We work closely with federal and state regulators and electric utilities to formulate and coordinate effective demand response solutions in light of these regulatory developments and mandates. Advanced technologies for demand response, energy efficiency, smart metering, and distributed generation, including digital information capabilities to implement these technologies, is being driven through regulatory and legislative efforts. This includes a smart grid policy using a national task-force, modernization through deployment of "smart" technologies, a new communications and an inter-operability framework, research and development, and removal of the barriers to smart grid roll-out. Federal grants and matching funds are being deployed to help spur smart grid investments.

## **The Converge Strategy**

We intend to continue to grow and expand our position in the clean energy sector by pursuing the strategic objectives described below.

*Increase Market Penetration.* We intend to further penetrate the clean energy sector by:

- identifying the needs of and providing additional IEM solutions to new and existing customers;
- securing additional long-term contracts as a growing proportion of our revenues;
- effectively matching product innovations with the future needs of our customers, including AMI rollouts designed to migrate North America to a smart electricity grid; and
- expanding the scope of our commercial and industrial demand response offerings, conservation, energy efficiency solutions and other clean energy alternatives, including international opportunities.



*Expand the Market for our IEM Solutions.* We intend to continue demonstrating the effectiveness of our capacity programs in order to secure additional long-term contracts with existing and future customers by:

- marketing to and educating existing and prospective customers, consumer advocates, consultants and industry experts about the benefits of IEM solutions;
- working with utilities, state regulators and local, state and federal governmental agencies to explain the benefits of IEM solutions and obtain rate treatment similar to supply-side resources, such that electric utilities are allowed to earn a rate of return on the capital invested in demand response resources; and
- expanding our current product strategic alliances and identifying new strategic relationships.

*Continue to be an Innovative Leader in our Markets.* From 2001 to 2011, we invested approximately \$26.0 million in research and development alone. We intend to continue such research and development, in addition to capturing operational and technical knowledge gained from the smart grid offerings. This will enable us to develop new and innovative solutions to better serve our existing electric utility customer base, large C&I customers, and to appeal to new customers. We believe that this continued investment strategy will allow us to realize new revenue opportunities and decrease our operating costs, thereby enabling us to remain competitive and to maintain our market position.

*Pursue Targeted Strategic Opportunities.* We intend to pursue strategic relationships and opportunities to strengthen our competitive position in the clean energy sector through domestic and international opportunities. This sector is comprised of a number of companies with niche offerings or customer relationships, which provide attractive opportunities, whether through acquisition, partnering, or joint alliances.

## **Segments**

As of December 31, 2011, we reported our results of operations in two reportable segments: our Residential Business segment and our Commercial & Industrial Business segment. In prior periods, we reported the results of operations in three segments: the Utility Products & Services segment, the Residential Business segment and the C&I Business segment. Beginning for the year ended December 31, 2010, the former Utility Products & Services segment is presented as part of the Residential Business segment. The results of our energy efficiency programs were previously reported in the Residential Business segment. Beginning for the year ended December 31, 2010, the energy efficiency programs are reported as part of the C&I Business segment. Accordingly, the results of operations have been reclassified for the year ended December 31, 2009 to conform to the presentation for the years ended December 31, 2011 and 2010. We believe that this reporting structure more accurately represents the broader customer markets that we serve: residential and commercial and industrial.

See “Item 8. Financial Statements and Supplementary Data, Note 15” for our presentation of results of operations for the last three fiscal years by reportable segment.

### ***Residential Business***

Our Residential Business segment offers IEM solutions that address demands for residential and small commercial end-use participants. These solutions include intelligent hardware, our IntelliSOURCE software and services, such as installation, marketing and program management. Our suite of intelligent hardware includes a broad range of products from basic one-way load control switches to technologically sophisticated smart thermostats and in-home displays that encompass the entire range of the smart grid market. Our products are designed to communicate on multiple communication modes, including wireless internet, VHF paging, telephone, broadband cable, cellular and radio frequency communication. We provide the hardware that is installed at a utility consumer's location on high-energy consumption equipment, such as central air conditioning. Our software applications send wireless messages to manage and control our hardware. Upon receiving the messages, our hardware, in turn, provides more intelligent operation of the equipment, thereby making electric capacity available to the utility. The information delivered from the IEM solutions can then be used by the utility to better manage electricity consumption, analyze usage trends and anticipate energy constraints.

Our IntelliSOURCE provides a consistent infrastructure for command and control, while creating a critical, two-way, real-time communication link to residential customers. Not only does IntelliSOURCE support direct load, price responsive, and dynamic pricing controls, but it also flexibly accommodates next-generation upgrades such as variable pricing, renewable energy management, and electric vehicle charging. Key features of IntelliSOURCE include:

- Communication – Expands the back office infrastructure to allow for deployments, while supporting interfaces for third-party systems,
- Command and control – Handles grouping and addressing structures; algorithms and control operations; device management and configuration; and event generation and control,
- Data management – Performs data collection including validation and verification, and
- Knowledge applications – Enables analysis and evaluation of the performance of the customer's demand response

program.

Depending on customer needs, the Residential Business segment sells product and software offerings, VPC programs and turnkey programs. In some instances, we sell the customer product and software and the customer elects to perform the services, such as installation and marketing, to complete its IEM network. In other instances, as in our VPC and turnkey programs, we provide the product and software as well as perform full program services including installation and customer acquisition marketing. If we provide full outsourced, pay-for-performance capacity through the IEM network, we refer to the program as a VPC program, in which we typically own the assets of the system. Our VPC programs are pay-for-performance in that we are only paid for capacity that we provide as determined by a measurement and verification process with our customers, as described below. If the customer elects to own the IEM network or we are paid for the services, as opposed to being paid for reduced capacity or energy, we refer to the program as a turnkey program.

Peak load demand, defined as the maximum capacity of electricity required over a specified time, is dynamic in nature and places the greatest stress on the grid system due to both the elevated levels and fluctuating duration of demand. Our VPC and turnkey offerings compete in the peak capacity markets and provide a solution to alleviate stress on the electric grid by aggregating and coordinating the demands of load consuming equipment.

#### *Virtual Peaking Capacity (VPC) Programs*

The structure of our VPC programs is on a pay-for-performance basis whereby we enter into long-term contracts with utilities and are paid under each contract based on the amount of verifiable kilowatts of capacity that we provide. Under our VPC programs, we typically own and operate the entire IEM network.

The consumers who elect to participate in our VPC programs agree to allow us to install our products in their homes or businesses in order to decrease energy usage of certain appliances, such as their central air conditioner, electric water heater, irrigation pump or pool pump, during short periods of peak energy demand. These devices are controlled remotely by using our digital control units or thermostats coupled with our IntelliSOURCE software. We, in return, receive payment for this capacity from the utility under our existing contract with the utility.

We operate our VPC programs through long-term, fixed price contracts with our utility customers, which make periodic payments to us based on the amount of electric capacity that we expect to make available to them during the cooling season. The cooling season is the months in which seasonal peak energy demand is the highest. A contract year begins at the end of the utility's cooling season. For example, the cooling season for one of our VPC contracts runs from June 1<sup>st</sup> to September 30<sup>th</sup> and the contract year for this agreement begins on October 1<sup>st</sup> and ends on September 30<sup>th</sup>. We and our utility customers analyze results of measurement and verification tests that are performed during the cooling season of each contract year to statistically determine the capacity that was available to the utility during the cooling season. Measurement and verification tests are necessary when our hardware installed at participant locations to control energy usage of selected appliances consists of one-way devices, as those devices are programmed to receive and respond to a wireless signal initiated by our software and transmitted over a public or private network but do not send a confirmation. Therefore, there is no immediate verification that any certain device received a signal or properly executed its command. Because thousands of devices are subject to control in typical residential VPC programs, for one-way communicating systems, statistically significant measurement and verification is performed on a subset of these devices. This methodology has been developed that verifies the reduction of energy usage, measured in kilowatts, for a statistical sample of devices with an accepted utility confidence level generally of 90% or greater. This methodology is widely accepted in the industry. We refer to the results of this measurement and verification process as our available capacity.

Available capacity varies with the electricity demand of high-use energy equipment, such as central air conditioning compressors, at the time the measurement and verification tests are conducted, which, in turn, depends on factors beyond our control, such as temperature and humidity and the time of day and the day of the week the measurement and verification tests are performed. The correct operation of, and timely communication with, devices used to control equipment are also important factors that affect available capacity. Depending on the terms of the VPC contract, a difference between our available capacity and the estimated capacity on which proxy payments were previously made will result in either a refund payment from us to our utility customer or an additional payment to us by our customer. We refer to this process as the annual settlement.

#### *Turnkey Programs*

Our turnkey programs are targeted for utilities that not only need to have available capacity but often want to own the underlying assets and pay for our services and solutions. We provide the same or similar intelligent energy management network as that provided in our VPC programs; however, we do not own the underlying assets and are not paid based on available capacity. We are paid based on negotiated rates for our product, software and services and these payments are not subject to annual settlement.

#### ***Commercial & Industrial (C&I) Business***

The C&I Business segment provides IEM solutions to utilities and independent system operators that are managing programs or energy markets, where large C&I consumers participate. These solutions are delivered through the management of megawatts for these C&I consumers in VPC and open market programs as well as through the completion of energy efficiency projects. Similar to the Residential Business segment, the C&I Business segment contracts with utilities to provide available capacity to utility customers through pay-for-performance VPC programs. We recruit large C&I end-use participants into the VPC program, requesting that participants reduce electricity usage at certain times, and provide the available capacity to our customer.

#### *Open Markets*

In open markets, grid operators and utilities seek bids from demand response providers to utilize the commercial and industrial consumer base to provide demand response capacity based on prices offered in competitive bidding. These opportunities are generally characterized by energy and capacity obligations with shorter contract periods and prices that may vary by hour, by day, by month or by bidding period. Several major grid operators, including PJM Interconnection, New York Independent System Operator, New England Power Pool and Electric Reliability Council of Texas, have active demand capacity markets in which we participate. Our C&I Business segment works with commercial and industrial consumers to first identify available demand response capacity and then register and facilitate the sale of that capacity or energy in the open market on behalf of those consumers. In these transactions, we receive payments from grid operators throughout the year and are required to respond during the grid operator's mandatory performance period. For our largest capacity program with PJM Interconnection, we receive payments from June 1st to May 31st of each year and are required to provide demand reduction from June 1st to September 31st. We make payments to commercial and industrial consumers for both contracting to reduce electricity usage and actually doing so when called upon.

#### *Energy Efficiency Program*

The structure of our energy efficiency program is a pay-for-performance model whereby we provide permanent base load reduction through equipment upgrades, energy auditing and consulting, building automation, lighting retrofits and other measures that reduce C&I consumers' total energy consumption. We enter into long-term contracts to provide the reduced capacity, maintain and operate the improvements and ensure their utilization.

#### **Customers**

We have an established customer base of utility and other energy service providers, including municipal and cooperative electric utilities, located across North America in both regulated and deregulated jurisdictions. For example, our customers include large investor-owned utilities, independent system operators and regional transmission organizations (which are regional entities that monitor and control a regional electric grid), electric cooperatives, municipalities, energy service companies and military bases, including energy providers such as Austin Energy, Consolidated Edison Company of New York, Inc., Georgia Power, Gulf Power Company, Inc., PacifiCorp, PECO, Pepco Holdings, Inc., PJM Interconnection, PPL Corporation, Progress Energy, Inc., Public Service Company of New Mexico, San Diego Gas & Electric Company and Southern Maryland Electric Cooperative, Inc. For the year ended December 31, 2011, our top ten customers accounted for 72% of our consolidated revenue. Of these customers, two customers accounted for more than 10% of revenue: PJM Interconnection LLC (22%) and Pepco Holdings, Inc. (16%). For the year ended December 31, 2010, our top ten customers accounted for 71% of our consolidated revenue. Of these customers, two customers accounted for more than 10% of revenue: PJM Interconnection LLC (28%) and Pepco Holdings, Inc. (12%). For the year ended December 31, 2009, our top ten customers accounted for 67% of our consolidated revenue. Of these customers, two customers accounted for more than 10% of our revenue: PJM Interconnection LLC (20%) and NV Energy (12%).

#### **Manufacturing**

We outsource all of our product manufacturing operations to contract manufacturers. For our current production requirements, we utilize both a domestic manufacturer and an additional manufacturer that has facilities offshore. This dual sourcing complements our supply chain effort and helps support our plans for continual cost reductions, quality improvement and diversification of supply risk.

We employ dedicated test engineers who design all product test systems, write custom software for product tests and monitor product quality and yields. All outgoing product at our contract manufacturers is tested on the systems that we have designed. Additionally, quality data is collected electronically and utilized by our design engineers for continuous product improvement and by the contract manufacturer for improvement of key manufacturing processes. Quality control tests are performed on a statistically significant portion of all outgoing orders to ensure compliance to specifications and corrective action techniques are employed to permanently resolve issues.

#### **Competition**

The clean energy sector is highly competitive. We face competition from traditional clean energy providers, advanced metering equipment and service providers, and supply-side independent power producers. In addition, some traditional providers of advanced meter reading products may add demand response products and services to their existing business. We also compete against traditional supply-side resources such as natural gas-fired peaking plants as well as independent power producers. Electric utilities could also offer their own demand response solutions, which would decrease our base of potential customers and could decrease our revenues and profitability. For more information on the risks we face in our highly competitive market, see “Part I, Item 1A - Risk Factors - *We operate in highly competitive markets; if we are unable to compete successfully, we could lose market share, revenues and profit.*”

## **Regulatory**

Our products and services are typically not subject to existing federal and state regulations in the U.S. governing the electric utility industry. However, our solutions are subject to oversight by FERC, NERC, and other regulatory entities under the Federal Power Act, and the individual Regional Transmission Owner or Independent System Operator approved tariffs and manuals. In addition, our products and their installation are subject to government oversight and regulation under state and local ordinances relating to communications requirements, building codes, public safety regulations pertaining to electrical connections and local and state licensing requirements. In the future, federal, state or local governmental entities or competitors may seek to change existing regulations, impose additional regulations or apply current regulations to cover our products and services.

## **Trademarks**

Comverge, Inc. and its subsidiaries own the following trademarks in the United States: 6D, Apollo, Comverge, Coolibrium, Datapult, Enerwise, IntelliSUPPORT, IntelliPLAN, IntelliMEASURE, IntelliPEAK, IntelliMARKET, IntelliFOCUS, IntelliTEMP, IntelliCONNECT, kw Operation Kill-a-Watt, Maingate, Powerportal, Profit from Energy, Public Energy Solutions, Sixth Dimension, SuperStat, The Energy To Go Clean, The Energy To Be Clean, The Energy To Be Green, TheWattSpot, Virtual Peaking Capacity and Wattspot.

## **History and Development of the Business**

Our business began as divisions of Scientific Atlanta, Inc. and Lucent Technologies Inc. in 1974 and 1991, respectively. In 1992, Acorn Energy, Inc. (formerly known as Acorn Factor, Inc.), or AEI, created its Powercom Division to develop advanced meter reading, electric utility data management and analysis, and load management solutions. Comverge, Inc. was organized in 1997 as a Delaware corporation by AEI. We evolved our operations through the acquisition of the Utility Solutions Division of Lucent Technologies Inc. in 1997 and the organization of Comverge Control Systems, Ltd. in 1998. In 1999, we acquired the Controls System Division of Scientific Atlanta, Inc. We made the strategic decision in 2002 to develop, own and operate load management systems on an outsourced basis for the benefit of our utility customers. We named this offering Virtual Peaking Capacity. In 2003, we acquired the intellectual property, operating assets and customers of Sixth Dimension, Inc. In April 2007, we completed an initial public offering. In July 2007, we acquired Enerwise Global Technologies, Inc., reported as part of the C&I Business segment. We acquired the four operating entities comprising the business of Public Energy Solutions in September 2007, and include their offerings as part of the C&I Business segment. In February 2010, we appointed R. Blake Young as our President and Chief Executive Officer. In October 2010, we unveiled our vision for IEM, the next-generation of software, hardware and services that help electric utilities, commercial and industrial organizations and consumers optimize energy usage. In December 2011, we were selected by Eskom, the largest electricity provider in Africa, to manage its complex supply and demand challenges by creating and co-managing Africa's first open market for demand response resources. The Eskom contract represents the first significant international contract for us.

## **Employees**

We had 519 employees as of December 31, 2011. Our employees are not represented by any labor unions, and we have not experienced any work stoppages. We consider our relations with our employees to be good.

## **Available Information**

Our web site is located at <http://www.comverge.com>. Our investor relations website is located at <http://ir.comverge.com>. The information on or accessible through our web sites is not part of this Annual Report on Form 10-K. Our Annual Report on Form 10-K, Quarterly Reports on Form 10-Q, Current Reports on Form 8-K and amendments to such reports are available, free of charge, on our investor relations website as soon as reasonably practicable after we electronically file with or furnish such material to the SEC. Further, a copy of this Annual Report on Form 10-K is located at the SEC's Public Reference Room at 100 F Street, NE, Washington, D.C. 20549. Information on the operation of the Public Reference Room can be obtained by calling the SEC at 1-800-SEC-0330. The SEC maintains an internet site that contains reports, proxy and information statements and other information regarding our filings at <http://www.sec.gov>.

## Executive Officers of the Registrant

Our executive officers as of March 9, 2012 are as follows:

**R. Blake Young, 53**, became our President and Chief Executive Officer in February 2010 and has served as a member of the Converge Board of Directors since August 2006. Prior to his appointment as President and Chief Executive Officer, Mr. Young was the founder and Managing Partner of Cap2ity Consulting Group, a business, technology and management consulting group from June 2009 to February 2010. Previously, he served as Senior Vice President, Global IT & Technology for BG Group, a global energy company based in London from January 2007 to June 2009. Prior to that, Mr. Young held various senior management positions with Dynegy Inc., including Executive Vice President and Chief Administrative Officer as well as Executive Vice President & President of Global Technology from 1998 to 2005. He also served as President of Illinois Power Company, Dynegy's electric and gas transmission and distribution company. Prior to his eight years at Dynegy, Mr. Young served as Chief Information Officer of the US Grocery Division of Campbell Soup Company. Before that, Mr. Young had a 14-year career with Tenneco Energy, an integrated natural gas transporter and marketer, where he served in a number of senior administrative and commercial management positions, including Chief Information Officer and Executive Director of national accounts. Mr. Young received a Bachelor of Science degree from Louisiana State University.

**David Mathieson, 57**, has served as our Executive Vice President and Chief Financial Officer since May 2011. Prior to joining our company, Mr. Mathieson was Senior Vice President and Chief Financial Officer of RSC Holdings, Inc., a rental equipment provider servicing the industrial, maintenance and non-residential construction markets, from January 2008 to May 2010. In addition, Mr. Mathieson served as Senior Vice President and Chief Financial Officer of The Brady Corporation, a global manufacturer and marketer of complete identification solutions, from December 2003 to December 2007. Before joining The Brady Corporation, Mr. Mathieson spent more than 20 years in various leadership roles at Honeywell, Inc., where he held the position of Vice President and Chief Financial Officer of Honeywell-Europe from June 1981 to September 2001.

**Steven Moffitt, 46**, has served as our Chief Operating Officer since May 2011 and previously served as our Executive Vice President of Engineering and Operations from July 2010 until May 2011. Mr. Moffitt has over 20 years of experience in information technology leadership, strategy development, project management and systems development. Prior to joining our company, Mr. Moffitt served as Vice President and Divisional Chief Information Officer of the BG Group from November 2008 to March 2010 where he managed the BG Infrastructure globally, including data centers, network, computer and storage environments. Prior to that Mr. Moffitt was Managing Director, Global Head of Commodities Technology at UBS Investment Bank from September 2006 to November 2008. Mr. Moffitt also served as Senior Vice President & Divisional CIO of FiServ, Inc., a provider of technology solutions to the financial world, including banks, credit unions, and securities processing organizations from March 2006 to September 2006. Mr. Moffitt has also served as Senior Vice President & Chief Information Officer of Dynegy, Inc. from January 2000 to December 2005. Mr. Moffitt holds a Bachelor of Science degree from the University of Texas-Arlington where he majored in Information Systems.

**Teresa Naylor, 49**, joined our company in September 2010 as our Senior Vice President of Human Resources. Ms. Naylor has over 20 years of human resources management and leadership experience and she leads the human resources business, including leadership development, talent management, compensation, benefits, compliance and all human resources generalist responsibilities. Prior to joining the company, Ms. Naylor served as Vice President of Human Resources for MXENERGY from 2006 to 2010, where she was responsible for the human resource functions and team development. Prior to MXENERGY, she was the Vice President of Human Resources for CenterPoint Energy, Inc. from 2004 to 2006, where she was responsible for all enterprise-wide executive leadership succession planning and corporate human resources services to over 9,000 employees. Previously, she also held executive level positions with Dynegy, Inc. including leadership roles at Illinois Power and Illinova Generating Company from 1998-2004, and Lincolnland Visiting Nurse Association from 1991 to 1998. Ms. Naylor holds a Bachelor of Science degree in interdisciplinary studies (organizational management) from Cameron University and a Master of Science degree from University of St. Francis.

**Matthew H. Smith, 37**, has served as our Senior Vice President, General Counsel and Secretary since January 1, 2008. Mr. Smith joined us in January 2005 as Senior Counsel responsible for contract negotiations, intellectual property, litigation and corporate governance matters. Prior to joining us, Mr. Smith worked for the law firm King & Spalding LLP concentrating primarily on intellectual property and litigation matters. Mr. Smith began his legal career as a federal appellate court clerk for Judge H. Emory Widener, Jr. on the U.S. Court of Appeals for the Fourth Circuit. Mr. Smith obtained a B.A. in History and Psychology and a J.D. from the University of North Carolina, Chapel Hill.

**Arthur Vos IV, 37**, has served as our Senior Vice President of Utility Sales and Chief Technology Officer since October 2011. Prior to that, Mr. Vos serviced as our Senior Vice President of Product Management and Alliances since November 2009. From September 2007 to November 2009, he served as our Vice President, Marketing and Strategy. Mr. Vos was named Vice President, Marketing, Products and Strategy in 2004. Mr. Vos joined us in April 2003 as our Vice President of Development for our 6DiNET Group after the acquisition of Sixth Dimension, Inc. Over a 12 year history in the electric power industry, Mr. Vos

has led and architected numerous demand response and energy monitoring solutions. As the Chief Technology Officer of Comverge, Mr. Vos now leads our entire development effort which includes an advanced SmartGrid software suite, intelligent communicating in-home devices and distributed energy management solutions. Mr. Vos obtained B.S. and M.S. degrees from Colorado State University with an emphasis in artificial intelligence, distributed control systems, manufacturing systems and embedded system design.

**Greg Allarding , 47**, has served as our Senior Vice President of Operations since October 2011 and is responsible for our Utility Program Operations, Information Technology, Network Operations Center, Supply Chain and Call Center Operations. He joined the Company in August 2010 as Vice President of Network Operations & CIO. Prior to joining the Company, Mr. Allarding was an Accenture executive with over 16 years of experience in the utilities industry, managing large complex system implementations, leading high performance teams focused on process improvement, implementation and operations methodologies; and managing people and processes to drive operational results and excellence in delivery. Mr. Allarding obtained a B.S. in Management Information Systems from the University of South Florida.

**Kyle Wiggins, 30**, has served as our Vice President and Corporate Controller since October 2011. Prior to that, Mr. Wiggins served as Assistant Controller of the Company from April 2008 to September 2011. Prior to joining the Company, Mr. Wiggins was a member of the audit services group of KPMG, LLP. As Vice President and Corporate Controller, Mr. Wiggins is responsible for the Company's financial reporting and internal controls. Mr. Wiggins is a certified public accountant and earned his Bachelor's and Master's degrees in accounting from the University of Georgia.

## Item 1A: Risk Factors

*You should carefully consider the risks described in the risk factors below before making a decision to invest in our common stock or in evaluation of Converge and our business. The risks and uncertainties described below are not the only ones we face. Additional risks and uncertainties that we do not presently know, or that we currently view as immaterial, may also impair our business operations. This report is qualified in its entirety by these risk factors.*

*The actual occurrence of any of the risks described below could materially harm our business, prospects, financial condition and results of operations. In the event of such harm, the trading price of our common stock could decrease.*

### Risks Related to Our Business

***We will require significant capital to pursue our strategy, but we may not be able to obtain additional financing on acceptable terms or at all.***

For the last several years, we have financed our operations and capital expenditures through the sale of our securities and by borrowing money. Our ability to obtain additional financing will be subject to a number of factors, including the development of the market for IEM solutions, commercial acceptance of our products, our operating performance, the terms of our existing indebtedness and the credit and capital markets. On November 29, 2011, we entered into a Common Stock Purchase Agreement (“Purchase Agreement”) with Aspire Capital Fund LLC (“Aspire Capital”). Under the terms of the Purchase Agreement, we have a right to sell up to a maximum of 100,000 shares per day, which total may be increased by mutual agreement up to an additional 1,000,000 shares per day up to an aggregate maximum of \$10.0 million. The extent to which we rely on Aspire Capital as a source of funding will depend on a number of factors, including the prevailing market price of our common stock and the extent to which we are able to secure working capital from other sources. The Purchase Agreement provides that we only may sell shares of our common stock to Aspire Capital on business days on which the closing sale price of our common stock equals or exceeds \$1.00.

The growth of our business will depend on significant amounts of capital for marketing and product development of our IEM solutions, including intelligent hardware and software. In addition, international expansion will require significant capital. As the Company focuses on profitability, with a more refined approach to growth, we will still need working capital to operate the business. If we raise additional funds through the sale of equity or convertible debt securities, the ownership percentage of our then-existing stockholders will be reduced and the percentage of our outstanding common stock into which our convertible securities and our senior unsecured notes are convertible will be reduced. In addition, any such transaction may dilute the value of our common stock and other debt or equity securities. We may have to issue securities that have rights, preferences and privileges senior to our common stock. The terms of any additional indebtedness may include restrictive financial and operating covenants that would limit our ability to compete and expand or limit our flexibility in paying our indebtedness.

We may not be able to obtain additional capital on acceptable terms or at all. If our stock price continues to decline, it may be difficult for us to obtain sufficient funds through the sale of equity or convertible debt securities. Because of our losses, we do not fit traditional credit lending criteria, which, in particular, could make it difficult for us to obtain loans or to access the capital markets. Moreover, our loan and security agreements contain restrictions on our ability to incur additional indebtedness, which, if not waived, could prevent us from obtaining needed capital. There can be no assurance that we will be able to obtain such financing and a failure to obtain additional financing when needed could adversely affect our ability to (i) maintain and grow our business and (ii) retain key employees.

***We have incurred annual net losses since our inception, and we may continue to incur annual net losses in the future.***

Our annual net loss for the years ended December 31, 2011, 2010 and 2009 was \$12.8 million, \$31.4 million and \$31.7 million, respectively. Our accumulated deficit from inception through December 31, 2011, was \$228.8 million. Initially, our net losses were driven principally by start-up costs and the costs of developing our technology. More recently, our net losses have been driven principally by our operating and depreciation expenses as well as impairment charges. To grow our revenues and customer base, we plan to continue emphasizing the expansion and development of our IEM solutions in the domestic and international markets. This strategy may cause us to incur net losses in the foreseeable future, and there can be no assurance that we will be able to grow our revenues and expand our client base to become profitable.

***We may not receive the payments anticipated by our long-term contracts and recognize revenues or the anticipated margins from our backlog or expected business, and comparisons of period-to-period estimates are not necessarily meaningful and may not be indicative of actual payments.***

Payments from long-term contracts represent our estimate of the total payments that our contracts allow us to receive over the course of the contract term. Our estimated payments from these long-term contracts are based on a number of assumptions. The expectations regarding our annual and multi-year contracts include assumptions relating to purchase orders received, contractual anticipated order volumes and purchase orders that we expect to receive under a contract if it is extended based on amounts and timing of historical purchases. We also assume that we will be able to meet our obligations under these contracts on a timely basis. The expectations regarding the build-out of our turnkey and capacity contracts are based on our experience to date in building out the load management systems as well as future expectations for continuing to enroll participants in each contract's service territory. In some instances, we may not build out at the anticipated rate due to, among other things, enrollment rates varying from our expectations. We have also included assumptions for how we believe the programs will perform during the measurement and verification tests. If we are not able to meet this build-out schedule, we have higher than expected withdrawal by consumers from our programs or if the measurement and verification results are lower than expected, we may not be able to receive the full amount of estimated payments from long-term contracts. While we have historically recorded a \$0.3 million penalty per megawatt in liquidated damages for each megawatt that we believed we would not fulfill for our energy efficiency contracts, we have not reduced our anticipated payments from long-term contracts for any penalties. As of December 31, 2011, we anticipated a potential payment of \$0.3 million in liquidated damages for our energy efficiency contracts based on our build-out rate for the 2012 program year. We have also assumed that no contracts will be terminated for convenience or other reasons by our customers and that the rate of replacement of participant terminations under our capacity contracts will remain consistent with our historical average. Changes in our estimates or any of these assumptions, the number of load control devices installed, changes in our measurement and verification test results and payments, contracts being rescheduled, canceled or renewed, disputes as to actual capacity provided, or new contracts being signed before existing contracts are completed, and other factors, may result in actual payments from long-term contracts being significantly lower than estimated payments from long-term contracts. A comparison of estimated payments from long-term contracts from period to period is not necessarily meaningful and may not be indicative of actual payments. In addition, the timing of payments from long-term contracts and revenue recognition may vary period to period.

Our backlog represents our estimate of revenues from commitments, including purchase orders and long-term contracts, that we expect to recognize over the course of the next 12 months. The inaccuracy of any of our estimates and other factors may result in actual results being significantly lower than estimated under our reported backlog. Material delays, market conditions, cancellations or payment defaults could materially affect our financial condition, results of operation and cash flow. Accordingly, a comparison of backlog from period to period is not necessarily meaningful and may not be indicative of actual revenues. As of December 31, 2011, we had contractual backlog of \$143 million through December 31, 2012.

***Our loan and security agreements contain financial and operating restrictions that may limit our access to credit. If we fail to comply with covenants in our loan and security agreements, we may be required to repay our indebtedness thereunder, which may have an adverse effect on our liquidity and our business.***

Our loan and security agreements contain covenants that limit our ability to operate our business, invest, sell assets, create liens or make distributions or other payments to our investors and creditors. All of these restrictions may limit our ability to take advantage of potential business opportunities as they arise. For instance, provisions in our loan and security agreements with Silicon Valley Bank (“SVB”) and Grace Bay Holdings II, LLC (“Grace Bay”) impose restrictions on our ability to, among other things: incur more debt; pay dividends and make distributions; make certain investments; redeem or repurchase capital stock; create liens; enter into transactions with affiliates; and merge or consolidate.

Under our SVB loan and security agreement, our borrowing availability is subject to a monthly borrowing base calculation based upon our unrestricted cash balances maintained at SVB and the balances of certain accounts receivable. To include our unrestricted cash balances maintained at SVB and certain other essential figures in the borrowing base calculation, we must maintain a minimum balance of unrestricted cash at all times of at least \$20.0 million. We had aggregate available borrowing capacity under our SVB loan agreement of \$1.9 million as of December 31, 2011; however, if we do not maintain at least \$20.0 million of unrestricted cash at all times, our borrowing base may be reduced. Upon a reduction in the borrowing base, the \$1.9 million of additional capacity may not be available to us. Even with our anticipated revenue growth, it is possible that the Company's cash may fall below \$20.0 million. Should the Company's unrestricted cash balance fall below \$20.0 million and the Company's borrowing capacity be consequently reduced, any amounts the Company owes to SVB in excess of the Company's reduced borrowing capacity will become immediately due and payable under our SVB loan agreement. A failure to pay any such excess amount could result in a default under the SVB loan and security agreement and, as a result, could cause cross-defaults in our other borrowing arrangements, such that all of our outstanding debt could become due and payable. In addition, any resulting loss in liquidity could cause potential defaults in our borrowing arrangements, such that all of our outstanding debt could become due and payable. Our ability to maintain the minimum cash balance of unrestricted cash of \$20.0 million is directly dependent on our ability to manage our cash expenditures, add new sources of revenue, and/or obtain

additional capitalization. There can be no guarantee that we will be successful in these endeavors. While a failure to maintain the minimum cash balance is not an event of default or breach of any covenant under the SVB loan agreement, a reduction in our cash balance below the required minimum threshold would affect our borrowing base capacity and may result in our inability to borrow, obtain sufficient funds, refinance or restructure the loan and security agreement. Under such circumstances, this could have a material adverse impact on our liquidity, financial position and results of operations.

***Our failure to meet the covenants and financial tests contained in, and any event of default under, our loan and security agreements, could have a material adverse effect on our financial condition.***

The SVB and Grace Bay loan and security agreements contain customary covenants, including covenants which require us to meet specified financial ratios and financial tests. The Grace Bay agreement sets forth quarterly revenue targets that if not maintained, give Grace Bay the right to require us to make monthly repayments of the loan balance over the remaining term of the loan. For the fiscal quarter ended December 31, 2011, we were not able to meet the revenue targets in the Grace Bay agreement and Grace Bay has requested that we begin making amortization payments. Such amortization payments are front-loaded, such that 45% of the loan balance (\$6.8 million as of December 31, 2011) would be due over the first twelve months. If we comply with succeeding measurement periods, we may prospectively cease monthly amortization of the loan; provided however, Grace Bay may again exercise its amortization right under the loan agreement if we fail to meet future minimum revenue targets. In letters dated February 27, 2012 and March 1, 2012, Grace Bay also alleged that we are in default under the Grace Bay agreement. An event of default in the Grace Bay agreement triggers a cross-default in the SVB loan and security agreement. Such events of default may result in the acceleration of the maturity of indebtedness outstanding under these agreements, which would require us to repay all amounts outstanding. If the maturity of our indebtedness is accelerated, we may not have sufficient funds available for repayment or we may not have the ability to borrow or obtain sufficient funds to replace the accelerated indebtedness on terms acceptable to us or at all. As of the date of this filing of Form 10-K, the Company has not received notice to accelerate the debt and would contest any such acceleration. Our ability to repay our indebtedness and meet the revenue targets in the Grace Bay loan and security agreement is dependent on us securing new customers. There can be no guarantee that we will be able to add customers and the related additional revenue sufficient to repay our indebtedness or meet such revenue targets.

In addition, we cannot assure that our assets or cash flow will be sufficient to make our amortization payments or to fully repay borrowings under our outstanding loan and security agreements following such event of default or any future event of default, upon maturity or if accelerated, or that we would be able to refinance or restructure the payments on those agreements. Upon a default, our lenders have the right to exercise their rights and remedies to collect payment on the loans, which would include the right to foreclose on our assets. Accordingly, the amortization payments we are required to make to Grace Bay and the events of default under our loan agreements, as well as any future event of default, may have a material adverse effect on our business, liquidity, financial position and results of operations. To the extent our lenders exercise their rights and remedies, we may be forced to seek bankruptcy protection.

***Our ability to provide bid bonds, performance bonds or letters of credit is limited and could negatively affect our ability to bid on or enter into significant long-term agreements.***

We are occasionally required to provide letters of credit, bid bonds or performance bonds to secure our performance under customer contracts or open market programs. Our ability to obtain such bonds primarily depends upon our capitalization, working capital, past performance, management expertise and reputation and external factors beyond our control, including the overall capacity of the surety market. Surety companies consider those factors in relation to the amount of our tangible net worth and other underwriting standards that may change from time to time. Events that affect surety markets generally may result in bonding becoming more difficult to obtain in the future, or being available only at a significantly greater cost. In addition, some of our customers also require collateral in the form of letters of credit to secure performance or to fund possible damages as the result of an event of default under our contracts with them. Our ability to obtain letters of credit under our loan and security agreement with SVB is limited to \$30.0 million in the aggregate. As of December 31, 2011, we had \$23.5 million of letters of credit outstanding from the facility. If we enter into significant long-term agreements or increase our offering in certain open market power pools and either of which require the issuance of letters of credit, our liquidity could be negatively impacted. Our inability to obtain adequate bonding or letters of credit and, as a result, to bid or enter into significant long-term agreements, could have a material adverse effect on our future revenues and business prospects.

***We operate in highly competitive markets; if we are unable to compete successfully, we could lose market share, revenues and profit.***

We face strong competition from traditional IEM and clean energy providers, both larger and smaller than us, from advanced metering infrastructure equipment and from energy service providers. In addition, we may face competition from large internet

and/or software based companies. Advanced metering infrastructure systems generally include advanced meter reading with a demand response component, including a communications infrastructure. Energy service providers typically provide expertise to utilities and end-use consumers relating to energy audits, demand reduction or energy efficiency measures. We also compete against traditional supply-side resources such as natural gas-fired power plants and independent power producers. In addition, some providers of advanced meter reading products may add demand response products or energy services to their existing business, and other such providers may elect to add similar offerings in the future. Further, energy service providers may add their own demand response solutions, which could decrease our base of potential customers and could decrease our revenues and profitability.

Certain energy service and advanced metering infrastructure providers are substantially larger and better capitalized than we are and these providers have the ability to combine (1) advanced meter reading or commodity sales and (2) demand response products into an integrated offering to a large existing customer base. Because many of our target customers already purchase either advanced meter reading, energy efficiency products or services, demand response products or services, or commodities from one or more of our competitors, our success depends on our ability to attract target customers away from their existing providers or to partner with one or more of these entities to distribute our products. In addition, the target market for our capacity programs has been composed largely of “early adopters,” or customers who have sought out new technologies and services. Because the number of early adopters is limited, our continued growth will depend on our success in marketing and selling our programs to mainstream customers in our target markets. Larger competitors could focus their substantial financial resources to develop a competing business model that may be more attractive to potential customers than what we offer. Competitors who also provide advanced metering infrastructure, energy services or commodities may offer such services at prices below cost or even for free in order to improve their competitive positions. In addition, because of the other services that our competitors provide, they may choose to offer IEM services as part of a bundle that includes other products, such as residential advanced meter reading and automated invoicing, which we do not offer. Any of these competitive factors could make it more difficult for us to attract and retain customers, cause us to lower our prices in order to compete and reduce our market share and revenues.

Some of our strategic alliances are not exclusive, and accordingly, the companies with whom we have strategic alliances may in the future elect to compete with us by developing and selling competing products and services. In addition, these companies have similar, and often more established, relationships with our customers, and may recommend other products and services to their customers instead of our products and services.

The significant competition in our industry has resulted in increasingly aggressive pricing, and we anticipate that prices may continue to decrease. We believe that in some instances our prices are currently higher than those of our competitors for similar solutions. Users of our solutions may switch to another clean energy provider based on price, particularly if they perceive the quality of our competitors' products to be equal to or better than that of our products. Continued price decreases by our competitors could result in a loss of customers or a decrease in the growth of our business, or it may require us to lower our prices to remain competitive, which would result in reduced revenues and lower profit margins and may adversely affect our results of operations and financial position and delay or prevent our future profitability.

***Failure to provide quality products and services, including third party suppliers manufacturing quality products and third-party installers' properly installing our products, could cause malfunctions of our products, potential recalls or replacements or delays in the delivery of our products or services, which could damage our reputation, cause us to lose customers and negatively impact our revenues and growth.***

Our success depends on our ability to provide quality products and reliable services in a timely manner, which in part depends on the proper functioning of facilities and equipment owned, operated and/or manufactured by third parties upon which we depend. For example, our reliance on third parties includes:

- utilizing components that they manufacture in our products;
- utilizing products that they manufacture for our various capacity programs;
- outsourcing cellular and paging wireless communications that are used to execute instructions to our devices under our VPC programs and clients in open market programs;
- outsourcing certain installation, maintenance, data collection and call center operations to third-party providers; and
- buying capacity from third parties who have contracted with electricity consumers to participate in our VPC programs.

Because we are wholly dependent upon third parties for the manufacture and supply of certain products, a significant interruption in the manufacturing or delivery of our products by these vendors or in defects from the manufacturers, could result in our being required to expend considerable time, effort and expense to establish alternate production lines at other facilities and our operations could be materially disrupted, which could cause us to not meet production deadlines and lose

customers. In addition, our contracts often provide that we install products in the end-users' facilities or premises using Comverge employees or third party installers. To the extent such installations are faulty or inadequate, considerable time, effort and expense may be incurred to remedy the situation and restore customer satisfaction. Any delays, malfunctions, inefficiencies or interruptions in these products, services or operations could adversely affect the reliability or operation of our products or services, which could cause us to experience difficulty retaining current customers and attracting new customers. In addition, our brand, reputation and growth could be negatively impacted. For example, in August, 2010, we were notified by the supplier of our thermostats, White-Rodgers, that White-Rodgers had filed a notice with the Consumer Product Safety Commission (the "CPSC") to address a product issue with the thermostats that White-Rodgers had shipped to Comverge. White-Rodgers reported to the CPSC that it was aware of incidents of battery leakage in the model of thermostat sold to Comverge, in which battery leakage led to an overheating of the device. We are not aware of any reports of personal injury associated with these incidents but are aware of claims for minor property damage. White-Rodgers informed us that in the event of battery leakage, electrolyte in the leakage can contact the printed circuit board, which may result in the circuit board overheating. White-Rodgers has not conceded that the thermostats contain a defect or pose a substantial product hazard, but has nevertheless voluntarily proposed a corrective action plan that was approved by the CPSC in January 2011 to address thermostats in inventory and thermostats installed in the field. White-Rodgers has stated that it will cover reasonable costs associated with implementing the corrective action. Comverge is not aware of any information suggesting that Comverge's communication module in these thermostats is related to the reported incidents. In relation to the White-Rodgers thermostat issue, Comverge is involved in litigation and disputes to address certain customers' complaints relating to the White-Rodgers thermostat issue. For further information on lawsuits relating to the thermostat issue, see "Part I, Item 3 - Legal Proceedings" contained in this Annual Report on Form 10-K.

***Regulatory or legislative rule changes made by major grid operators, state commissions, or FERC, could adversely impact our revenues.***

We operate in a regulated market. Changes to rules, regulations, or laws may affect our business and anticipated revenues. During 2008, PJM Interconnection LLC, or PJM, announced a rule change for economic demand response programs in the PJM open market. The rule change reduced the price we receive under our economic or voluntary demand response programs for commercial and industrial consumers. Because such programs are voluntary, the lower price and operating rule changes in 2008 made it less compelling for our commercial and industrial consumers to participate in the demand response programs. We rely on our demand response programs to generate revenue and PJM or any other major grid operator may reduce incentives to consumers or make other economic rule changes in the future that would have a negative impact on our business. Rule changes relating to the capacity market at PJM expanding the availability of demand response resources outside of the summer months have been approved by the FERC, which could take effect three years from now. In addition, FERC has made rule changes relating to measurement and verification of resources in PJM. While we do not anticipate any of the changes would have a significantly material negative effect on our financial statements, such changes will require additional administrative and operational requirements. These rule changes are not yet clearly defined, and in turn, the impact or effect of any such rule changes on our revenues or financial condition are unknown at this time. However, there can be no assurance that these rule changes will not have a material adverse effect on our business, financial condition and results of operations.

***Any restructuring activities that we may undertake, including our expense reduction initiative, may not achieve the benefits anticipated and could result in additional unanticipated costs, which could have a material adverse effect on our business, financial condition, cash flows or results of operations.***

We regularly evaluate our existing operations, anticipated customer demand and business efficiencies and, as a result of such evaluations, we may undertake restructuring activities within our businesses, including the announced expense reduction initiative in 2011. These restructuring plans may involve higher costs or longer timetables than we anticipate and could result in substantial costs related to severance and other employee-related matters, litigation risks and expenses and other costs. These restructuring activities may not result in improvements in future financial performance. If we are unable to realize the benefits of any restructuring activities or appropriately structure our businesses to meet market conditions, the restructuring activities could have a material adverse effect on our business, financial condition, cash flows or results of operations.

***We rely on certain components and products from a single supplier or a limited number of suppliers.***

We rely on third party suppliers to manufacture and supply certain products for our various capacity programs. In addition, some of the components necessary for our products are currently provided to us by a single supplier, including certain thermostats used in our utility residential demand response business, and we generally do not maintain large volumes of inventory. Our reliance on these third parties involves a number of risks, including, among other things, the risk that:

- we may not be able to control the quality and cost of these products or respond to unanticipated changes and increases

- in demand;
- we may lose access to critical services and components, resulting in an interruption in the delivery of products or services to our customers; and
- we may not be able to find new or alternative components for our use or reconfigure our products in a timely manner if the components necessary for our products become unavailable.

If any of these risks materialize, it could significantly increase our costs and adversely affect the reliability or operation of our products or services. Lead times for materials and components ordered by us vary and depend on factors such as the specific supplier, contract terms and demand for a component at a given time. If these manufacturers or suppliers stop providing us with the components or services necessary for the operation of our business, we may not be able to identify alternate sources in a timely fashion. Any transition to alternate manufacturers or suppliers would likely result in increased expenses and operational delays, and we may not be able to enter into agreements with new manufacturers or suppliers in a timely manner or on commercially reasonable terms. Any disruptions in product flow may harm our ability to generate revenue, lead to customer dissatisfaction, damage our reputation and result in additional costs.

***We depend on the electric utility industry and associated power pool markets for revenues, and as a result, our operating results have experienced, and may continue to experience, significant variability due to volatility in electric utility capital spending or the open market programs, and other factors affecting the electric utility industry.***

We derive substantially all of our revenues from the sale of solutions, products and services, directly or indirectly, to the electric utility industry and open market programs. In relation to our electric utility customers, purchases of our solutions, products or services by electric utilities may be deferred or canceled as a result of many factors, including consolidation among electric utilities, changing governmental or grid operator regulations, weather conditions, rising interest rates, reduced electric utility spending and general economic downturns. In addition, a significant amount of revenue is dependent on long-term relationships with our utility customers, which are not always supported by long-term contracts. This revenue is particularly susceptible to variability based on changes in the spending patterns of our utility customers.

The open market programs in which we participate could be materially altered in ways that negatively affect our ability to participate and, in turn, decrease revenues. For example, these markets typically utilize short-term contracts and often have price volatility. Prices in these markets typically fall whenever capacity providers place excessive amounts of capacity for auction in these markets. If prices decline below the point at which customers who typically participate in these programs recognize a benefit from participating or if they decide to participate with another provider, we would no longer be able to enroll these customers, which could result in us recognizing lower than expected revenues. In addition, rule changes could negatively impact how we market, enroll, measure, verify, and settle with our end-customers and the open market authority.

We have experienced, and may in the future experience, significant variability in our revenues, on both an annual and a quarterly basis, as a result of these factors. Pronounced variability in the open markets or an extended period of reduction in spending by electric utilities could negatively impact our business and make it difficult for us to accurately forecast our future sales, which could lead to increased spending by us that is not matched with equivalent or better revenues.

***A significant portion of our revenues are generated from contracts with a small number of customers, the postponement, modification or termination of which could significantly reduce our revenues.***

Our revenues historically have been generated from a small number of customers. In 2011, 2010 and 2009, our top ten customers accounted for approximately 72%, 71% and 67% of our consolidated revenues, respectively. In 2011, two customers accounted for more than 10% of our revenues: PJM Interconnection LLC (22%) and Pepco Holdings Inc. (16%). In 2010, two customers accounted for more than 10% of our revenues: PJM Interconnection LLC (28%) and Pepco Holdings Inc. (12%). In 2009, two customers accounted for more than 10% of our revenues: PJM Interconnection LLC (20%) and NV Energy (12%). Our capacity contracts are multi-year contracts that are subject to postponement, modification or termination by our utility customers. Such action by a customer with respect to one or more of our significant contracts would significantly reduce our revenues.

***Our failure to meet product development and commercialization milestones may result in customer dissatisfaction, cancellation of existing customer orders or our failure to successfully compete in new markets.***

In the past, we have not met all of our product development and commercialization milestones. For example, we were behind schedule in developing a next-generation demand response product for a major customer. This delay resulted in a deferral of sales and gross profit associated with contracted delivery schedules for our products.

We establish milestones to monitor our progress toward developing commercially feasible products or to meet contractual delivery requirements of our customers. In meeting these milestones, we often depend on third-party contractors in the U.S. and other countries for much of our hardware manufacturing and software development. Internal delays or delays by third-party contractors could cause us to miss product development or delivery deadlines. In addition, internal development delays could result in the loss of commercially available hardware and software products, as we are unable to rely on outside vendors to provide such products when contractual rights for the supply or license of such products expire. As an example, we are developing and enhancing our software platform, IntelliSOURCE. Delays in development schedules could negatively affect our business. We may not successfully achieve our milestones in the future, which could distract our employees, harm our relationships with our existing and potential customers, and result in canceled orders, deferred or lost revenues and/or margin compression and our inability to successfully compete in new markets.

***The expiration of our capacity contracts without obtaining a renewal or replacement capacity contract, or finding another revenue source for the capacity our operating assets can provide, could materially affect our business.***

Although we have entered into additional long-term contracts in different geographic regions and are regularly in discussions with our customers to extend our existing contracts or enter into new contracts with these existing customers, there can be no assurance that any of these contracts will be extended or that we will enter into new contracts on favorable terms. If these contracts are not extended or replaced, we would expect to enroll the capacity that we make available under such contracts in another demand response capacity program, although there is no assurance we would be able to do so. For example, our capacity contract agreement with NV Energy was not continued in 2011. NV Energy accounted for 4% and 12% of our total revenue in 2010 and 2009, respectively.

***We could be required to make substantial refunds or pay damages to our customers if the actual amount of electric capacity we provide under our capacity programs is materially less than estimated or required under the applicable agreements.***

We typically operate our capacity programs through long-term, fixed price contracts with our utility customers. Under our base load contracts, our utility customers make periodic payments based on verified load reduction after inspecting and confirming the capacity reduced through energy efficiency measures. While the base load is able to be permanently reduced once the energy efficiency devices are installed and verified, the utility often retains the right to conduct follow up inspections for subsequent years. If the energy consumer removes the installed devices, shuts down operations or vacates the physical premises, there is the potential that any subsequent inspection by our utility customer would result in a lower amount of base load reduced capacity than originally verified, which may consequently obligate us to pay a penalty. In addition, our base load contracts require building out a specified amount of capacity (megawatts) at pre-determined dates throughout the contract life. Due to our potential participants' limited capital spending and increased competition in the marketplace, we are experiencing challenges in meeting certain contractual build-out milestones in a timely manner. If we fail to fulfill the required contracted capacity by the dates specified in our contracts, we would be obligated to pay penalties of up to \$0.3 million per megawatt that we fail to obtain in 2012. As of December 31, 2011, we have recorded potential liquidated damages for capacity fulfillment delays related to certain 2012 contractual milestones.

In the open market programs, which typically have a term of one to three years, we sell capacity that we obtain through our programs to independent system operators. The independent system operator makes periodic payments to us based on estimates of the amount of electric capacity that we expect to make available during the contract year. We refer to these payments as proxy payments and electric capacity on which proxy payments are made as estimated capacity. A contract year generally begins on June 1st and ends May 31st of the following year. We and the independent system operator analyze results of the metering data collected during the capacity events or test events to determine the capacity that was available during the actual event. Any discrepancy between our analysis of the metering data and the analysis from the independent system operator could result in lower than expected revenues or potential damages payable by us. In addition, the PJM open market program has amended rules which create potential penalties if the projected megawatts do not perform. To the extent PJM does not call an event, test events will be initiated before September 30 of each year to test the potential capacity. If we do not provide the required capacity during an event or test event, we may be subject to penalties. PJM has recently eliminated the Interruptible Load for Reliability ("ILR") program effective 2012. Customers that currently participate as ILR resources must be moved into other open market programs by 2012 in order to avoid loss of revenue. This change also (i) requires additional capital support for both planned and new megawatts under the three-year Base Residual Auction and (ii) has increased the potential penalties for non-compliance. As a result of the elimination of the ILR program and the changing open market programs, we may incur significantly higher penalties in the future.

Under our VPC contracts, which typically have a term of five to ten years, our utility customers make periodic payments to us based on estimates of the amount of electric capacity we expect to make available to them during the contract year. We refer to these payments as proxy payments and electric capacity on which proxy payments are made as estimated capacity. During

contract negotiations or the first contract year of a VPC program, estimated capacity is negotiated and established by the contract. A contract year generally begins at the end of the summer months, after a utility's seasonal peak energy demand for electricity. We refer to this seasonal peak energy demand as the cooling season. For example, the cooling season for one of our VPC contracts runs from June 1st to September 30th and the contract year for this agreement begins on October 1st and ends on September 30th. We and our utility customers analyze results of measurement and verification tests that are performed during the cooling season of each contract year to statistically determine the capacity that was available to the utility during the cooling season. We refer to measured and verified capacity as our available capacity. Available capacity varies with the electricity demand of high-use energy equipment, such as central air conditioning compressors, at the time measurement and verification tests are conducted, which, in turn, depends on factors beyond our control such as fluctuations in temperature and humidity. Although our contracts often contain restrictions regarding the time of day and, in some cases, the day of the week the measurement and verification tests are performed, the actual time within the agreed testing period that the tests are performed is beyond our control. If the measurement and verification tests are performed during a period of generally lower electricity usage, then the capacity made available through our system could be lower than estimated capacity for the particular contract being tested. The correct operation of, and timely communication with, devices used to control equipment are also important factors that affect available capacity under our VPC contracts. Any difference between our available capacity and the estimated capacity on which proxy payments were previously made will result in either a refund payment from us to our utility customer or an additional payment to us by our customer. We refer to this process as the annual settlement. For contract year 2011, we estimate an aggregate payment of \$2.0 million as a result of the annual settlement. For the contract year 2010, we received approximately \$0.1 million, in the aggregate, excluding the NV Energy program which expired in January 2011, as a result of the programs' annual settlement. For 2009, we paid \$0.6 million as a result of the annual settlement.

Any refund payments that we may be required to make (1) as a result of a subsequent inspection or failure to meet initial minimum capacity under our base load contracts, (2) to the power pool under our auction contracts, or (3) pursuant to an annual settlement determination under our VPC contracts could be substantial and could adversely affect our liquidity and anticipated revenue projections. In addition, because measurement and verification test results for each VPC contract generally establishes estimated capacity on which proxy payments will be made for the following contract year, a downward adjustment in estimated capacity for a particular VPC contract would decrease the dollar amount of proxy payments for the following contract year and could significantly decrease our estimated backlog and estimated payments from long-term contracts. In addition, such adjustment could result in significant year-to-year variations in our quarterly and annual revenues.

***We face risks related to our expansion into international markets.***

As we expand our addressable market by pursuing opportunities to provide IEM solutions in international markets, as noted through our Eskom agreement, we face additional risks. We have had little experience operating large programs in markets outside of the United States. Accordingly, new markets may require us to respond to new and unanticipated regulatory, marketing, sales and other challenges. There can be no assurance that we will be successful in responding to these and other challenges we may face in our current international enterprise, and as we attempt to expand in additional international markets. As an example, we anticipate our South African contract with Eskom to produce material revenue and profits in 2012; however, operational, regulatory, and market risks could impair our anticipated success in 2012. International operations also entail a variety of other risks, including:

- unexpected changes in legislative or regulatory requirements of foreign countries;
- currency exchange fluctuations;
- longer payment cycles and greater difficulty in accounts receivable collection; and
- significant taxes or other burdens of complying with a variety of foreign laws.

International operations are also subject to general geopolitical risks, such as political, social and economic instability and changes in diplomatic and trade relations. One or more of these factors could adversely affect any international operations and result in lower revenue than we expect and could significantly affect our profitability.

***Changes in the availability and regulation of radio spectrum or paging providers limiting paging services may cause us to lose utility customers.***

A significant number of our products use radio spectrum, which is subject to regulation in the United States by the Federal Communications Commission. Licenses for radio frequencies must be obtained and periodically renewed. Licenses granted to us or our customers may not be renewed on acceptable terms, if at all. The Federal Communications Commission may adopt changes to the rules for our licensed and unlicensed frequency bands that are incompatible with our business. These changes in frequency allocation may result in the termination of demand response programs by our utility customers or the replacement of our systems with ones owned by our competitors. This would erode our competitive advantage with respect to those utility

customers and would force us to compete with other providers for their business. In addition, paging providers may discontinue providing paging services, which may result in no coverage or an increase in our cost in seeking alternative providers.

***We may be subject to damaging and disruptive intellectual property litigation related to allegations that our products or services infringe on intellectual property held by others, which could result in the loss of use of the product or service.***

Third-party patent applications and patents may be applicable to our products. As a result, third-parties have made and may in the future make infringement and other allegations that could subject us to intellectual property litigation relating to our products and services, which litigation is time-consuming and expensive, divert attention and resources away from our daily business, impede or prevent delivery of our products and services, and require us to pay significant royalties, licensing fees and damages. In addition, parties making infringement and other claims may be able to obtain injunctive or other equitable relief that could effectively block our ability to provide our services and could cause us to pay substantial damages. In the event of a successful claim of infringement, we may need to obtain one or more licenses from third parties, which may not be available at a reasonable cost, or at all.

***If we are unable to protect our intellectual property, our business and results of operations could be negatively affected.***

Our ability to compete effectively depends in part upon the maintenance and protection of the intellectual property related to our capacity programs and the solutions, hardware, firmware and software that we have acquired or developed internally. Patent protection is unavailable for certain aspects of the technology that is important to our business. In addition, one or more of our pending patent applications may not be issued. To date, we have attempted to rely on copyright, trademark and trade secrecy laws, as well as confidentiality agreements and licensing arrangements, to establish and protect our rights to this technology. However, we have not obtained confidentiality agreements from all of our customers and vendors, some of our licensing or confidentiality agreements are not in writing, and some customers are subject to laws and regulations that require them to disclose information that we would otherwise seek to keep confidential. Policing unauthorized use of our technology is difficult and expensive, as is enforcing our rights against unauthorized use. The steps that we have taken or may take may not prevent misappropriation of the technology on which we rely. In addition, effective protection may be unavailable or limited if we expand to other jurisdictions outside the United States, as the intellectual property laws of foreign countries sometimes offer less protection or have onerous filing requirements. Any litigation could be unsuccessful, cause us to incur substantial costs and divert resources away from our daily business.

***We may not be able to maintain quality customer care during periods of growth or in connection with the addition of new and complex products or services, which could adversely affect our ability to acquire and retain utility customers and participants in our capacity programs.***

In the past, during periods of growth, we have not been able to expand our customer care operations quickly enough to meet the needs of our increased customer base, and the quality of our customer care has suffered. As we add new and complex products and services or we undergo product issues with corrective actions, we will face challenges in increasing and training our customer care staff. If we are unable to hire, train and retain sufficient personnel to provide adequate customer care in a timely manner, we may experience customer dissatisfaction and increased participant terminations. The risk is enhanced through selling solution based systems, contingent upon our IntelliSOURCE software, as the software and potential integration are complex and often times outside of our control, such as in the instance and to the extent we are required to integrate with an AMI provider's meter software.

***Electric utility industry sales cycles can be lengthy and unpredictable and require significant employee time and financial resources with no assurances that we will realize revenues.***

Sales cycles with our customers can generally be long and unpredictable. Our customers include electric utilities and large commercial and industrial energy consumers that generally have extended budgeting, procurement and regulatory approval processes. In addition, electric utilities tend to be risk averse and tend to follow industry trends rather than be the first to purchase new products or services, which can extend the lead time for or prevent acceptance of new products or services such as our capacity programs or advanced metering initiatives. Accordingly, our potential customers may take longer to reach a decision to purchase products. This extended sales process requires the dedication of significant time by our personnel and our use of significant financial resources, with no certainty of success or recovery of our related expenses. It is not unusual for an electric utility or commercial and industrial energy consumer to go through the entire sales process and not accept any proposal or quote. In addition, pilot test programs, which are often conducted and analyzed before a sale becomes final, generally result in operating losses to us due to the lack of scalability, start-up costs, development expenditures and other factors.

***If we are unable to expand the distribution of our products through strategic alliances, we may not be able to grow our business.***

Part of our ability to grow our business depends on our success in continuing to increase the number of customers we serve through a variety of strategic marketing alliances or channel partnerships with metering companies, communications providers, advanced meter reading providers, installation companies and other large multinational companies. Revenues from strategic alliances have not historically accounted for a significant portion of our total revenues. We may not be able to maintain productive relationships with the companies with which we have strategic alliances, and we may not be able to establish similar relationships with additional companies on a timely and economic basis, if at all.

***An increased rate of terminations of residential, commercial and industrial energy consumers, or the use of more efficient products by such consumers, who are enrolled in our VPC, open market, or turnkey programs, or who would enroll in such programs, would negatively impact our business by reducing our revenues and requiring us to spend more money to maintain and grow our participant base.***

Our ability to provide electric capacity under our capacity contracts depends on the number of residential, commercial and industrial energy consumers who enroll and participate in our programs. The average annual rate of participant terminations for our residential VPC programs from inception through December 31, 2011 was approximately 8%. As a result, we will need to acquire new participants on an ongoing basis to maintain available capacity provided to our utility customers. In addition, to the extent existing or future participants install high efficiency air conditioning units which could minimize the effectiveness of our solution as to that participant, we may face lower measurement and verification results. If we are unable to recruit and retain participants for our capacity programs, we will face difficulties acquiring capacity to sell through such programs. Furthermore, the increased competition and the length of contracts for commercial and industrial capacity consumers may result in an increase of such consumers not re-enrolling when their contract ends or terminating their contract for a more lucrative offer, which could further restrict our ability to acquire capacity to sell into such programs. If participant termination rates increase, we will need to acquire more participants in order to maintain our revenues and more participants than estimated to grow our business. This loss of revenues resulting from participant terminations can be significant, and limiting terminations is an important factor in our ability to achieve future profitability. If we are unsuccessful in controlling participant terminations, we may be unable to acquire a sufficient number of new participants or we may incur significant costs to replace participants, which could cause our revenues to decrease, and we might not become profitable.

***If we lose key personnel upon whom we are dependent, we may not be able to manage our operations and meet our strategic objectives.***

Many key responsibilities of our business have been assigned to a relatively small number of individuals. Our future success depends to a considerable degree on the vision, skills, experience and effort of our senior management team, including R. Blake Young, our President and Chief Executive Officer; David Mathieson, our Executive Vice President and Chief Financial Officer; Steve Moffitt, our Executive Vice President and Chief Operating Officer; Arthur Vos IV, our Senior Vice President of Utility Sales and Chief Technology Officer; George Hunt, our Senior Vice President, Commercial and Industrial; David Ellis, our General Manager, International; Matthew Smith, our Senior Vice President, General Counsel and Secretary; and Teresa Naylor, our Senior Vice President of Human Resources. We do not maintain key-person insurance on any of these individuals. Any loss or interruption of the services of any of our key employees could significantly reduce our ability to effectively manage our operations and implement our strategy.

***The success of our businesses depends in part on our ability to develop new products and services and increase the functionality of our current products.***

From January 1, 2001 through December 31, 2011, we have invested over \$26.0 million in research and development costs associated with our current products. From time to time, our customers have expressed a need for increased functionality in our products and software. In response, and as part of our strategy to enhance our solutions and grow our business, we plan to continue to make substantial investments in the research and development of new technologies. Our future success will depend in part on our ability to continue to design and manufacture new competitive products and software, to enhance our existing products and to provide new value-added services. Product development initiatives will require continued investment, and we may experience unforeseen problems in the performance of our technologies or products, including new technologies that we develop and deploy. Furthermore, we may not achieve market acceptance of our new products, solutions and software. In the past, we incurred significant costs to develop a specific product for large commercial and industrial customers that has found limited market acceptance. If we are unable to develop new products and services, or if the market does not accept such products and services, our business and results of operations will be adversely affected. In addition, if we are unable to maintain low costs for established products supplied under fixed fee contracts, our business and results of operations will be

adversely affected.

***If we have material weaknesses in our internal control over financial reporting, the accuracy and timing of our financial reporting may be adversely affected.***

There were no material weaknesses identified by management or our independent registered public accounting firm during the audit of our consolidated financial statements for the years ended December 31, 2011 and 2010. A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of our annual or interim financial statements will not be prevented or detected on a timely basis. However, there is no assurance that we will not discover material weaknesses in internal controls in the future.

As part of our business strategy, we may pursue the acquisition of complementary businesses. To the extent we acquire a new business, we must integrate the accounting system for the business with our own, and we may experience challenges in our internal control over financial reporting as a result. Any such difficulty we encounter could increase the risk of a material weakness. The existence of one or more material weaknesses in any period would preclude a conclusion that we maintain effective internal control over financial reporting. Such conclusion would be required to be disclosed in our future Annual Reports on Form 10-K and may impact the accuracy and timing of our financial reporting.

***Any internal or external security breaches, information technology system failures, cyber security attacks or network distributions that involve our products or our business could harm our reputation, business operations, energy usage and financial conditions and even the perception of security risks, whether or not valid, could inhibit market acceptance of our products and cause us to lose customers.***

Our customers use our products to compile and analyze sensitive and confidential information. The occurrence or perception of security breaches in our products or services could harm our reputation, financial condition and results of operations. In addition, we may come into contact with sensitive consumer information or data when we perform operational, support or maintenance functions for our utility customers. A failure to handle this information properly, or a compromise of our security systems that results in customer personal information being obtained by unauthorized persons could adversely affect our reputation with our customers and others, as well as our operations, results of operations, financial condition and liquidity, and could result in litigation against us or the imposition of penalties. In addition, a security breach could require that we expend significant additional resources related to our information security systems and could result in a disruption of our operations. This risk is enhanced through the distribution of our new IntelliSOURCE software system and integration work with the utilities back office, as we anticipate our system and solutions will be utilized on a larger scale.

Additionally, we enter into contracts that require our systems to be secure, as the nation's energy infrastructure is critical to continued safety and business operations. Our products and services involve the (i) storage and transmission of customers' proprietary information and (ii) the use, reduction, and movement of energy and capacity. Security breaches could expose us to a risk of loss of this information, unmanaged electrical usage or stoppage, litigation, and potential liability. Our security measures may be breached due to the actions of outside parties, employee error, malfeasance, or otherwise, and, as a result, an unauthorized party may obtain access to our data or our customers' data and could inappropriately affect electrical management. Additionally, outside parties may attempt to fraudulently induce employees or customers to disclose sensitive information in order to gain access to our data or our customers' data. Any such breach or unauthorized access could result in significant legal and financial exposure, damage to our reputation, and a loss of confidence in the security of our products and services that could potentially have a material adverse effect on our business. Because the techniques used to obtain unauthorized access, disable or degrade service, or sabotage systems change frequently and often are not recognized until launched against a target, we may be unable to anticipate these techniques or to implement adequate preventative measures. If an actual or perceived breach of our security occurs, the market perception of the effectiveness of our security measures could be harmed, and we could lose customers.

***Current market developments may adversely affect our business, results of operations and access to capital.***

Over the past few years, dramatic declines in the housing market, including increasing foreclosures, and concerns over certain European countries' economic health have resulted in concern about the stability of the financial markets generally. The resulting lack of available credit and lack of confidence in the financial markets could materially and adversely affect our results of operations and financial conditions and our access to capital. In particular, we may face the following risks in connection with these events:

- continuing foreclosures in the housing market may cause a decline in participation in our demand response programs;
- our ability to assess the creditworthiness of our customers may be impaired due to slow payment, receivership or

bankruptcy of our customers; and

- our ability to borrow, or our customer's availability to borrow, from other financial institutions could be adversely affected by further disruptions in the capital markets or other events, including actions by credit rating agencies and investor expectations.

***Our business may become subject to modified or new government regulation, which may negatively impact our ability to market our products.***

Our products and services are not subject to the majority of existing federal and state regulations in the U.S. governing the electric utility industry. However, our solutions are subject to oversight by the FERC, NERC, and other regulatory entities under the Federal Power Act, and the individual Regional Transmission Owner or Independent System Operator approved tariffs and manuals. In addition, our products and services are subject to government oversight and regulation under certain federal, state and local laws and ordinances, particularly relating to market participation and manipulation, communication requirements, building codes, public safety regulations pertaining to electrical connections and local and state licensing requirements. In the future, federal, state or local governmental entities or competitors may seek to change existing regulations, impose additional regulations or apply current regulations to cover our products and services. If any of these things occur, as applicable to our products or services, whether at the federal, state or local level, they may negatively impact the installation, servicing and marketing of our products and increase our costs and the price of our products and services. We are currently evaluating various state regulations regarding installation work for one of our programs. While we do not know the outcome of our evaluation or the potential for any state regulatory board to address such work, there is the potential that we could suffer a loss of significant installation revenue, if not all installation revenue, for this contract.

***We are exposed to fluctuations in the market values of our portfolio investments and interest rates; impairment of our investments could harm our earnings.***

We maintain an investment portfolio of various holdings, types, and maturities. These securities are generally classified as available-for-sale and, consequently, are recorded on our consolidated balance sheets at fair value with unrealized gains or losses reported as a separate component of accumulated other comprehensive income (loss), net of tax. For information regarding the sensitivity of and risks associated with the market value of portfolio investments and interest rates, see “Item 7A - Quantitative and Qualitative Disclosure About Market Risk” in this Annual Report on Form 10-K.

***If we fail to hire and train additional personnel and improve our controls and procedures to respond to the growth of our business, the quality of our products and services could materially suffer and cause us to lose customers.***

Our business and operations have expanded rapidly since our inception. For example, from January 1, 2003 through December 31, 2011, the number of our employees increased more than 640%, growing from 70 to 519. To continue expanding our customer base effectively and to meet our growth objectives for the future, we are currently working to fill multiple positions within our company. In addition, we must continue to successfully train, motivate and retain our existing and future employees. In order to manage our expanding operations, we will also need to continue to improve our management, operational and financial controls and our reporting systems and procedures. All of these measures will require significant expenditures and will demand the attention of management. If we are not able to hire, train and retain the necessary personnel, or if these operational and reporting improvements are not implemented successfully, the quality of our products and services could materially suffer as a result and cause us to lose customers.

***Our business may be subject to additional obligations to collect and remit sales, use or other tax and, any successful action by state, foreign or other authorities to collect additional sales, use or other tax could adversely harm our business.***

We file sales and/or use tax returns in certain states within the U.S. as required by law and certain client contracts for a portion of the hardware, software and services that we provide. We do not collect sales or other similar taxes in other states and many of the states do not apply sales or similar taxes to the vast majority of the services that we provide. However, one or more states could seek to impose additional sales or use tax collection and record-keeping obligations on us. Any successful action by state, foreign or other authorities to compel us to collect and remit sales or use tax, either retroactively, prospectively or both, could adversely affect our results of operations and business.

***We may not be able to identify suitable acquisition candidates or complete acquisitions successfully, which may inhibit our rate of growth, and we may not be successful in integrating any acquired businesses and acquisitions that we complete which may expose us to a number of unanticipated operational or financial risks.***

In addition to organic growth, we have pursued, and to the extent we continue to pursue, growth through the acquisition of

companies or assets, we may enlarge our geographic markets, add experienced management and increase our product and service offerings. However, we may be unable to implement this growth strategy if we cannot identify suitable acquisition candidates or reach agreement on potential acquisitions on acceptable terms or for other reasons. Moreover, our acquisition efforts involve certain risks, including:

- difficulty integrating operations and systems;
- the potential for key personnel and customers of the acquired company terminating their relationships with the acquired company as a result of the acquisition;
- additional financial and accounting challenges and complexities in areas such as tax planning and financial reporting;
- additional risks and liabilities (including for environmental-related costs) as a result of our acquisitions, some of which we may not discover during our due diligence;
- disruption of our ongoing business or insufficient management attention to our ongoing business; and
- realizing cost savings or other financial benefits we anticipated.

The rapid growth of the clean energy sector may cause us to experience more competition for acquisition opportunities, which could result in higher valuations for acquisition candidates. As a result, we may be required to pay more for acquisitions we believe are beneficial, which could, in turn, require us to recognize additional goodwill in connection with such acquisitions. To the extent that any acquisition results in additional goodwill, it will reduce our tangible net worth, which might have an adverse effect on our credit. In addition, in the event that we issue shares of our common stock as part or all of the purchase price, an acquisition will dilute the ownership of our then-current stockholders. Once integrated, acquired operations may not achieve levels of revenues, synergies or productivity comparable to those achieved by our existing operations, or otherwise perform as expected. For example, we did not experience the anticipated revenue growth during 2011, 2010 and 2009 from our acquisitions of Enerwise and PES, which was due in part to PES not reaching its anticipated build-out and in part to the regulatory rule change in 2008 that affected Enerwise's economic program in PJM. In addition, future acquisitions could result in the incurrence of additional indebtedness and other expenses. There can be no assurance that our acquisition strategy will not have a material adverse effect on our business, financial condition and results of operations.

#### **Risks Related to Our Common Stock**

##### ***Shares eligible for future sale may cause the market price for our common stock to decline even if our business is doing well.***

Sales of substantial amounts of our common stock in the public market, or the perception that these sales may occur, could cause the market price of our common stock to decline. This could also impair our ability to raise additional capital in the future through the sale of our equity securities. Under our fifth amended and restated certificate of incorporation, we are authorized to issue up to 150,000,000 shares of common stock, of which 25,913,694 shares of common stock were outstanding as of December 31, 2011. We cannot predict the size of future issuances of our common stock or the effect, if any, that future sales and issuances of shares of our common stock, or the perception of such sales or issuances, would have on the market price of our common stock.

##### ***We do not intend to pay dividends on our common stock.***

We have not declared or paid any dividends on our common stock to date, and we do not anticipate paying any dividends on our common stock in the foreseeable future. We intend to reinvest all future earnings in the development and growth of our business. In addition, our senior loan agreement prohibits us from paying dividends and future loan agreements may also prohibit the payment of dividends. Any future determination relating to our dividend policy will be at the discretion of our board of directors and will depend on our results of operations, financial condition, capital requirements, business opportunities, contractual restrictions and other factors deemed relevant. To the extent we do not pay dividends on our common stock, investors must look solely to stock appreciation for a return on their investment in our common stock.

##### ***The sale of our common stock to Aspire Capital may cause substantial dilution to our existing stockholders and the sale of the shares of common stock acquired by Aspire Capital could cause the price of our common stock to decline.***

Shares offered to Aspire Capital under the Purchase Agreement between us and Aspire Capital may be sold over a period of up to 24 months from the date of the agreement. The number of shares ultimately offered for sale to Aspire Capital is dependent upon the number of shares we elect to sell to Aspire Capital under the Purchase Agreement. Depending upon market liquidity at the time, sales of shares of our common stock under the Purchase Agreement may cause the trading price of our common stock to decline. As of December 31, 2011, we have issued 400,000 shares of common stock under the Purchase Agreement, excluding the 144,927 Commitment Shares. After Aspire Capital has acquired shares pursuant to the Purchase Agreement, it may sell all, some or none of those shares.

Aspire Capital may ultimately purchase all, some or none of the \$10.0 million of our common stock together with the 144,927 shares of common stock we refer to as the Commitment Shares. Sales to Aspire Capital by us pursuant to the Purchase Agreement may result in substantial dilution to the interests of other holders of our common stock. The sale of a substantial number of shares of our common stock to Aspire Capital in this offering, or anticipation of such sales, could make it more difficult for us to sell equity or equity-related securities in the future at a time and at a price that we might otherwise wish to effect sales. However, we have the right to control the timing and amount of any sales of our shares to Aspire Capital and the Purchase Agreement may be terminated by us at any time at our discretion without any cost to us.

***Our fifth amended and restated certificate of incorporation, our second amended and restated bylaws and Delaware law contain provisions that could discourage acquisition bids or merger proposals, which may adversely affect the market price of our common stock.***

Provisions in our fifth amended and restated certificate of incorporation, our second amended and restated bylaws and applicable provisions of the General Corporation Law of the State of Delaware may make it more difficult or expensive for a third party to acquire control of us even if a change of control would be beneficial to the interests of our stockholders. These provisions could discourage potential hostile takeover attempts and could adversely affect the market price of our common stock. Our fifth amended and restated certificate of incorporation and our second amended and restated bylaws:

- currently provide for a classified board of directors, which could discourage potential acquisition proposals and could delay or prevent a change of control. At our 2010 Annual Meeting, our shareholders approved a shareholder proposal that requested the board to take the necessary steps to declassify the board and to adopt the annual election of each director. While our board recommended declassifying the board at our 2011 Annual Meeting, the proposal did not receive the affirmative vote of at least 66 2/3% of the total number of outstanding shares required to amend our certificate of incorporation in order to implement the declassification of the board and therefore, the classified structure of the board remains in place;
- authorize the issuance of blank check preferred stock that could be issued by our board of directors during a takeover attempt;
- prohibit cumulative voting in the election of directors, which would otherwise allow holders of less than a majority of stock to elect some directors;
- require super-majority voting to effect amendments to certain provisions of our fifth amended and restated certificate of incorporation and to effect amendments to our second amended and restated bylaws concerning the number of directors;
- limit who may call special meetings;
- prohibit stockholder action by written consent, requiring all actions to be taken at a meeting of the stockholders;
- establish advance notice requirements for nominating candidates for election to the board of directors or for proposing matters that can be acted upon by stockholders at a stockholders meeting; and
- require that vacancies on the board of directors, including newly-created directorships, be filled only by a majority vote of directors then in office.

In addition, Delaware law prohibits us from engaging in any business combination with any “interested stockholder,” meaning generally that a stockholder who beneficially owns more than 15% of our common stock cannot acquire us for a period of three years from the date this person became an interested stockholder, unless various conditions are met, such as approval of the transaction by our board of directors.

***Our common stock may not continue to trade on the Nasdaq Global Market, which could cause the price of our common stock to decline and make your shares more difficult to sell.***

In order for our common stock to trade on the Nasdaq Global Market, we must continue to meet the listing standards of that market. Among other things, those standards require that our common stock maintain a minimum closing bid price of at least \$1.00 per share. During 2011, our common stock traded at times at prices near \$1.00. If we do not continue to meet Nasdaq's applicable minimum listing standards, Nasdaq could delist us from the Nasdaq Global Market. If our common stock is delisted from the Nasdaq Global Market, we could seek to have our common stock listed on the Nasdaq Capital Market or other Nasdaq markets. However, delisting of our common stock from the Nasdaq Global Market could hinder your ability to sell, or obtain an accurate quotation for the price of, your shares of our common stock. Delisting could also adversely affect the perception among investors of Comverge and its prospects, which could lead to further declines in the market price of our common stock. Delisting may also make it more difficult and expensive for us to raise capital. In addition, delisting might subject us to a Securities and Exchange Commission rule that could adversely affect the ability of broker-dealers to sell or make a market in our common stock, thereby hindering your ability to sell your shares.

**Item 1B. Unresolved Staff Comments**

None.

**Item 2. Properties**

In Norcross, Georgia, we lease 35,600 square feet of office space which includes our Network Operations Center and supports both the Residential Business and C&I Business segments and our executive and administrative support functions. In East Hanover, New Jersey, we lease 14,250 square feet of office space for our energy science and customer acquisition marketing functions, which primarily support our Residential Business segment. In Kennett Square, Pennsylvania, we lease 19,737 square feet of office space for our C&I Business segment and servicing one of our Pennsylvania utility programs. In Broomfield, Colorado, we lease approximately 4,300 square feet of office space for software development. We also lease properties in certain cities as program offices. The above facilities are in good condition, and we believe that our properties will be sufficient to support our operations for the foreseeable future. We do not own any properties.

**Item 3. Legal Proceedings**

We have provided information about certain legal proceedings in which we are involved in “Part II, Item 8 - Financial Statements and Supplementary Data - Note 12.”

In addition to the matters disclosed in Note 12, we are a party to various investigations, lawsuits, arbitrations, claims and other legal proceedings that arise in the ordinary course of our business, and, based on information available to us, we do not believe at this time that any such additional proceedings will individually, or in the aggregate, have a material adverse effect on our financial position, liquidity or results of operations. For further information on the risks we face from existing and future investigations, lawsuits, arbitrations, claims and other legal proceedings, please see “Part I, Item 1A - Risk Factors” of this report.

**Item 4. Mine Safety Disclosures**

Not applicable.

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**Part II****Item 5. Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities****Price Range of Common Stock**

Our common stock has been listed on the Nasdaq Global Market under the symbol "COMV" since April 12, 2007. Prior to that time, there was no public market for our common stock. The following table sets forth the range of high and low sales prices per share as reported on the Nasdaq Global Market for each quarterly period in 2011 and 2010.

Comverge, Inc. Price per Share	2011				2010			
	First Quarter	Second Quarter	Third Quarter	Fourth Quarter	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
High	\$ 7.87	\$ 5.09	\$ 3.71	\$ 1.98	\$ 13.25	\$ 12.28	\$ 10.43	\$ 8.36
Low	\$ 4.25	\$ 2.50	\$ 1.76	\$ 1.03	\$ 9.58	\$ 8.23	\$ 5.88	\$ 5.81

The closing sales price of our common stock on the Nasdaq Global Market was \$1.42 per share on March 9, 2012. As of March 9, 2012, there were 27,552,580 shares of our common stock outstanding, which were held by approximately 275 holders of record. Such number of stockholders does not reflect the number of individuals or institutional investors holding stock in nominee name through banks, brokerage firms and others.

**Dividend Policy**

We have never paid any cash dividends on our common stock. For the foreseeable future, we intend to retain and reinvest any earnings in our business, and we do not anticipate paying any cash dividends. Whether or not we declare any dividends will be at the discretion of our board of directors, considering then-existing conditions, including our financial condition and results of operations, capital requirements, contractual restrictions (including those under our loan agreement), business opportunities and other factors that our board of directors deems relevant.

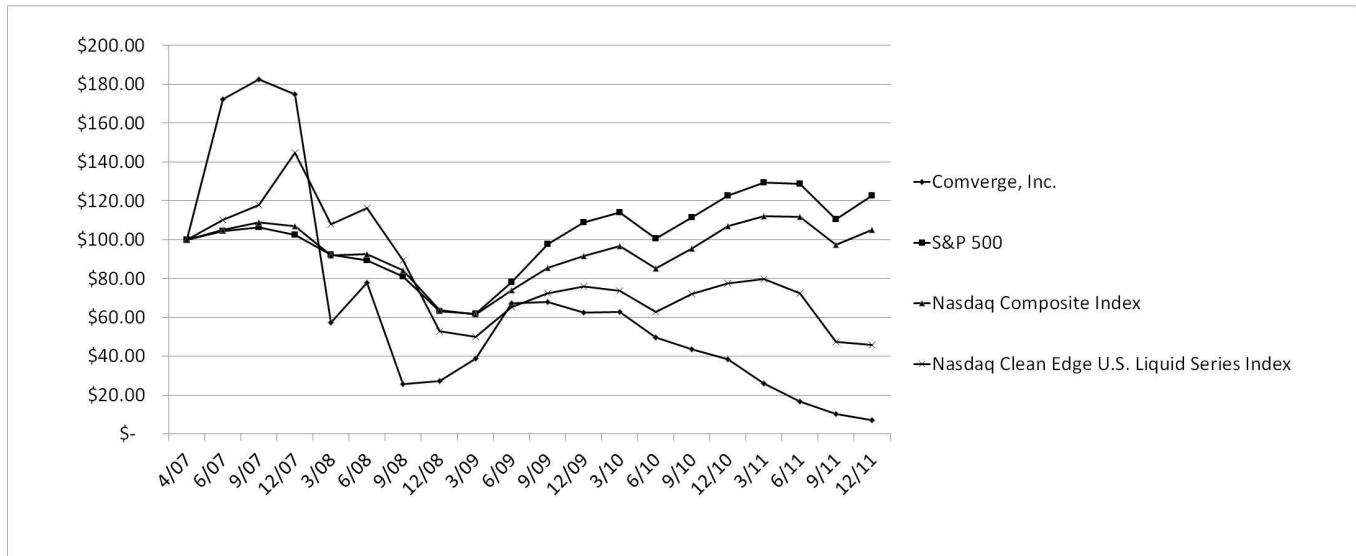
**Use of Proceeds from Public Offerings**

During 2007, we completed public offerings of our common stock on April 18, 2007 (Registration Nos. 333-137813 and 333-142082) and December 12, 2007 (Registration No. 333-146837). Net proceeds to us from both offerings were \$110 million.

Of the net proceeds received, we utilized \$34 million for our two acquisitions completed during 2007, \$10 million to repay outstanding debt over the last four years, \$18 million for non-financed capital expenditures, and \$48 million to fund the operations of our business and for general corporate purposes.

**Stock Price Performance Graph**

The following graph shows the total stockholder return of an investment of \$100 in cash on April 12, 2007, the date we priced our stock pursuant to our initial public offering, through December 31, 2011, for (1) our common stock, (2) the S&P 500 Index, (3) the Nasdaq Composite Index, and (4) the Nasdaq Clean Edge U.S. Liquid Series Index. After April 12, 2007, measurement points are the last trading day prior to the end of each of our quarters. Returns are based on historical results and are not intended to suggest future performance. Data for the S&P 500 Index, the Nasdaq Composite Index, and the Nasdaq Clean Edge U.S. Liquid Series Index assume reinvestment of dividends, if dividends were paid. We have never paid dividends on our common stock and have no present plans to do so.



	March 31, 2011	June 30, 2011	September 30, 2011	December 31, 2011
Comverge, Inc.	\$ 25.89	\$ 16.50	\$ 10.11	\$ 7.00
S&P 500	\$ 129.31	\$ 128.81	\$ 110.35	\$ 122.66
Nasdaq Composite Index	\$ 112.13	\$ 111.82	\$ 97.38	\$ 105.03
Nasdaq Clean Edge U.S. Liquid Series Index	\$ 79.73	\$ 72.25	\$ 47.30	\$ 45.66

	March 31, 2010	June 30, 2010	September 30, 2010	December 31, 2010
Comverge, Inc.	\$ 62.83	\$ 49.78	\$ 43.67	\$ 38.39
S&P 500	\$ 114.06	\$ 100.53	\$ 111.31	\$ 122.66
Nasdaq Composite Index	\$ 96.68	\$ 85.04	\$ 95.50	\$ 106.96
Nasdaq Clean Edge U.S. Liquid Series Index	\$ 73.68	\$ 62.87	\$ 72.05	\$ 77.49

	March 31, 2009	June 30, 2009	September 30, 2009	December 31, 2009
Comverge, Inc.	\$ 38.61	\$ 67.22	\$ 67.83	\$ 62.44
S&P 500	\$ 61.92	\$ 78.21	\$ 97.75	\$ 108.76
Nasdaq Composite Index	\$ 61.63	\$ 73.98	\$ 85.57	\$ 91.49
Nasdaq Clean Edge U.S. Liquid Series Index	\$ 49.84	\$ 65.18	\$ 72.49	\$ 75.87

	March 31, 2008	June 30, 2008	September 30, 2008	December 31, 2008
Comverge, Inc.	\$ 57.39	\$ 77.67	\$ 25.56	\$ 27.22
S&P 500	\$ 92.18	\$ 89.20	\$ 81.17	\$ 62.95
Nasdaq Composite Index	\$ 91.89	\$ 92.45	\$ 84.34	\$ 63.58
Nasdaq Clean Edge U.S. Liquid Series Index	\$ 107.79	\$ 116.12	\$ 89.21	\$ 52.71

	<b>April 12, 2007</b>	<b>June 30, 2007</b>	<b>September 30, 2007</b>	<b>December 31, 2007</b>
Comverge, Inc.	\$ 100.00	\$ 172.28	\$ 182.56	\$ 174.94
S&P 500	\$ 100.00	\$ 104.30	\$ 106.40	\$ 102.33
Nasdaq Composite Index	\$ 100.00	\$ 104.96	\$ 108.92	\$ 106.93
Nasdaq Clean Edge U.S. Liquid Series Index	\$ 100.00	\$ 110.06	\$ 117.70	\$ 144.79

As of March 9, 2012, the total value of an investment of \$100 in cash on April 12, 2007 through March 9, 2012 would be \$7.89, \$133.71, \$120.48 and \$50.57 for our common stock, the S&P 500 Index, the Nasdaq Composite Index, and the Nasdaq Clean Edge U.S. Liquid Series Index, respectively.

*The stock price performance data included in the above graph and table is not intended to be indicative of future stock price performance.*

#### **Purchases of Equity Securities by the Issuer and Affiliate Purchases**

The following table discloses purchases of shares of our common stock made by us or on our behalf for the periods shown below.

<b>Period</b>	<b>Total Number of Shares Purchased (1)</b>	<b>Average Price Paid per Share</b>
October 2011	514	\$ 1.63
November 2011	8,513	\$ 1.43
December 2011	300	\$ 1.29

- (1) Represents shares surrendered by employees to exercise stock options and to satisfy tax withholding obligations on vested restricted stock and stock option exercises pursuant to the Amended and Restated 2006 Long-Term Incentive Plan.

**Item 6. Selected Financial Data**

The following tables set forth our selected historical financial data for the periods indicated. The selected statement of operations data for the years ended December 31, 2011, 2010 and 2009, and the selected balance sheet data as of December 31, 2011 and 2010, have been derived from our audited financial statements and related notes thereto included elsewhere in this annual report. The selected statement of operations data for the years ended December 31, 2008 and 2007, and the selected balance sheet data as of December 31, 2009, 2008, and 2007, have been derived from our audited financial statements and related notes thereto not included in this annual report.

The information presented below should be read in conjunction with “Management's Discussion and Analysis of Financial Condition and Results of Operations” and the financial statements and the notes thereto included elsewhere in this annual report.

	<b>Year Ended December 31,</b>				
	<b>2011 (1)</b>	<b>2010 (1)</b>	<b>2009 (1)</b>	<b>2008 (1)</b>	<b>2007</b>
	<b>(in thousands, except per share data)</b>				
<b>Statement of Operations Data:</b>					
Total revenue	\$ 136,420	\$ 119,389	\$ 98,844	\$ 77,238	\$ 55,162
Total cost of revenue	80,415	74,538	65,648	43,335	28,818
Gross profit	56,005	44,851	33,196	33,903	26,344
Operating expenses					
General and administrative expenses	41,000	39,362	37,781	34,463	22,072
Marketing and selling expenses	20,136	18,031	17,737	15,738	9,831
Research and development expenses	4,297	6,279	4,878	1,137	997
Amortization of intangible assets	645	2,144	2,209	2,439	973
Impairment charges	—	9,871	—	75,432	—
Operating loss	(10,073)	(30,836)	(29,409)	(95,306)	(7,529)
Interest and other expense (income), net	2,680	854	2,038	(299)	(1,072)
Loss before income taxes	(12,753)	(31,690)	(31,447)	(95,007)	(6,457)
Provision (benefit) for income taxes	72	(339)	219	(901)	147
Net loss	<u>\$ (12,825)</u>	<u>\$ (31,351)</u>	<u>\$ (31,666)</u>	<u>\$ (94,106)</u>	<u>\$ (6,604)</u>
Net loss per share (basic and diluted)	<u>\$ (0.52)</u>	<u>\$ (1.27)</u>	<u>\$ (1.45)</u>	<u>\$ (4.45)</u>	<u>\$ (0.46)</u>

	<b>As of December 31,</b>				
	<b>2011</b>	<b>2010</b>	<b>2009</b>	<b>2008</b>	<b>2007</b>
	<b>(in thousands)</b>				
<b>Balance Sheet Data:</b>					
Cash and cash equivalents and marketable securities	\$ 23,641	\$ 35,592	\$ 50,478	\$ 47,847	\$ 72,929
Goodwill and intangible assets	4,134	4,315	16,958	18,430	93,197
Total assets	105,409	114,157	120,897	125,157	203,145
Total long-term liabilities	19,115	25,486	13,867	29,499	30,496
Shareholders' equity	36,981	46,058	74,044	67,660	152,631

- (1) The results of operations for the years ended December 31, 2011, 2010, 2009 and 2008 will not be comparable to the results of operations for the year ended December 31, 2007 due to the Enerwise and PES acquisitions completed in the second half of 2007. The year ended December 31, 2007 includes results from the date of acquisitions to the end of the year. The years ended December 31, 2011, 2010, 2009 and 2008 include a full year of operating results for the consolidated company, including the acquired entities.

## **Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations**

*You should read the following discussion together with the financial statements and the notes thereto included elsewhere in this annual report. This discussion contains forward-looking statements that are based on management's current expectations, estimates and projections about our business and operations. The cautionary statements made in this annual report should be read as applying to all related forward-looking statements wherever they appear in this annual report. Our actual results may differ materially from those currently anticipated and expressed in such forward-looking statements as a result of a number of factors, including those we discuss under "Risk Factors" and elsewhere in this annual report.*

### **Overview**

Comverge is a leading provider of intelligent energy management, or IEM, solutions that empower utilities, commercial and industrial customers, and residential consumers to use energy in a more effective and efficient manner. IEM solutions build upon demand response, enabling two-way communication between providers and consumers, giving all customer classes the insight and control needed to optimize energy usage and meet peak demand. Beyond reducing the energy load, this new approach reduces cost for the utility or grid operator, integrates other systems and allows for the informed decision-making that will power the smart grid.

We provide our IEM solutions through our two reportable segments: the Residential Business segment and the Commercial & Industrial, or C&I, Business segment. The Residential Business segment sells IEM solutions to utility customers for use in programs with residential and small commercial end-use participants. These solutions include hardware, our IntelliSOURCE software and services, such as installation, participant marketing and program management. If the utility customer elects to own the IEM system, we refer to the program as a turnkey program. If we provide capacity through fully-outsourced programs, in which we typically own the underlying system, we refer to the program as a Virtual Peaking Capacity, or VPC, program. Our VPC programs are pay-for-performance in that we are only paid for capacity that we provide as determined by a measurement and verification process with our customers. The C&I Business segment provides IEM solutions to utilities and independent system operators that are managing programs or auctions for large C&I consumers. These solutions are delivered through the management of C&I megawatts in open markets and VPC programs as well as through the completion of energy efficiency projects.

### *Liquidity*

We were notified by letters dated February 24, 2012 and March 8, 2012, that Grace Bay Holdings II, LLC ("Grace Bay") had acquired all of the outstanding principal amount of the notes issued by Partners for Growth III, L.P. ("PFG") and all other rights and obligations under our loan agreement with PFG. Our SVB and Grace Bay loan and security agreements contain customary covenants, including covenants which require us to meet specified financial ratios and financial tests. The Grace Bay agreement sets forth quarterly revenue targets that if not maintained, give Grace Bay the right to require us to make monthly repayments of the loan balance over the remaining term of the loan. For the fiscal quarter ended December 31, 2011, we were not able to meet the revenue targets in the Grace Bay agreement and Grace Bay has requested that we begin making amortization payments. If we subsequently comply with the minimum revenues target for succeeding measurements periods, we will prospectively cease monthly amortization of the loan; provided however, Grace Bay may again exercise its right to require amortization under the loan agreement if we fail to meet future minimum revenue targets. In letters dated February 27, 2012 and March 1, 2012, Grace Bay also alleged that we are in default under the Grace Bay agreement. An event of default in the Grace Bay agreement triggers a cross-default in the SVB loan and security agreement. Such events of default may result in the acceleration of the maturity of indebtedness outstanding under these agreements, which would require us to repay all amounts outstanding. If the maturity of our indebtedness is accelerated, we may not have sufficient funds available for repayment or we may not have the ability to borrow or obtain sufficient funds to replace the accelerated indebtedness on terms acceptable to us or at all. As of the date of this filing on Form 10-K, the Company has not received notice to accelerate the debt and would contest any such acceleration.

Management continues actively exploring all such financing options including restructuring of its current credit facilities in the near term or the possible sale of the Company. Our ability to secure additional capital or modify our existing debt terms to meet our projected revenue growth or cash expenditure reductions or our ability to sell the Company cannot be assured. In addition, certain financing options may require the consent of our current debt holders and we may not be able to obtain such consent or the terms of such consent may be cost-prohibitive. Thus, due to the combination of the amount of cash flow that is expected from operations, debt that is due in 2012, and the restrictive debt covenants with which it may not comply, there is substantial doubt about the Company's ability to continue as a going concern. The consolidated financial statements have been prepared assuming that we will continue as a going concern and contemplate the realization of assets and the satisfaction of liabilities in

the normal course of business.

See Liquidity and Capital Resources herein for further details.

### Payments from Long-Term Contracts

Payments from long-term contracts represent our estimate of total payments that we expect to receive under long-term agreements with our customers. Our assumptions are based on timing of cash receipts, which will not necessarily be equivalent to revenue recognized in each period. The information presented below with respect to payments from long-term contracts includes payment assumptions for our VPC and energy efficiency, turnkey, open market and market operator programs. As of December 31, 2011, we estimated that our total payments to be received through 2024 are approximately \$539 million. The table below summarizes these expected payments from long-term contracts in the year in which we anticipate receipt. For 2012, a portion of the cash payments has already been reflected in revenue for the year ended December 31, 2011.

	<b>Payments from Long- Term Contracts</b>
2012	\$ 147
2013	141
2014	101
Thereafter	150
<b>Total</b>	<b>\$ 539</b>

These estimates of payments from long-term contracts are forward-looking statements based on the contractual terms and conditions. In management's view, such information was prepared on a reasonable basis, reflects the best currently available estimates and judgments, and, to management's knowledge and belief, presents the assumptions and considerations on which we base our belief that we can receive such payments. However, this information should not be relied upon as being necessarily indicative of actual future results, and readers of this filing should not place undue reliance on this information. Any differences among these assumptions, other factors and our actual experiences may result in actual payments in future periods significantly differing from management's current estimates of payments allowed under the long-term contracts and our actual experiences may result in actual payments collected being significantly lower than current estimates. See "Part I, Item 1A - Risk Factors— *We may not receive the payments anticipated by our long-term contracts and recognize revenues or the anticipated margins from our backlog, and comparisons of period-to-period estimates are not necessarily meaningful and may not be indicative of actual payments.*" The information in this section is designed to summarize the financial terms of our long-term contracts and is not intended to provide guidance on our future operating results, including revenue or profitability.

#### *VPC and Energy Efficiency Programs*

In calculating an estimated \$210 million of payments through 2024 from our VPC and energy efficiency contracts, we have included expectations regarding build-out based on our historical experience as well as future expectations of participant enrollment in each contract's service territory. We have assumed that once our build-out phase is completed, we will operate our VPC contracts at the capacity achieved during build-out.

For our VPC contracts, the amount our utility customers pay to us at the end of each contract year may vary due to the results of measurement and verification tests performed each contract year based on the electric capacity that we made available to the utility during the contract year. The payments from VPC contracts reflect our most reasonable currently available estimates and judgments regarding the capacity that we believe we will provide our utility customer in future periods.

The amount of available capacity we are able to provide, and therefore the amount of payments we receive, is dependent upon the number of participants in our VPC programs. For purposes of estimating our payments under long-term contracts, we have assumed the rate of replacement of participant terminations under our VPC contracts will remain consistent with our historical average.

#### *Turnkey Programs*

Our turnkey contracts as of December 31, 2011 represent \$98 million in payments expected to be received through the year 2014 with seven utility customers to provide products, software, and services, including program management, installation,

and/or marketing. Payments from turnkey contracts are based on contractual anticipated order volumes, forecasted installations and other services applied over the term of the contract.

#### *Open Market Programs*

As of December 31, 2011, we expect to receive \$183 million in long-term payments through the year 2015 in open market programs in which we have been awarded megawatts. In estimating the long-term payments, we have assumed that we will retain our commercial and industrial participants that we have currently enrolled in the programs and that we will be able to enroll additional participants or fulfill additional capacity through incremental auctions in order to meet the megawatts awarded to us.

#### *Market Operator*

As of December 31, 2011, we expect to receive \$27 million in long-term payments through 2013 as we create and co-manage Africa's first open market for demand response resources. Under the terms of agreement, we will deploy the IntelliSOURCE 2.0 platform for Eskom to register, dispatch and operate a new competitive demand response market in South Africa.

#### *Other Contracts*

We expect to receive an estimated \$21 million in payments through 2014 pursuant to currently executed contracts for our IEM solutions, the majority of which is based on projected hardware orders.

In addition to the foregoing assumptions, our estimated payments from long-term contracts assume that we will be able to meet, on a timely basis, all of our obligations under these contracts and that our customers will not terminate the contracts for convenience or other reasons. Our annual net loss in 2011, 2010 and 2009 was \$12.8 million, \$31.4 million and \$31.7 million, respectively. We may continue to generate annual net losses in the future, including through the term of our long-term contracts. See "Part I, Item 1A - Risk Factors— *We have incurred annual net losses since our inception, and we may continue to incur annual net losses in the future.* "

Although we currently intend to release quarterly updates of future revisions that we may make to our estimated payments from long-term contracts, we do not undertake any obligation to release the results of any future revisions that we may make to these estimated payments from long-term contracts to reflect events or circumstances occurring after the date of this filing.

#### **Backlog**

Our backlog represents our estimate of revenue from commitments, including purchase orders and long-term contracts, that we expect to recognize over the course of the next twelve months. The timing of payments from long-term contracts and revenue recognition may vary period to period. The inaccuracy of any of our estimates and other factors may result in actual results being significantly lower than estimated under our reported backlog. Material delays, operational deficiencies, market conditions, cancellations or payment defaults could materially affect our financial condition, results of operation and cash flow. Accordingly, a comparison of backlog from period to period is not necessarily meaningful and may not be indicative of actual revenues. As of December 31, 2011, we had contractual backlog of \$143 million through December 31, 2012.

#### **Megawatts**

We evaluate the megawatts of capacity that we make available to the electric utility industry according to operating segment. For VPC, energy efficiency and turnkey contracts, we include the maximum contracted capacity at contract inception. For open markets, we included megawatts when we had enrolled a participant in prior periods. In order to present megawatts in a more consistent manner with the VPC, energy efficiency and turnkey programs, we have updated our disclosure to include the maximum megawatts that we have been awarded for an auction period for our capacity megawatts. For our role as a market operator, we have included the amount of megawatts that we believe will be registered in the market. The following table summarizes our megawatts as of December 31, 2011 and 2010. The megawatts presented as of December 31, 2010 have been revised to be consistent with the presentation as of December 31, 2011.

	<b>As of December 31, 2011</b>		
(Megawatts)	<b>Residential Business</b>	<b>C&amp;I Business</b>	<b>Total Comverge</b>
VPC and energy efficiency (1)	442	294	736
Turnkey	692	—	692
Open market (2)	—	2,636	2,636
Market operator	—	500	500
<b>Total (3)</b>	<b>1,134</b>	<b>3,430</b>	<b>4,564</b>

	<b>As of December 31, 2010</b>		
(Megawatts)	<b>Residential Business</b>	<b>C&amp;I Business</b>	<b>Total Comverge</b>
VPC and energy efficiency	597	294	891
Turnkey	690	—	690
Open market (2)	—	2,139	2,139
Market operator	—	—	—
<b>Total (3)</b>	<b>1,287</b>	<b>2,433</b>	<b>3,720</b>

(1) Our VPC contract with NV Energy for 155 megawatts of contracted capacity is no longer in effect for 2011.

(2) Megawatts reported for Open Markets include capacity which may be enrolled in the various programs specific to the individual RTO/ISO market structure. Each market allows demand resources to participate in their capacity, energy and/or ancillary services markets, to the extent in which the individual resources are able to meet requirements for fulfillment of specific market products. For example, a resource may be enrolled in capacity, reserve and energy programs and at different levels such that the same megawatts are included in each program's participation.

(3) The megawatts presented in the tables above do not include 437 megawatts that we manage for a fee. We believe these megawatts are more effectively assessed by considering sites, and we have removed these megawatts from the disclosure of megawatts.

**Results of Operations*****Year Ended December 31, 2011 Compared to Year Ended December 31, 2010****Revenue*

The following table summarizes our revenue for the year ended December 31, 2011 and 2010 (dollars in thousands):

	<b>Year Ended December 31,</b>		<b>Percent Change</b>
	<b>2011</b>	<b>2010</b>	
Segment Revenue:			
Residential Business	\$ 77,405	\$ 67,605	14%
C&I Business	59,015	51,784	14%
Total	<u>\$ 136,420</u>	<u>\$ 119,389</u>	<u>14%</u>

*Residential Business*

Our Residential Business segment had revenue of \$77.4 million for the year ended December 31, 2011 compared to \$67.6 million for the year ended December 31, 2010, an increase of \$9.8 million or 14%. The increase in revenue is due to a \$14.9 million increase from our turnkey programs as we continued to build out these programs during the year ended December 31, 2011. The increase in revenue from turnkey programs was partially offset by a \$0.9 million decrease in our VPC programs. For our residential VPC programs during the year ended December 31, 2011, we recognized a decrease of \$3.0 million from our Nevada program which expired on January 1, 2011 and a decrease of \$2.5 million due to lower available capacity in 2011 compared to 2010 for certain of our VPC programs as well as a non-recurring contractual payment in one of our VPC programs during 2010. These decreases in revenue from certain of our residential VPC programs were partially offset by an increase of \$4.6 million from our Pennsylvania VPC program, which began initial build-out in 2011. The remaining decrease of \$4.2 million is due to our other product and service sales as one of our customers transitioned to a full turnkey program in mid-2010, a services agreement expired at the end of 2010 and we did not bid substantial residential megawatts into an open market during 2011. These decreases in other product and service sales were partially offset by the payments received from White-Rodgers as discussed below.

During the year ended December 31, 2011, we sold 257,000 digital control units and thermostats compared to 210,000 digital control units and thermostats during the year ended December 31, 2010, an increase of 47,000 units mainly due to the build-out of digital control units in our turnkey programs. For the year ended December 31, 2011, our turnkey programs comprised 50% of total units sold compared to 44% during the year ended December 31, 2010.

In August 2010, we were notified by the supplier of our thermostats, White-Rodgers, that White-Rodgers had filed with the Consumer Product Safety Commission, or CPSC, to address a product issue with the thermostats that White-Rodgers had shipped to Comverge. White-Rodgers did not concede that the thermostats contained a defect or posed a substantial product hazard, but voluntarily proposed a corrective action plan to address thermostats in inventory and thermostats installed in the field. In January 2011, the CPSC approved the corrective action plan. White-Rodgers stated that it will provide compensation for our work in implementing the corrective action plan and, to date, we received a non-recurring payment during the first and third quarters of 2011 for the majority of our field work. After the corrective action plan was approved and any needed remediation work was completed for our inventory, we resumed installing thermostats in certain turnkey programs during the first quarter of 2011. Please also see "Part I, Item 3 - Legal Proceedings" and "Part II, Item 8 - Financial Statements and Supplementary Data - Note 12" in this report for additional information related to the White-Rodgers thermostats.

*C&I Business*

Our C&I Business segment had revenue of \$59.0 million for the year ended December 31, 2011 compared to \$51.8 million for the year ended December 31, 2010, an increase of \$7.2 million or 14%. The increase in revenue is due to an increase of \$4.2 million in VPC program revenue as we committed and fulfilled increased megawatts compared to the prior year's control season, an increase of \$1.3 million in energy efficiency program revenue due to the increase in annual payments that we received for maintaining the lighting upgrades originally installed as well as increased build-out, an increase of \$0.8 million in

revenue from other energy services and an increase of \$0.9 million in our open market programs. The increase in open market revenue of \$0.9 million consisted of an increase of \$2.7 million recognized due to the results of an incremental auction in the PJM open market and \$4.6 million in other open markets in which we participate, excluding the PJM capacity program, partially offset by a decrease of \$6.4 million in PJM capacity revenue due to a decrease of approximately 40% in the current program auction price compared to the prior program year.

*Gross Profit and Gross Margin*

The following table summarizes our gross profit and gross margin for the year ended December 31, 2011 and 2010 (dollars in thousands):

	Year Ended December 31,			
	2011		2010	
	Gross Profit	Gross Margin	Gross Profit	Gross Margin
Segment Gross Profit:				
Residential Business	\$ 33,471	43%	\$ 27,887	41%
C&I Business	22,534	38%	16,964	33%
Total	<u>\$ 56,005</u>	<u>41%</u>	<u>\$ 44,851</u>	<u>38%</u>

*Residential Business*

Gross profit for our Residential Business segment was \$33.5 million for the year ended December 31, 2011 compared to \$27.9 million for the year ended December 31, 2010 , an increase of \$5.6 million or 20%. The increase in gross profit is due to an increase of \$6.2 million from our turnkey programs and \$0.8 million from our VPC programs partially offset by a decrease of \$1.4 million from our other product and service sales. The increase in gross profit from our turnkey programs is due to the increased revenue as we continued to build out these programs during the year ended December 31, 2011 . The increase in gross profit from our VPC programs is a result of the gross profit contributed by our new Pennsylvania program partially offset by a decrease from our remaining residential VPC programs, in the aggregate, including the NV Energy contract expiration.

Gross margin for our Residential Business segment was 43% for the year ended December 31, 2011 compared to 41% for the year ended December 31, 2010 . The increase of two percentage points is due to the higher gross margin contributed by our turnkey programs as we focused on efficient build-out as well as the non-recurring payments received from White-Rodgers during the first and third quarters of 2011 for a portion of our field work to implement White-Rodgers' corrective action plan.

*C&I Business*

Gross profit for our C&I Business segment was \$22.5 million for the year ended December 31, 2011 compared to \$17.0 million for the year ended December 31, 2010 , an increase of \$5.6 million or 33%. The increase in gross profit is due to an increase of \$2.5 million from our VPC programs, \$1.7 million from our energy efficiency programs due to the increase in annual payments that we received for maintaining the lighting upgrades originally installed as well as increased cost efficiency and \$1.4 million from our open markets. Gross profit from our open markets included \$2.7 million of revenue recognized on a net basis from the incremental auction.

Gross margin for the year ended December 31, 2011 was 38% compared to 33% for the year ended December 31, 2010 . The increase of five percentage points was mainly due to the recognition of revenue from the incremental auction.

*Operating Expenses*

The following table summarizes our operating expenses for the year ended December 31, 2011 and 2010 (dollars in thousands):

	Year Ended December 31,		Percent Change
	2011	2010	
Operating Expenses:			
General and administrative expenses	\$ 41,000	\$ 39,362	4 %
Marketing and selling expenses	20,136	18,031	12 %
Research and development expenses	4,297	6,279	(32)%
Amortization of intangible assets	645	2,144	(70)%
Impairment charges	—	9,871	*
Total	<u>\$ 66,078</u>	<u>\$ 75,687</u>	<u>(13)%</u>

\* Not meaningful.

#### *General and Administrative Expenses*

General and administrative expenses were \$41.0 million for the year ended December 31, 2011 compared to \$39.4 million for the year ended December 31, 2010, an increase of \$1.6 million or 4%. The increase in general and administrative expenses is due to an increase of \$0.6 million in compensation and benefits, \$1.5 million in professional and consulting fees mainly due to financial and legal advisers to the Board of Directors for strategic initiatives, \$0.5 million in travel and entertainment, \$0.8 million in depreciation expense and \$0.3 million in insurance expense partially offset by a decrease of \$2.1 million in centralization costs that were recorded during the year ended December 31, 2010.

On July 25, 2011, we announced a cost initiative, which is focused on streamlining and simplifying operations to assist in accelerating our path to profitability. This initiative is expected to reduce annual expenses by \$4.1 million, which resulted in a reduction in headcount during 2011 and efficiencies gained from improved management of our supply chain, warehousing and corporate procurement functions. During the year ended December 31, 2011, we incurred \$0.8 million in costs, primarily in compensation and benefits, to implement the initiative. We do not expect significant additional costs in 2012.

#### *Marketing and Selling Expenses*

Marketing and selling expenses were \$20.1 million for the year ended December 31, 2011 compared to \$18.0 million for the year ended December 31, 2010, an increase of \$2.1 million or 12%. The increase in marketing and selling expenses was mainly due to an increase of \$0.4 million in compensation and benefits, \$0.9 million in commissions expense, \$0.4 million in consulting expense, \$0.2 million in marketing and advertising and \$0.2 million in other expenses.

#### *Research and Development Expenses*

Research and development expenses were \$4.3 million for the year ended December 31, 2011 compared to \$6.3 million for the year ended December 31, 2010, a decrease of \$2.0 million or 32%. The decrease in research and development expenses is due to our capitalizing certain labor costs of \$1.3 million related to the development of IntelliSOURCE version 2.0 and version 3.0 during the period as well as a decrease in expense of \$0.7 million due to compensation and benefits and consulting expense. IntelliSOURCE version 2.0 was released in April 2011.

#### *Intangible Assets*

Amortization of intangible assets was \$0.6 million for the year ended December 31, 2011 compared to \$2.1 million for the year ended December 31, 2010, a decrease of \$1.5 million or 70%. The decrease in amortization expense is primarily due to the decrease in intangible assets as a result of our impairment assessment during the fourth quarter of 2010.

In addition to the amortization presented in operating expenses, we also recorded \$0.9 million and \$0.7 million for the years ended December 31, 2011 and 2010, respectively, in cost of revenue.

#### *Impairment Charges*

We entered into an amendment with a certain customer during the fourth quarter of 2010 that decreased committed capacity in the Energy Efficiency reporting unit in the C&I Business segment, thereby reducing future cash flows. The decline in future

cash flows impacted the fair value of the reporting unit, causing its carrying value to exceed its fair value, when we performed our impairment assessment. The valuation for the goodwill was performed using a discounted cash flow income approach to valuing the business using a 13.1% discount rate. Based on the results of the assessment, we recorded \$7.7 million in impairment charges in the fourth quarter of 2010. We also evaluated the Energy Efficiency reporting unit's intangible assets for impairment. Based on the evaluation, we recorded \$2.2 million in impairment charges related to non-compete agreements and contract acquisition intangible assets. The Energy Efficiency reporting unit's goodwill and intangible assets were fully impaired and no further balance remains.

Total non-cash impairment charges for the year ended December 31, 2010 were \$9.3 million, net of tax benefit. For the year ended December 31, 2010, the impairment charge, net of tax benefit, per share, was \$0.38.

#### *Interest Expense, Net*

We recorded net interest and other expense of \$2.7 million during the year ended December 31, 2011 compared to \$0.9 million during the year ended December 31, 2010, an increase of \$1.8 million. The increase in net interest is primarily due to the increased interest expense associated with our subordinated convertible loan agreement with Grace Bay, which was entered into with PFG on November 5, 2010 and amended effective March 31, 2011, the interest incurred as a result of outstanding letters of credit and the \$0.5 million charge to write off unamortized debt issuance costs during the first quarter of 2011 related to the modification of the Grace Bay agreement.

#### *Other Income, Net*

Net other income remained consistent at \$36,000 for the year ended December 31, 2011 compared to \$21,000 for the year ended December 31, 2010.

#### *Income Taxes*

A provision of \$0.1 million was recorded for the year ended December 31, 2011 related to taxable income in one state. A tax benefit of \$0.3 million was recorded during the year ended December 31, 2010 as a result of the impairment of certain intangible assets. We provided a full valuation allowance for our deferred tax assets because the realization of any future tax benefits could not be sufficiently assured as of December 31, 2011 and 2010.

### **Results of Operations**

#### ***Year Ended December 31, 2010 Compared to Year Ended December 31, 2009***

Prior to December 31, 2010, we reported the results of operations in three segments: the Utility Products & Services segment, the Residential Business segment and the C&I Business segment. Starting for the year ended December 31, 2010, the former Utility Products & Services segment is presented as part of the Residential Business segment. The results of our Energy Efficiency programs were previously reported in the Residential Business segment. Starting for the year ended December 31, 2010, the Energy Efficiency programs are reported as part of the C&I Business segment. Accordingly, the results of operations have been reclassified for the year ended December 31, 2009 to conform to the presentation for the years ended December 31, 2011 and 2010. We believe that this reporting structure more accurately represents the broader customer markets that we serve: residential, and commercial and industrial.

See "Item 8. Financial Statements and Supplementary Data, Note 15" for our presentation of results of operations for the last three fiscal years by reportable segment.

#### *Revenue*

The following table summarizes our revenue for the years ended December 31, 2010 and 2009 (dollars in thousands):

	Year Ended December 31,		
	2010	2009	Percent Change
Segment Revenue:			
Residential Business	\$ 67,605	\$ 60,496	12%
Commercial & Industrial Business	51,784	38,348	35%
Total	<u>\$ 119,389</u>	<u>\$ 98,844</u>	<u>21%</u>

### *Residential Business*

Our Residential Business segment had revenue of \$67.6 million for the year ended December 31, 2010 compared to \$60.5 million for the year ended December 31, 2009, an increase of \$7.1 million or 12%. The increase in revenue is due to an increase of \$20.3 million in revenue from our turnkey programs as we continued to ramp existing programs, expanded one of our programs into a new region and began operations for three new programs during the year ended December 31, 2010. The increase in revenue from turnkey programs was partially offset by a decrease of \$7.0 million in revenue from our residential VPC programs and \$6.2 million from our other product and service sales partially due to the impact on revenue from the White-Rodgers product issue as described below. The decrease in residential VPC program revenue was due to the NV Energy VPC program, which transitioned from an aggressive growth phase in 2009 to primarily maintenance of the megawatts previously deployed in 2010.

We defer revenue and direct cost under our VPC contracts until such revenue can be made fixed and determinable through a measurement and verification test, generally in our fourth quarter. In the fourth quarters of the years ended December 31, 2010 and 2009, we recognized VPC contract revenue of \$19.0 million and \$25.7 million, respectively.

During the year ended December 31, 2010, we sold 210,000 units of thermostats and digital control units compared to 182,000 units of thermostats and digital control units during the year ended December 31, 2009. For the year ended December 31, 2010, our turnkey programs comprised 44% of total units sold compared to 8% during the year ended December 31, 2009.

In August 2010, we were notified by the supplier of our thermostats, White-Rodgers, that White-Rodgers had filed with the Consumer Product Safety Commission, or CPSC, to address a product issue with the thermostats that White-Rodgers had shipped to Comverge. White-Rodgers has not conceded that the thermostats contain a defect or pose a substantial product hazard, but has nevertheless voluntarily proposed a corrective action plan to address thermostats in inventory and thermostats installed in the field. In January 2011, the CPSC approved the corrective action plan. White-Rodgers has stated that it will cover reasonable costs associated with implementing the corrective action plan. This corrective action by White-Rodgers negatively impacted revenue and operating cost in 2010.

### *C&I Business*

Our C&I Business segment had revenue of \$51.8 million for the year ended December 31, 2010 compared to \$38.3 million for the year ended December 31, 2009, an increase of \$13.5 million or 35%. The increase in revenue is due to an increase of \$14.1 million in revenue from increased megawatts in open market programs across the nation, primarily the PJM capacity program. In addition, the C&I Business segment had an increase of \$4.1 million in revenue due to increased megawatt commitments in our C&I VPC programs compared to the prior year. The increase in open market and C&I VPC program revenue was partially offset by a decrease of \$4.6 million in the energy efficiency programs and a decrease of \$0.1 million in other energy engineering services. The decrease in revenue from our energy efficiency programs is primarily due to a decline in the number of installations we performed compared to the prior year. For 2011, notwithstanding a decrease in the price per megawatt for PJM, our largest customer in 2010, we expect that growth in our other geographical markets and our C&I VPC programs to result in increased revenue in our C&I Business segment compared to 2010.

### *Gross Profit and Margin*

The following table summarizes our gross profit and gross margin for the years ended December 31, 2010 and 2009 (dollars in thousands):

	Year Ended December 31,			
	2010		2009	
	Gross Profit	Gross Margin	Gross Profit	Gross Margin
Segment Gross Profit and Margin:				
Residential Business	\$ 27,887	41%	\$ 22,015	36%
Commercial & Industrial Business	16,964	33%	11,181	29%
Total	<u>\$ 44,851</u>	<u>38%</u>	<u>\$ 33,196</u>	<u>34%</u>

*Residential Business*

Gross profit for our Residential Business segment was \$27.9 million for the year ended December 31, 2010 compared to \$22.0 million for the year ended December 31, 2009, an increase of \$5.9 million or 27%. The increase in gross profit is due to an increase of \$4.9 million from our turnkey programs and \$5.0 million from our VPC programs partially offset by a decrease of \$4.0 million from our other product and service sales. The increase in gross profit from our turnkey programs is due to the increased revenue during the year ended December 31, 2010 as a result of our operation of expanded and new programs. The increase in gross profit from our VPC programs is a result of the higher gross margin provided as we fully expensed the cost of capital deployed in our NV Energy VPC contract during 2009, prior to the one-year contract extension. The gross profit from other product and service sales decreased, in part, due to the decrease in sales from certain thermostat customers as a result of the White-Rodgers corrective action.

Gross margin for our Residential Business segment was 41% for the year ended December 31, 2010 compared to 36% for the year ended December 31, 2009, an increase of five percentage points. The increase was due to the gross margin contributed by the residential VPC programs.

*C&I Business*

Gross profit for our C&I Business segment was \$17.0 million for the year ended December 31, 2010 compared to \$11.2 million for the year ended December 31, 2009, an increase of \$5.8 million or 52%. The increase in gross profit is due to an increase of \$6.0 million in gross profit from increased megawatts in open markets across the nation, primarily the PJM capacity program. In addition, the C&I Business segment had an increase of \$2.6 million in gross profit due to increased megawatts provided through our C&I VPC programs compared to the prior year. The increase in open market and C&I VPC program revenue was partially offset by a decrease of \$2.8 million in the energy efficiency programs. The decrease in gross profit from our energy efficiency programs is primarily due to a decline in the number of installations we performed compared to the prior year.

Gross margin for the year ended December 31, 2010 increased by four percentage points compared to gross margin for the year ended December 31, 2009 due to the enrollment of more profitable megawatts in the PJM capacity program.

*Operating Expenses*

The following table summarizes our operating expenses for the years ended December 31, 2010 and 2009 (dollars in thousands):

	Year Ended December 31,		
	2010	2009	Percent Change
Operating Expenses:			
General and administrative expenses	\$ 39,362	\$ 37,781	4 %
Marketing and selling expenses	18,031	17,737	2 %
Research and development expenses	6,279	4,878	29 %
Amortization of intangible assets	2,144	2,209	(3)%
Impairment charges	9,871	—	*
Total	<u>\$ 75,687</u>	<u>\$ 62,605</u>	<u>21 %</u>

\* Not meaningful.

*General and Administrative Expenses*

General and administrative expenses were \$39.4 million for the year ended December 31, 2010 compared to \$37.8 million for



the year ended December 31, 2009, an increase of \$1.6 million or 4%. The increase in general and administrative expenses is due to an increase of \$2.8 million in compensation and benefits, \$2.1 million in centralization costs as we transitioned certain functions to our Norcross, Georgia office, \$0.9 million in occupancy expense as we established branch offices for our new turnkey programs, \$0.8 million in professional fees and \$0.7 million in other expenses. These increases in general and administrative expenses were partially offset by a decrease of \$5.7 million in non-recurring charges incurred during the year ended December 31, 2009. We recorded \$5.7 million of charges comprised of \$4.3 million in stock based compensation and retirement and consulting expense related to the retirement of our former Chairman, President and Chief Executive Officer and \$1.4 million in stock based compensation related to the acceleration of non-executive stock options with a strike price of \$14.10 or higher.

#### *Marketing and Selling Expenses*

Marketing and selling expenses were \$18.0 million for the year ended December 31, 2010 compared to \$17.7 million for the year ended December 31, 2009, an increase of \$0.3 million or 2%. The increase in marketing and selling expenses is due to an increase of \$2.2 million in compensation and benefits partially offset by a decrease of \$0.6 million in marketing and advertising and \$0.3 million in other expenses. In addition, we recorded a non-recurring charge of \$1.0 million in stock based compensation related to the acceleration of non-executive stock options with a strike price of \$14.10 or higher, during the year ended December 31, 2009.

We expense customer acquisition costs as incurred. VPC customer acquisition costs were \$4.3 million and \$6.3 million for the years ended December 31, 2010 and 2009, respectively, a decrease of \$2.0 million mainly due to our NV Energy VPC program transitioning from an aggressive growth strategy to a maintenance phase.

#### *Research and Development Expenses*

Research and development expenses are incurred primarily in connection with the identification, testing and development of new products and software, specifically the development of products to support utility Advanced Metering Infrastructure, or AMI. Research and development expenses were \$6.3 million for the year ended December 31, 2010 and \$4.9 million for the year ended December 31, 2009, an increase of \$1.4 million or 29%. The increase in research and development expenses is mainly due to an increase and re-deployment in headcount and an increase in contractors to develop new AMI-enabled hardware products and our IntelliSOURCE software.

#### *Amortization of Intangible Assets*

Amortization of intangible assets remained consistent at \$2.1 million and \$2.2 million for the years ended December 31, 2010 and 2009, respectively.

In addition to the amortization presented in operating expenses, we also recorded \$0.7 million in amortization expense for the year ended December 31, 2010 in our cost of revenue compared to \$0.6 million for the year ended December 31, 2009.

#### *Impairment Charges*

We entered into an amendment with a certain customer during the fourth quarter of 2010 that decreased committed capacity in the Energy Efficiency reporting unit in the C&I Business segment, thereby reducing future cash flows. The decline in future cash flows impacted the fair value of the reporting unit, causing its carrying value to exceed its fair value, when we performed our impairment assessment. The valuation for the goodwill was performed using a discounted cash flow income approach to valuing the business using a 13.1% discount rate. Based on the results of the assessment, we recorded \$7.7 million in impairment charges in the fourth quarter of 2010. We also evaluated the Energy Efficiency reporting unit's intangible assets for impairment. Based on the evaluation, we recorded \$2.2 million in impairment charges related to non-compete agreements and contract acquisition intangible assets. The Energy Efficiency reporting unit's goodwill and intangible assets were fully impaired and no further balance remains.

Total non-cash impairment charges for the year ended December 31, 2010 were \$9.3 million, net of tax benefit. For the year ended December 31, 2010, the impairment charge, net of tax benefit, per share, was \$0.38.

#### *Interest Expense, Net*

We recorded net interest expense of \$0.9 million for year ended December 31, 2010 compared to net interest expense of \$2.1 million for the year ended December 31, 2009, a decrease of \$1.2 million. The decrease of \$1.2 million in net interest expense was mainly a result of a non-recurring \$0.8 million charge recorded to interest expense to write-off unamortized debt issuance costs related to our termination of the General Electric Capital Corporation credit agreement during the year ended December 31, 2009. The remaining decrease of \$0.4 million in net interest expense was a result of less debt outstanding for the majority of 2010.

*Other Income, Net*

Net other income remained consistent at \$21,000 for the year ended December 31, 2010 compared to net other income of \$76,000 for the year ended December 31, 2009.

*Income Taxes*

A tax benefit of \$0.3 million was recorded during the year ended December 31, 2010. As a result of the impairment of certain intangible assets, the related deferred tax liability was removed from our consolidated balance sheet as of December 31, 2010, and is reflected as a tax benefit in our consolidated statements of operations for the year ended December 31, 2010. A provision of \$0.2 million was recorded during the year ended December 31, 2009 related to a deferred tax liability.

We provided a full valuation allowance for our deferred tax assets because the realization of any future tax benefits could not be sufficiently assured as of December 31, 2010 and 2009.

## Liquidity and Capital Resources

Prior to our initial public offering in April 2007, we funded our operations primarily through the issuance of an aggregate of \$40.9 million in preferred stock, \$4.0 million in subordinated convertible debt and borrowings under our then senior loan agreement and General Electric Capital Corporation credit facility. We used these proceeds to fund our operations and to invest in our VPC programs, both in the form of capital expenditures to build out the capacity under our VPC contracts and participant acquisition expenses such as advertising and participant incentive payments, which were expensed as incurred. In April 2007, we completed an initial public offering of 5,300,000 shares of our common stock. Aggregate proceeds to us from the offering were \$86.0 million, after deducting underwriting discounts and commissions and offering expenses. In conjunction with the completion of our initial public offering, the holder of our then only outstanding subordinated convertible debt converted \$1.0 million of the principal balance into 138,121 shares of common stock. In December 2007, we completed a second public offering of 4,000,000 shares of our common stock. Of the 4,000,000 shares, 920,000 were newly issued and the remaining shares were sold by selling stockholders. Aggregate proceeds to us from the offering were \$24.0 million, after deducting underwriting discounts and commissions and offering expenses. In conjunction with the completion of our second offering, the holder of our subordinated convertible debt converted an additional \$1.1 million of the principal balance into 151,933 shares of common stock. In November 2009, we completed a third public offering of 2,760,000 shares of common stock. Aggregate proceeds to us from the offering were \$27.0 million, after deducting underwriting discounts and commissions and offering expenses. In November 2008, we entered into a loan and security agreement with Silicon Valley Bank ("SVB"). The SVB security and loan agreement was amended in February 2010 to increase the revolver loan from \$10.0 million to \$30.0 million for borrowings to fund general working capital and other corporate purposes and issuances of letters of credit. In November 2010, we entered into a convertible loan and security agreement with Partners for Growth III, L.P for \$15.0 million to fund general working capital and other corporate purposes. We were notified by letters dated February 24, 2012 and March 8, 2012, that Grace Bay Holdings II, LLC ("Grace Bay") had acquired all of the outstanding principal amount of the notes issued by Partners for Growth III, L.P. ("PFG") and was assigned all other rights and obligations under our loan agreement with PFG. In November 2011, the Company entered into a common stock purchase agreement with Aspire Capital Fund, LLC, whereby Aspire Capital has committed over the next two years to purchase up to \$10.0 million of the Company's common stock based on prevailing market prices over a period preceding each sale. The Company is not required to sell the entire \$10.0 million of Comverge common stock. The Company issued 144,927 shares of its common stock to Aspire as a commitment fee in connection with entering into the purchase agreement. As of December 31, 2011, we have issued 400,000 shares, excluding the commitment shares, to Aspire Capital for net proceeds of \$0.4 million.

The Company has incurred losses since inception, resulting in an accumulated deficit of \$228.8 million and stockholders' equity of \$37.0 million as of December 31, 2011. Working capital as of December 31, 2011 was \$23.1 million, consisting of \$72.4 million in current assets and \$49.3 million in current liabilities, including \$9.2 million of long-term debt due within one year. The total long-term debt as of December 31, 2011 was \$17.1 million, excluding the \$9.2 million included in current liabilities. Further, we anticipate spending approximately \$8.7 million on capital expenditures during 2012.

We are required to meet certain financial covenants contained in the SVB and Grace Bay loan and security agreements, specifically a minimum tangible net worth and an adjusted quick ratio. The financial covenants in both loan and security agreements are substantially similar. Compliance with the adjusted quick ratio covenants is measured on a monthly basis and compliance with the minimum tangible net worth covenants is measured on a quarterly basis. For the fourth quarter of 2011, the SVB and Grace Bay loan agreements required a minimum tangible net worth requirement of \$42.0 million. For December 2011, the SVB and Grace Bay loan agreements required a minimum ratio of current assets to current liabilities of 1.25:1.00. We met the covenant requirements for the period ended December 31, 2011 under both loan agreements. However, our lenders have some discretion in establishing the covenants for 2012 and when these covenants are established, management believes it is possible that we will not meet the covenant requirements during 2012 if additional capitalization of the Company is not achieved or if SVB and Grace Bay do not agree to different terms for their respective loan and security agreements. Our failure to comply with these covenants may result in the declaration of an event of default under each of the SVB and Grace Bay loan agreements and cause us to be unable to borrow under such loan agreements. See "Part II, Item 1A - Risk Factors - *Our failure to meet the covenants and financial tests contained in, and any event of default under, our loan and security agreements could have a material adverse effect on our financial condition.*"

Our borrowing availability under the SVB loan and security agreement is subject to a monthly borrowing base calculation. We had aggregate available borrowing capacity under our SVB loan agreement of \$1.9 million as of December 31, 2011; however, if we do not maintain at least \$20.0 million of unrestricted cash at all times, our borrowing base may be reduced. Upon a reduction in the borrowing base, the \$1.9 million of additional capacity may not be available to us. Even with our anticipated revenue growth or cash expenditure reductions, it is possible that the Company's cash balance may fall below \$20.0 million. Should the Company's unrestricted cash balance fall below \$20.0 million and the Company's borrowing capacity be

consequently reduced, any amounts the Company owes to SVB in excess of the Company's reduced borrowing capacity will become immediately due and payable under our SVB loan agreement. A failure to pay any such excess amount could result in a default under the SVB loan and security agreement and, as a result, could cause cross-defaults in our other borrowing arrangements, such that all of our outstanding debt could become due and payable. In addition, any resulting loss in liquidity could cause potential defaults in our borrowing arrangements, such that all of our outstanding debt could become due and payable.

As noted above, we were notified by letters dated February 24, 2012 and March 8, 2012 that Grace Bay had acquired all rights and interests under our loan agreement with PFG. The Grace Bay loan and security agreement sets targets for our minimum revenues. We did not achieve the annual revenue target of \$139.8 million for the year ended December 31, 2011. Such failure gives Grace Bay the right, but not the obligation, to begin requiring monthly amortization payments of the loan balance over the remaining term of the Grace Bay loan. Such amortization payments would be front-loaded, such that 45% of the loan balance (approximately \$6.8 million as of December 31, 2011) would be due over the first twelve months after Grace Bay's election to amortize. In a letter dated February 27, 2012, Grace Bay exercised its right to require such amortization payments. If the Company subsequently complies with succeeding measurements periods, the Company may prospectively cease monthly amortization of the loan; provided however, Grace Bay may again exercise its amortization right under the loan agreement if the Company fails to meet future minimum revenue targets. As we did not meet the fiscal year 2011 revenue target, we reclassified three months of payments, or \$1.7 million, to current portion of long-term debt as of December 31, 2011. Based on our revenue to date during the first quarter of 2012 and our projected revenue for all of 2012, we determined that it is probable that we will exceed the revenue target for the first quarter (\$17.7 million) as well as the remainder of the year. Accordingly, we believe that it is probable that the amortization right related to the failure to meet the revenue target for the year ended December 31, 2011 will contractually cease when we file our Form 10-Q for the quarter ended March 31, 2012. Additionally, Grace Bay has alleged that we are in default under the Grace Bay agreement which would trigger a cross-default in the SVB loan and security agreement. Such event of default would enable SVB or Grace Bay, as applicable, to accelerate all amounts due under their respective loan agreements and to exercise other remedies available to them under the respective loan agreements. Further, any payment of such immediately due and payable obligations under the loan agreements may cause us to breach additional financial covenants in either the SVB or Grace Bay loan agreements. As of the date of this filing on Form 10-K, the Company has not received notice to accelerate the debt and would contest any such acceleration.

Any failure by the Company to pay any obligations that become due and payable under either the SVB or Grace Bay loan and security agreement may constitute an event of default under such agreement. Such event of default would enable SVB or Grace Bay, as applicable, to accelerate all amounts due under their respective loans and to exercise other remedies available to them under the respective loan agreements. Further, any payment of such immediately due and payable obligations under the SVB loan agreement may cause the Company to breach certain financial covenants in either the SVB or Grace Bay loan agreements. Any such breach of financial covenants would constitute an event of default under such agreements, enabling SVB and Grace Bay to exercise their respective remedies under their respective agreements, including acceleration of all amounts due thereunder.

On November 29, 2011, we entered into the Purchase Agreement with Aspire Capital, which provides that, upon the terms and subject to the conditions and limitations set forth therein, Aspire Capital is committed to purchase an aggregate of up to \$10.0 million of shares of our common stock over the 24-month term of the Purchase Agreement. Under the Purchase Agreement, we agreed to pay Aspire Capital a commitment fee equal to 2% of \$10.0 million in consideration for Aspire Capital's obligation to purchase up to \$10.0 million of our common stock. We paid this commitment fee by issuing to Aspire Capital 144,927 shares of our common stock valued at \$1.38 per share. During 2011, we sold 400,000 shares of our common stock to Aspire Capital at a purchase price of \$1.09 per share, for an aggregate purchase price of \$0.4 million. Under the terms of the agreement, we cannot sell shares to Aspire Capital at a purchase price less than \$1.00 per share. As of March 9, 2012, we could offer and sell from time to time to Aspire Capital up to an additional \$5.0 million, in aggregate, based on the offering price of our common stock under the Purchase Agreement.

Management continues actively exploring all such financing options including restructuring of its current credit facilities in the near term or the possible sale of the Company. Our ability to secure additional capital or modify our existing debt terms to meet our projected revenue growth or cash expenditure reductions or our ability to sell the Company cannot be assured. In addition, certain financing options may require the consent of our current debt holders and we may not be able to obtain such consent or the terms of such consent may be cost-prohibitive. Thus, due to the combination of the amount of cash flow that is expected from operations, debt that is due in 2012, and the restrictive debt covenants with which it may not comply, there is substantial doubt about the Company's ability to continue as a going concern. The consolidated financial statements have been prepared assuming that we will continue as a going concern and contemplate the realization of assets and the satisfaction of liabilities in the normal course of business.

**Cash Flows**

The following table summarizes our cash flows for the year ended December 31, 2011 , 2010 and 2009 (dollars in thousands):

	<b>Year Ended December 31,</b>		
	<b>2011</b>	<b>2010</b>	<b>2009</b>
Operating activities	\$ (3,004)	\$ (14,369)	\$ 7,779
Investing activities	17,052	(5,085)	(24,234)
Financing activities	1,818	11,185	12,953
Net change in cash and cash equivalents, excluding effect of foreign exchange	<u>\$ 15,866</u>	<u>\$ (8,269)</u>	<u>\$ (3,502)</u>

*Cash Flows (Used in) Provided by Operating Activities*

Cash used in operating activities was \$3.0 million for the year ended December 31, 2011 compared to \$14.4 million for the year ended December 31, 2010 , a decrease in cash used of \$11.4 million. The change in cash flows from operating activities included a decrease in net loss of \$7.2 million, after adjusting for non-cash items including depreciation, amortization, impairment and stock-based compensation. The remaining change of \$4.2 million in cash flows from operating activities is a result of the change in operating assets and liabilities, primarily in accounts receivable and accounts payable and other liabilities.

Cash used in operating activities was \$14.4 million for the year ended December 31, 2010 compared to cash provided by operating activities of \$7.8 million for the year ended December 31, 2009, a decrease in cash provided of \$22.2 million. The change in cash flows from operating activities included an increase in net loss of \$8.7 million, after adjusting for non-cash items including depreciation, amortization, stock-based compensation and impairment charges. The remaining change of \$13.5 million in cash flows from operating activities was a result of the change in operating assets and liabilities, primarily an increase in accounts receivable due to increased billings in our new turnkey programs as well as timing of cash receipts and an increase in payables and accrued expenses due to the increased megawatts under contract, and thus increased participant payments, in our C&I open market programs.

*Cash Flows Provided by (Used In) Investing Activities*

Cash provided by investing activities was \$17.1 million for the year ended December 31, 2011 compared to cash used in investing activities of \$5.1 million during the year ended December 31, 2010 , an increase in cash provided of \$22.2 million. The increase was due to an increase in the change in marketable securities of \$21.9 million as we sold certain marketable securities and allowed others to mature in order to reinvest those funds in more liquid cash and cash equivalents. We incurred increased capital expenditures of \$0.6 million during the year ended December 31, 2011 as we invested in our network operations and data center, capitalized certain software development costs, and continued to build out our IEM networks in existing VPC programs. Additionally, restricted cash decreased by \$0.9 million during the year ended December 31, 2011 due to our issuing a letter of credit for financial assurance in place of restricted cash.

Cash used in investing activities was \$5.1 million for the year ended December 31, 2010 compared to \$24.2 million during the year ended December 31, 2009, a decrease of \$19.1 million. The decrease was due to a change in marketable securities of \$12.3 million as certain securities matured and we used the resulting cash to fund our operations. We incurred less capital expenditures during the year ended December 31, 2010, mainly due to the Nevada VPC program transitioning from aggressive growth to a maintenance phase.

*Cash Flows Provided by Financing Activities*

Cash flows provided by financing activities were \$1.8 million for the year ended December 31, 2011 compared to \$11.2 million for the year ended December 31, 2010 , a decrease of \$9.4 million. The cash flows provided by financing activities mainly consisted of \$1.5 million in borrowings, net of payments, from our SVB debt facility and \$0.4 million in proceeds, net of offering costs, from the issuance of common stock to Aspire Capital during the year ended December 31, 2011. The cash flows provided by financing activities mainly consisted of \$15.0 million from our Grace Bay debt facility partially offset by \$3.0 million in payments, net of borrowings, of our SVB debt facility and \$0.5 million of debt issuance costs for the year ended December 31, 2010.

Cash flows provided by financing activities were \$11.2 million during the year ended December 31, 2010 compared to \$13.0 million during the year ended December 31, 2009, a decrease of \$1.8 million. During the year ended December 31, 2010, we received \$15.0 million from borrowings under our Grace Bay debt facility and repaid \$3.0 million, net, under our SVB debt facility. During the year ended December 31, 2009, we received \$10.9 million from additional borrowings under our then-outstanding General Electric Capital Corporation, or GECC, credit agreement. During late 2009, we completed our third offering of common stock and received net proceeds of \$27.4 million and used those proceeds to pay the remaining outstanding debt with GECC of \$23.4 million.

### ***Indebtedness***

#### *Loan and Security Agreement*

On February 5, 2010, Comverge, Inc. and each of its wholly owned subsidiaries entered into a second amendment to its existing revolving credit and term loan facility with Silicon Valley Bank ("SVB"). The second amendment increased the revolver loan by an additional \$20.0 million bringing the total revolver loan to \$30.0 million for borrowings to fund general working capital and other corporate purposes and issuances of letters of credit. The second amendment also added Alternative Energy Resources, Inc., a wholly-owned subsidiary of Comverge, Inc. as a borrower and extended the term of the revolver facility by one year to December 31, 2012. In connection with the extension of the term of the revolving credit facility, commitment fees of \$75,000 and \$100,000 were paid on February 5, 2011 and 2010, respectively, and an additional commitment fee of \$75,000 is payable on February 5, 2012. As amended to date, the SVB facility provides a \$30.0 million revolver for borrowings to fund working capital and other corporate purposes and a \$15.0 million term loan which was used to repay maturing convertible notes. Our outstanding balance as of December 31, 2011 was \$6.8 million. As of December 31, 2011, we had \$1.9 million of borrowing availability under the SVB revolver loan. However, the term loan is no longer available for additional borrowings. As mentioned below in "Subordinated Convertible Loan and Security Agreement," Grace Bay has alleged that we are in default under the Grace Bay loan and security agreement. An event of default in the Grace Bay agreement triggers a cross-default in the SVB loan and security agreement, which prevents us from borrowing under such agreement and gives SVB the right to accelerate outstanding indebtedness.

The interest on revolving loans under the SVB facility accrues at either (a) a rate per annum equal to the greater of the Prime Rate plus the Prime Rate Advance Margin, or (b) a rate per annum equal to the LIBOR Advance Rate plus the LIBOR Rate Advance Margin, as such terms are defined in the amended SVB facility agreement. During an event of default, interest on revolving loans bears interest at a rate per annum equal to the Prime Rate plus 4.00%. The second amendment also sets forth certain financial ratios to be maintained by the borrowers on a consolidated basis. On November 23, 2010, Comverge, Inc. and its wholly-owned subsidiaries entered in a fourth amendment to its facility with SVB. The fourth amendment modified the availability provisions and financial covenants under the agreement and also modified certain definitions to reflect the subordinated convertible loan and security agreement with Partners for Growth III, L.P., which was subsequently assigned to Grace Bay. The obligations under the SVB facility are secured by all assets of Comverge and its other borrower subsidiaries. The revolver terminates and all amounts outstanding thereunder are due and payable in full on December 31, 2012. As of December 31, 2011, our outstanding balance on the revolver was \$4.5 million. The term loan is payable over 57 months beginning April 1, 2009 and matures on December 31, 2013. The facility contains customary terms and conditions for credit facilities of this type, including restrictions on our ability to incur additional indebtedness, create liens, enter into transactions with affiliates, transfer assets, pay dividends or make distributions on, or repurchase, our stock, consolidate or merge with other entities, or suffer a change in control. In addition, we are required to meet certain financial covenants customary in this type of agreement, including maintaining a minimum specified tangible net worth and a minimum specified ratio of current assets to current liabilities, which were defined as \$42.0 million as of the end of the fourth quarter of 2011 and 1.25:1.00 as of December 31, 2011, respectively. The facility contains customary events of default, including for payment defaults, breaches of representations, breaches of affirmative or negative covenants, cross defaults to other material indebtedness, bankruptcy and failure to discharge certain judgments. If a default occurs and is not cured within any applicable cure period or is not waived, our obligations under the facility may be accelerated.

#### *Subordinated Convertible Loan and Security Agreement*

On November 5, 2010, Comverge, Inc. and its wholly-owned subsidiaries entered into a five-year \$15.0 million subordinated convertible loan and security agreement with Partners For Growth III, L.P., which was subsequently assigned to Grace Bay. Interest on the loan made under such agreement is payable monthly and accrues at a rate per annum equal to the floating Prime Rate (as such term is defined in the Grace Bay loan agreement) plus 2.50%, which sum as of December 31, 2011 was equal to 6.50%. During an event of default, interest shall be increased by a rate of 4.00% per annum. The Grace Bay agreement contains customary events of default, including for payment defaults, breaches of representations, breaches of affirmative or negative covenants, cross defaults to other material indebtedness, bankruptcy and failure to discharge certain judgments. If a default occurs and is not cured within any applicable cure period or is not waived, our obligations under the loan agreement

may be accelerated. The Grace Bay agreement also sets forth quarterly revenue targets to be maintained by the borrowers on a consolidated basis. If the revenue targets are not maintained, Grace Bay has the right, but not the obligation, to begin requiring monthly amortization payments of the loan balance over the remaining term of the loan. Such payments would be front-loaded, such that 45% of the loan balance (approximately \$6.8 million as of December 31, 2011) would be due over the first twelve months after Grace Bay's election. If Grace Bay exercises its right to require such amortization and the Company subsequently complies with the minimum revenue target for succeeding measurements periods, the Company may prospectively cease monthly amortization of the loan; provided however, Grace Bay may again exercise its right to require amortization under the loan agreement if the Company fails to meet future minimum revenue targets. Any failure by the Company to maintain such minimum revenues does not, by itself, constitute a default or an event of default under the Grace Bay loan agreement. The obligations under the loan agreement are secured by all assets of Comverge and its subsidiaries. At its option, Grace Bay had the ability to convert the note representing the Grace Bay loan into common stock at \$9.41 per share prior to the effectiveness of Modification No. 1 as described below. Subject to certain conditions, the Grace Bay loan agreement provides Comverge the ability to force Grace Bay to convert the note at the market price per share on the date Comverge gives notice of its election to force such conversion, discounted by a certain percentage; provided however, Comverge may not force conversion of the note unless the then-current trading price for Comverge's common stock exceeds \$6.825 on or before May 5, 2012 and \$7.371 thereafter. The Grace Bay loan agreement also provides, at our option, the ability to borrow up to an additional \$5.0 million in the first 36 months from the effective date of the Grace Bay loan agreement by issuing one or more notes to Grace Bay, which are convertible at Grace Bay's option into common stock at a conversion price based upon the stock price at the time of the additional borrowing; however, at no time may the amount of existing unconverted borrowings exceed \$20.0 million. In connection with the loan, a commitment fee of \$0.3 million was paid on November 5, 2010. There are no additional commitment fees.

On March 31, 2011, the Company entered into Modification No. 1 to the subordinated convertible loan and security agreement with PFG, which was subsequently assigned to Grace Bay. The modification revised the quarterly revenue targets for fiscal year 2011 and the price at which the note may be optionally converted by Grace Bay into our common stock from \$9.41 to \$5.46 per share of common stock. As a result of the modification, we recognized a charge of \$0.5 million in interest expense to write off the debt issuance costs related to the original agreement during the year ended December 31, 2011. Modification No. 1 is included as Exhibit 10.1 with the Company's Quarterly Report on Form 10-Q for the three months ended March 31, 2011 as filed with the SEC on May 5, 2011.

For the fiscal quarter ended December 31, 2011, we were not able to meet the revenue target in the agreement and Grace Bay has requested that we begin making amortization payments as provided under the loan and security agreement. Additionally, in letters dated February 27, 2012 and March 2, 2012, Grace Bay alleged that we are in default under the Grace Bay agreement. An event of default in the Grace Bay agreement triggers a cross-default in the SVB loan and security agreement. Following such default, Grace Bay and SVB have the right to accelerate indebtedness outstanding under their respective loan agreements and foreclose on the collateral securing the debt.

#### *Letters of Credit*

Our revolving facility with SVB provides for the issuance of up to \$30.0 million of letters of credit. As of December 31, 2011, we had \$23.5 million face value of irrevocable letters of credit outstanding from the facility. Additionally, we have \$4.8 million of cash restricted or on-deposit to satisfy financial assurance requirements.

#### *Capital Spending*

Our residential VPC programs require a significant amount of capital spending to build out our demand response systems. We expect to incur approximately \$6.4 million in capital expenditures, primarily over the next three years, to continue building out our existing VPC programs, of which approximately \$4.5 million is anticipated to be incurred through December 31, 2012. If we are successful in being awarded additional VPC contracts, we would incur additional amounts to build out these new VPC programs.

Additionally, we expect to incur \$3.4 million in capital spending in executing our contract with ESKOM to create and co-manage Africa's first open market for demand response resources and \$0.8 million in other capital expenditures.

#### **Non-GAAP Financial Measures**

##### *EBITDA*

Earnings Before Interest, Taxes, Depreciation and Amortization, or EBITDA, is defined as net loss before net interest expense,

income tax expense, and depreciation and amortization. EBITDA is a non-GAAP financial measure and is not a substitute for other GAAP financial measures such as net loss, operating loss or cash flows from operating activities as calculated and presented in accordance with accounting principles generally accepted in the U.S., or GAAP. In addition, our calculation of EBITDA may or may not be consistent with that of other companies. We urge you to review the GAAP financial measures included in this filing and our consolidated financial statements, including the notes thereto, and the other financial information contained in this filing, and to not rely on any single financial measure to evaluate our business.

EBITDA is a common alternative measure of performance used by investors, financial analysts and rating agencies to assess operating performance for companies in our industry. Depreciation is a necessary element of our costs and our ability to generate revenue. We do not believe that this expense is indicative of our core operating performance because the depreciable lives of assets vary greatly depending on the maturity terms of our VPC contracts. The clean energy sector has experienced recent trends of increased growth and new company development, which have led to significant variations among companies with respect to capital structures and cost of capital (which affect interest expense). Management views interest expense as a by-product of capital structure decisions and, therefore, it is not indicative of our core operating performance.

We define Adjusted EBITDA as EBITDA before stock-based compensation expense and impairment charges. Management does not believe that stock-based compensation is indicative of our core operating performance because the stock-based compensation is fixed at the grant date, then expensed over a period of several years after the grant date, and generally cannot be changed or influenced by management after the grant date. Management believes the impairment charges related to the Energy Efficiency reporting unit to be not indicative of our core operating performance as these charges relate to acquisitions completed in prior period.

A reconciliation of net loss, the most directly comparable GAAP measure, to EBITDA and Adjusted EBITDA for each of the periods indicated is as follows (dollars in thousands):

	<b>Year Ended December 31,</b>		
	<b>2011</b>	<b>2010</b>	<b>2009</b>
Net loss	\$ (12,825)	\$ (31,351)	\$ (31,666)
Depreciation and amortization	7,515	9,111	20,499
Interest expense, net	2,716	875	2,114
Provision for income taxes	72	(339)	219
EBITDA	(2,522)	(21,704)	(8,834)
Non-cash stock compensation expense	3,313	3,327	10,038
Non-cash impairment charge	—	9,871	—
Adjusted EBITDA	<u>\$ 791</u>	<u>\$ (8,506)</u>	<u>\$ 1,204</u>

### **Commitments and Contingencies**

In the ordinary conduct of our business, we are subject to various investigations, lawsuits, arbitrations, claims and other legal proceedings. Although we cannot predict with certainty the ultimate resolution of any investigations, lawsuits, arbitrations, claims and other legal proceedings asserted against us, we do not believe that any currently pending legal proceeding or proceedings to which we are a party or of which any of our property is subject will have a material adverse effect on our business, results of operations, cash flows or financial condition, except as disclosed in “Part I, Item 3 - Legal Proceedings” and “Part II, Item 8 - Financial Statements and Supplementary Data -Note 12” in this Annual Report on Form 10-K.

Our policy is to assess the likelihood of any adverse judgments or outcomes related to legal matters, as well as ranges of probable losses. A determination of the amount of the liability required, if any, for these contingencies is made after an analysis of each known issue. A liability is recorded and charged to operating expense when we determine that a loss is probable and the amount can be reasonably estimated. Additionally, we disclose contingencies for which a material loss is reasonably possible, but not probable. As of December 31, 2011, there were no material contingencies requiring accrual or disclosure.

### **Contractual Obligations**

Information regarding our known contractual obligations of the types described below as of December 31, 2011 is set forth in the following table (dollars in thousands):

**Payments Due by Period**

<b>Contractual Obligations</b>	<b>Total</b>	<b>Less</b>	<b>1 - 3 Years</b>	<b>3 - 5 Years</b>	<b>More</b>
		<b>Than</b>			<b>Than</b>
		<b>1 Year</b>			<b>5 Years</b>
Bank debt obligations	\$ 26,250	\$ 9,186	\$ 3,750	\$ 13,314	\$ —
Cash interest payments on debt	3,486	1,172	1,612	702	—
Operating lease obligations	5,361	2,383	1,874	888	216
Retirement obligations	445	167	251	27	—
Warranty obligations	209	209	—	—	—
<b>Total</b>	<b>\$ 35,751</b>	<b>\$ 13,117</b>	<b>\$ 7,487</b>	<b>\$ 14,931</b>	<b>\$ 216</b>

*Cash Interest Payments on Debt*

As of December 31, 2011, \$26.3 million of outstanding debt was at floating interest rates. We have used the interest rate as of December 31, 2011 in estimating cash interest payments on debt.

*Licensing Agreement*

We are obligated to pay royalties to the licensor for each unit of hardware sold that incorporates a certain licensed technology under two separate licensing agreements. During the years ended December 31, 2011, 2010 and 2009, the Company paid an immaterial amount in royalties for the two licensing agreements. These payments have been excluded from the table above.

*Guarantees*

We typically grant customers a limited warranty that guarantees that our products will substantially conform to current specifications for one year related to software and hardware products from the delivery date. We also indemnify our customers from third-party claims relating to the intended use of our products. Standard software license agreements contain indemnification clauses. Pursuant to these clauses, we indemnify and agree to pay any judgment or settlement relating to a claim.

We guaranteed the electrical capacity we have committed to deliver pursuant to certain long-term contracts. Such guarantees may be secured by cash, letters of credit, performance bonds or third-party guarantees. Performance guarantees as of December 31, 2011 and 2010 were \$27.7 million and \$19.8 million, respectively.

**Off-Balance Sheet Arrangements**

We have no off-balance sheet arrangements.

**Critical Accounting Policies**

The discussion and analysis of our financial condition and results of operations is based upon our consolidated financial statements, which have been prepared in accordance with accounting principles generally accepted in the United States of America. The preparation of these financial statements requires us to make certain estimates and judgments that affect our reported assets, liabilities, revenue and expenses, and our related disclosure of contingent assets and liabilities. On an on-going basis, we re-evaluate our estimates, including those related to revenue recognition, impairment of long-lived assets, and stock-based compensation. We base our estimates on historical experience and on various assumptions that we believe to be reasonable under the circumstances. Actual results may differ from these estimates. A summary of our critical accounting policies is set forth below.

*Revenue Recognition - Residential Business*

We sell intelligent energy management solutions directly to utilities for use and deployment by the utility. We recognize revenue for such sales when delivery has occurred or services have been rendered and the following criteria have been met: persuasive evidence of an arrangement exists, the price is fixed or determinable, delivery has occurred and collection is probable.

We have certain contracts which are multiple element arrangements and provide for several deliverables to the customer that may include hardware, software and services, such as installation of the hardware, marketing, program management and hosting. We evaluate each deliverable to determine whether it represents a separate unit of accounting. A deliverable constitutes a separate unit of accounting when it has stand-alone value and there are no customer-negotiated refunds or return rights for the delivered elements. The separate deliverables in these arrangements meet the separation criteria. The contract

consideration for these multiple element arrangements is allocated to the units of accounting based on the relative selling prices of all of the deliverables in the arrangement using the hierarchy of Vendor Specific Objective Evidence (VSOE), Third Party Evidence (TPE) or Estimated Selling Price (ESP). VSOE of fair value is based on the price charged when the element is sold separately. TPE of selling price is established by evaluating largely interchangeable competitor products or services in stand-alone sales to similarly situated customers. ESP is established considering multiple factors including, but not limited to list price, gross margin analysis and internal costs. Allocation of the consideration is determined at arrangement inception on the basis of each unit's relative selling price. Once an allocated fair value is established for each unit of accounting, the contract deliverables are scoped into the appropriate accounting guidance for revenue recognition.

We enter into long-term contracts with utilities in which we typically own the underlying intelligent energy management network and provide our customer with electric capacity during the peak season. We invoice Virtual Peaking Capacity, or VPC, customers on a monthly or quarterly basis throughout the contract year. Contract years typically begin at the end of a control season (generally, at the end of a utility's summer cooling season that correlates to the end of the utility's peak demand for electricity) and continue for twelve months thereafter. The VPC contracts require us to provide electric capacity through demand reduction to utility customers, and require a measurement and verification of such capacity on an annual basis. In certain VPC contracts, the results of the measurement and verification process are applied retrospectively to the program year. For these contracts, we defer revenue and the associated cost of revenue related to these until such time as the annual contract payment is fixed or determinable. Once a utility's customer, or program participant, enrolls in one of our VPC programs, we install hardware at the participant's location. The cost of the installation and the hardware are capitalized and depreciated as cost of revenue over the remaining term of the contract with the utility, which is shorter than the operating life of the equipment. We also record telecommunications costs related to the network as cost of revenue. The cost of revenue is recognized contemporaneously with revenue.

#### *Revenue Recognition - C&I Business*

We enter into agreements to provide demand response services. The demand response programs require us to provide electric capacity through demand reduction when the utility or independent system operator calls a demand response event to curtail electrical usage. Demand response revenues are earned based on our ability to deliver capacity. In order to provide capacity, we manage a portfolio of commercial and industrial end users' electric loads. Capacity amounts are verified through the results of an actual demand response event or a demand response test. We recognize revenue and associated cost of revenue in our demand response services at such time as the capacity amount is fixed or determinable.

We bid into forward auctions for open market programs with independent system operators, or ISO's. The program year, which spans from June 1st to May 31st annually for our primary program, is three years from the date of the initial auction. Participation in the capacity program requires us to respond to requests from the ISO to curtail energy usage during the mandatory performance period of June through September, which is the peak demand season. For participation, we receive cash payments on a monthly basis in the program year. We may utilize the incremental auctions held within the three-year period prior to the commencement of the program year or may enter into bilateral agreements with other market demand or supply-side providers to fulfill a portion of the megawatts awarded in the initial auction. For the remaining megawatts, we enroll C&I participants in order to fulfill our megawatt commitment with the ISO. If we remain the primary obligor for the megawatt commitment, we recognize revenue and cost of revenue on a gross basis for those megawatts ratably over the performance period, once the revenue is fixed or determinable. If we are released from our obligations to fulfill those megawatts through an incremental auction or a bilateral agreement, we recognize revenue, net of the cost of revenue, at the time that megawatts are accepted by the ISO and the financial assurance is released.

We enter into agreements to provide base load reduction. Energy efficiency revenues are earned based on our ability to achieve committed capacity through base load reduction. In order to provide this reduction, we deliver and install energy efficiency management solutions. The base load capacity contracts require us to provide electric capacity to utility customers and include a measurement and verification of such capacity in order to determine contract consideration. We defer revenue and associated cost of revenue until such time as the capacity amount, and therefore the related revenue, is fixed or determinable. Once the reduction amount has been verified, the revenue is recognized. If the revenue is subject to penalty, refund or an ongoing obligation, the revenue is deferred until the contingency is resolved and/or we have met our performance obligation. Certain contracts contain multiple deliverables, or elements, which require us to assess whether the different elements qualify for separate accounting. The separate deliverables in these arrangements meet the separation criteria.

Revenue from time-and-materials service contracts and other services are recognized as services are provided. Revenue from certain fixed price contracts are recognized on a percentage-of-completion basis, which involves the use of estimates. If we do not have a sufficient basis to measure the progress towards completion, revenue is recognized when the project is completed or when final acceptance is received from the customer. We also enter into agreements to provide hosting services that allow customers

to monitor and analyze their electrical usage. Revenue from hosting contracts is recognized as the services are provided, generally on a recurring monthly basis.

#### *Goodwill and Intangibles, net*

Goodwill represents the excess of cost over the fair value of the net tangible assets and identified intangible assets of businesses acquired in purchase transactions. Goodwill is not being amortized. Intangibles are recorded at their fair value at acquisition date. We amortize finite-lived intangibles over their estimated useful lives using the straight-line method, which approximates the projected utility of such assets based upon the information available. Goodwill and other indefinite-lived intangible assets are tested for impairment on at least an annual basis, on December 31 of each year, as well as on an as-needed basis determined by events or changes in circumstances.

Goodwill is allocated among and evaluated for impairment at the reporting unit level, which is defined as an operating segment or one level below an operating segment. Goodwill was tested for impairment using the two-step approach. Step 1 of the goodwill impairment test, used to identify potential impairment, compares the fair value of the reporting unit with its carrying amount, including goodwill. If the fair value of the reporting unit exceeds its carrying amount, goodwill of the reporting unit is considered not impaired and the second step of the impairment test is not required. If the carrying amount of a reporting unit exceeds its fair value, the second step of the goodwill impairment test would be performed to measure the amount of impairment, if any.

We performed our annual impairment test as of December 31, 2011 and the results of the tests performed indicated no impairment.

We entered into an amendment with a certain customer during the fourth quarter of 2010 that decreased committed capacity in the Energy Efficiency reporting unit in the C&I Business segment, thereby reducing future cash flows. The decline in cash flows impacted the fair value of the reporting unit, causing its carrying value to exceed its fair value, when we performed our impairment assessment. Based on this evaluation, we recorded impairment charges. See “Results of Operations - Year Ended December 31, 2010 Compared to Year Ended December 31, 2009 - Impairment Charges” for a complete discussion on the methodology and assumptions applied. The results of the annual impairment test indicated no additional impairment as of December 31, 2010.

#### *Impairment of Long-Lived Assets*

We evaluate the recoverability of long-lived assets whenever events or changes in circumstances indicate that the carrying amount should be assessed by comparing their carrying value to the undiscounted estimated future net operating cash flows expected to be derived from such assets. If such evaluation indicates a potential impairment, a discounted cash flow analysis is used to measure fair value in determining the amount of these assets that should be written off.

#### *Stock-Based Compensation*

Stock-based compensation expense recognized for the years ended December 31, 2011, 2010 and 2009 were \$3.3 million, \$3.3 million and \$10.0 million, respectively, before income taxes. For awards with service conditions and graded-vesting, a one-time election was made to recognize stock-based compensation expense on a straight-line basis over the requisite service period for the entire award. For options with performance and/or service conditions only, we utilized the Black-Scholes option pricing model to estimate fair value of options issued. For restricted stock awards with service conditions, we utilized the intrinsic value method. For awards with market conditions, we utilized a lattice model to estimate the award fair value and the derived service period. Determining the fair value of stock options at the grant date requires judgment including estimates for the risk-free interest rate, volatility, annual forfeiture rate, and expected term. Performance-based unvested awards require management to make assumptions regarding the likelihood of achieving company or personal performance goals. If any of these assumptions differ significantly from actual, stock-based compensation expense could be impacted. We will recognize \$4.5 million of additional expense related to unvested awards as of December 31, 2011 over a weighted average period of 1.6 years.

#### **Recent Accounting Pronouncements**

In October 2009, the Financial Accounting Standards Board, or FASB, issued Accounting Standards Update, or ASU, No. 2009-13, “Multiple-Deliverable Revenue Arrangements” (ASU 2009-13). ASU 2009-13 changes the requirements for establishing separate units of accounting in a multiple element arrangement and requires the allocation of arrangement consideration to each deliverable to be based on the relative selling price. Concurrently with issuing ASU 2009-13, the FASB also issued ASU No. 2009-14, “Certain Revenue Arrangements That Include Software Elements” (ASU 2009-14). ASU 2009-14 excludes software that is contained on a tangible product from the scope of software revenue guidance if the software component and the non-software component function together to deliver the tangible products’ essential functionality. The

Company adopted these standards on a prospective basis for new and materially modified arrangements originating after December 31, 2010. The adoption of these amendments did not have a material effect on the Company's financial statements.

In May 2011, the FASB issued new guidance for the measurement and disclosure of fair value. The primary objective of the standard is to ensure that fair value has the same meaning under GAAP and International Financial Reporting Standards and to establish common fair value measurement guidance in the two sets of standards. The standard does not change the overall fair value model in GAAP, but it amends various fair value principles and establishes additional disclosure requirements. This new guidance is effective for interim and annual periods beginning after December 15, 2011, with amendments applied prospectively. Adoption is not expected to have a material impact on our financial condition or results of operations.

In June 2011, the FASB issued authoritative guidance related to comprehensive income. The guidance eliminates the option to present other comprehensive income in the Statement of Shareholders' Equity, but instead allows companies to elect to present net income and other comprehensive income in one continuous statement (Statement of Comprehensive Income) or in two consecutive statements. This guidance does not change any of the components of net income or other comprehensive income and earnings per share will still be calculated based on net income. We adopted this guidance on January 1, 2012.

In September 2011, the FASB issued new accounting guidance which allows a company the option to make a qualitative evaluation about the likelihood of goodwill impairment. A company is required to perform the two-step impairment test only if it concludes, based on a qualitative assessment, the fair value of a reporting unit is more likely than not to be less than its carrying value. The guidance is effective for annual and interim goodwill impairment tests performed for fiscal years beginning after December 15, 2011, with early adoption permitted. Adoption is not expected to have a material impact on our financial condition or results of operations.

## **Item 7A. Quantitative and Qualitative Disclosures about Market Risk**

### **Foreign Exchange Risk**

We faced minimal exposure to adverse movements in foreign currency exchange rates and did not utilize any foreign currency exchange transactions to hedge our exposure in 2011. Foreign currency gains for the years ended December 31, 2011, 2010 and 2009 were immaterial. In December 2011, we entered into a contract with a South African utility that will be transacted in South African rand. No activity from this contract is included in our results of operations for 2011. We are currently evaluating our strategy to minimize foreign exchange risk related to these operations.

### **Interest Rate Risk**

As of December 31, 2011, \$26.3 million of outstanding debt was at floating interest rates. Based on outstanding floating rate debt of \$26.3 million as of December 31, 2011, an increase of 1.0% in the prime rate would result in an increase in our interest expense of approximately \$0.3 million per year.

### **Market Value of Portfolio Investments**

We maintain an investment portfolio of various holdings, types, and maturities. As of December 31, 2011, we had \$14.3 million of investments in money market funds recorded at fair value on our balance sheet. While our investments are made in highly rated securities and in compliance with our investment policy, these investments are exposed to fluctuations in market values and could have a material impact on our financial position and results of operations.

**Item 8. Financial Statements and Supplementary Data**

**Comverge, Inc.**  
**Index to Consolidated Financial Statements**

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## Report of Independent Registered Public Accounting Firm

To the Board of Directors and Stockholders of Comverge, Inc:

In our opinion, the consolidated financial statements listed in the accompanying index present fairly, in all material respects, the financial position of Comverge, Inc and its subsidiaries at December 31, 2011 and December 31, 2010, and the results of their operations and their cash flows for each of the three years in the period ended December 31, 2011 in conformity with accounting principles generally accepted in the United States of America. In addition, in our opinion, the financial statement schedule listed in the accompanying index presents fairly, in all material respects, the information set forth therein when read in conjunction with the related consolidated financial statements. Also in our opinion, the Company maintained, in all material respects, effective internal control over financial reporting as of December 31, 2011, based on criteria established in *Internal Control - Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO). The Company's management is responsible for these financial statements and financial statement schedule, for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting, included in Management's Report on Internal Control over Financial Reporting appearing under Item 9A. Our responsibility is to express opinions on these financial statements, on the financial statement schedule, and on the Company's internal control over financial reporting based on our integrated audits. We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audits to obtain reasonable assurance about whether the financial statements are free of material misstatement and whether effective internal control over financial reporting was maintained in all material respects. Our audits of the financial statements included examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, and evaluating the overall financial statement presentation. Our audit of internal control over financial reporting included obtaining an understanding of internal control over financial reporting, assessing the risk that a material weakness exists, and testing and evaluating the design and operating effectiveness of internal control based on the assessed risk. Our audits also included performing such other procedures as we considered necessary in the circumstances. We believe that our audits provide a reasonable basis for our opinions.

The accompanying financial statements have been prepared assuming that the Company will continue as a going concern. As discussed in Note 1 to the financial statements, the combination of the expected operating performance, the amount of cash flow that is expected from operations, debt that is due in 2012, and the restrictive debt covenants with which the Company may not comply, raises substantial doubt about the Company's ability to continue as a going concern. Management's plans in regard to these matters are also described in Note 1. The financial statements do not include any adjustments that might result from the outcome of this uncertainty.

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (i) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (ii) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (iii) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

PricewaterhouseCoopers LLP (signed)  
Atlanta, Georgia,  
March 15, 2012

**COMVERGE, INC. AND SUBSIDIARIES**  
**CONDENSED CONSOLIDATED BALANCE SHEETS**  
(In thousands, except share data)

	December 31, 2011	December 31, 2010
<b>Assets</b>		
Current assets		
Cash and cash equivalents	\$ 23,641	\$ 7,800
Restricted cash	4,051	1,736
Marketable securities	—	27,792
Billed accounts receivable, net	18,481	14,433
Unbilled accounts receivable	12,730	17,992
Inventory, net	10,377	9,181
Deferred costs	1,804	1,712
Other current assets	1,313	2,056
<b>Total current assets</b>	<b>72,397</b>	<b>82,702</b>
Restricted cash	332	3,733
Property and equipment, net	26,865	22,480
Intangible assets, net	3,635	3,816
Goodwill	499	499
Other assets	1,681	927
<b>Total assets</b>	<b>\$ 105,409</b>	<b>\$ 114,157</b>
<b>Liabilities and Shareholders' Equity</b>		
Current liabilities		
Accounts payable	\$ 5,123	\$ 8,455
Accrued expenses	20,347	17,375
Deferred revenue	7,094	5,821
Current portion of long-term debt	9,188	3,000
Other current liabilities	7,561	7,962
<b>Total current liabilities</b>	<b>49,313</b>	<b>42,613</b>
Long-term liabilities		
Deferred revenue	490	1,662
Long-term debt	17,062	21,750
Other liabilities	1,563	2,074
<b>Total long-term liabilities</b>	<b>19,115</b>	<b>25,486</b>
Commitments and contingencies (Note 12)		
Shareholders' equity		
Common stock, \$0.001 par value per share, authorized 150,000,000 shares; issued 25,968,436 and outstanding 25,913,694, shares as of December 31, 2011 and issued 25,355,223 and outstanding 25,329,118 shares as of December 31, 2010	26	25
Additional paid-in capital	266,090	262,226
Common stock held in treasury, at cost, 54,742 and 26,105 shares as of December 31, 2011 and December 31, 2010, respectively	(338)	(257)
Accumulated deficit	(228,772)	(215,947)
Accumulated other comprehensive income (loss)	(25)	11
<b>Total shareholders' equity</b>	<b>36,981</b>	<b>46,058</b>
<b>Total liabilities and shareholders' equity</b>	<b>\$ 105,409</b>	<b>\$ 114,157</b>

*The accompanying notes are an integral part of these unaudited condensed consolidated financial statements.*



**COMVERGE, INC. AND SUBSIDIARIES**  
**CONDENSED CONSOLIDATED STATEMENTS OF OPERATIONS**  
(In thousands, except share and per share data)

	Year Ended December 31,		
	2011	2010	2009
Revenue			
Product	\$ 22,645	\$ 23,152	\$ 20,732
Service	113,775	96,237	78,112
Total revenue	136,420	119,389	98,844
Cost of revenue			
Product	17,611	17,662	12,912
Service	62,804	56,876	52,736
Total cost of revenue	80,415	74,538	65,648
Gross profit	56,005	44,851	33,196
Operating expenses			
General and administrative expenses	41,000	39,362	37,781
Marketing and selling expenses	20,136	18,031	17,737
Research and development expenses	4,297	6,279	4,878
Amortization of intangible assets	645	2,144	2,209
Impairment charges	—	9,871	—
Operating loss	(10,073)	(30,836)	(29,409)
Interest expense, net	2,716	875	2,114
Other income, net	(36)	(21)	(76)
Loss before income taxes	(12,753)	(31,690)	(31,447)
Provision (benefit) for income taxes	72	(339)	219
Net loss	\$ (12,825)	\$ (31,351)	\$ (31,666)
Net loss per share (basic and diluted)	\$ (0.52)	\$ (1.27)	\$ (1.45)
Weighted average shares used in computation	24,901,201	24,667,485	21,786,978

*The accompanying notes are an integral part of these unaudited condensed consolidated financial statements.*

**COMVERGE, INC. AND SUBSIDIARIES**  
**CONDENSED STATEMENT OF CHANGES IN SHAREHOLDERS' EQUITY AND COMPREHENSIVE LOSS**  
(In thousands, except share data)

	Common Stock		Treasury Shares			Accumulated Deficit	Accumulated Other Comprehensive Income	Total Shareholders' Equity
	Number of Shares	Amount	Additional Paid-in Capital	Number of Shares	Amount			
<b>Balance at December 31, 2008</b>	21,926,660	\$ 22	\$ 220,638	(18,539)	\$ (119)	\$ (152,930)	\$ 49	\$ 67,660
Common stock issued in public offerings, net of offering costs	2,760,000	3	27,033	—	—	—	—	27,036
Issuance of common stock upon exercises of stock options	310,447	—	1,126	—	—	—	—	1,126
Stock-based compensation	—	—	10,038	—	—	—	—	10,038
Issuance of restricted stock, net of forfeitures	94,279	—	—	—	—	—	—	—
Common stock held in treasury	—	—	—	(17,690)	(155)	—	—	(155)
Retirement of shares from treasury	(30,567)	—	(211)	30,567	211	—	—	—
Issuance of shares related to prior year acquisition	11,945	—	36	—	—	—	—	36
Components of comprehensive loss:								
Net loss	—	—	—	—	—	(31,666)	—	(31,666)
Changes in unrealized gain on marketable securities	—	—	—	—	—	—	(31)	(31)
Total comprehensive loss	—	—	—	—	—	—	—	(31,697)
<b>Balance at December 31, 2009</b>	25,072,764	25	258,660	(5,662)	(63)	(184,596)	18	74,044
Issuance of common stock upon exercises of stock options	137,756	—	239	—	—	—	—	239
Stock-based compensation	—	—	3,327	—	—	—	—	3,327
Issuance of restricted stock, net of forfeitures	144,703	—	—	—	—	—	—	—
Common stock held in treasury	—	—	—	(20,443)	(194)	—	—	(194)
Components of comprehensive loss:								
Net loss	—	—	—	—	—	(31,351)	—	(31,351)
Changes in unrealized gain on marketable securities	—	—	—	—	—	—	(7)	(7)
Total comprehensive loss	—	—	—	—	—	—	—	(31,358)
<b>Balance at December 31, 2010</b>	25,355,223	25	262,226	(26,105)	(257)	(215,947)	11	46,058
Common stock issued to Aspire Capital, net of offering costs	544,927	1	434	—	—	—	—	435
Issuance of common stock upon exercises of stock options	90,178	—	117	—	—	—	—	117
Stock-based compensation	—	—	3,313	—	—	—	—	3,313
Issuance of restricted stock, net of forfeitures	(21,892)	—	—	—	—	—	—	—
Common stock held in treasury	—	—	—	(28,637)	(81)	—	—	(81)
Components of comprehensive loss:								
Net loss	—	—	—	—	—	(12,825)	—	(12,825)
Changes in unrealized gain on marketable securities	—	—	—	—	—	—	(11)	(11)
Changes in unrealized loss on foreign exchange	—	—	—	—	—	—	(25)	(25)
Total comprehensive loss	—	—	—	—	—	—	—	(12,861)
<b>Balance at December 31, 2011</b>	25,968,436	\$ 26	\$ 266,090	(54,742)	\$ (338)	\$ (228,772)	\$ (25)	\$ 36,981

*The accompanying notes are an integral part of these consolidated financial statements.*

**COMVERGE, INC. AND SUBSIDIARIES**  
**CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS**  
(In thousands)  
(Unaudited)

	Year Ended December 31,		
	2011	2010	2009
<b>Cash flows from operating activities</b>			
Net loss	\$ (12,825)	\$ (31,351)	\$ (31,666)
Adjustments to reconcile net loss to net cash from operating activities:			
Depreciation	5,993	6,276	17,689
Amortization of intangible assets and capitalized software	1,522	2,835	2,810
Stock-based compensation	3,313	3,327	10,038
Impairment charges	—	9,871	—
Write-off of debt issuance costs	523	—	754
Amortization of debt issuance costs	127	111	258
Amortization of marketable securities	85	739	252
Gain on sale of marketable securities	(28)	—	—
Loss on disposal of property and equipment	280	415	670
Allowance for inventory obsolescence	652	316	(10)
Allowance for doubtful accounts	(115)	210	66
Deferred income taxes	10	(387)	220
Changes in operating assets and liabilities:			
Billed and unbilled accounts receivable, net	1,329	(12,643)	4,727
Inventory, net	(2,267)	(3,065)	(2,059)
Deferred costs and other assets	(655)	(1,236)	806
Accounts payable	(3,332)	1,916	(958)
Accrued expenses and other liabilities	2,283	7,907	6,003
Deferred revenue	101	390	(1,821)
Net cash (used in) provided by operating activities	(3,004)	(14,369)	7,779
<b>Cash flows from investing activities</b>			
Changes in restricted cash	1,086	167	(1,579)
Purchases of marketable securities	—	(26,049)	(39,166)
Maturities/sales of marketable securities	27,724	31,920	32,750
Purchases of property and equipment	(10,403)	(11,040)	(14,901)
Capitalized software costs	(1,322)	—	—
Purchases of technology licenses	(33)	(83)	(1,338)
Net cash provided by (used in) investing activities	17,052	(5,085)	(24,234)
<b>Cash flows from financing activities</b>			
Proceeds from exercise of stock options	117	239	1,067
Payment of employee taxes due to net settlement stock option exercises	(81)	(194)	(96)
Borrowings under SVB loan facility	12,500	18,000	—
Repayment of SVB loan facility	(11,000)	(21,000)	(2,250)
Borrowings under PFG loan facility	—	15,000	—
Borrowings under GECC credit agreement	—	—	10,900
Repayment of GECC credit agreement	—	—	(23,424)
Repayment of subordinated convertible promissory notes	—	—	(590)
Net proceeds (payments) from issuance of common stock	435	(335)	27,371
Payment of debt issuance costs	(153)	(525)	(25)
Net cash provided by financing activities	1,818	11,185	12,953
Effect of exchange rate changes on cash and cash equivalents	(25)	—	—
Net change in cash and cash equivalents	15,841	(8,269)	(3,502)
Cash and cash equivalents at beginning of period	7,800	16,069	19,571

Cash and cash equivalents at end of period	\$ 23,641	\$ 7,800	\$ 16,069
Cash paid for interest	\$ 1,995	\$ 952	\$ 1,629
<b>Supplemental disclosure of noncash investing and financing activities</b>			
Recording of asset retirement obligation	\$ (233)	\$ (239)	\$ 399
Common stock issued in consideration in business acquisitions	\$ —	\$ —	\$ 36

*The accompanying notes are an integral part of these unaudited condensed consolidated financial statements.*

**COMVERGE, INC. AND SUBSIDIARIES**  
**NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS**  
**(in thousands, except share and per share data)**

**1. Description of Business, Basis of Presentation, Liquidity and Substantial Doubt about Ability to Continue as Going Concern**

*Description of Business*

Comverge, Inc., a Delaware corporation, and its subsidiaries (collectively, the “Company”), provide intelligent energy management solutions that enable energy providers and consumers to optimize their power usage and meet peak demand. The Company delivers its intelligent energy management solutions through a portfolio of hardware, software and services. The Company has two operating segments: the Residential Business segment and the Commercial & Industrial, or C&I, Business segment. In December 2011, the Company began international operations; however, the Company had minimal transactions in 2011, the effect of which were immaterial to the financial statements and were limited to the re-measurement of cash.

*Basis of Presentation*

The consolidated financial statements of the Company include the accounts of its subsidiaries. The consolidated financial statements have been prepared in conformity with accounting principles generally accepted in the United States of America. The consolidated financial statements presented reflect entries necessary for the fair presentation of the Consolidated Statements of Operations for the years ended December 31, 2011, 2010 and 2009, Consolidated Balance Sheets as of December 31, 2011 and 2010 and Consolidated Statements of Cash Flows for the years ended December 31, 2011, 2010 and 2009. All entries required for the fair presentation of the financial statements are of a normal recurring nature. Intercompany transactions and balances are eliminated upon consolidation.

*Liquidity and Substantial Doubt about Ability to Continue as Going Concern*

The Company has incurred losses since inception, resulting in an accumulated deficit of \$228,772 and stockholders' equity of \$36,981 as of December 31, 2011. Working capital as of December 31, 2011 was \$23,084, consisting of \$72,397 in current assets and \$49,313 in current liabilities, including \$9,188 of long-term debt due within one year. The total long-term debt as of December 31, 2011 was \$17,062, excluding the \$9,188 included in current liabilities. Further, the Company anticipates spending approximately \$8,700 on capital expenditures during 2012.

The Company is required to meet certain financial covenants contained in the Silicon Valley Bank, or SVB, and Grace Bay loan and security agreements, specifically a minimum tangible net worth and an adjusted quick ratio. The financial covenants in both loan and security agreements are substantially similar. Compliance with the adjusted quick ratio covenant is measured on a monthly basis and compliance with the tangible net worth covenant is measured on a quarterly basis. For the quarter ended December 31, 2011, the SVB and Grace Bay loan and security agreements required a minimum tangible net worth of \$42,000. For December 2011, the SVB and Grace Bay loan and security agreements required a minimum ratio of current assets to current liabilities of 1.25:1.00. The Company met the financial covenant requirements for the period ended December 31, 2011. However, the Company's lenders have some discretion in establishing covenants for 2012 and when these covenants are established, management believes it is possible that the Company will not meet the covenant requirements during 2012 if additional capitalization of the Company is not achieved or if SVB and Grace Bay do not agree to different terms for their respective loan and security agreements. The Company's failure to comply with these covenants may result in the declaration of an event of default under each of the SVB and Grace Bay loan agreements and cause us to be unable to borrow under such loan agreements. See Note 10 for further discussion.

The Company had aggregate available borrowing capacity under its SVB loan agreement of \$1,929 as of December 31, 2011; however, if the Company does not maintain at least \$20,000 of unrestricted cash at all times, the Company's borrowing base may be reduced. Upon a reduction in the borrowing base, the \$1,929 of additional capacity may not be available to the Company. Even with its anticipated revenue growth or cash expenditure reductions, it is possible that the Company's cash balance may fall below \$20,000. Should the Company's unrestricted cash balance fall below \$20,000 and the Company's borrowing capacity be consequently reduced, any amounts the Company owes to SVB in excess of the Company's reduced borrowing capacity will become immediately due and payable under its SVB loan agreement. A failure to pay any such excess amount could result in a default under the SVB loan agreement and, as a result, could cause cross-defaults in the Company's other borrowing arrangements, such that all of its outstanding debt could become due and payable. In addition, any resulting loss in liquidity could cause potential defaults in the Company's borrowing arrangements, such that all of its outstanding debt could become due and payable. The Grace Bay loan and security agreement sets targets for the Company's minimum revenues.

The Company did not achieve certain year-to-date revenue growth targets, which were \$139,838 in revenue for the year ended December 31, 2011. During the first quarter of 2012, Grace Bay exercised its Amortization Right (as defined in the loan agreement) as the Company did not meet its revenue target for the fourth quarter of 2011. If the Company subsequently complies with succeeding measurements periods (quarterly), the Company may prospectively cease monthly amortization of the loan, provided, however, Grace Bay may again exercise its Amortization Right under the loan agreement if the Company fails to meet future minimum revenue targets. Based on its revenue to date during the first quarter of 2012 and its projected revenue for all of 2012, the Company has determined that it is probable that it will exceed the revenue target for the first quarter (\$17,697) as well as the remainder of the year. Accordingly, the Company believes that it is probable that the Amortization Right triggered and elected by Grace Bay related to the failure to meet the revenue target for the year ended December 31, 2011 will contractually cease when the Company files its Form 10-Q for the quarter ended March 31, 2012. Thus, the Company has recorded (\$1,688 or 3 months of accelerated amortization) as a current liability as of December 31, 2011. Additionally, Grace Bay has alleged that we are in default under the Grace Bay agreement which would trigger a cross-default in the SVB loan and security agreement. Such event of default would enable SVB or Grace Bay, as applicable, to accelerate all amounts due under their respective loan agreements and to exercise other remedies available to them under the respective loan agreements. Further, any payment of such immediately due and payable obligations under the loan agreements may cause us to breach additional financial covenants in either the SVB or Grace Bay loan agreements.

Any failure by the Company to pay any obligations that become due and payable under either the SVB or Grace Bay loan and security agreement may constitute an event of default under such agreement. Such event of default would enable SVB or Grace Bay, as applicable, to accelerate all amounts due under their respective loans and to exercise other remedies available to them under the respective loan agreements. Further, any payment of such immediately due and payable obligations under the SVB loan agreement may cause the Company to breach certain financial covenants in either the SVB or Grace Bay loan agreements. Any such breach of financial covenants would constitute an event of default under such agreements, enabling SVB and Grace Bay to exercise their respective remedies under their respective agreements, including acceleration of all amounts due thereunder. As of the date of this filing on Form 10-K, the Company has not received notice to accelerate the debt and would contest any such acceleration.

On November 29, 2011, the Company entered into the Purchase Agreement with Aspire Capital, which provides that, upon the terms and subject to the conditions and limitations set forth therein, Aspire Capital is committed to purchase an aggregate of up to \$10,000 of shares of its common stock over the 24-month term of the Purchase Agreement. Under the Purchase Agreement, the Company agreed to pay Aspire Capital a commitment fee equal to 2% of \$10,000 in consideration for Aspire Capital's obligation to purchase up to \$10,000 of our common stock. The Company paid this commitment fee by issuing to Aspire Capital 144,927 shares of our common stock valued at \$1.38 per share. During 2011, the Company sold 400,000 shares of its common stock to Aspire Capital at a purchase price of \$1.09 per share, for an aggregate purchase price of \$435. Under the terms of the agreement, the Company cannot sell shares to Aspire Capital at a purchase price less than \$1.00 per share. As of March 9, 2012, the Company could offer and sell from time to time to Aspire Capital up to an additional \$5,013, in aggregate, based on the offering price of its common stock under the Purchase Agreement.

Management continues actively exploring all such financing options including restructuring of its current credit facilities in the near term or the possible sale of the Company. The Company's ability to secure additional capital or modify its existing debt terms to meet its projected revenue growth or cash expenditure reductions or its ability to sell the Company cannot be assured. In addition, certain financing options may require the consent of our current debt holders and we may not be able to obtain such consent or the terms of such consent may be cost-prohibitive. Due to the circumstances described above including the expected operating performance, the amount of cash flow that is expected from operations, debt that is due in 2012, and the restrictive debt covenants with which the Company may not comply, there is substantial doubt about the Company's ability to continue as a going concern. The consolidated financial statements have been prepared assuming that the Company will continue as a going concern and contemplate the realization of assets and the satisfaction of liabilities in the normal course of business.

## **2. Significant Accounting Policies and Recent Accounting Pronouncements**

### *Use of Estimates in Preparation of Financial Statements*

The preparation of financial statements in conformity with accounting principles generally accepted in the United States of America requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and the disclosure of contingent assets and liabilities as of the date of the financial statements, and the reported amounts of revenue and expense during the reporting periods. Significant estimates include management's estimate of provisions required for non-collectible accounts receivable, obsolete or slow-moving inventory, and potential product warranty liability as well as management's estimates related to revenue recognition using the percentage-of-completion method. Actual results could differ

from those estimates.

#### *Cash and Cash Equivalents and Restricted Cash*

The Company considers all highly liquid investments with an original maturity of three months or less to be cash equivalents. Cash and cash equivalents consist of cash and demand deposits in banks and short-term investments.

The Company maintains cash balances to secure its performance or to fund possible damages as the result of an event of default related to certain service contracts. These amounts have been classified as restricted cash on the balance sheet and are classified as current or noncurrent based on the underlying restriction.

#### *Allowance for Doubtful Accounts*

The Company reviews the outstanding accounts receivable monthly, as well as the bad debt write-offs experienced in the past, and establishes an allowance for doubtful accounts. Account balances are charged off against the allowance when the Company determines it is probable the receivable will not be recovered. As of December 31, 2011 and 2010, there were \$92 and \$1,721, respectively, identified as doubtful of collection. The decrease in the allowance for doubtful accounts was due to the collection of an outstanding receivable from one customer during the year ended December 31, 2011.

#### *Inventory, net*

Inventories are stated at the lower of cost or market. Inventory cost is determined on the basis of specific identification based on acquisition cost and due provision is made to reduce all slow-moving, obsolete, or unusable inventories to their estimated useful or scrap values. As of December 31, 2011 and 2010, there were provisions of \$951 and \$466, respectively, for finished goods inventory identified as slow-moving, obsolete or unusable.

#### *Property and Equipment, net*

Property and equipment are stated at cost less accumulated depreciation. Depreciation is calculated using the straight-line method over the estimated useful lives of the depreciable assets. In the case of installed assets that are part of long-term contracts, the assets are depreciated over the shorter of the useful life or the term of the contract. Leasehold improvements are depreciated over the shorter of the lease term or useful life. Improvements are capitalized while repairs and maintenance are expensed as incurred. Gains or losses realized on the disposal or retirement of property and equipment are recognized in the consolidated statement of operations.

The Company recognizes the fair value of liabilities for asset retirement obligations in the period in which they are incurred if a reasonable estimate of fair value can be made. The Residential Business segment installs hardware at residences of select utility customers. At the request of the homeowner, the Company is obligated to remove this hardware. Any associated asset retirement costs are capitalized as part of the carrying amount of the long-lived asset and recognized as depreciation expense over the asset's life. The Company's estimate is based on the historical data for the ratio of cumulative assets removed to the cumulative number of assets installed. Accordingly, in the years ended December 31, 2011, 2010 and 2009, the Company recognized an asset retirement obligation liability and an associated change in the cost of long-lived assets of \$233, \$239 and \$399, respectively.

#### *Goodwill and Intangibles, net*

Goodwill represents the excess of cost over the fair value of the net tangible assets and identified intangible assets of businesses acquired in purchase transactions. Goodwill is not being amortized. Intangibles are recorded at their fair value at acquisition date. The Company amortizes finite-lived intangibles over their estimated useful lives, ranging from three to twenty years, using the straight-line method, which approximates the projected utility of such assets based upon the information available. Goodwill and other indefinite-lived intangible assets are tested for impairment on at least an annual basis, on December 31<sup>st</sup> of each year, as well as on an as-needed basis determined by events or changes in circumstances.

Goodwill is allocated among and evaluated for impairment at the reporting unit level, which is defined as an operating segment or one level below an operating segment. Goodwill was tested for impairment using the two-step approach. Step 1 of the goodwill impairment test, used to identify potential impairment, compares the fair value of the reporting unit with its carrying amount, including goodwill. If the fair value of the reporting unit exceeds its carrying amount, goodwill of the reporting unit is considered not impaired and the second step of the impairment test is not required. If the carrying amount of a reporting unit exceeds its fair value, the second step of the goodwill impairment test would be performed to measure the amount of impairment, if any.

The Company performed its annual impairment test as of December 31, 2011 and the results of the tests performed indicated no impairment.

The Company entered into an amendment with a certain customer during the fourth quarter of 2010 that decreased committed capacity in the Energy Efficiency reporting unit in the C&I Business segment, thereby reducing future cash flows. The decline in cash flows impacted the fair value of the reporting unit, causing its carrying value to exceed its fair value, when the Company performed its impairment assessment. Based on this evaluation, the Company recorded impairment charges. See note 7 for a complete discussion on the methodology and assumptions applied. The results of the annual impairment test indicated no additional impairment as of December 31, 2010.

#### *Impairment of Long-Lived Assets*

The Company evaluates the recoverability of long-lived assets whenever events or changes in circumstances indicate that the carrying amount should be assessed by comparing their carrying value to the undiscounted estimated future net operating cash flows expected to be derived from such assets. If such evaluation indicates a potential impairment, a discounted cash flow analysis is used to measure fair value in determining the amount of these assets that should be written off. No such event or change in circumstance existed as of December 31, 2011 that would indicate that carrying amount should be assessed.

#### *Debt Issuance Costs*

Debt issuance costs are amortized over the term of the corresponding debt instrument using the straight-line method, which approximates the effective interest method. Amortization of debt issuance costs was \$127, \$111 and \$258 for the years ended December 31, 2011, 2010 and 2009, respectively. The write-off of \$523 of certain debt issuance costs was recorded in conjunction with our modification of the PFG debt agreement. See Note 10 for more details. Debt issuance costs are included in Other current assets and Other assets and consisted of the following as of December 31, 2011 and 2010.

	<b>December 31, 2011</b>	<b>December 31, 2010</b>
Debt issuance costs at beginning of year	\$ 648	\$ 234
Addition of debt issuance costs	153	525
Write-off of debt issuance costs	(523)	—
Amortization of debt issuance costs	(127)	(111)
Debt issuance costs at end of year	<u>\$ 151</u>	<u>\$ 648</u>

#### *Warranty Provision*

The Company generally warrants its products against certain manufacturing and other defects. These product warranties are provided for specific periods of time and/or usage of the product depending on the nature of the product, the geographic location of its sale and other factors. The warranty provision included in Other current liabilities is set forth below.

	<b>December 31, 2011</b>	<b>December 31, 2010</b>
Warranty provision at beginning of year	\$ 620	\$ 82
Accruals for warranties issued during the year	46	1,093
Warranty settlements during the year	(457)	(555)
Warranty provision at the end of year	<u>\$ 209</u>	<u>\$ 620</u>

#### *Fair Value of Financial Instruments*

The Company uses financial instruments in the normal course of business, including cash and cash equivalents, investment securities, accounts receivable, accounts payable, accrued expenses, and debt obligations. The carrying values of accounts receivable, accounts payable, and accrued expenses approximated their respective fair values at each balance sheet date due to the short-term maturity of these assets and liabilities.

#### *Concentration of Credit Risk*

The Company derives a significant portion of its revenue from products and services that it supplies to electricity providers such as utilities and independent system operators. Changes in economic conditions and unforeseen events could occur and reduce consumers' use of electricity. The Company's business success depends in part on its relationships with a limited number of large customers. During the year ended December 31, 2011, the Company had two customers which accounted for 22% and

16% of the Company's revenue. The total accounts receivable from these customers were \$14,767 and \$4,340, respectively, as of December 31, 2011. During the year ended December 31, 2010, the Company had two customers which accounted for 28% and 12% of the Company's revenue. The total accounts receivable from these customers were \$14,200 and \$3,864, respectively, as of December 31, 2010. During the year ended December 31, 2009, the Company had two customers which accounted for 20% and 12% of the Company's total revenue.

No other customer accounted for more than 10% of the Company's total revenue in 2011, 2010 and 2009.

The Company is subject to concentrations of credit risk from its cash and cash equivalents, short-term investments and accounts receivable. The Company limits its exposure to credit risk associated with cash and cash equivalents and short-term investments by placing its cash and cash equivalents and short-term investments with multiple domestic financial institutions and adhering to the Company's investment policy.

#### *Revenue Recognition - Residential Business*

The Company sells intelligent energy management solutions directly to utilities for use and deployment by the utility. The Company recognizes revenue for such sales when delivery has occurred or services have been rendered and the following criteria have been met: persuasive evidence of an arrangement exists, the price is fixed or determinable, delivery has occurred and collection is probable.

The Company has certain contracts which are multiple element arrangements and provide for several deliverables to the customer that may include hardware, software and services, such as installation of the hardware, marketing, program management and hosting. The Company evaluates each deliverable to determine whether it represents a separate unit of accounting. A deliverable constitutes a separate unit of accounting when it has stand-alone value and there are no customer-negotiated refunds or return rights for the delivered elements. The separate deliverables in these arrangements meet the separation criteria. The contract consideration for these multiple element arrangements is allocated to the units of accounting based on the relative selling prices of all of the deliverables in the arrangement using the hierarchy of Vendor Specific Objective Evidence (VSOE), Third Party Evidence (TPE) or Estimated Selling Price (ESP). VSOE of fair value is based on the price charged when the element is sold separately. TPE of selling price is established by evaluating largely interchangeable competitor products or services in stand-alone sales to similarly situated customers. ESP is established considering multiple factors including, but not limited to list price, gross margin analysis and internal costs. Allocation of the consideration is determined at arrangement inception on the basis of each unit's relative selling price. Once an allocated fair value is established for each unit of accounting, the contract deliverables are scoped into the appropriate accounting guidance for revenue recognition.

The Company enters into long-term contracts with utilities in which the Company typically owns the underlying intelligent energy management network and provides its customer with electric capacity during the peak season. The Company invoices Virtual Peaking Capacity, or VPC, customers on a monthly or quarterly basis throughout the contract year. Contract years typically begin at the end of a control season (generally, at the end of a utility's summer cooling season that correlates to the end of the utility's peak demand for electricity) and continue for twelve months thereafter. The VPC contracts require the Company to provide electric capacity through demand reduction to utility customers, and require a measurement and verification of such capacity on an annual basis. In certain VPC contracts, the results of the measurement and verification process are applied retrospectively to the program year. For these contracts, the Company defers revenue and the associated cost of revenue related to these until such time as the annual contract payment is fixed or determinable. Once a utility's customer, or program participant, enrolls in one of the Company's VPC programs, the Company installs hardware at the participant's location. The cost of the installation and the hardware are capitalized and depreciated as cost of revenue over the remaining term of the contract with the utility, which is shorter than the operating life of the equipment. The Company also records telecommunications costs related to the network as cost of revenue. The cost of revenue is recognized contemporaneously with revenue.

The current deferred revenue and deferred cost of revenue as of December 31, 2011 and December 31, 2010 are provided below:

	December 31, 2011	December 31, 2010
<b>Deferred revenue:</b>		
VPC contract related	\$ 1,624	\$ 2,502
Other	5,470	3,319
Current deferred revenue	<u>\$ 7,094</u>	<u>\$ 5,821</u>
<b>Deferred cost of revenue:</b>		
VPC contract related	\$ 1,047	\$ 1,041
Other	757	671
Current deferred cost of revenue	<u>\$ 1,804</u>	<u>\$ 1,712</u>

#### *Revenue Recognition - Commercial & Industrial Business*

The Company enters into agreements to provide demand response services. The demand response programs require the Company to provide electric capacity through demand reduction when the utility or independent system operator calls a demand response event to curtail electrical usage. Demand response revenues are earned based on the Company's ability to deliver capacity. In order to provide capacity, the Company manages a portfolio of commercial and industrial end users' electric loads. Capacity amounts are verified through the results of an actual demand response event or a demand response test. The Company recognizes revenue and associated cost of revenue in its demand response services at such time as the capacity amount is fixed or determinable.

The Company bids into forward auctions for open market programs with independent system operators, or ISO's. The program year, which spans from June 1st to May 31st annually for the Company's primary program, is three years from the date of the initial auction. Participation in the capacity program requires the Company to respond to requests from the ISO to curtail energy usage during the mandatory performance period of June through September, which is the peak demand season. For participation, the Company receives cash payments on a monthly basis in the program year. The Company may utilize the incremental auctions held within the three-year period prior to the commencement of the program year or may enter into bilateral agreements with other market demand or supply-side providers to fulfill a portion of the megawatts awarded in the initial auction. For the remaining megawatts, the Company enrolls C&I participants in order to fulfill its megawatt commitment with the ISO. If the Company remains the primary obligor for the megawatt commitment, the Company recognizes revenue and cost of revenue on a gross basis for those megawatts ratably over the performance period, once the revenue is fixed or determinable. If the Company is released from its obligations to fulfill those megawatts through an incremental auction or a bilateral agreement, the Company recognizes revenue, net of the cost of revenue, at the time that megawatts are accepted by the ISO and the financial assurance is released.

The Company enters into agreements to provide base load reduction. Energy efficiency revenues are earned based on the Company's ability to achieve committed capacity through base load reduction. In order to provide this reduction, the Company delivers and installs energy efficiency management solutions. The base load capacity contracts require the Company to provide electric capacity to utility customers and include a measurement and verification of such capacity in order to determine contract consideration. The Company defers revenue and associated cost of revenue until such time as the capacity amount, and therefore the related revenue, is fixed or determinable. Once the reduction amount has been verified, the revenue is recognized. If the revenue is subject to penalty, refund or an ongoing obligation, the revenue is deferred until the contingency is resolved and/or the Company has met its performance obligation. Certain contracts contain multiple deliverables, or elements, which require the Company to assess whether the different elements qualify for separate accounting. The separate deliverables in these arrangements meet the separation criteria.

Revenue from time-and-materials service contracts and other services are recognized as services are provided. Revenue from certain fixed price contracts are recognized on a percentage-of-completion basis, which involves the use of estimates. If the Company does not have a sufficient basis to measure the progress towards completion, revenue is recognized when the project is completed or when final acceptance is received from the customer. The Company also enters into agreements to provide hosting services that allow customers to monitor and analyze their electrical usage. Revenue from hosting contracts is recognized as the services are provided, generally on a recurring monthly basis.

#### *Foreign Currency Transactions*

The currency of the primary economic environment in which the operations of the Company are conducted is the United States Dollar ("dollar"). The functional currency of the Company's international subsidiary is the local currency. The Company translates the financial statements of the subsidiary to dollars using month-end rates of exchange for assets and liabilities and average rates of exchange for revenues, costs, and expenses. The Company records translation gains and losses in accumulated

other comprehensive income as a component of stockholders' equity. Translation losses were immaterial for the year ended December 31, 2011. As the Company's international subsidiary was established in 2011, no such translation gains or losses were recorded in 2010 or 2009. The Company records net gains and losses resulting from foreign exchange transactions as a component of interest and other income, net. Foreign currency losses were immaterial for the years ended December 31, 2011, 2010 and 2009.

*Comprehensive Loss*

The Company reports total changes in equity resulting from revenues, expenses, and gains and losses, including those that do not affect the accumulated deficit. Accordingly, other comprehensive loss includes those amounts relating to unrealized gains and losses on investment securities classified as available for sale as well as the effect of exchange rate changes.

*Marketable Securities*

The Company classifies all of its marketable securities as available-for-sale. The Company considers all highly liquid interest-earning securities with a maturity of three months or less at the date of purchase to be cash equivalents. Securities with maturities beyond three months are classified as short-term based on their highly liquid nature and because such marketable securities represent the investment of cash that is available for current operations. These securities are recorded at market value using the specific identification method; unrealized gains and losses (excluding other-than-temporary impairments) are reflected in accumulated other comprehensive loss in the financial statements.

The amortized cost and fair value of marketable securities, with gross unrealized gains and losses, as of December 31, 2011 and 2010 were as follows:

	<b>December 31, 2011</b>						
	<b>Amortized Cost</b>	<b>Unrealized Gains</b>	<b>Unrealized Losses</b>	<b>Fair Value</b>	<b>Cash and Equivalents</b>	<b>Restricted Cash</b>	<b>Marketable Securities</b>
Money market funds	\$ 14,305	\$ —	\$ —	\$ 14,305	\$ 11,312	\$ 2,993	\$ —
Commercial paper	—	—	—	—	—	—	—
Corporate debentures/bonds	—	—	—	—	—	—	—
Total marketable securities	14,305	—	—	14,305	11,312	2,993	—
Cash in operating accounts	13,719	—	—	13,719	12,329	1,390	—
Total	<u>\$ 28,024</u>	<u>\$ —</u>	<u>\$ —</u>	<u>\$ 28,024</u>	<u>\$ 23,641</u>	<u>\$ 4,383</u>	<u>\$ —</u>

	<b>December 31, 2010</b>						
	<b>Amortized Cost</b>	<b>Unrealized Gains</b>	<b>Unrealized Losses</b>	<b>Fair Value</b>	<b>Cash and Equivalents</b>	<b>Restricted Cash</b>	<b>Marketable Securities</b>
Money market funds	\$ 1,657	\$ —	\$ —	\$ 1,657	\$ 1,657	\$ —	\$ —
Commercial paper	9,395	—	—	9,395	3,598	—	5,797
Corporate debentures/bonds	23,982	24	(13)	23,993	1,998	—	21,995
Total marketable securities	35,034	24	(13)	35,045	7,253	—	27,792
Cash in operating accounts	6,016	—	—	6,016	547	5,469	—
Total	<u>\$ 41,050</u>	<u>\$ 24</u>	<u>\$ (13)</u>	<u>\$ 41,061</u>	<u>\$ 7,800</u>	<u>\$ 5,469</u>	<u>\$ 27,792</u>

Realized gains and losses to date have not been material. Interest income for the years ended December 31, 2011, 2010 and 2009 was \$112, \$929 and \$515, respectively.

The Company applies a fair value hierarchy that requires the use of observable market data, when available, and prioritizes the inputs to valuation techniques used to measure fair value in the following categories:

- Level 1 - Valuation is based upon quoted prices for identical instruments traded in active markets.
- Level 2 - Valuation is based upon quoted prices for similar instruments in active markets, quoted prices for identical or similar instruments in markets that are not active and model-based valuation techniques for which all significant assumptions are observable in the market.
- Level 3 - Valuation is generated from model-based techniques that use significant assumptions not observable in the market. These unobservable assumptions reflect its own estimates of assumptions market participants would use in pricing the asset or liability.

The Company's assets that are measured at fair value on a recurring basis are generally classified within Level 1 or Level 2 of the fair value hierarchy. The types of instruments valued based on quoted market prices in active markets include most money market securities, U.S. Treasury securities and equity investments. Such instruments are generally classified within Level 1 of the fair value hierarchy. The Company invests in money market funds that are traded daily and does not adjust the quoted price for such instruments.

The types of instruments valued based on quoted prices in less active markets, broker or dealer quotations, or alternative pricing sources with reasonable levels of price transparency include the Company's U.S. Agency securities, Commercial Paper, U.S. Corporate Bonds and certificates of deposit. Such instruments are generally classified within Level 2 of the fair value hierarchy. The Company uses consensus pricing, which is based on multiple pricing sources, to value its fixed income investments.

The following tables set forth by level, within the fair value hierarchy, the Company's marketable securities accounted for at fair value as of December 31, 2011 and 2010. Assets and liabilities are classified in their entirety based on the lowest level of input that is significant to the fair value measurement.

	<b>Fair Value Measurements at Reporting Date Using</b>			
	<b>December 31, 2011</b>	<b>Quoted Prices in Active Markets for Identical Assets (Level 1)</b>	<b>Significant Other Observable Inputs (Level 2)</b>	<b>Significant Unobservable Inputs (Level 3)</b>
Money market funds	14,305	14,305	—	—
Commercial paper	—	—	—	—
Corporate debentures/bonds	—	—	—	—
<b>Total</b>	<b>14,305</b>	<b>14,305</b>	<b>—</b>	<b>—</b>

	<b>Fair Value Measurements at Reporting Date Using</b>			
	<b>December 31, 2010</b>	<b>Quoted Prices in Active Markets for Identical Assets (Level 1)</b>	<b>Significant Other Observable Inputs (Level 2)</b>	<b>Significant Unobservable Inputs (Level 3)</b>
Money market funds	1,657	1,657	—	—
Commercial paper	9,395	—	9,395	—
Corporate debentures/bonds	23,993	—	23,993	—
<b>Total</b>	<b>35,045</b>	<b>1,657</b>	<b>33,388</b>	<b>—</b>

#### *Advertising Expenses*

Advertising costs are expensed as incurred. Advertising expense was \$3,675, \$3,503 and \$4,114 for the years ended December 31, 2011, 2010 and 2009, respectively. Substantially all advertising costs were incurred to promote the Company's VPC and open market programs to participants in an effort to acquire electric capacity in fulfillment of certain capacity commitments with utility customers and independent system operators.

### *Software Development Costs for Internal Use*

Software costs for internal use of \$49, \$164 and \$176 were capitalized in 2011, 2010 and 2009, respectively. These costs will be amortized over a three-year expected life in accordance with Company policy. During the year ended December 31, 2011, 2010 and 2009, \$69, \$293 and \$209, respectively, was recorded as depreciation expense for internal use software.

### *Software Development Costs to be Sold, Leased or Otherwise Marketed*

The capitalization of software development costs begins upon the establishment of technological feasibility and ends when the software is generally available. Based upon the Company's product development process, technological feasibility is established upon the completion of a working model or detailed program design. For the years ended December 31, 2010 and 2009, the period between achieving technological feasibility and the general availability of the related products had been short and software development costs qualifying for capitalization had not been material. Accordingly, the Company did not capitalize any software development costs. For the year ended December 31, 2011, the Company capitalized \$1,322 in software development costs for IntelliSOURCE version 2.0 and 3.0. The Company recognized \$267 in amortization of software development costs during the year ended December 31, 2011.

### *Research and Development Expenses*

All research and development costs are expensed as incurred and consist primarily of salaries and benefits.

### *Stock-Based Compensation*

Stock-based compensation expense recognized for the years December 31, 2011, 2010 and 2009 was \$3,313, \$3,327 and \$10,038, respectively, before income taxes.

### *Segment Reporting*

As of December 31, 2011, the Company reports through two operating segments: the Residential Business segment and the C&I Business segment. Operating segments are components of an enterprise for which separate financial information is available and is evaluated regularly by the Company in deciding how to allocate resources and in assessing performance. The Company's chief operating decision maker assesses the Company's performance and allocates the Company's resources based on these segments. These segments constitute the Company's two reportable segments.

Prior to December 31, 2010, the Company reported the results of operations in three segments: the Utility Products & Services segment, the Residential Business segment and the C&I Business segment. Beginning for the year ended December 31, 2010, the former Utility Products & Services segment is presented as part of the Residential Business segment. The results of the Energy Efficiency programs were previously reported in the Residential Business segment. Beginning for the year ended December 31, 2010, the Energy Efficiency programs are reported as part of the C&I Business segment. Accordingly, the results of operations have been reclassified for the year ended December 31, 2009 to conform to the presentation for the years ended December 31, 2011 and 2010. The Company believes that this reporting structure more accurately represents the broader customer markets that it serves: residential, and commercial and industrial.

### *Income Taxes*

The Company utilizes the asset and liability method of accounting for income taxes. Deferred income taxes reflect the net tax effects of temporary differences between the carrying amounts of assets and liabilities for financial reporting purposes and the amounts used for income tax purposes, as well as operating loss, capital loss and tax credit carryforwards. Deferred tax assets and liabilities are classified as current or noncurrent based on the classification of the related assets or liabilities for financial reporting, or according to the expected reversal dates of the specific temporary differences, if not related to an asset or liability for financial reporting. Valuation allowances are established against deferred tax assets if it is more likely than not that they will not be realized. The Company recognizes interest and penalties related to uncertain tax positions in income tax expense. As of December 31, 2011 and 2010, there were no accrued interest and penalties related to uncertain tax positions.

### *Recent Accounting Pronouncements*

In October 2009, the Financial Accounting Standards Board, or FASB, issued Accounting Standards Update, or ASU, No. 2009-13, "Multiple-Deliverable Revenue Arrangements" (ASU 2009-13). ASU 2009-13 changes the requirements for establishing separate units of accounting in a multiple element arrangement and requires the allocation of arrangement consideration to each deliverable to be based on the relative selling price. Concurrently with issuing ASU 2009-13, the FASB also issued ASU No. 2009-14, "Certain Revenue Arrangements That Include Software Elements" (ASU 2009-14). ASU 2009-14 excludes software that is contained on a tangible product from the scope of software revenue guidance if the software component and the non-software component

function together to deliver the tangible products' essential functionality. The Company adopted these standards on a prospective basis for new and materially modified arrangements originating after December 31, 2010. The adoption of these amendments did not have a material effect on the Company's financial statements.

In May 2011, the FASB issued new guidance for the measurement and disclosure of fair value. The primary objective of the standard is to ensure that fair value has the same meaning under GAAP and International Financial Reporting Standards and to establish common fair value measurement guidance in the two sets of standards. The standard does not change the overall fair value model in GAAP, but it amends various fair value principles and establishes additional disclosure requirements. This new guidance will be effective for interim and annual periods beginning after December 15, 2011, with amendments applied prospectively. Adoption is not expected to have a material impact on the Company's financial condition or results of operations.

In June 2011, the FASB issued authoritative guidance related to comprehensive income. The guidance eliminates the option to present other comprehensive income in the Statement of Shareholders' Equity, but instead allows companies to elect to present net income and other comprehensive income in one continuous statement (Statement of Comprehensive Income) or in two consecutive statements. This guidance does not change any of the components of net income or other comprehensive income and earnings per share will still be calculated based on net income. The Company plans to adopt this guidance on January 1, 2012.

In September 2011, the FASB issued new accounting guidance which allows a company the option to make a qualitative evaluation about the likelihood of goodwill impairment. A company will be required to perform the two-step impairment test only if it concludes, based on a qualitative assessment, the fair value of a reporting unit is more likely than not to be less than its carrying value. The guidance is effective for annual and interim goodwill impairment tests performed for fiscal years beginning after December 15, 2011, with early adoption permitted. Adoption is not expected to have a material impact on the Company's financial condition or results of operations.

### 3. *Net Loss Per Share*

Basic net loss per share is computed by dividing net loss by the weighted average number of common shares outstanding for the period. Diluted net loss per share is computed using the weighted average number of common shares outstanding and, when dilutive, potential common shares from options and warrants using the treasury stock method and from convertible securities using the if-converted method. Because the Company reported a net loss for the year ended December 31, 2011, 2010 and 2009, all potential common shares have been excluded from the computation of the dilutive net loss per share for all periods presented because the effect would have been anti-dilutive. Such potential common shares consist of the following:

	<b>Year Ended December 31,</b>		
	<b>2011</b>	<b>2010</b>	<b>2009</b>
Subordinated debt convertible to common stock	2,747,252	1,594,048	—
Unvested restricted stock awards	395,693	557,776	496,589
Outstanding options	2,361,750	2,533,947	1,988,400
<b>Total</b>	<b>5,504,695</b>	<b>4,685,771</b>	<b>2,484,989</b>

### 4. *Accounts Receivable, net*

Billed accounts receivable as of December 31, 2011 and 2010 was \$18,481 and \$14,433, respectively, net of the allowance for doubtful accounts.

Unbilled accounts receivable as of December 31, 2011 and 2010 was \$12,730 and \$17,992, respectively. Unbilled accounts receivable mainly reflect amounts that the Company will invoice in the next twelve months pursuant to the Company's contractual right to make future billings under the Residential Business segment's VPC and turnkey contracts as well as amounts related to the primary capacity program in which the Company receives monthly payments throughout the program year.

### 5. *Inventory, net*

Inventory as of December 31, 2011 and 2010 consisted of the following:

	December 31, 2011	December 31, 2010
Raw materials and supplies	\$ 177	\$ 638
Finished goods	10,200	8,543
Inventory, net	<u>\$ 10,377</u>	<u>\$ 9,181</u>

**6. Property and Equipment, net**

Property and equipment as of December 31, 2011 and 2010 consisted of the following:

	Estimated Useful Life (in years)	December 31, 2011	December 31, 2010
Load control equipment	Contract term	\$ 35,547	\$ 49,423
Computer hardware and software	3	11,573	5,723
Office furniture, automobiles and other equipment	5 - 7	3,671	2,014
Leasehold improvements	Lease term	1,854	1,839
Construction in progress	N/A	203	2,425
Property and equipment		<u>52,848</u>	<u>61,424</u>
Accumulated depreciation		<u>(25,983)</u>	<u>(38,944)</u>
Property and equipment, net		<u>\$ 26,865</u>	<u>\$ 22,480</u>

Depreciation expense in respect of property and equipment was \$5,993, \$6,276 and \$17,689 for the years ended December 31, 2011, 2010 and 2009, respectively. Of such amounts, \$3,932, \$5,256 and \$16,550 were included in cost of revenue and \$2,061, \$1,020 and \$1,139 were included in general and administrative expenses for the years ended December 31, 2011, 2010 and 2009, respectively. The above balances reflect the removal of assets for our Nevada residential VPC program on January 1, 2011 as the title of these assets transferred to NV Energy upon contract expiration.

**7. Goodwill and Intangible Assets, net**

Changes in the carrying amount of the Company's consolidated goodwill during the years ended December 31, 2011 and 2010 consisted of the following:

	Residential Business	C&I Business	Total
Balance as of December 31, 2009:			
Goodwill	499	75,424	75,923
Accumulated impairment losses	—	(67,744)	(67,744)
Goodwill, net	<u>499</u>	<u>7,680</u>	<u>8,179</u>
Balance as of December 31, 2010:			
Goodwill	499	75,424	75,923
Accumulated impairment losses	—	(75,424)	(75,424)
Goodwill, net	<u>499</u>	<u>—</u>	<u>499</u>
Balance as of December 31, 2011:			
Goodwill	499	—	499
Accumulated impairment losses	—	—	—
Goodwill, net	<u>499</u>	<u>—</u>	<u>499</u>

The Company's consolidated intangible assets, net as of December 31, 2011 and 2010 consisted of the following:

	Estimated Useful Life (in years)	As of December 31, 2011		
		Gross Amount	Accumulated Amortization	Net Amount
Trade names and trademarks	Indefinite	\$ 2,758	\$ (2,758)	\$ —
Capitalized software	1-3	1,322	(267)	1,055
Acquired technology	3-8	5,785	(4,802)	983
Patents	4-20	382	(194)	188
Customer relationships and contracts	5-10	13,646	(12,237)	1,409
Total		\$ 23,893	\$ (20,258)	\$ 3,635

	Estimated Useful Life (in years)	As of December 31, 2010		
		Gross Amount	Accumulated Amortization	Net Amount
Trade names and trademarks	Indefinite	\$ 2,758	\$ (2,758)	\$ —
Non-compete agreements	5	456	(456)	—
Acquired technology	3-8	5,749	(3,810)	1,939
Patents	4-20	400	(180)	220
Customer relationships and contracts	5-10	13,646	(11,989)	1,657
Total		\$ 23,009	\$ (19,193)	\$ 3,816

Total estimated amortization expense for all intangible assets for the next five years and thereafter is as follows:

**Year Ended December 31,**

2012	\$ 1,599
2013	458
2014	421
2015	403
2016	403
Thereafter	351

*Impairment Charges - Year Ended December 31, 2010*

Based on the then-current valuations of the Energy Efficiency reporting unit in the C&I Business segment, the Company determined that the related goodwill and intangible assets' carrying value was greater than the fair value. The Company recorded \$9,871 in non-cash impairment charges of goodwill and certain intangible assets in the fourth quarter of 2010, as presented and discussed below.

	Impairment Charges
Goodwill	\$ 7,680
Noncompete agreements	236
Contract acquisition	1,955
Total	\$ 9,871

*Goodwill*

The Company entered into an amendment with a certain customer during the fourth quarter of 2010 that decreased committed capacity in the Energy Efficiency reporting unit in the C&I Business segment, thereby reducing future cash flows. The decline in future cash flows impacted the fair value of the reporting unit, causing its carrying value to exceed its fair value when the Company performed its impairment assessment. The valuation for the goodwill was performed using a discounted cash flow income approach to valuing the business with a 13.1% discount rate. The fair value of the reporting unit was determined using Level 3 inputs. The valuation resulted in an impairment of goodwill related to the C&I Business segment of \$7,680. This charge is included in the line item "Impairment charges" of the Company's consolidated statements of operations for the year



ended December 31, 2010. No further goodwill balance remains related to the Energy Efficiency reporting unit.

The Company also performed its annual impairment test on the remaining \$499 of goodwill as of December 31, 2011 and 2010 and the results of the tests indicated no additional impairment.

#### *Other intangible assets*

Due to the decreased future cash flows as a result of the contract amendment, the Company also evaluated the related intangible assets for impairment. Using the undiscounted cash flows from the Energy Efficiency reporting unit, the Company compared fair value using Level 3 inputs to carrying value, noting that the carrying value exceeded fair value of the reporting unit's intangible assets. Based on the analysis, the Company fully impaired the non-compete agreements and the contract acquisition intangible assets, resulting in a \$2,191 charge during the fourth quarter of 2010, as presented in the line item "Impairment charges" of the Company's consolidated statements of operations for the year ended December 31, 2010.

As a result of the impairment, the Company reversed a deferred tax liability of \$611 associated with the Energy Efficiency reporting unit's intangible assets. The impact of the reversal resulted in an income tax benefit recorded in the year ended December 31, 2010.

The Company also performed an evaluation on the remaining intangibles as of December 31, 2011 and 2010 and the results of the evaluation indicated no additional impairment.

### **8. Accrued Expenses**

Accrued expenses as of December 31, 2011 and 2010 consisted of the following:

	<b>December 31, 2011</b>	<b>December 31, 2010</b>
Capacity program participant agreement	\$ 15,085	\$ 13,374
Other	5,262	4,001
<b>Total accrued expenses</b>	<b>\$ 20,347</b>	<b>\$ 17,375</b>

### **9. Other Current Liabilities**

Other current liabilities as of December 31, 2011 and 2010 consisted of the following:

	<b>December 31, 2011</b>	<b>December 31, 2010</b>
Payroll, bonus and benefits	\$ 3,717	\$ 4,264
Other	3,844	3,698
<b>Total other current liabilities</b>	<b>\$ 7,561</b>	<b>\$ 7,962</b>

### **10. Long-Term Debt**

On November 6, 2008, Comverge, Inc. and all its wholly-owned subsidiaries, excluding Alternative Energy Resources, Inc., entered into a \$25,000 secured revolving credit and term loan facility, or the Facility, with Silicon Valley Bank, or SVB. The Facility originally provided a \$10,000 revolver, the Revolver Facility, for borrowings to fund working capital and other corporate purposes and a \$15,000 term loan, the Term Loan Facility, to repay certain maturing convertible notes on or before April 1, 2009. On February 5, 2010, Comverge, Inc. and its wholly-owned subsidiaries, Enerwise Global Technologies, Inc, Comverge Giants, LLC, Public Energy Solutions, LLC, Public Energy Solutions NY, LLC, Clean Power Markets, Inc., and Alternative Energy Resources, Inc., entered into a second amendment to the Facility. The second amendment increased the Revolver Facility by an additional \$20,000 bringing the total Revolver Facility to \$30,000 for borrowings to fund general working capital and other corporate purposes and issuances of letters of credit. The second amendment also added Alternative Energy Resources, Inc., a wholly-owned subsidiary of Comverge, as a borrower and extended the term of the Revolver Facility by one year to December 31, 2012. In connection with the extension of the term of the Revolver Facility, commitment fees of \$100 and \$75 was paid on February 5, 2010 and February 5, and 2011, respectively, and an additional commitment fee of \$75 is payable on February 5, 2012. The interest on revolving loans under the Facility accrues at either (a) a rate per annum equal

to the greater of the Prime Rate plus the Prime Rate Advance Margin, or (b) a rate per annum equal to the LIBOR Advance Rate plus the LIBOR Rate Advance Margin, as such terms are defined in the loan and security agreement documenting the Facility. During an event of default, interest on revolving loans bears interest at a rate per annum equal to the Prime Rate plus 4.00%. The second amendment also sets forth certain financial ratios to be maintained by the borrowers on a consolidated basis. On November 23, 2010, Comverge, Inc. and its wholly-owned subsidiaries entered in a fourth amendment to the Facility. The fourth amendment modified the availability provisions and financial covenants under the agreement and also modified certain definitions to reflect the subordinated convertible loan and security agreement with Partners for Growth III, L.P. The obligations under the Facility are secured by all assets of Comverge and its other borrower subsidiaries. All other terms and conditions of the Facility remain the same and in full force and effect. The Term Loan Facility became payable over 57 months beginning April 1, 2009 and matures on December 31, 2013. The Facility contains customary terms and conditions for credit facilities of this type, including restrictions on the Company's ability to incur additional indebtedness, create liens, enter into transactions with affiliates, transfer assets, pay dividends or make distributions on, or repurchase, Comverge, Inc. stock, consolidate or merge with other entities, or suffer a change in control. In addition, the Company is required to meet certain financial covenants customary in this type of agreement, including maintaining a minimum specified tangible net worth and a minimum specified ratio of current assets to current liabilities which were defined as \$42,000 as of the end of the fourth quarter of 2011 and 1.25:1.00 as of December 31, 2011, respectively. The Facility contains customary events of default, including payment defaults, breaches of representations, breaches of affirmative or negative covenants, cross defaults to other material indebtedness, bankruptcy and failure to discharge certain judgments. If a default occurs and is not cured within any applicable cure period or is not waived, the Company's obligations under the Facility may be accelerated, including making all outstanding amounts due currently at SVB's option. As of December 31, 2011, the Company had \$23,481 of outstanding letters of credit under the Revolving Facility.

On November 5, 2010, Comverge, Inc. and its wholly-owned subsidiaries entered into a five-year \$15,000 subordinated convertible loan and security agreement with Partners For Growth III, L.P., or PFG. The loan was used to fund general working capital and other corporate purposes. Interest on the loan is payable monthly and accrues at a rate per annum equal to the floating Prime Rate (as such term is defined in the PFG loan agreement) plus 2.50%, which sum as of December 31, 2011 was equal to 6.50%. As discussed further below, the Company was notified by letters dated February 24, 2012 and March 8, 2012 that Grace Bay Holdings II, LLC ("Grace Bay") acquired by assignment all of the outstanding principal amount of the notes issued under the agreement with PFG as well as all of the rights and obligations heretofore possessed by PFG under the loan agreement with PFG. During an event of default, interest shall be increased by a rate of 4.00% per annum. The agreement contains customary events of default, including for payment defaults, breaches of representations, breaches of affirmative or negative covenants, cross defaults to other material indebtedness, bankruptcy and failure to discharge certain judgments. If a default occurs and is not cured within any applicable cure period or is not waived, the Company's obligations under the loan agreement may be accelerated, including making all outstanding amounts due currently at Grace Bay's option. The agreement also sets forth quarterly revenue targets to be maintained by the borrowers on a consolidated basis. If the revenue targets are not maintained, Grace Bay has the right, but not the obligation, to begin requiring monthly amortization payments of the loan balance over the remaining term of the loan. Such payments would be front-loaded, such that 45% of the loan balance would be due over the first twelve months after the Grace Bay's election. If Grace Bay exercises its right to require such amortization and the Company subsequently complies with succeeding measurement periods, the Company may prospectively cease monthly amortization of the loan; provided however, Grace Bay may again exercise its right to require such amortization under the loan agreement if the Company fails to meet future minimum revenue targets. Any failure by the Company to maintain such minimum revenues does not, by itself, constitute a default or an event of default under the loan and security agreement. The obligations under the loan agreement are secured by all assets of Comverge and its subsidiaries. As its option, Grace Bay had the ability to convert the note evidencing the loan into up to 1,594,048 shares of Comverge common stock at \$9.41 per share prior to the effectiveness of Modification No. 1 as described below. Subject to certain terms, the loan agreement provides the Company the ability to force Grace Bay to convert the note at the market price per share on the date Comverge gives notice of its election to force such conversion, discounted by a certain percentage; provided however, the Company may not force conversion of the note unless the then-current trading price for the Company's common stock exceeds \$6.825 on or before May 5, 2012 and \$7.371 thereafter. The Company's call option qualifies as a contingent beneficial conversion feature which would be recorded if and when the contingent event occurs. The loan agreement also provides, at the borrowers' option, the ability to borrow up to an additional \$5,000 in the first 36 months from the effective date of the loan agreement by issuing one or more notes to Grace Bay, which are convertible into common stock at a conversion price based upon the stock price at the time of the additional borrowing; however, at no time may the amount of existing unconverted borrowings exceed \$20,000. In connection with the loan, a commitment fee of \$300 was paid on November 5, 2010. There are no additional commitment fees.

The Company entered into Modification No. 1 to the subordinated convertible loan and security agreement effective March 31, 2011. The modification revised the quarterly revenue targets for fiscal year 2011, specifically changing the target for the year ended December 31, 2011 from \$149,899 to \$139,838. As the Company did not meet the fiscal year 2011 revenue target, it

reclassified three months of payments, or \$1,688, to current portion of long-term debt as of December 31, 2011. The Company believes that it will meet the revenue target for the first quarter of 2012 and cease amortization at that time. The modification of the subordinated convertible loan agreement also revised the price at which the note may be optionally converted by Grace Bay into the Company's common stock from \$9.41 to \$5.46 per share of common stock. As a result of the modification, the Company recognized a charge of \$523 in interest expense to write off the debt issuance costs related to the original agreement during the year ended December 31, 2011. Modification No. 1 is included as Exhibit 10.1 with the Company's Quarterly Report on Form 10-Q for the three months ended March 31, 2011 as filed with the SEC on May 5, 2011.

Pursuant to Schedule 13D filed with the Securities and Exchange Commission on February 27, 2012, Grace Bay entered into an Assignment and Assumption Agreement with PFG ("the Assignment Agreement"), whereby Grace Bay purchased \$7,650 or 51% of the aggregate principal amount of the PFG loan with an option to purchase the remaining 49%, effective February 24, 2012. On March 2, 2012, PFG gave notice of its right under the Assignment Agreement to put its remaining interest in the loan to Grace Bay (the "Put"). By letter dated March 8, 2012, Grace Bay delivered notice to the Company that it had acquired PFG's remaining interest in the Note. From and after March 8, 2012, PFG does not have any voting or dispositive control over the loan.

Long-term debt as of December 31, 2011 and 2010 consisted of the following:

	December 31, 2011	December 31, 2010
Security and loan agreement with SVB, collateralized by all assets of Comverge, Inc. and its subsidiaries, maturing in December 2013, interest payable at a variable rate (3.27% and 3.26% as of December 31, 2011 and 2010, respectively)	\$ 11,250	\$ 9,750
Subordinated convertible loan agreement with Grace Bay, secured by all assets of Comverge, Inc. and its subsidiaries, maturing in November 2015, interest payable at a variable rate (6.50% and 5.75% as of December 31, 2011 and 2010, respectively)	15,000	15,000
<b>Total debt</b>	<b>26,250</b>	<b>24,750</b>
Less: Current portion of long-term debt	(9,188)	(3,000)
<b>Total long-term debt</b>	<b>\$ 17,062</b>	<b>\$ 21,750</b>

The fair value of the debt obligations was approximately \$21,637 as of December 31, 2011. The Company determined the estimated fair value of the long-term debt by using the discounted cash flows method.

Total debt payments in future periods is as follows:

**Year Ended December 31,**

2012	\$ 9,188
2013	3,750
2014	—
2015	13,312

**11. Income Taxes**

The income tax provision (benefit) consists of the following:

	Year Ended December 31,		
	2011	2010	2009
Federal income tax at statutory federal rate	34.0 %	34.0 %	34.0 %
State income tax expense (benefit), net of federal benefit	(0.2)%	— %	(0.1)%
Other	(1.0)%	(0.1)%	0.4 %
Valuation allowance	(33.3)%	(32.8)%	(35.0)%
<b>Effective tax rate</b>	<b>(0.5)%</b>	<b>1.1 %</b>	<b>(0.7)%</b>

A reconciliation of income tax expense (benefit) at the statutory federal income tax rate and income taxes as reflected in the

consolidated financial statements is as follows:

	<b>Year Ended December 31,</b>		
	<b>2011</b>	<b>2010</b>	<b>2009</b>
Current:			
U.S. Federal	\$ —	\$ —	\$ —
State and local	25	48	19
<b>Total</b>	<b>25</b>	<b>48</b>	<b>19</b>
Deferred:			
U.S. Federal	24	(346)	187
State and local	23	(41)	13
<b>Total</b>	<b>47</b>	<b>(387)</b>	<b>200</b>
Provision for income taxes	<u>\$ 72</u>	<u>\$ (339)</u>	<u>\$ 219</u>

Deferred tax assets (liabilities) consisted of the following:

	<b>Year Ended December 31,</b>	
	<b>2011</b>	<b>2010</b>
Deferred tax assets:		
Net operating loss carryforwards	\$ 46,105	\$ 37,243
Other	14,297	16,283
Gross deferred income tax assets	60,402	53,526
Less: valuation allowance for deferred income tax assets	(60,402)	(53,526)
Net deferred income tax assets	—	—
Deferred tax liabilities:		
Intangible amortization	(187)	(155)
Other	—	—
Net deferred income tax liabilities	<u>\$ (187)</u>	<u>\$ (155)</u>

As of December 31, 2011, the company had a net deferred tax liability of \$187 related to amortization of tax deductible goodwill.

Deferred tax assets are required to be reduced by a valuation allowance if it is more likely than not that some portion or all of a deferred tax asset will not be realized. The ultimate realization of deferred tax assets is dependent upon the generation of future taxable income during the periods in which those temporary differences are deductible. In making this determination, the Company considers all available positive and negative evidence affecting specific deferred tax assets, including the Company's past and anticipated future performance, the reversal of deferred tax liabilities, the length of carry-back and carry-forward periods and the implementation of tax planning strategies. Objective positive evidence is necessary to support a conclusion that a valuation allowance is not needed for all or a portion of deferred tax assets. For the year ended December 31, 2011, the Company has determined that based on all available evidence, a valuation allowance of \$60,402 is appropriate. The Company's valuation allowance for the year ended December 31, 2010 was \$53,526. The Company's cumulative losses in recent years provided the significant negative evidence used in making the determinations.

Deferred tax assets relating to the tax benefits of employee stock option grants have been reduced to reflect exercises through the year ended December 31, 2011. Certain exercises resulted in tax deductions in excess of previously recorded tax benefits. The Company's net operating carryforwards referenced below at December 31, 2011 include \$21,258 of income tax deductions in excess of previously recorded tax benefits. Although these additional tax deductions are reflected in net operating loss carryforwards referenced below, the tax benefit will not be recognized until they reduce taxes payable. Accordingly, since the tax benefit does not reduce the Company's current taxes payable in 2011, these tax benefits are not reflected in the Company's deferred tax assets presented above. The tax benefit of these excess deductions will be reflected as a credit to additional paid-in capital when recognized.

The Company has federal, state, and foreign net operating losses of approximately \$140,826, \$94,077 and \$3,849, respectively, as of December 31, 2011. The Federal net operating loss carryforwards begin expiring in 2019 and state net operating loss carryforwards began expiring in 2009. The foreign net operating losses do not expire. The above net operating losses reflect a limitation set forth by section 382 of the Internal Revenue Code due to prior ownership changes.



As of December 31, 2011 and 2010, the Company had determined no liabilities for uncertain tax positions should be recorded. The tax years ended December 31, 2010, 2009 and 2008 remain open for audit based on the statute of limitations.

## 12. Commitments and Contingencies

### *Operating Leases*

Rental lease expenses for the years ended December 31, 2011, 2010 and 2009 were \$2,378, \$2,242 and \$2,175, respectively. The Company mainly incurs rent expense due to office space leased for both operations and administrative functions and vehicles leased for operations. These lease agreements for office space range in length from one year to eight years and lease agreements for vehicles are generally for three years. Estimated future minimum rental payments and lease payments on noncancelable operating leases as of December 31, 2011 were as follows:

#### **Year Ended December 31,**

2012	\$ 2,383
2013	1,193
2014	681
2015	465
2016	423
Thereafter	216

### *Employee Retirement Savings Plan*

The Company sponsors a tax deferred retirement savings plan that permits eligible U.S. employees to contribute varying percentages of their compensation up to the limit allowed by the Internal Revenue Service. This plan also provides for discretionary Company contributions. No discretionary contributions were made for the years ended December 31, 2011, 2010 or 2009.

### *Licensing Agreements*

The Company is obligated to pay royalties to the licensor for each unit of hardware sold that incorporates a certain licensed technology under two separate licensing agreements. During the years ended December 31, 2011, 2010 and 2009, the Company paid an immaterial amount in royalties for the two licensing agreements.

### *Guarantees*

The Company typically grants customers a limited warranty that guarantees that its products will substantially conform to current specifications for one year for hardware products and ninety days for software products from the delivery date. The Company also indemnifies its customers from third-party claims relating to the intended use of its products. Standard software license agreements contain indemnification clauses. Pursuant to these clauses, the Company indemnifies and agrees to pay any judgment or settlement relating to a claim. As of December 31, 2011 and 2010, we had \$209 and \$620 recorded in accrued warranty liability.

The Company has guaranteed the electrical capacity it has committed to deliver pursuant to certain long-term contracts. Such guarantees may be secured by cash, letters of credit, performance bonds or third-party guarantees. Performance guarantees as of December 31, 2011 and 2010 were \$27,719 and \$19,774, respectively.

### *Legal Proceedings*

The Company assesses the likelihood of any adverse judgments or outcomes related to legal matters, as well as ranges of probable losses. A determination of the amount of the liability required, if any, for these contingencies is made after an analysis of each known issue. In accordance with applicable accounting guidance, a liability is recorded when the Company determines that a loss is probable and the amount can be reasonably estimated. Additionally, the Company discloses contingencies for which a material loss is reasonably possible, but not probable. As a litigation or regulatory matter develops, the Company monitors the matter for further developments that could affect the amount previously accrued, if any, and updates such amount accrued or disclosures previously provided as appropriate. As of December 31, 2011, there were no material contingencies requiring accrual.

On November 22, 2010, a civil action complaint was filed against the Company in the United States District Court for the Eastern District of Kentucky (Case No. 5:10-CV-00398) by East Kentucky Power Cooperative, Inc. ("EKPC"). EKPC alleged

a breach of warranty claim relating to certain thermostats manufactured by White-Rodgers that it claims are defective. The relief sought by EKPC includes an unspecified amount of damages, pre- and post-judgment interest and costs. The parties are attempting to resolve the dispute, however, if the dispute cannot be resolved, the Company intends to defend this claim vigorously.

On May 9, 2011, a civil action complaint was filed against the Company and White-Rodgers, a division of Emerson Electric, in the Ontario Superior Court of Justice (Case No. CV-11-16275) by Enwin Utilities Ltd. Enwin alleged breach of contract and tort claims for approximately 2,000 thermostats, manufactured by White-Rodgers, and purchased from Comverge. The relief sought by Enwin includes \$1,000 in damages plus costs. The Company intends to defend this claim vigorously.

At this time, the Company's management cannot estimate with reasonable certainty the ultimate disposition of any of the unresolved lawsuits and, while the Company does not believe it will sustain material liability in relation to any of the two active disputes described above, there can be no assurance that the Company will not sustain material liability as a result of, or related to, these lawsuits.

### **13. Shareholders' Equity**

#### *Common Stock*

Holders of the Company's common stock are entitled to dividends if and when declared by the Board of Directors. The holders of common stock are entitled to vote upon all matters submitted to a vote of holders of common stock of the Company and shall be entitled to one vote for each share of common stock held.

In November 2011, the Company entered into a common stock purchase agreement with Aspire Capital Fund, LLC, an Illinois limited liability company, whereby Aspire Capital has committed over the next two years to purchase up to \$10,000 of the Company's common stock based on prevailing market prices over a period preceding each sale. The Company is not required to sell the entire \$10,000 of Comverge common stock. The Company issued 144,927 shares of its common stock to Aspire as a commitment fee in connection with entering into the purchase agreement.

#### *Treasury Stock*

Treasury stock represents shares surrendered by employees to exercise stock options and to satisfy tax withholding obligations on vested restricted stock and stock option exercises pursuant to the 2006 Long-Term Incentive Plan, as amended. Treasury stock is carried at the market value on the date of vesting or exercise.

#### *Preferred Stock*

The Company is authorized to issue 15,000,000 shares of preferred stock. As of December 31, 2011 and 2010, no preferred stock was issued or outstanding. The rights, preferences, and provisions would be determined, at the discretion of the Board of Directors, at the time of issuance.

#### *Stock Warrants*

In June 2010, the Company entered into a joint venture master agreement with Projects International, Inc., or Projects International, to form a strategic alliance arrangement under which the parties will identify and jointly pursue opportunities for demand response, smart grid and energy efficiency projects in certain countries or geographical regions. The Company also entered into a warrant agreement with Projects International pursuant to which up to 1,200,000 shares of Comverge common stock may be purchased by Projects International for \$16.24 per share upon the attainment of defined performance metrics in the warrant agreement. The warrant agreement provides that warrants will be earned if Projects International is successful during the first three years of the master agreement in securing a qualifying contract resulting in a minimum of 100 megawatts of delivered load reduction over the term of the contract, and in increments of 120,000 shares for every 100 megawatts of delivered load reduction contracts, in the aggregate, above the minimum performance metric, up to a maximum of 1,000 megawatts. No warrants under the agreement have been issued as of December 31, 2011 and no amounts have been recorded in the results of operations for the year ended December 31, 2011.

### **14. Stock-Based Compensation**

The Company's Amended and Restated 2006 Long-Term Incentive Plan, or 2006 LTIP, was approved by the Company's shareholders in May 2010 and provides for the granting of stock-based incentive awards to eligible Company employees and directors and to other non-employee service providers, including options to purchase the Company's common stock and restricted stock awards at not less than the fair value of the Company's common stock on the grant date and for a term of not

greater than seven years. Awards are granted with service vesting requirements, performance vesting conditions, market vesting conditions, or a combination thereof. Subject to adjustment as defined in the 2006 LTIP, the aggregate number of shares available for issuance is 7,556,036. Outstanding stock-based incentive awards expire between five and ten years from the date of grant and generally vest over a one to four-year period from the date of grant. As of December 31, 2011, 1,950,053 shares were available for grant under the 2006 LTIP. The expense related to stock-based incentive awards recognized for the years ended December 31, 2011, 2010 and 2009 was \$3,313, \$3,327 and \$10,038.

A summary of the Company's stock option activity for the year ended December 31, 2011, 2010 and 2009, respectively, is presented below:

	2011			2010		2009	
	Number of Options (in Shares)	Weighted Average Exercise Price	Range of Exercise Prices	Number of Options (in Shares)	Weighted Average Exercise Price	Number of Options (in Shares)	Weighted Average Exercise Price
Outstanding at beg. of year	2,533,947	\$ 11.82	\$0.58-\$34.23	1,988,400	\$ 12.63	1,810,656	\$ 14.23
Granted	505,923	5.11	\$2.19 - \$6.20	1,024,293	9.71	684,970	6.07
Exercised	(90,178)	1.29	\$0.58 - \$4.30	(137,756)	1.74	(310,447)	3.63
Cancelled	(180,779)	17.93	\$0.58-\$34.23	(149,750)	22.03	(28,131)	22.33
Forfeited	(407,163)	7.51	\$3.70-\$13.90	(191,240)	8.16	(168,648)	18.11
Outstanding at end of year	2,361,750	\$ 11.06	\$0.58-\$34.23	2,533,947	\$ 11.82	1,988,400	\$ 12.63
Exercisable at end of year	1,577,966	\$ 12.68	\$0.58-\$34.23	1,442,791	\$ 13.73	1,408,782	\$ 14.46

As of December 31, 2011 outstanding and exercisable options had no intrinsic value, in the aggregate. The intrinsic value of outstanding options approximates the intrinsic value of options expected to vest.

Exercise Prices	Outstanding as of December 31, 2011			Exercisable as of December 31, 2011		
	Number Outstanding (In Shares)	Average Remaining Contractual Life (In Years)	Weighted Average Exercise Price per Share	Number Exercisable (In Shares)	Average Remaining Contractual Life (In Years)	Weighted Average Exercise Price per Share
\$0.58 - \$2.39	124,670	1.4	\$ 0.89	112,639	0.8	\$ 0.75
\$2.40 - \$3.99	97,024	6.1	3.52	14,899	4.5	3.38
\$4.00 - \$7.99	489,468	4.6	5.22	231,800	3.2	4.80
\$8.00-\$10.33	684,490	4.6	9.78	351,074	4.1	9.70
\$10.34 - \$14.09	467,219	2.9	11.57	368,944	2.4	11.76
\$14.10 - \$17.99	1,000	0.6	14.10	1,000	0.6	14.10
\$18.00 - \$23.53	352,007	1.9	18.05	351,738	1.9	18.05
23.54	13,672	1.8	23.54	13,672	1.8	23.54
\$23.55 - \$36.00	132,200	2.1	32.72	132,200	2.1	32.72
	2,361,750	3.6	\$ 11.06	1,577,966	2.6	\$ 12.68

Of the stock options outstanding as of December 31, 2011, 2,323,524 options were held by employees and 38,226 options were held by members or former members of the Board of Directors. During the year ended December 31, 2011, proceeds received from the exercise of 90,178 options were \$117. The intrinsic value of options exercised during December 31, 2011 was approximately \$259.

For awards with performance and/or service conditions only, the Company utilized the Black-Scholes option pricing model to estimate fair value of options issued, with the following assumptions (weighted averages based on grants during the period):

	Year Ended December 31,		
	2011	2010	2009
Risk-free interest rate	2.28%	2.03%	1.91%
Expected term of options, in years	4.5	4.6	4.6
Expected annual volatility	71%	70%	70%
Expected dividend yield	—%	—%	—%

The weighted average grant date fair value for option grants awarded during the year was \$2.89, \$5.50 and \$3.66 for the years ended December 31, 2011, 2010 and 2009, respectively. Volatility measures the amount that a stock price has fluctuated or is expected to fluctuate during a period. Beginning in mid-2011, the Company determines volatility based on historical prices of its common stock over a period equal to the expected term of an award. Prior to mid-2011, the Company determined volatility based on an analysis of comparable public companies as it had limited history as a public company. The risk-free interest rate is the rate available as of the option date on zero-coupon U.S. government issues with a remaining term equal to the expected life of the option. The Company uses the mid-life method for estimating expected term as it believes that the limited history as a public company does not provide predictive behavior on option exercises. Prior to mid-2011, the Company used the simplified method for estimating expected term as it did not have a sufficient history as a public company. The simplified method is based on vesting-tranches and the contractual life of each grant. The Company has not paid dividends in the past and does not plan to pay any dividends in the foreseeable future. The Company estimates its forfeiture rate of unvested stock awards based on historical experience.

On November 6, 2009, the Company's board of directors approved the acceleration of the vesting of 192,053 service-based stock options with exercise prices equal to or greater than \$14.10 for certain of its employees. Restricted stock, stock options with vesting based on performance, and stock options held by executive officers and directors were not accelerated. As a result of the acceleration, an aggregate of 192,053 unvested stock options with exercise prices ranging from \$14.10 to \$34.23 became immediately exercisable. The weighted average exercise price of the options that were accelerated was \$23.85. The accelerated options would have vested from time to time through February 4, 2012. All other terms and conditions applicable to the accelerated stock option grants, including the exercise price, number of shares, and term, remain unchanged. The incremental noncash stock based compensation expense recognized in the fourth quarter of 2009 as a result of the acceleration was \$2,705.

A summary of the Company's restricted stock award activity for the years ended December 31, 2011, 2010 and 2009 is presented below:

	2011		2010		2009	
	Number of Shares	Weighted Average Grant Date Fair Value Per Share	Number of Shares	Weighted Average Grant Date Fair Value Per Share	Number of Shares	Weighted Average Grant Date Fair Value Per Share
Unvested at beginning of year	557,776	\$ 8.91	496,589	\$ 9.28	548,511	\$ 10.80
Granted	263,417	4.25	285,505	9.78	164,505	7.17
Vested	(140,191)	12.55	(83,516)	13.89	(146,201)	12.01
Forfeited	(285,309)	8.31	(140,802)	9.03	(70,226)	10.04
Unvested at end of year	395,693	\$ 4.95	557,776	\$ 8.91	496,589	\$ 9.28

During the year ended December 31, 2011, the Company granted 263,417 restricted stock awards. Of these awards, 5,500 shares were granted with performance conditions based on achieving an EBITDA target for the year ended December 31, 2011, with the remaining awards granted with service conditions. During the year ended December 31, 2010, the Company granted 285,505 restricted stock awards. Of these awards, 6,833 shares were granted with performance conditions based on achieving an EBITDA target for the year ended December 31, 2010, with the remaining awards granted with service conditions. During the year ended December 31, 2009, the Company granted 164,505 restricted stock awards. Of these awards, 8,667 shares were granted with performance conditions based on achieving an EBITDA target for the year ended December 31, 2009, with the remaining awards granted with service conditions.

For awards with service conditions, including graded vesting if such award is granted to an employee, the Company recognizes stock-based compensation expense on a straight-line basis over the requisite service period for the entire award. For awards with performance conditions, the Company recognizes stock-based compensation expense over the performance period based on assessed probability of performance achievement. For awards with market conditions, the Company recognizes stock-based compensation over the derived service period. The weighted average period in which the Company expects to recognize the compensation expense for unvested awards is 1.6 years. The remaining amount of \$4,471 to be recognized as compensation expense for unvested awards as of December 31, 2011 is presented below.

**Year Ended December 31,**

2012	\$	2,365
2013		1,548
2014		505
2015		53
2016		—
Thereafter		—

Mr. Robert M. Chiste retired from the Company as Chairman of the Board of Directors, President and Chief Executive Officer, effective June 19, 2009, and resigned from the Company's Board, effective June 20, 2009. In connection with his retirement, Mr. Chiste and the Company entered into a retirement agreement dated July 17, 2009, pursuant to which, related to equity awards, all unvested options held by Mr. Chiste as of June 19, 2009 vest and became exercisable in full and remain exercisable for the lesser of their remaining terms or until March 31, 2013 and all restricted stock grants and any other equity-based awards held by Mr. Chiste as of June 19, 2009 vest and became exercisable in full. As a result, the Company recorded an expense of \$2,786 in non-cash stock-based compensation expense during the third quarter of 2009.

**15. Segment Information**

As of December 31, 2011, the Company had two reportable segments: the Residential Business segment and the C&I Business segment. Management has three primary measures of segment performance: revenue, gross profit and operating income. The Company does not allocate assets and liabilities to its operating segments. All inter-operating segment revenues were eliminated in consolidation. For the year ended December 31, 2011, substantially all of our revenues were generated with domestic customers. Prior to December 31, 2010, the Company reported the results of operations in three segments: the Utility Products & Services segment, the Residential Business segment and the C&I Business segment. Beginning for the year ended December 31, 2010, the former Utility Products & Services segment is presented as part of the Residential Business segment. The results of the Energy Efficiency programs were previously reported in the Residential Business segment. Beginning for the year ended December 31, 2010, the Energy Efficiency programs are reported as part of the C&I Business segment. Accordingly, the results of operations have been reclassified for the year ended December 31, 2009 to conform to the presentation for the years ended December 31, 2011 and 2010. The Company believes that this reporting structure more accurately represents the broader customer markets that it serves: residential, and commercial and industrial.

The Residential Business segment sells intelligent energy management solutions to utility customers for use in programs with residential and small commercial end-use participants. These solutions include intelligent hardware, our IntelliSOURCE software and services, such as installation, customer acquisition marketing and program management. If the Company enters into a fully-outsourced pay-for-performance agreement providing capacity or energy, in which it typically owns the intelligent energy management system, the Company refers to the program as a VPC program. The VPC programs are pay-for-performance in that the Company is only paid for capacity that it provides as determined by a measurement and verification process with its customers. For VPC programs, cost of revenue is based on operating costs of the demand response system, primarily telecommunications costs related to the system and depreciation of the assets capitalized in building the demand response system. If the customer elects to own the intelligent energy management system, the Company refers to the program as a turnkey program. For turnkey programs and other sales, product and service cost of revenue includes materials, labor and overhead.

The C&I Business segment provides intelligent energy management solutions to utilities and independent system operators that are managing programs or auctions for large C&I consumers. These solutions are delivered through the management of C&I megawatts in open markets and VPC programs as well as through the completion of energy efficiency projects. Cost of revenue includes participant payments for the VPC and open market programs as well as materials, labor and overhead for the energy efficiency programs.

Operating expenses directly associated with each operating segment include sales, marketing, product development, amortization of intangible assets and certain administrative expenses. Operating expenses not directly associated with an operating segment are classified as “Corporate Unallocated Costs.” Corporate Unallocated Costs include support group compensation, travel, professional fees and marketing activities.

The following tables show operating results for each of the Company’s reportable segments:

	<b>Year Ended December 31, 2011</b>			
	<b>Residential Business</b>	<b>C&amp;I Business</b>	<b>Corporate Unallocated Costs</b>	<b>Total</b>
Revenue				
Product	\$ 22,645	\$ —	\$ —	\$ 22,645
Service	54,760	59,015	—	113,775
Total revenue	77,405	59,015	—	136,420
Cost of revenue				
Product	17,611	—	—	17,611
Service	26,323	36,481	—	62,804
Total cost of revenue	43,934	36,481	—	80,415
Gross profit	33,471	22,534	—	56,005
Operating expenses				
General and administrative expenses	14,394	4,962	21,644	41,000
Marketing and selling expenses	8,563	7,485	4,088	20,136
Research and development expenses	4,297	—	—	4,297
Amortization of intangible assets	—	633	12	645
Operating income (loss)	6,217	9,454	(25,744)	(10,073)
Interest and other expense (income), net	22	(7)	2,665	2,680
Income (loss) before income taxes	<u>\$ 6,195</u>	<u>\$ 9,461</u>	<u>\$ (28,409)</u>	<u>\$ (12,753)</u>

	<b>Year Ended December 31, 2010</b>			
	<b>Residential Business</b>	<b>C&amp;I Business</b>	<b>Corporate Unallocated Costs</b>	<b>Total</b>
Revenue				
Product	\$ 23,152	\$ —	\$ —	\$ 23,152
Service	44,453	51,784	—	96,237
Total revenue	67,605	51,784	—	119,389
Cost of revenue				
Product	17,662	—	—	17,662
Service	22,056	34,820	—	56,876
Total cost of revenue	39,718	34,820	—	74,538
Gross profit	27,887	16,964	—	44,851
Operating expenses				
General and administrative expenses	16,843	4,842	17,677	39,362
Marketing and selling expenses	6,831	7,659	3,541	18,031
Research and development expenses	6,279	—	—	6,279
Amortization of intangible assets	—	2,128	16	2,144
Impairment charges	—	9,871	—	9,871
Operating loss	(2,066)	(7,536)	(21,234)	(30,836)
Interest and other expense (income), net	(12)	(5)	871	854
Loss before income taxes	<u>\$ (2,054)</u>	<u>\$ (7,531)</u>	<u>\$ (22,105)</u>	<u>\$ (31,690)</u>



	<b>Year Ended December 31, 2009</b>			
	<b>Residential Business</b>	<b>C&amp;I Business</b>	<b>Corporate Unallocated Costs</b>	<b>Total</b>
<b>Revenue</b>				
Product	\$ 20,732	\$ —	\$ —	\$ 20,732
Service	39,764	38,348	—	78,112
<b>Total revenue</b>	<b>60,496</b>	<b>38,348</b>	<b>—</b>	<b>98,844</b>
<b>Cost of revenue</b>				
Product	12,912	—	—	12,912
Service	25,569	27,167	—	52,736
<b>Total cost of revenue</b>	<b>38,481</b>	<b>27,167</b>	<b>—</b>	<b>65,648</b>
<b>Gross profit</b>	<b>22,015</b>	<b>11,181</b>	<b>—</b>	<b>33,196</b>
<b>Operating expenses</b>				
General and administrative expenses	13,274	5,894	18,613	37,781
Marketing and selling expenses	8,874	5,966	2,897	17,737
Research and development expenses	4,878	—	—	4,878
Amortization of intangible assets	—	2,191	18	2,209
<b>Operating loss</b>	<b>(5,011)</b>	<b>(2,870)</b>	<b>(21,528)</b>	<b>(29,409)</b>
Interest and other expense (income), net	1,657	(7)	388	2,038
<b>Loss before income taxes</b>	<b>\$ (6,668)</b>	<b>\$ (2,863)</b>	<b>\$ (21,916)</b>	<b>\$ (31,447)</b>

## 16. Related Party Transactions

During the year ended December 31, 2009, Comverge and Tangent Energy Solutions, a privately-held company, have a non-exclusive referral agreement whereby the Company would provide demand response services to Tangent and its customers. Mr. Scott Ungerer, a former director of the Company also serves on the board of directors of Tangent Energy Solutions and is the managing director of EnerTech Capital Funds, a beneficial owner of Comverge common stock. EnerTech currently is a majority owner of Tangent Energy Solutions. Mr. Ungerer resigned from the Company's board of directors on February 27, 2012.

No material services were provided and no payments were made under the agreement during the years ended December 31, 2011, 2010 and 2009.

## 17. Quarterly Financial Information (Unaudited)

The following table illustrates selected unaudited consolidated quarterly statement of operations data for the years ended December 31, 2011 and 2010. In the Company's opinion, this unaudited information has been prepared on substantially the same basis as the consolidated financial statements appearing elsewhere in this Annual Report on Form 10-K and includes all adjustments (consisting of normal recurring adjustments) necessary to present fairly the unaudited consolidated quarterly data. The unaudited consolidated quarterly data should be read together with the audited consolidated financial statements and notes thereto appearing elsewhere in this Annual Report on Form 10-K. The results for any quarter are not necessarily indicative of results for any future period.

	Quarter Ended in 2011			
	March 31	June 30	September 30	December 31
Revenue				
Product	\$ 4,691	\$ 7,663	\$ 5,414	\$ 4,877
Service	13,934	24,792	43,189	31,860
Total revenue	18,625	32,455	48,603	36,737
Cost of revenue				
Product	3,462	6,355	4,397	3,397
Service	7,396	14,759	27,612	13,037
Total cost of revenue	10,858	21,114	32,009	16,434
Gross profit	7,767	11,341	16,594	20,303
Operating expenses				
General and administrative expenses	10,234	11,159	10,410	9,197
Marketing and selling expenses	5,089	5,199	5,107	4,741
Research and development expenses	1,049	1,052	1,216	980
Amortization of intangible assets	237	236	106	66
Operating income (loss)	(8,842)	(6,305)	(245)	5,319
Interest and other expense, net	929	723	612	416
Income (loss) before income taxes	(9,771)	(7,028)	(857)	4,903
Provision for income taxes	15	18	18	21
Net income (loss)	\$ (9,786)	\$ (7,046)	\$ (875)	\$ 4,882
Net income (loss) per share (basic)	\$ (0.39)	\$ (0.28)	\$ (0.04)	\$ 0.20
Net income (loss) per share (diluted)	\$ (0.39)	\$ (0.28)	\$ (0.04)	\$ 0.18

	<b>Quarter Ended in 2010</b>			
	<b>March 31</b>	<b>June 30</b>	<b>September 30</b>	<b>December 31</b>
Revenue				
Product	\$ 5,461	\$ 5,294	\$ 5,798	\$ 6,599
Service	7,920	11,753	45,937	30,627
<b>Total revenue</b>	<b>13,381</b>	<b>17,047</b>	<b>51,735</b>	<b>37,226</b>
Cost of revenue				
Product	3,624	4,382	4,588	5,068
Service	5,042	7,308	30,928	13,598
<b>Total cost of revenue</b>	<b>8,666</b>	<b>11,690</b>	<b>35,516</b>	<b>18,666</b>
Gross profit	4,715	5,357	16,219	18,560
Operating expenses				
General and administrative expenses	8,098	9,214	10,496	11,554
Marketing and selling expenses	4,778	4,066	4,634	4,553
Research and development expenses	1,365	1,543	1,664	1,707
Amortization of intangible assets	536	536	536	536
Impairment charges	—	—	—	9,871
<b>Operating loss</b>	<b>(10,062)</b>	<b>(10,002)</b>	<b>(1,111)</b>	<b>(9,661)</b>
Interest and other expense, net	62	291	214	287
<b>Loss before income taxes</b>	<b>(10,124)</b>	<b>(10,293)</b>	<b>(1,325)</b>	<b>(9,948)</b>
Provision (benefit) for income taxes	60	55	55	(509)
<b>Net loss</b>	<b>\$ (10,184)</b>	<b>\$ (10,348)</b>	<b>\$ (1,380)</b>	<b>\$ (9,439)</b>
<b>Net loss per share (basic and diluted)</b>	<b>\$ (0.41)</b>	<b>\$ (0.42)</b>	<b>\$ (0.06)</b>	<b>\$ (0.38)</b>

Net loss for the fourth quarter of 2010 included non-recurring impairment charges of \$9,260, net of tax benefit. Refer to Note 7 for further discussion.

<b>Description</b>	<b>Balance at Beginning of Period</b>	<b>Additions Charged to Costs and Expenses</b>	<b>Additions Charged to Other Accounts</b>	<b>Deductions</b>	<b>Balance at End of Period</b>
Deducted from asset accounts					
Year ended December 31, 2009					
Allowance for doubtful accounts	494	66	—	(191)	369
Allowance for inventory obsolescence	198	(10)	—	—	188
Valuation allowance on net deferred tax assets	31,864	—	11,551	—	43,415
<b>Total</b>	<b>32,556</b>	<b>56</b>	<b>11,551</b>	<b>(191)</b>	<b>43,972</b>
Deducted from asset accounts					
Year ended December 31, 2010					
Allowance for doubtful accounts	369	210	1,142	—	1,721
Allowance for inventory obsolescence	188	316	—	(38)	466
Valuation allowance on net deferred tax assets	43,415	—	10,111	—	53,526
<b>Total</b>	<b>43,972</b>	<b>526</b>	<b>11,253</b>	<b>(38)</b>	<b>55,713</b>
Deducted from asset accounts					
Year ended December 31, 2011					
Allowance for doubtful accounts	1,721	(115)	—	(1,514)	92
Allowance for inventory obsolescence	466	652	—	(167)	951
Valuation allowance on net deferred tax assets	53,526	—	6,876	—	60,402
<b>Total</b>	<b>55,713</b>	<b>537</b>	<b>6,876</b>	<b>(1,681)</b>	<b>61,445</b>

**Item 9. Changes in and Disagreements with Accountants on Accounting and Financial Disclosure**

None.

**Item 9A. Controls and Procedures**

**Evaluation of Disclosure Controls and Procedures**

Our management, with the participation of our principal executive officer and principal financial officer, has evaluated the effectiveness of our disclosure controls and procedures (as such term is defined in Rules 13a-15(e) and 15d-15(e) under the Exchange Act) as of the end of the period covered by this report. Based on such evaluation, our principal executive officer and principal financial officer have concluded that, as of the end of such period, our disclosure controls and procedures were effective.

**Management's Report on Internal Control Over Financial Reporting**

Our management is responsible for establishing and maintaining adequate internal control over financial reporting, as defined in Exchange Act Rule 13a-15(f). Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate. Management conducted an evaluation of the effectiveness of our internal control over financial reporting based on the framework in *Internal Control-Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission. Based on this evaluation, management concluded that our internal control over financial reporting was effective as of December 31, 2011. The effectiveness of our internal control over financial reporting as of December 31, 2011 has been audited by PricewaterhouseCoopers LLP, an independent registered public accounting firm, as stated in their report which is included in Part II, Item 8 of this Annual Report on Form 10-K.

**Changes in Internal Control Over Financial Reporting**

There have not been any changes in our internal control over financial reporting (as such term is defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act) during the most recent fiscal quarter that have materially affected, or are reasonably likely to materially affect, our internal control over financial reporting.

**Item 9B. Other Information**

None.

### **Part III**

#### **Item 10. Directors, Executive Officers and Corporate Governance**

For information with respect to our executive officers, see “Executive Officers of the Registrant” at the end of "Part I, Item 1 - Business" of this Annual Report on Form 10-K. Except for the information set forth in “Executive Officers of the Registrant” at the end of Part I, Item 1, the information required by this item is incorporated by reference to Comverge's Proxy Statement for its 2012 Annual Meeting of Stockholders to be filed with the SEC within 120 days after the end of the fiscal year ended December 31, 2011.

#### **Item 11. Executive Compensation**

The information required by this item is incorporated by reference to Comverge's Proxy Statement for its 2012 Annual Meeting of Stockholders to be filed with the SEC within 120 days after the end of the fiscal year ended December 31, 2011.

#### **Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters**

The information required by this item is incorporated by reference to Comverge's Proxy Statement for its 2012 Annual Meeting of Stockholders to be filed with the SEC within 120 days after the end of the fiscal year ended December 31, 2011.

#### **Item 13. Certain Relationships and Related Transactions and Director Independence**

The information required by this item is incorporated by reference to Comverge's Proxy Statement for its 2012 Annual Meeting of Stockholders to be filed with the SEC within 120 days after the end of the fiscal year ended December 31, 2011.

#### **Item 14. Principal Accounting Fees and Services**

The information required by this item is incorporated by reference to Comverge's Proxy Statement for its 2012 Annual Meeting of Stockholders to be filed with the SEC within 120 days after the end of the fiscal year ended December 31, 2011.

**Part IV**

**Item 15. Exhibits and Financial Statement Schedules**

(a) The following documents are filed as part of this report:

**1. Consolidated Financial Statements**

Report of Independent Registered Public Accounting Firm

Financial Statements

Consolidated Balance Sheets

Consolidated Statements of Operations

Consolidated Statement of Changes in Shareholders' Equity and Comprehensive Loss

Consolidated Statements of Cash Flows

Notes to Consolidated Financial Statements

**2. Financial Statement Schedules**

Schedule II-Valuation and Qualifying Accounts

**3. Exhibits**

See the Exhibit Index immediately following the signature page of this Annual Report on Form 10-K.

## Signatures

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the Registrant has duly caused this Annual Report on Form 10-K to be signed on its behalf by the undersigned, thereunto duly authorized, on March 15, 2012.

Comverge, Inc.

/s/R. Blake Young

R. Blake Young

Director, President and Chief Executive Officer

## Power of Attorney

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints R. Blake Young and David Mathieson, jointly and severally, his or her attorney-in-fact, with the power of substitution, for him or her in any and all capacities, to sign any amendments to this Annual Report on Form 10-K and to file the same, with exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, hereby ratifying and confirming all that each of said attorneys-in-fact, or his or her substitute or substitutes, may do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, this Annual Report on Form 10-K has been signed below by the following persons on behalf of the Registrant and in the capacities and on the dates indicated.

<b>Signature</b>	<b>Title</b>	<b>Date</b>
<u>/s/R. Blake Young</u> R. Blake Young	Director, President and Chief Executive Officer (Principal Executive Officer)	March 15, 2012
<u>/s/David Mathieson</u> David Mathieson	Executive Vice President and Chief Financial Officer (Principal Financial and Accounting Officer)	March 15, 2012
<u>/s/Nora Mead Brownell</u> Nora Mead Brownell	Director	March 15, 2012
<u>/s/Alec G. Dreyer</u> Alec G. Dreyer	Chairman of the Board	March 15, 2012
<u>/s/A. Laurence Jones</u> A. Laurence Jones	Director	March 15, 2012
<u>/s/John T. McCarter</u> John T. McCarter	Director	March 15, 2012
<u>/s/John S. Rego</u> John S. Rego	Director	March 15, 2012
<u>/s/Joseph M. O'Donnell</u> Joseph M. O'Donnell	Director	March 15, 2012

Exhibit Number	Symbol	EXHIBITS Description	Incorporated by reference herein	
			Form	File Date
2.1		Agreement and Plan of Merger by and among the Company, Comverge Eagle Inc., Enerwise Global Technologies, Inc. and Stockholder Representatives referenced therein, dated June 27, 2007	Current Report on Form 8-K (File No. 001-33399)	June 28, 2007
2.2		Equity Purchase Agreement by and among Comverge, Inc., Comverge Giants, Inc., and Keith and Lori Hartman, dated September 29, 2007	Current Report on Form 8-K (File No. 001-33399)	October 4, 2007
3.1		Fifth Amended & Restated Certificate of Incorporation of the Company	Current Report on Form 8-K (File No. 001-33399)	April 18, 2007
3.2		Second Amended & Restated Bylaws of the Company	Current Report on Form 8-K (File No. 001-33399)	April 18, 2007
3.3		Amendment No. 1 to Second Amended & Restated Bylaws of the Company	Current Report on Form 8-K (File No. 001-33399)	January 4, 2008
4.1		Specimen Common Stock Certificate	Registration Statement on Form S-1/A (File No. 333-137813)	February 8, 2007
4.2		Third Amended and Restated Investors' Rights Agreement, dated February 14, 2006, among the Company and the signatories thereto	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006
4.3		Form of Indenture	Registration Statement on Form S-3 (File No. 333-161400)	August 17, 2009
4.4		Amended and Restated Registration Rights Agreement between the Company and certain Stockholders, dated October 16, 2007	Registration Statement on Form S-1 (File No. 333-146837)	October 22, 2007
10.1	†	Contract between the Company and PacifiCorp dated March 26, 2003, including Change Order Nos. 1, 2 and 3	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006
10.2	†	Demand Response Capacity Agreement between the Company and San Diego Gas & Electric Company, dated October 6, 2003, including First Amendment, dated November 16, 2004 and Application Service Provider Agreement, dated June 15, 2005	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006
10.3		Second Amendment to Demand Response Capacity Delivery Agreement between the Company and San Diego Gas & Electric Company, effective January 19, 2007	Registration Statement on Form S-1/A (File No. 333-137813)	February 8, 2007



Exhibit Number	Symbol	Description	Incorporated by reference herein	
			Form	File Date
10.4	†	Restated Communicating Thermostat Co-Development and Supply Agreement between the Company and White-Rodgers Division of Emerson Electric Co., effective March 8, 2004.	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006
10.5	&	Form of Stock Option Agreement under the Company's 2000 Stock Option Plan	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006
10.6	&	Form of Notice of Stock Option Grant under the Company's 2000 Stock Option Plan	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006
10.7	&	Form of Stock Issuance Agreement	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006
10.8	&	Form of Non-qualified Stock Option Agreement under the Company's 2006 Long-Term Incentive Plan	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006
10.9	&	Form of Restricted Stock Grant Agreement under the Company's 2006 Long-Term Incentive Plan	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006
10.10		Form of Indemnification Agreement	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006
10.11		Loan and Security Agreement by and among the Company, Enerwise Global Technologies, Inc., Comverge Giants, Inc., Public Energy Solutions, LLC, Public Energy Solutions NY, LLC and Clean Power Markets, Inc. and Silicon Valley Bank, dated November 6, 2008	Current Report on Form 8-K (File No. 001-33399)	November 12, 2008
10.12		Second Amendment to Loan and Security Agreement by and among the Company, Enerwise Global Technologies, Inc., Comverge Giants, LLC, Public Energy Solutions, LLC, Public Energy Solutions NY LLC, Alternative Energy Resources, Inc. and Clean Power Markets, Inc. and Silicon Valley Bank, dated February 5, 2010	Current Report on Form 8-K (File No. 001-33399)	February 12, 2010
10.13		Fourth Amendment to Loan and Security Agreement by and among the Company and its wholly-owned subsidiaries and Silicon Valley Bank, dated November 23, 2010	Current Report on Form 8-K (File No. 001-33399)	November 29, 2010
10.14	†	Supply Agreement by and between the Company and Telco Solutions III, LLC, effective September 27, 2004	Registration Statement on Form S-1 (File No. 333-137813)	October 5, 2006



Exhibit Number	Symbol	Description	Incorporated by reference herein	
			Form	File Date
10.15	†	Demand Response Capacity Delivery Agreement between the Company and Public Service Company of New Mexico, dated January 31, 2007	Registration Statement on Form S-1/A (File No. 333-137813)	April 5, 2007
10.16	†	Demand Response Purchase Agreement between the Company and Pacific Gas and Electric Company, dated February 25, 2007	Registration Statement on Form S-1/A (File No. 333-137813)	March 5, 2007
10.17	&	Amended and Restated Comverge, Inc. 2006 Long Term Incentive Plan, effective March 24, 2008	Definitive 14A Proxy Statement (File No. 001-33399)	April 7, 2008
10.18	†	Demand Side Management Agreement by and between Consolidated Edison Company of New York, Inc. and Public Energy Solutions, LLC, a wholly-subsi-dary of Comverge, dated February 6, 2008	Quarterly Report on Form 10-Q (File No. 001-33399)	May 13, 2008
10.19	†	Amendment to Demand Side Management Agreement by and between Consolidated Edison Company of New York, Inc. and Public Energy Solutions, LLC, a wholly-subsi-dary of the Company, dated October 30, 2009	Annual Report on Form 10-K (File No. 001-33399)	March 8, 2010
10.20	†	Commercial and Industrial Load Management Agreement by and between Arizona Public Service Company and Alternative Energy Resources, Inc., a wholly-owned subsidiary of the Company, dated September 12, 2008	Quarterly Report on Form 10-Q (File No. 001-33399)	November 12, 2008
10.21	†	Direct Load Control Solution Agreement by and between PEPCO Holdings, Inc. and the Company, dated January 21, 2009	Annual Report on Form 10-K/A (File No. 001-33399)	November 10, 2009
10.22	&	Retirement Agreement by and between Robert M. Chiste and the Company, dated July 17, 2009	Quarterly Report on Form 10-Q (File No. 001-33399)	August 6, 2009
10.23	&	Executive Employment Agreement, Michael Picchi, dated September 29, 2009	Annual Report on Form 10-K (File No. 001-33399)	March 8, 2010
10.24	&	First Amendment to Executive Employment Agreement, Michael Picchi, effective September 1, 2010.	Quarterly Report on Form 10-Q (File No. 001-33399)	November 8, 2010
10.25	&	Executive Employment Agreement, Edward Myszka, dated September 29, 2009	Annual Report on Form 10-K (File No. 001-33399)	March 8, 2010
10.26	&	First Amendment to Executive Employment Agreement, Edward Myszka, effective September 1, 2010	Quarterly Report on Form 10-Q (File No. 001-33399)	November 8, 2010



Exhibit Number	Symbol	Description	Incorporated by reference herein	
			Form	File Date
10.27	&	Executive Employment Agreement, Matthew Smith, dated September 29, 2009	Annual Report on Form 10-K (File No. 001-33399)	March 8, 2010
10.28	&	First Amendment to Executive Employment Agreement, Matthew Smith, effective September 1, 2010	Quarterly Report on Form 10-Q (File No. 001-33399)	November 8, 2010
10.29	&	Executive Employment Agreement, Arthur Vos, dated September 29, 2009	Annual Report on Form 10-K (File No. 001-33399)	March 8, 2010
10.30	&	First Amendment to Executive Employment Agreement, Arthur Vos, effective September 1, 2010	Quarterly Report on Form 10-Q (File No. 001-33399)	November 8, 2010
10.31	&	Executive Employment Agreement, R. Blake Young, dated February 18, 2010	Annual Report on Form 10-K (File No. 001-33399)	March 8, 2010
10.32	&	Executive Employment Agreement, Christopher Camino, dated June 14, 2010, including First Amendment, dated May 24, 2010 and Second Amendment, dated June 10, 2010	Quarterly Report on Form 10-Q (File No. 001-33399)	July 30, 2010
10.33	&	Executive Employment Agreement, Steven Moffitt, dated July 1, 2010	Quarterly Report on Form 10-Q (File No. 001-33399)	July 30, 2010
10.34	&	Executive Employment Agreement, David Mathieson, dated May 31, 2011.	Quarterly Report on Form 10-Q (File No. 001-33399)	August 8, 2011
10.35	†	Joint Venture Master Agreement by and between the Company and Projects International, Inc., dated June 11, 2010	Quarterly Report on Form 10-Q (File No. 001-33399)	July 30, 2010
10.36		Trademark License Agreement by and between the Company and Projects International, Inc., dated June 11, 2010	Quarterly Report on Form 10-Q (File No. 001-33399)	July 30, 2010
10.37		Warrant Agreement by and between the Company and Projects International, Inc., dated June 11, 2010	Quarterly Report on Form 10-Q (File No. 001-33399)	July 30, 2010
10.38	†	Professional Services Agreement by and between the Company and TXU Energy Retail Company LLC, effective April 15, 2009	Quarterly Report on Form 10-Q (File No. 001-33399)	November 8, 2010



Exhibit Number	Symbol	Description	Incorporated by reference herein	
			Form	File Date
10.39	†	Amendment No. 1 to Professional Services Agreement by and between the Company and TXU Energy Retail Company LLC, effective August 18, 2009	Quarterly Report on Form 10-Q (File 001-33399)	November 8, 2010
10.40	†	Amendment No. 2 to Professional Services Agreement by and between the Company and TXU Energy Retail Company LLC, effective January 20, 2010	Quarterly Report on Form 10-Q (File 001-33399)	November 8, 2010
10.41	†	Amendment No. 3 to Professional Services Agreement by and between the Company and TXU Energy Retail Company LLC, effective June 18, 2010	Quarterly Report on Form 10-Q (File 001-33399)	November 8, 2010
10.42	†	Amendment No. 4 to Professional Services Agreement by and between the Company and TXU Energy Retail Company LLC, effective July 1, 2010	Quarterly Report on Form 10-Q (File 001-33399)	November 8, 2010
10.43	†	Amendment No. 5 to Professional Services Agreement by and between the Company and TXU Energy Retail Company LLC, effective July 27, 2010	Quarterly Report on Form 10-Q (File 001-33399)	November 8, 2010
10.44	†	Amendment No. 6 to Professional Services Agreement by and between the Company and TXU Energy Retail Company LLC, effective October 14, 2010	Annual Report on Form 10-K (File No. 001-33399)	March 9, 2011
10.45	†	Amendment No. 2 to Demand Side Management Agreement by and between Consolidated Edison Company of New York, Inc. and Public Energy Solutions, LLC, a wholly-owned subsidiary of the Company, dated November 22, 2010	Annual Report on Form 10-K (File No. 001-33399)	March 9, 2011
10.46	†	Loan and Security Agreement by and among the Company, its subsidiaries and Partners for Growth II, LP, dated November 5, 2010 (as assigned to Grace Bay Holdings II, LLC)	Annual Report on Form 10-K (File No. 001-33399)	March 9, 2011
10.47		Modification No. 1 to Loan and Security Agreement by and among the Company, its subsidiaries and Partners for Growth II, LP, dated March 31, 2011 (as assigned to Grace Bay Holdings II, LLC)	Quarterly Report on Form 10-Q (File No. 001-33399)	May 5, 2011
10.48		Amended and Restated Executive Employment Agreement, Michael D. Picchi, dated March 7, 2011	Quarterly Report on Form 10-Q (File No. 001-33399)	May 5, 2011
10.49	† *	Eskom Professional Services Contract For Demand Response Aggregation Pilot Programme, by and among the Company, its subsidiary and Eskom, dated December 20, 2011		
10.50	* &	Executive Employment Agreement, Gregory Allarding, dated October 28, 2011		
10.51	* &	Executed Severance Agreement and General Release, Christopher Camino dated October 4, 2011		
10.52	* &	Executed Severance Agreement and General Release, Edward J. Myszka dated October 14, 2011		
21.1	*	List of subsidiaries of the Company		



Exhibit Number	Symbol	Description	Incorporated by reference herein	
			Form	File Date
23.1	*	Consent of Independent Registered Public Accounting Firm		
24.1	*	Powers of Attorney (incorporated by reference to the signature page of the Annual Report on Form 10-K)		
31.1	*	Certification of Chief Executive Officer pursuant to Exchange Act Rules 13a-14(a) and 15d-14(a), as adopted pursuant to Section 302 of the Sarbanes Oxley Act of 2002		
31.2	*	Certification of Chief Financial Officer pursuant to Exchange Act Rules 13a-14(a) and 15d-14(a), as adopted pursuant to Section 302 of the Sarbanes Oxley Act of 2002		
32.1	‡	Certification of Chief Executive Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes Oxley Act of 2002		
32.2	‡	Certification of Chief Financial Officer pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes Oxley Act of 2002		

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- & Indicates management compensatory plan, contract or arrangement.
  - † Confidential treatment has been requested for portions of this exhibit.
  - \* Filed herewith.
  - ‡ Furnished herewith.

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EXHIBIT 10.49



# NEC3 Professional Services Contract (PSC3) Cover page

**Contract between** Eskom Holdings SOC Limited  
(Reg. No. 2002/015527/06)  
**And** Comverge South Africa (Pty) Ltd  
(Reg. No. 2010/008371/07 )  
**For** Demand Response Aggregation Pilot Programme  
Contract number: 4600043033

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This contract consists of the following documents (and all documents referenced in any of these documents), set out in order of precedence, in the case of conflict between any documents:

	No of pages
1 This cover page	2
2 NEC 3 Professional Service Contract: Dispute resolution option W1	
3 Contract Data	17
4 Option Z clauses (as contained in the Contract Data)	
5 NEC 3 Professional Service Contract: Core clauses	
6 NEC 3 Professional Service Contract: Main option clauses for option G	
7 NEC 3 Professional Service Contract: Secondary option clauses identified in document C1.2 a Contract Data	
8 Definitions / The Scope	
9 Software License and Support Agreement	49
10 The Price List and SD&L Matrix	14
11 The Risk Register	9

# CONTRACT DATA

The Contract Data, not in order of precedence, consists of:

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Document reference	Title	No of pages
C1.1	Form of Offer & Acceptance	[1]
C1.2a	Contract Data provided by the <i>Employer</i>	[13]
C1.2b	Contract Data provided by the <i>Consultant</i>	[2]
C1.3	Securities documents	[1]

## C1.1 Form of Offer & Acceptance

### Offer

The terms of the agreement between the Parties for the Demand-Response Aggregation Pilot Programme are set out in the contract, which this offer and acceptance is part of.

By signing here below the *Consultant* agrees to perform all of the obligations and liabilities of the *Consultant* under this contract including compliance with all its terms and conditions for the total Price of \*\*\* subject to the terms of this contract.

The *Consultant* shall within two weeks of the Contract Date deliver any securities, bonds, guarantees, proof of insurance and any other documentation to be provided in terms of the *conditions of contract* identified in the Contract Data. Failure by the *Consultant* to do so within \*\*\* of the Contract Date constitutes a repudiation of this contract.

Signature(s)                    /s/ David D. Ellis  
Name(s)                         David D. Ellis  
Capacity                         Managing Director, Comverge International  
**For the *Consultant* :**         Comverge South Africa, Pty. Limited, 10 Fricker Road Illovo Boulevard Johannesburg, South Africa

(Insert name and address of organisation)

14 December 2011

Name & signature of witness         The signatory warrants that he/she is duly authorised to sign this contract on behalf of the *Consultant*

Date:                             /s/ Eve M. Minner

Eve M. Minner

### Acceptance

By signing here below, the *Employer* agrees to perform all of the obligations and liabilities of the *Employer* under this contract including compliance with all its terms and conditions. .

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Signature(s)	/s/ Andrew Etzinger		
Name(s)	Andrew Etzinger		
Capacity	SGM		
<b>for the Employer</b>	Eskom, Megawatt Park, Sunninghill <i>(Insert name and address of organisation)</i> The signatory warrants that he/she is duly authorised to sign this contract on behalf of the Employer		
Name & signature of witness	/s/ J.H. Thorby J.H. Thorby	Date	20/12/11

## C1.2a Contract Data

### Part one - Data provided by the *Employer*

Clause	Statement	Data
1	<b>General</b>	
	The <i>conditions of contract</i> are	<b>The conditions contained in the documents described in the cover page</b>
	Dispute resolution option	<b>W1</b>
	Secondary options:	<b>X2: Changes in the law</b>
		<b>X4: Parent company guarantee</b>
		<b>X10 <i>Employer's Agent</i></b>
		<b>X11: Termination by the <i>Employer</i></b>
		<b>X18: Limitation of liability</b>
		<b>Z: <i>Additional conditions of contract</i></b>
10.1	The <i>Employer</i> is (Name):	<b>Eskom Holdings SOC Limited (reg. no.: 2002/015527/06), a juristic person incorporated in terms of the company laws of the Republic of South Africa</b>
	Address	<b>Megawatt Park, Maxwell Drive, Sandton, Johannesburg, 2000</b>
	Tel No.	<b>011 800 8111</b>
	Fax No.	
11.2 (9)	The <i>services</i> are	<b>As per the Scope</b>
11.2 (10)	The following matters will be included in the Risk Register, where the Parties agree that the risks announced are mutual and shall be mutually defined by the Parties throughout the duration of Agreement:	<b>Performance Risk</b>
		<b>Developmental Risk</b>
		<b>Financial Risk</b>
		<b>Governance Risk</b>
11.2 (11)	The Scope is in	<b>the document called Scope</b>
12.2	The <i>law of the contract</i> is the law of	<b>the Republic of South Africa</b>
13.1	The <i>language of this contract</i> is	<b>English</b>
13.3	The <i>period for reply</i> is	<b>*** for replies and *** for responses.</b>
13.6	The <i>period for retention</i> is (retention of at least documents, metering data and paperwork)	<b>*** following Completion or earlier termination</b>

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<b>2</b>	<b>The Parties' main responsibilities</b>		
25.2	The <i>Employer</i> provides access to the following persons, places and things	access to	<i>access date</i>
		1 Provide customer- and market knowledge, as and when required	Within 2 weeks of request, unless otherwise expressly agreed in Task Order
		2 Provide access to Employer's personnel as and when required, or as specified in each Task Order	Within 2 weeks of request unless otherwise expressly agreed in Task Order
<b>3</b>	<b>Time</b>		
31.2	The <i>starting date</i> is.	<b>The date of last signature of the Contract Data, and the <i>starting date</i> is also the Contract Date</b>	
11.2 (3)	The <i>completion date</i> for the whole of the <i>services</i> is.	<b>31 March 2013</b>	
11.2 (6)	The <i>key date s</i> and the <i>condition s</i> to be met are:	<b>Condition to be met</b>	<i>key date</i>
		1 Demand Response Platform to be fully operational for managing up to 500 (five hundred) MW	*** after the Contract Date
		2 Learnings of up to 100 MW of demand response	***
<b>4</b>	<b>Quality</b>		
40.2	The quality policy statement and quality plan are provided within	<b>6 weeks of the Contract Date</b>	
42.2	The <i>defects date</i> is	<b>Completion</b>	
<b>5</b>	<b>Payment</b>		
50.1	The <i>assessment interval</i> is	<b>between the 25th day of each successive month</b>	
50.3	The <i>expenses</i> stated by the <i>Employer</i> are	<b>Accounted for in the Price List</b>	



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		30 days after receipt of invoice. The payment process will be initiated upon receipt of a copy of an invoice, and payment made only after receipt of an original and valid tax invoice, in accordance with applicable legislation
		In respect of the ***, payment will be made by ***, provided that: This contract (i) has been *** the *** by ***, and (ii) the cash flow or payment *** by ***, where <i>Employer</i> must complete ***, and <i>Consultant</i> must provide a *** which is received by ***, and both Parties will make best endeavours to meet the timelines.
51.1	The period within which payments are made is	
51.2	The <i>currency of this contract</i> is the	South African Rand
51.5	The <i>interest rate</i> is	the publicly quoted prime rate of interest (calculated on a 365-day year) charged from time to time by the Standard Bank of South Africa (as certified, in the event of any dispute, by any manager of such bank, whose appointment it shall not be necessary to prove) for amounts due in Rand
<b>6</b>	<b>Compensation events</b>	Will be dealt with as per the core clauses of the <i>conditions of contract</i> , as amended by the Z clauses
<b>7</b>	<b>Rights to material</b>	Will be dealt with as per the core clauses of the <i>conditions of contract</i>
<b>8</b>	<b>Indemnity, insurance and liability</b>	
81.1	The amounts of insurance and the periods for which the <i>Consultant</i> maintains insurance are	
	<b>Event</b>	<b>Cover</b>
	Liability for failure by the <i>Consultant</i> to use the skill and care normally used by professionals providing services similar to the <i>services</i>	*** Rand) in respect of each claim, where the total annual aggregated liability is capped at ***.
	death of or bodily injury to a person (not an employee of the <i>Consultant</i> ) or loss of or damage to property arising from or in connection with the <i>Consultant</i> 's Providing the Services.	*** Rand) for any one occurrence or series of occurrences arising out of one event, where the total annual aggregated liability is capped at ***
	death of or bodily injury to employees of the <i>Consultant</i> arising out of and in the course of their employment in connection with this contract	As prescribed by the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993 and the <i>Consultant</i> 's common law liability for people falling outside the scope of the Act with a limit of indemnity of not less than *** in respect of each claim
		Period following Completion of the whole of the <i>services</i> or earlier termination
		See guidance notes to <i>Consultants</i> in Annexure A
		See guidance notes to <i>Consultants</i> in Annexure A
		As <i>Consultant</i> deems necessary
81.1	The <i>Employer</i> provides the following insurances	Refer to Annexure A for details of insurance provided by the <i>Employer</i>

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82.1	The <i>Consultant's</i> total liability to the <i>Employer</i> for all matters arising under or in connection with this contract, other than the excluded matters, is limited to	*** of the total of the Price, as described in the Form of Offer and Acceptance
<b>9</b>	<b>Termination</b>	<b>Will be dealt with as per the core clauses, as amended by the Z clauses.</b>
<b>11</b>	<b>Data for Option W1</b>	
	The <i>Adjudicator</i> is:	the person selected from the Eskom Panel of Adjudicators listed in Annexure B, or another person, where such Adjudicator shall be agreed between the Parties, and failing agreement within 5 days of the last nomination received from a Party, the person nominated by the chairperson of the Arbitration Foundation of South Africa (AFSA), who will be requested to bear in mind the nature of the dispute, i.e. whether it is a legal or technical matter, when making such appointment.
W1.4(2)	The <i>tribunal</i> is:	Arbitration in accordance with the procedural and substantive law of the Republic of South Africa, and the decision of any arbitrator will be final, and binding on the Parties
W1.4(5)	The <i>arbitration procedure</i> is The place where arbitration is to be held The person or organisation who will choose an arbitrator if the Parties cannot agree a choice or if the <i>arbitration procedure</i> does not state who selects an arbitrator, is	the latest edition of Rules for the Conduct of Arbitrations published by AFSA Johannesburg, South Africa  the Chairman for the time being or his nominee of the Arbitration Foundation of South Africa or its successor body.
<b>12</b>	<b>Data for secondary Option clauses</b>	
<b>X2</b>	<b>Changes in the law</b>	
X2.1	The <i>law of the project</i> is	The law of the Republic of South Africa, which for the purposes of this clause includes any NERSA rules which have been properly enacted as provided for in section 35 of the Electricity Act of 2006, or any Act which replaces such Act
<b>X4</b>	<b>Parent company guarantee</b>	A parent company guarantee is required to be provided by the <i>Consultant's</i> parent company, Comverge Inc. in accordance with the form attached as Schedule 3 .
<b>X10</b>	<b>The <i>Employer's</i> Agent</b>	
X10.1	The <i>Employer's</i> Agent is Name: Address The authority of the <i>Employer's</i> Agent is	<b>John Thorby</b> <b>Megawatt Park, Maxwell Drive, Sandton, Johannesburg</b> <b>Business Development Manager</b>
<b>X18</b>	<b>Limitation of liability</b>	
X18.1	The <i>Consultant's</i> liability to the <i>Employer</i> for the <i>Employer's</i> indirect or consequential loss is limited to:	***
X18.2	The <i>Consultant's</i> liability to the <i>Employer</i> for Defects that are not found until after the <i>defects date</i> is limited to:	*** of The total of the Price, as described in the Form of Offer and Acceptance
X18.3	The <i>end of liability date</i> is	the Completion of the services
<b>Z</b>	<b>The Additional conditions of contract are:</b>	
<b>Z1</b>	<b>Cession delegation and assignment</b>	

The *Consultant* does not cede, delegate or assign any of its rights or obligations to any person without the Z1.1 written consent of the *Employer* , which may not be unreasonably withheld .

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The *Employer* may on written notice to the *Consultant* cede and delegate its rights and obligations under this contract to any of its subsidiaries or any of its present divisions or operations or other entity which may be converted into separate legal entities as a result of the restructuring of the Electricity Supply Industry and the  
Z1.2 Electricity Distribution Industry by the Government of the Republic of South Africa.

**Z3      Change of Broad Based Black Economic Empowerment (B-BBEE) status**

Where a change in the *Consultant's* legal status, ownership or any other change to his business composition or business dealings results in a change to the *Consultant's* B-BBEE status, the *Consultant* notifies the  
Z3.1 *Employer* within seven days of the change.

The *Consultant* is required to submit an updated verification certificate and necessary supporting documentation confirming the change in his B-BBEE status to the *Employer* within thirty days of the  
Z3.2 notification or as otherwise instructed by the *Employer* .

Where, as a result, the *Consultant's* B-BBEE status has decreased since the Contract Date the *Employer* may either re-negotiate this contract or alternatively, terminate the *Consultant's* obligation to Provide the  
Z3.3 Services.

Failure by the *Consultant* to notify the *Employer* of a change in its B-BBEE status may constitute a reason for termination. If the *Employer* terminates in terms of this clause, the procedures on termination are those stated in core clause 91. The payment on termination includes a deduction of the forecast of the additional cost to the  
Z3.4 *Employer* of completing the whole of the *service s* in addition to the amounts due in terms of core clause 92.1.

**Z4**

Any offer, payment, consideration, or benefit of any kind made by either Party, which constitutes or could be construed either directly or indirectly as an illegal or corrupt practice, as an inducement or reward for the award or in execution of this contract constitutes grounds for terminating the contract or taking any other  
Z4.1 action as appropriate against the offending Party (including civil or criminal action).

The *Employer* may terminate the contract if the offending Party (or any member of the *Consultant* , where the offending Party is the *Consultant* , where the *Consultant* constitutes a joint venture, consortium or other unincorporated grouping of two or more persons or organisations) is found guilty by a competent court, administrative or regulatory body of participating in illegal or corrupt practices.

Such practices include making of offers, payments, considerations, or benefits of any kind or otherwise, whether in connection with any procurement process or contract with either Party or other people or organisations and including in circumstances where the *Consultant* , if the offending Party is the *Consultant* , or any such member is removed from the approved vendor data base of the *Employer* as a consequence of  
Z4.2 such practice.

If either Party terminates in terms of this clause, the procedures on termination are those stated in core clause  
Z4.3 91.

**Z5**

**Confidentiality**

Neither Party discloses or makes any information (the Confidential Information) arising from or in connection with this contract available to Others. This undertaking does not, however, apply to information which at the time of disclosure or thereafter, without default on the part of the pertinent Party, enters the public domain or to information which was already in the possession of the pertinent Party at the time of disclosure (evidenced by written records in existence at that time). Should a Party disclose information to Others in terms of clause  
Z5.1 23.1, that Party ensures that the provisions of this clause are complied with by the recipient.

If a Party is uncertain about whether any such information is confidential, it is to be regarded as such until  
Z5.2 notified otherwise by the other Party .

In the event that a Party is, at any time, required by law to disclose any such information which is required to be kept confidential, such Party, to the extent permitted by law prior to disclosure, notifies the other Party so that an appropriate protection order and/or any other action can be taken if possible, prior to any disclosure. In the event that such protective order is not, or cannot, be obtained, then the disclosing Party may disclose that portion of the information which it is required to be disclosed by law and uses reasonable efforts to obtain  
Z5.3 assurances that confidential treatment will be afforded to the information so disclosed.

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Z5.4 The taking of images (whether photographs, video footage or otherwise) of the *Employer's* project works or any portion thereof, in the course of Providing the Services and after Completion, requires the prior written consent of the *Employer*. All rights in and to all such images vests exclusively in the *Employer*.

Z5.5 Confidential Information includes, but is not limited to any technical, commercial or financial information, know-how and trade secrets, processes, machinery, designs, drawings, technical specifications and data relating to the contract, in whatever form and which relates to the disclosing Party's business practices or promotion of the disclosing Party's business plans, policies or practices or any other information of the disclosing Party's business, in the widest possible sense, and which information is either communicated to or otherwise acquired by the receiving Party from the disclosing Party during the course of the Parties' discussions and negotiations, or any other type of meeting, with one another, whether or not such information is formally designated as confidential

The parties may disclose Confidential Information to their respective officers directors, employees, agents and professional advisors who:

Z5.6 Z5.6.1 have a need to know (and then only to the extent that each such person has a need to know);  
Z5.6.2 are aware that the Confidential Information must be kept confidential;  
Z5.6.3 are aware of the disclosing party's undertaking in relation to such information in terms of this agreement;  
and  
Z5.6.4 have been directed by the disclosing party to keep the Confidential Information confidential and have undertaken to keep the Confidential Information confidential.

Z5.7 Upon termination or expiration of this contract, the Parties shall promptly, and in any event, within 5 days after such request from the other Party, return or destroy all copies of the Confidential Information and other material if they contain any Confidential Information, and delete all Confidential Information from all computer systems and databases. Any Confidential Information that is not returned or destroyed remains subject to the confidentiality obligations under this contract.

**Z6 Waiver and estoppel: Add to core clause 12.3:**

Z6.1 Any extension, concession, waiver or relaxation of any action stated in this contract by the Parties or the *Adjudicator*, does not constitute a waiver of rights, and does not give rise to an estoppel unless the Parties agree otherwise and confirm such agreement in writing.

**Z7 Provision of a Tax Invoice. Add to core clause 51:**

Z7.1 The *Consultant* (if registered in South Africa in terms of the companies Act) is required to comply with the requirements of the Value Added Tax Act, no. 89 of 1991 (as amended) and to include the *Employer's* VAT number 4740101508 on each invoice he submits for payment.

**Z8 Notifying compensation events**

Z8.1 Delete from the last sentence in core clause 61.3, "unless the *Employer* should have notified the event to the *Consultant* but did not"

**Z9 Employer's limitation of liability**

Z9.1 The *Employer's* liability to the *Consultant* for the *Consultant's* indirect or consequential loss is limited to \*\*\*

**Z10 Termination: Add to core clause 90.1, at the second main bullet point, fourth sub-bullet point, after the words "against it":**

Z10.1 or had a judicial management order or business rescue order granted against it.



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### **Repayment of capital**

**Z11**      If, at the Completion of the *services*, the *Employer* and the *Consultant* have not entered into a contract to extend the services of the *Consultant*, either as per the Scope or as per any agreed increased scope of work or a separate contract, then the *Employer* will refund the actual value of the capital expenditure, as per the Task Order, to a \*\*\*.

If, at the completion of the *services*, the *Employer* and the *Consultant* have not entered into a contract to extend the services of the *Consultant*, either as per the scope or as per any agreed increased scope of work or a separate contract, then the *Employer* will refund the actual value of the capital expenditures, as per the Task Order, to a \*\*\*.

**Z12**      **Survival**

Clauses W1, Z5, Z10.10, will survive the termination of this contract.

**Z13**      **Solicitation**

A Party may not, without the prior agreement of the other Party, solicit for employment any employee of the other party who has been involved in this contract at any time while that employee is working for the other Party on this contract, or for a period which is the lesser of (i) \*\*\* following termination of such employee's employment with the other Party; and (ii) \*\*\* from expiry of the contract.

**Z14**      **Restraint of trade**

Both Parties will ensure that any employee formally seconded to the Consultant for the purposes of dedicated participation in the services enters into a restraint of trade agreement (in the form set out in Schedule 7) prior to their participation in the services.

**Z15**      **Indemnity**

delete clause 80.1 and replace with the following:

"The Consultant defends, indemnifies, and holds harmless the Employer from and against any claims, damages, liabilities, costs, and expenses (including attorney's fees) of any third party for which the Employer becomes liable or incurs for any material breach of representation or negligence by the Consultant in the event that the Consultant is proportionately or wholly negligent.

The Employer defends, indemnifies, and holds harmless the Consultant from and against any claims, damages, liabilities, costs, and expenses (including attorney's fees) of any third party for which the Consultant becomes liable or incurs for any material breach of representation or negligence by the Employer in the event that the employer is proportionately or wholly negligent.

**Z16**      **Limitation of Liability**

delete the first paragraph of clause 82.1 and replace with the following:

"Each Party's total liability to the other for all matters arising under or in connection with this contract, other than the excluded matters, is limited to the amount stated in the \*\*\* and applies in contract or delict and otherwise to the extent allowed under the law of the contract."

delete the words "the *Consultant*" in the second paragraph of clause 82.1 and replace with "either Party as applicable"

Delete all the bullet points to the second paragraph of clause 82.1 and add the following bullet points:

- loss of or damage to third party property;
- death of or bodily injury to a person other than an employee of the Parties;
- any breach of the confidential information provision;
- any breach of the intellectual property rights provisions, or an infringement by any Party of the intellectual property rights of third parties;
- any indemnity provision.

**Z17**      **Demobilisation**

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The Employer may, without cause, terminate this contract at any time, in whole or in part, by providing written notice of termination to the Consultant. The termination will be effective as specified in the Employer's notice of termination, but not earlier than one day after Consultant's receipt of the notice. Notwithstanding the effective date of termination, the Consultant shall have 30 days to wind down and demobilise. The Employer shall provide the Consultant with all reasonable assistance to do so.

Notwithstanding the content of core clause 92.1 and instead thereof, for the purposes of this clause Z17 only, if the contract is terminated as provided in the paragraph above, the Employer shall pay the Consultant the following:

If the total amount paid to the Consultant, at the time that the Employer gives notice of termination, in terms of this clause, is equal to or less than\*\*\*, the Employer pays the Consultant an additional amount, which amount shall be final, of \*\*\* only; or,

if the total amount paid to the Consultant in terms of this contract, at the time that the Employer gives notice of termination, in terms of this clause, is more \*\*\*, the Employer pays the Consultant an additional amount, which amount shall be final, of \*\*\* only, and

an amount due assessed as for normal payments.

**Z18      Termination event for software licence agreement**

Renumber clause 90.2 as clause 90.2a, and add the following clause 90.2b:

90.2b    The *Consultant* may terminate the software licence and support agreement if the *Employer* is in breach thereof, which breach, if capable of being cured, is not cured within thirty (30) days after the *Consultant* gives the *Employer* written notice of such breach; or the *Consultant* may terminate the software licence agreement immediately upon notice if the *Employee* breaches any of its obligations under Section 3 thereof. Such termination will not affect any rights which may have accrued to either Party under this contract prior to such termination.

Replace the second bullet of clause 91.1 with the following:

"The *Employer* may complete the services and may use any material to which he still has title, provided that in the event of termination in terms of clause 90.2b, clause 7.1 of the software license and support agreement will apply.

**Z19      Option X 18: Limitation of liability**

Add clause 18.4 as follows:

"Indirect or consequential loss will include, without limitation, loss of profits, loss of use, business interruption, loss of data, cost of cover, loss of income and loss of production.

**Z20      Expert**

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Insert a new clause W1.5 to dispute resolution option W1:

Where there is an ambiguity in the Scope and the Parties do not agree whether an issue falls within or outside of the Scope, either Party may refer the matter for determination by an expert. Such expert (who shall be appropriately qualified) ("Expert") shall be as agreed by the Parties or, failing agreement within 5 days, as appointed by the AFSA, who must appoint an independent and appropriately qualified Expert.

If the Expert determines that the relevant matter falls within the Scope then the *Consultant* shall execute the work required at no extra cost to the *Employer*.

If the Expert determines that the relevant matter does not fall within the Scope the Parties shall attempt to agree a price for the execution of the work required. Absent an agreement on the price within 15 days the relevant matter shall be omitted from the Scope subject thereto that any Party who disagrees with the initial determination leading to a discussion on price, and a possible consequential omission from the Scope, has the opportunity to refer the matter for resolution in terms of option W1.

Prior to making his determination, the Expert shall have the right, upon giving reasonable notice, to convene meetings with either or both of the Parties at which he may require either of them to clarify and explain their respective proposals. Each Party may present its own expert opinion or evidence at such meetings.

The determination of an Expert is not final and binding and either Party may institute the dispute resolution process provided for in option W1.

Z21

### **Intellectual Property**

The following definitions are used for the purposes of this clause:

**Intellectual property rights** includes all industrial and intellectual property rights whether protected by statute or at common law, including all copyright and similar rights, trade secrets and know-how, rights in relation to designs (whether or not registrable), rights in relation to registered and unregistered trademarks, the services, the hardware and the software, provided in the pilot project, but excludes non-assignable IP rights;

Background IP means the intellectual property rights belonging to the respective Parties or any other person that are/is in existence prior to the date of the contract;

non assignable IP rights means non-assignable moral rights, rights of identity, rights of integrity, and similar non-assignable personal rights of authors and producers.

**Work in progress** means, as the context requires, the services in its all stages of negotiation, discussion, delivery, training, including all equipment, software, hardware, raw materials, inventory and components on hand, created during the term of the contract or acquired for the performance of the services.

Z21.1 *Consultant*'s Background IP:

Z21.1.1 The *Employer* acknowledges that the *Consultant* remains the owner of all of the *Consultant*'s Background IP and that nothing in the contract prevents, limits or restricts the *Consultant*'s use or exploitation of the *Consultant*'s Background IP.

Z21.1.2 During the term of the contract, the *Consultant* grants to the *Employer* a non-exclusive, non-transferable, revocable licence to use the *Consultant*'s Background IP provided by the *Consultant* to the *Employer* for the sole purpose of performing its obligations under the contract.

Z21.1.3 The *Employer* may not, without the *Consultant*'s prior written permission, sub-licence or provide the *Consultant*'s Background IP to any person for the purposes of providing *services* to or performing work for the *Employer*. The *Employer* shall not reproduce, communicate, use, register or attempt to register any interest in or otherwise deal with the *Consultant*'s Background IP or allow any other person to do the same, for any purpose.

Z21.2 *Consultant*'s Background IP Warranty

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Z21.2.1 The Consultant warrants that it has the right to license all of its Background IP to the Employer in accordance with clause Z21.1, and that use by the Employer of the Consultant's background IP in accordance with the contract will not infringe the intellectual property rights of any third person or breach any applicable laws.

Z21.2.2 The Consultant shall be liable for and shall indemnify and hold harmless the Employer and its personnel against any liability, whether direct or indirect, arising out of any claim by a person against the Employer or its personnel alleging that the Consultant's Background IP and its use by the Employer or by another person at the direction of the Employer, infringes any intellectual property rights.

Z21.3 Employer's Background IP:

Z21.3.1 The *Consultant* acknowledges that the *Employer* remains the owner of the *Employer's* Background IP and that nothing in the *contract* prevents limits or restricts the *Employer's* use or exploitation of the *Employer's* Background IP.

Z21.3.2 The *Employer* grants to the *Consultant* a non-exclusive, non-transferable, revocable licence to use the *Employer's* Background IP provided by the *Employer* to the *Consultant* for the sole purpose of performing its obligations under the contract. The *Consultant* may sub-licence this licence to any sub-consultant where that sub-consultant requires such *Employer's* Background IP for the purposes of performing any part of the *services* sub *contract* ed to it.

Z21.3.3 The *Consultant* shall maintain the *Employer's* Background IP in confidence unless otherwise agreed by the *Employer* .

Z21.3.4 The *Consultant* shall not reproduce, communicate, use, register or attempt to register any interest in, or otherwise deal with the *Employer's* Background IP, or allow any other person to do the same, for any purpose other than to perform the *Consultant's* obligations under the contract.

Z21.3 Work in Progress:

Z21.3.1 The work in progress shall become the sole and absolute property of the *Consultant* . All work in progress shall be and remain with the *Consultant* free and clear. Such work in progress shall be clearly identified and visibly tagged or marked by the *Employer* as the property of the *Consultant* , and shall not be co-mingled in the *Employer's* property, services, software, hardware or the like or with the property of third parties. The *Consultant* shall have the right, at its sole and absolute discretion, to inspect and verify that the work in progress has been identified as the *Consultant's* property.

**Z22** Supplier Development and Localisation (SD&L)

Z22.1 The *Consultant* confirms that it is willing to contribute to supplier development and localisation in South Africa.

Z22.2 To this end, the *Consultant* will use reasonable endeavours to achieve the targets set out in the SD&L plan.

Z22.3 The *Consultant* will, as soon as possible after the *starting date* , provide to the *Employer* an implementation plan wherein it sets out how and by when it intends achieving the targets as set out in the SD&L plan.

Z22.4 The *Consultant* undertakes to report to the *Employer* every 4 months, calculated from the starting date , on its progress regarding the implementation plan.



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## Annexure A: Notes to Consultants

*This is guidance to Consultants to assist their decision making about what cover to arrange in the insurance to be provided by the Consultant. The guidance is not part of the contract and the Employer carries no liability for it.*

1. For the purpose of works contracts, insurance provided by Eskom (the *Employer*) has been arranged on the basis of “project” or “contract” value, where the value is the total of the Prices at Completion of the whole of the works including VAT.

A “project” is a collection of contracts or work packages to be undertaken as part of a single identified capital expansion or refurbishment of a particular asset or facility.

A “contract” is a single contract not linked to or being part of a “project”.

2. There are three main “formats” of cover and deductible structure; Format A, Format B and Format Dx.

**Format A** is for a project or contract value less than or equal to R350M ( three hundred and fifty million Rand ) inclusive of VAT.

**Format B** is for a project or contract value greater than R350M .( three hundred and fifty million Rand ) inclusive of VAT.

In the case of contracts / packages within a project:

- For a contract / package of R50M which is part of a R400M project, Format B will apply
- For a contract / package of R250M which is part of a R6 billion project, Format B will apply;
- For a contract / package of R120M which is part of a R350M project Format A will apply;

For a contract which is not part of a project the same limits apply:

- For a contract of R50M, Format A will apply
- For a contract of R355M, Format B will apply.

**Format Dx** applies only to Distribution Division projects and contracts. If a Distribution Division project or contract exceeds the Format A limit, the Eskom Insurance Management Services [EIMS] need to be contacted for advice on how to formulate the insurance cover. Cover and deductibles for Distribution Division are per the relevant policy available on the internet web link given below.

**Format A generally applies to Transmission Division** projects and contracts. If a Transmission Division project or contract exceeds the Format A limit, the Eskom Insurance Management Services [EIMS] need to be contacted for advice on how to formulate the insurance cover.

3. **Further information and full details of all Eskom provided policies and procedures may be obtained from:**

**[http://www.eskom.co.za/live/content.php?Item\\_ID=9248](http://www.eskom.co.za/live/content.php?Item_ID=9248)**

4. The Insurance which the *Consultant* is to provide against his liability for claims made against him arising out of his failure to use reasonable skill and care (first row in the Insurance Table of clause 81.1 in the PSC3) should also indemnify the *Consultant* for those sums which he could become legally liable to pay as damages arising from any claim first made against him and reported to Insurers some time after Completion of the whole of the *service s*. Hence the *Consultant* needs to ensure that his cover is in place at least until all his liabilities under the contract have expired. Such claims could arise out of any negligent act, error or omission committed or alleged to have been committed by the *Consultant* in the conduct of professional services in connection with the contract.



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## **Annexure B:    The *Employer* 's Panel of Adjudicators**

The following persons listed in alphabetical order of their surname have indicated their willingness to be included in the Eskom Panel of Adjudicators. Their CV's may be obtained by using the contact details provided.

Name	Location	Contact details (phone & e mail)
***	Gauteng	***
***	Gauteng	***
***	Gauteng	***
***	UK	***
***	Gauteng	***
***	Gauteng	***
***	Cape Town	***
***	Gauteng	***

**Information about the Panel and appointment of the selected *Adjudicator* is available from Eskom Supply Chain Operations management, by contacting \*\*\* (Tel.: \*\*\*)  
(Fax : \*\*\*) E-mail: \*\*\***

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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
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**SCHEDULE 3**

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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
Demand Response Aggregation Pilot Programme

[LETTERHEAD OF COMVERGE, INC.]

**Eskom Holdings Limited  
Megawatt Park  
Maxwell Drive  
Sandton  
Johannesburg**

Date:      November 30, 2011

Dear Sirs,

### ***Parent Company Guarantee for Contract No 4600043033***

With reference to the above numbered contract made or to be made between

**Eskom Holdings Limited**

(the *Employer*) and

**Comverge South Africa, Pty., Ltd.  
Contract No. 4600043033**

(the *Consultant*), for  
(the *services*).

I/We the undersigned  
on behalf of the *Consultant's* parent  
company  
of physical address

**David Mathieson**

**Comverge, Inc.**

**5390 Triangle Parkway, Suite 300, Norcross, GA 30092, USA**

and duly authorised thereto do hereby unconditionally guarantee to the *Employer* that the *Consultant* shall Provide the Services in accordance with the above numbered Contract.

1. If for any reason the *Consultant* fails to Provide the Services, we hereby agree to cause to Provide the Services at no additional cost to the *Employer*.
2. If we fail to comply with the terms of this Deed of Guarantee, the *Employer* may itself procure such performance (whether or not the Agreement be formally determined). The *Employer* is to notify us and we shall indemnify the *Employer* for any additional cost or expense it incurs.
3. Our liability shall be as primary obligor and not merely as surety and shall not be impaired or discharged by reason of any arrangement or change in relationship made between the *Consultant* and the *Employer* and/or between us and *Consultant*; nor any alteration in the obligations undertaken by the *Consultant* or in the terms of the Agreement; nor any indulgence, failure, delay by you as to any matter; nor any dissolution or liquidation or such other analogous event of the *Consultant*.
4. The *Employer* shall not be obliged before taking steps to enforce the terms of this Deed of Guarantee to obtain judgement against the *Consultant* in any court or other tribunal, to make or file any claim in liquidation (or analogous proceedings) or to seek any remedy or proceed first against the *Consultant*.
5. This Deed of Guarantee shall be governed by and construed in accordance with the laws of the Republic of South Africa and we hereby submit to the non-exclusive jurisdiction of the Supreme Court of South Africa.

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Signed at 12:00pm on this 30<sup>th</sup> day of November 2011

Signature(s)	<u>/s/David Mathieson</u>
Name(s) (printed)	<u>David Mathieson</u>
Position in parent company	<u>EVP, Chief Financial Officer</u>
Signature of Witness(s)	<u>/s/Helen Schuler</u>
Name(s) (printed)	<u>Helen Schuler</u>

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## C1.2b Contract Data

**Part two - Data provided by the *Consultant***

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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
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Clause	Statement	Data									
10.1	The <i>Consultant</i> is (Name):  Address  Tel No.  Fax No.	<b>Comverge SA</b> <b>10 Fricker Road Illovo Boulevard Johannesburg, South Africa</b>									
22.1	The <i>Consultant's key persons</i> are: 1Name: Job:  Responsibilities:  Qualifications:  Experience: 2Name:  Job  Responsibilities:  Qualifications:  Experience:	<b>David Ellis</b> <b>Managing Director Comverge International</b>									
Info.		<b>CV's (and further <i>key persons</i> data including CVs) are appended to Tender Schedule entitled.</b>									
11.2 (3)	The <i>completion date</i> for the whole of the <i>services</i> is	<b>31 March 2013</b>									
11.2 (10)	The following matters will be included in the Risk Register, where the Parties agree that the risks announced are mutual:	<b>Performance Risk- managing the CSPs in a similar fashion</b> <b>Developmental Risk- software functionality required outside of the Scope</b> <b>Financial Risk-increased cost associated for change orders outside of the Scope</b> <b>Governance Risk - separation of functions of CSP and Aggregator</b>									
11.2 (13)	The <i>staff rates</i> are as per	<b>The SD&amp;L Matrix</b>									
25.2	The <i>Employer</i> provides access to the following persons, places and things	<table border="1"> <thead> <tr> <th></th> <th>access to</th> <th>access date</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Provide customer- and market knowledge, as and when required</td> <td>Within 2 weeks of request, unless otherwise expressly agreed in Task Order</td> </tr> <tr> <td>2</td> <td>Provide access to Employer's personnel as and when required, or as specified in each Task Order</td> <td>Within 2 weeks of request, unless otherwise expressly agreed in Task Order</td> </tr> </tbody> </table>		access to	access date	1	Provide customer- and market knowledge, as and when required	Within 2 weeks of request, unless otherwise expressly agreed in Task Order	2	Provide access to Employer's personnel as and when required, or as specified in each Task Order	Within 2 weeks of request, unless otherwise expressly agreed in Task Order
	access to	access date									
1	Provide customer- and market knowledge, as and when required	Within 2 weeks of request, unless otherwise expressly agreed in Task Order									
2	Provide access to Employer's personnel as and when required, or as specified in each Task Order	Within 2 weeks of request, unless otherwise expressly agreed in Task Order									
31.1	The programme identified in the Contract Data is required within 4 weeks after contract signing										
50.2	The <i>expenses</i> stated by the <i>Consultant</i> are set out in the	<b>Price List and SD&amp;L Matrix</b>									

**Term contract**

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11.2 (25)	The <i>task schedule</i> is in	<b>Scope</b>
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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
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### **List of terms / acronyms:**

1. **Agent:** An entity accredited by Eskom to recruit potential Load Providers for participation in a Demand Response aggregation programme on behalf of one or more CSPs.
  2. **Agent Rules:** Rules and guiding principles that specifically govern the participation of Agents in the DR Aggregation programme.
  3. **Aggregator:** An entity that aggregates available load reduction from Load Providers and makes it available for use on an aggregated basis by the System Operator. Its duties may include scheduling and dispatching of demand response resources, collection of meter data, and processing payment of Load Providers.
  4. **Automated Clearing House (ACH):** An electronic network for financial transactions, which will be used in the DRAPP to process Settlement Statement payments to CSPs and Load Providers.
  5. **CBL mechanism:** A mechanism used for determination of the amount of Load reduced by a Load Provider. The mechanism determines the level of reduction by comparing the actual consumption during an Integration Period relative to the value of the CBL for the same Integration Period.
  6. **CSP Rules:** Rules and guiding principles that specifically govern the participation of CSPs in the DR Aggregation programme.
  7. **Customer Base Line (CBL):** A profile consisting of averaged 30 minute consumption profiles and which is representative of the consumer's average consumption. These profiles shall exclude planned downtime, Load Control Events, as well as process start-up periods.
  8. **Customer Classes:** Refers to a classification of consumers of electricity according to their processes, consumption pattern and/or level of consumption per annum
  9. **Customer Service Provider (CSP):** An entity, accredited by Eskom, that is responsible for recruiting and managing demand response contracts with Load Providers for the provision of demand response and administering the Load Provider.
  10. **Demand Response (DR):** An ad hoc intervention in the form of a reduction in electrical consumption or distributed generator dispatch that only changes the national demand profile for as long as it is dispatched and in consideration of the balance between demand and supply at the time of the intervention. Load shedding and/or any intervention that either permanently or semi-permanently changes the national demand profile without being dispatched per event, and as described above, is not included.
  11. **DRAPP:** Demand Response Aggregation Pilot Programme
  12. **Integration Period:** A period of 30 minutes, unless specified otherwise, during which the electrical consumption of a consumer of electricity accumulates and is recorded.
  13. **IVR:** Interactive Voice Response: a technology that allows a computer to interact with humans through the use of voice and human keypad inputs. This type of system might be used during the DRAPP to notify Load Providers and CSPs of a Load Control Event.
  14. **Load:** Refers to the amount of electrical consumption of the Load Provider that the Load Provider expects to be reduced, per hour, measured in kW or MW.
  15. **Load Control Event:** Refers to a period in time during which the electricity system is under constraint and during which the System Operator has requested Demand Response, with a specific begin- and end time.
  16. **Load Provider (LP):** A consumer of electricity, whether directly or indirectly linked to the Eskom electricity network, which has been contracted and certified to allow Demand Response.
  17. **Market:** The environment within which CSPs, Agents and LPs participate in the Demand Response aggregation programme and which includes all licensees' areas of supply in South Africa as well as neighbouring countries that are directly or indirectly connected to the Eskom electricity network and whose electricity consumption will have an influence on the Eskom supply and demand balance.
  18. **Market Rules:** Rules and guiding principles that govern participation of CSPs, Agents and LPs in the Market.
  19. **Megawatt (MW):** A unit of measure for electrical demand. As used in this context it refers to the amount of Demand Response / Load reduction and is therefore a measure of reduction of electrical demand.
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20. **M&V:** Monitoring and Verification
  21. **NOC:** Network Operation Centre
  22. **Organizational Change Management (OCM) Plan:** a structured approach to shifting/transitioning individuals, teams, and/or organizations from a current state to a desired future state. It is an organizational process aimed at empowering employees to accept and embrace changes in their current business environment. In project management, change management refers to a project management process where changes to a project are formally introduced and approved. In the DRAPP, the Consultant will lead the Employer and the Load Providers through an Organizational Change Management Plan to introduce Demand Response into the Market.
  23. **SD&L:** Supply Development and Localisation
  24. **Service Assurance:** The application of policies and processes to ensure that services offered meet a pre-defined service quality and performance level. In the DRAPP, those levels will relate to the deployment of load control events to the CSPs and Load Providers.
  25. **Settlement algorithm document:** A formula used to calculate the appropriate Settlement Statement for a Load Provider based on the actual reading of metering data as well as the Market Rules fee structure establishing DRAPP fees and as defined by the Employer.
  26. **Settlement Statement:** A document to be provided to Load Providers and CSP's by the Aggregator at the end of each calendar month and which document summarises the level of participation by a Load Provider and the anticipated amount of money due to the Load Provider by Eskom for Demand Response.
  27. **Web Services Definition Language (WSDL):** an XML format for describing network services as a set of endpoints operating on messages containing either document-oriented or procedure-oriented information. This format is used by the Consultant's IntelliSOURCE software application to dispatch Load Control Events to CSPs and Load Providers as well as gathering metering data back from the Load Providers.
  28. **Web User Interface (Web UI):** The screens of the Consultant's IntelliSOURCE software application used throughout the DRAPP by the Employer, the Consultant, the Load Provider and CSP.
-

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## Scope

*The contents of this Scope are considered Comverge South Africa (Pty) Ltd, otherwise known as the Consultant, confidential information and should be treated as such. The parties agree that certain materials outlined in the Scope are Consultant's protected intellectual property and will be kept strictly confidential. In accordance with the goals of the Employer's Demand Response Aggregation Pilot Programme (DRAPP), Consultant shall keep strictly confidential the substance of its discussions and conversations with, and its advice to Employer's personnel relating to the contractual agreement, except that such confidentiality shall not apply to any information that:*

- a). *is generally available to the public*
  - b). *becomes public information other than by an unauthorized act or omission by Consultant or any Consultant agent or representative of Consultant.*
  - c). *as shown by written records, was known to Consultant prior to the receipt of such information from Employer*
  - d). *is received by Consultant from third parties who were entitled to receive and transfer such information without obligations of confidentiality to Employer*
-

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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
Demand Response Aggregation Pilot Programme

A. **Aggregator**

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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
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The main roles of the Parties are as follows:

▪ *Employer*

- \*\*\*
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▪ *Consultant* in its role as Aggregator

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▪ Customer Service Providers

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- \*\*\*

▪ Agents

- \*\*\*

\*\*\*

1. **Program Implementation**

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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
Demand Response Aggregation Pilot Programme

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The roles/responsibilities are assigned in the risk matrix as:

<i>Responsibility</i>	<i>Description</i>
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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
 Demand Response Aggregation Pilot Programme

<i>Program Implementation</i>	<i>Consultant</i>		
	<i>Consultant (Aggregator)</i>	<i>Learnings</i>	<i>the Employer</i>
<i>Task 1 - ***</i>			
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<i>Task 2 - ***</i>			
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<i>Task 3 - ***</i>			
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Demand Response Aggregation Pilot Programme

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<i>Task 4 - ***</i>			
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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
Demand Response Aggregation Pilot Programme

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<i>Task 5 - ***</i>			
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<i>Task 6 - ***</i>			
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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
Demand Response Aggregation Pilot Programme

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<i>Task 7 - ***</i>			
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## Program Operations

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Demand Response Aggregation Pilot Programme

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## Qualification & Enrollment

*Description*

### Input

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### Process

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### Output

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*Process graph*

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 Demand Response Aggregation Pilot Programme

<i>Project Operations - Short Term</i>	<i>the Employer</i>	<i>Consultant</i>	<i>CSP</i>	<i>Munic</i>	<i>Agent</i>	<i>Load Provider</i>
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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
Demand Response Aggregation Pilot Programme

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Demand Response Aggregation Pilot Programme

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Demand Response Aggregation Pilot Programme

<i>Project Operations - Long Term</i>	<i>the Employer</i>	<i>Consultant</i>	<i>CSP</i>	<i>Munic</i>	<i>Agent</i>	<i>Load Provider</i>
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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
Demand Response Aggregation Pilot Programme

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Demand Response Aggregation Pilot Programme

## Qualification and Enrollment Process Scope

### *Consultant Deliverables*

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## Scheduling & Dispatch Description

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### Process

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Demand Response Aggregation Pilot Programme

## **Output**

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Demand Response Aggregation Pilot Programme

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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
 Demand Response Aggregation Pilot Programme

<i>Project Operations - Short Term</i>	<i>the Employer</i>	<i>Consultant</i>	<i>CSP</i>	<i>Munic</i>	<i>Agent</i>	<i>Load Provider</i>
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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
Demand Response Aggregation Pilot Programme

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Demand Response Aggregation Pilot Programme

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 Demand Response Aggregation Pilot Programme

<i>Project Operations - Long Term</i>	<i>the Employer</i>	<i>Consultant</i>	<i>CSP</i>	<i>Munic</i>	<i>Agent</i>	<i>Load Provider</i>
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Demand Response Aggregation Pilot Programme

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Demand Response Aggregation Pilot Programme

## *Scheduling & Dispatch Scope*

### *Consultant Deliverables*

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### *The Employer / Aggregator Call Centre Integration*

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## Monitoring & Verification (M&V) and Performance Reporting Description

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### Process

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### Output

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## PROCESS GRAPH

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Demand Response Aggregation Pilot Programme

<b>Project Operations - Short Term</b>	<b>the Employer</b>	<b>Consultant</b>	<b>CSP</b>	<b>Munic</b>	<b>Agent</b>	<b>Load Provider</b>
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ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
 Demand Response Aggregation Pilot Programme

<b>Project Operations - Long Term</b>	<b>the Employer</b>	<b>Consultant</b>	<b>CSP</b>	<b>Munic</b>	<b>Agent</b>	<b>Load Provider</b>
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### Consultant Deliverables

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## Settlement and Payment Processing Description

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### Process

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Demand Response Aggregation Pilot Programme

<b>Project Operations - Settlement</b>	<b>the Employer</b>	<b>Consultant</b>	<b>CSP</b>	<b>Munic</b>	<b>Agent</b>	<b>Load Provider</b>
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Demand Response Aggregation Pilot Programme

<b>Project Operations - Payment</b>	<b>the <i>Employer</i></b>	<b><i>Consultant</i></b>	<b>CSP</b>	<b>Munic</b>	<b>Agent</b>	<b>Load Provider</b>
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*Settlement Deliverables*

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## **Learnings**

### **A. The Employer Learnings Basis of Estimate**

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## **Appendices**

### **Appendix A-Assumptions**

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## *APPENDIX A: Assumptions*

### *CSPs and Load Providers*

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### *Reporting*

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### *IntelliSOURCE*

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## SOFTWARE LICENSE AND SUPPORT AGREEMENT

This Agreement is entered into by and between the *Consultant*, in this Agreement referred to as Comverge, and the *Employer*, in this Agreement referred to as the LICENSEE and describes the terms and conditions pursuant to which Comverge shall license to LICENSEE and support certain Comverge Software (as defined below).

While this Agreement forms part of the NEC 3 Professional Services Contract for the Demand Response Aggregation Pilot Programme (DRAPP) signed between the Parties, it is severable from said contract to the extent that it may be necessary to terminate the licenses granted herein.

### 1. Definitions

1.1 "Agreement" means this Software License and Support Agreement, including any and all attached Schedules.

1.2 "Comverge Software" means (i) the software products designated on the relevant Schedule hereto provided to LICENSEE by Comverge in executable form (but not the Source or Object Code), (ii) the associated program documentation ("Documentation"), (iii) any source code or object code which Comverge in its sole discretion may provide to LICENSEE from time to time and (iv) any Updates, modifications, maintenance releases, bug fixes or work-arounds which Comverge may provide to LICENSEE from time to time. For Hosted Solutions, as defined herein, the Comverge Software shall be housed at a Comverge facility where LICENSEE shall be given access via a web-based portal to such software.

1.3 "Hosted Solution" means Comverge housing and hosting the Comverge Software for LICENSEE on Comverge's own computer servers, as explained in Schedule A1.

1.4 "Confidential Information" in this Agreement, means this Agreement and all its Schedules, any addenda hereto signed by both parties, all software listings, Documentation, information, data, drawings, benchmark tests, specifications, trade secrets, object code, know-how and machine-readable copies of the Comverge Software, and any other proprietary information supplied to LICENSEE by Comverge or by LICENSEE to Comverge which is clearly marked as "confidential" if in tangible form, or identified as "confidential" if orally disclosed.

1.5 "Current Version" means the newest available release of the Comverge Software.

1.6 "Designated Equipment" means the computer hardware on which the Comverge Software will be installed as set forth on the relevant Schedule.

1.7 "New Releases": The term "New Releases" means material improvements or changes to the Comverge Software that may enhance operating performance. A New Release is signified by an increase in the release number to the left of the first decimal.

1.8 "Schedule" means a written document, signed by the Parties and expressly referencing this Agreement, which sets forth the Comverge Software, Designated Equipment, Production Site, License Fees, Support and Maintenance Fees, License Term (defined in Schedule A1) and other terms agreed to by the Parties.

1.9 "License Fees" means the payment for the Comverge Software license as contained in the NEC 3 Professional Services Contract for the DRAPP.

1.10 "Production Site" means the address and location of the Designated Equipment on which the Comverge Software will be installed as set forth on the relevant Schedule.

1.11 "Support and Maintenance Fees" means the fees for reasonable efforts to perform the Support and Maintenance Services set forth in the NEC 3 Professional Services Contract for the DRAPP, Price List.

1.12 "Updates" means any updates to the Comverge Software licensed hereunder, when and if available, and which Comverge, in its discretion, makes generally available to its Comverge Software LICENSEEs, where Updates are typically notated by a change to the right of the decimal. Updates do not include New Releases.

### 2 Grant of License

2.1 Comverge grants to LICENSEE a \*\*\* to use the Comverge Software identified in Schedule A1 on the Designated Equipment located at the designated Production Site as set forth in Schedule A1, or for Hosted Solutions, through a web-based portal as designated in Schedule A1.

LICENSEE may move from a Hosted Solution to a LICENSEE in-house solution at any time, without penalty. LICENSEE may possess only the number of copies of any Comverge Software necessary for the type of use specified

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Demand Response Aggregation Pilot Programme

in this Agreement and may use such copies only in accordance with this Agreement and the Documentation. Comverge shall at all times retain ownership of all Comverge Software including any Documentation and any copies thereof.

2.2 Comverge will deliver to LICENSEE, as soon as is practicable, either the Comverge Software or required information to enter the web-based portal for Hosted Solutions. LICENSEE may not reproduce the Documentation, without Comverge's express written permission.

2.3 Unless otherwise expressly prohibited, LICENSEE may copy the Comverge Software for backup or archival purposes provided that all titles, trademark symbols, copyright symbols and legends, and other proprietary markings are reproduced.

2.4 Comverge grants and LICENSEE receives no other rights or licenses to the Comverge Software, derivative works (as defined in the United States copyright Act of 1976, Title 17 USC Section 101 et. Seq.) or any intellectual property rights related thereto, including without limitation "know-how", whether by implication, estoppel or otherwise, except those rights expressly granted in this Section 2. However, it is agreed that the LICENSEE will be granted access to the necessary know-how, for the duration of the license term, to enable it to beneficially use the license as granted.

2.5 Comverge shall install the Comverge Software on the test equipment at the LICENSEE premise. Upon completing installation of the Comverge Software, Comverge shall demonstrate the Comverge Software functionality as follows to LICENSEE (where such demonstration is the "Acceptance Test"):

2.5.1\*\*\*

2.5.2\*\*\*

2.5.3\*\*\*

2.5.4\*\*\*

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Upon completing the demonstration of the Comverge Software, LICENSEE shall acknowledge in writing the completion of the Acceptance Test and the Comverge Software shall be deemed accepted by LICENSEE. If LICENSEE does not believe that Comverge completed the Acceptance Test, it shall issue a defect notice within twenty-four hours of the test as described above, explaining the areas for further testing. Comverge shall review LICENSEE's notice and, in the reasonable professional judgment of Comverge, shall take actions to address the areas of defect and resubmit for Acceptance Testing within 30 days of the notice. If the Parties are unable to agree to the successful completion of the Acceptance Testing, they shall submit to the dispute resolution process pursuant to NEC 3 Professional Services Contract for the DRAPP within thirty (30) days of the last Acceptance Test. If the LICENSEE is successful during such dispute resolution process, Comverge SA shall refund a portion of the License fee paid by LICENSEE, as determined through the dispute resolution process.

### 3 License Restrictions

3.1 LICENSEE agrees that it will not itself, or through any parent, subsidiary, affiliate, agent or other third party:

3.1.1 sell, lease, license, sublicense, encumber or otherwise deal with (save as authorised herein) any portion of the Comverge Software or Documentation;

3.1.2 compile, disassemble, or reverse engineer any portion of the Comverge Software or attempt to discover any source code or underlying ideas, algorithms or functionality of any Comverge Software;

3.1.3 create any derivative work based on the Comverge Software or any Comverge Confidential Information;

3.1.4 use the Comverge Software in any way that is not intended, including without limitation to provide processing services to third parties, commercial timesharing, rental or sharing arrangements, or on a "service bureau" basis or otherwise use or allow others to use the Comverge Software for the benefit of any third party;

3.1.5 provide, disclose, divulge or make available to, or permit use of the Comverge Software by persons other than LICENSEE's employees who have signed a confidentiality agreement consistent with the terms and provisions herein, without Comverge's prior written consent;

3.1.6 use any Comverge Software, or allow the transfer, transmission, export, or re-export of any Comverge Software or portion thereof in violation of any export control laws or regulations administered by the U.S. Commerce Department, OFAC, or any other government agency. All the limitations and restrictions on the Comverge Software in this Agreement also apply to the Documentation.

### 4 Manner of Payment

All support and maintenance fees due hereunder shall be made according to the NEC 3 Professional Services Contract for the DRAPP between the Parties.

### 5 License Fee/ Payment

In consideration of the rights granted herein, LICENSEE shall pay Comverge the License Fees specified in the core clauses, Price List and Contract Data of the NEC 3 Professional Services Contract for the DRAPP signed between the Parties.

### 6 Maintenance and Technical Support

6.1 Upon payment of the Support and Maintenance Fees at the intervals as described in the Scope and Price List of the NEC 3 Professional Services Contract for the DRAPP the LICENSEE shall be entitled to receive the Updates, if any, and technical support in accordance with the upgrade and technical support details on Schedule A2.

6.2 Such maintenance and technical support services shall be provided pursuant to the Scope of the NEC 3 Professional Services Contract for the DRAPP, as supplemented by Schedule A2. Comverge shall have no obligation to support (a) altered, damaged or modified Comverge Software (except as authorized by Comverge) or any portion of the Comverge Software incorporated into other software, (b) Comverge Software that is not the Current Version, (c) problems caused by LICENSEE's negligence, abuse, or misapplication, or use of the Comverge Software other than as specified in Comverge's user documentation or other causes beyond the control of Comverge, or (d) Comverge Software installed on a system that is not supported by Comverge. Comverge shall have no liability for any updates needed to or other changes in LICENSEE's hardware which may be necessary to use the Comverge Software.



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## 7 Termination

7.1 Upon termination for whatever reason, all licenses granted hereunder shall cease to be effective and LICENSEE shall immediately cease all use of any affected Comverge Software, Documentation and Comverge Confidential Information. Within fourteen (14) days of the date of termination or discontinuance of this Agreement for any reason whatsoever, LICENSEE shall return the Comverge Software, derivative works and all copies thereof, in whole or in part, all related Documentation and all copies thereof, and any other Confidential Information in its possession. LICENSEE shall furnish Comverge with a certificate signed by a duly authorized representative of LICENSEE verifying that the same has been done.

7.2 Termination is not an exclusive remedy and all other remedies will be available to Comverge whether or not termination occurs.

## 8 Indemnification for Infringement

Comverge shall, at its expense, defend or settle any claim, action or allegation brought against LICENSEE that the Comverge Software infringes any patent, copyright, trade secret or other proprietary right of any third party and shall pay any final judgment awarded or settlements entered into; the LICENSEE must take all reasonable steps to give prompt written notice to Comverge of any such claim, action or allegation of infringement, as soon as the LICENSEE becomes aware of it and gives Comverge the authority to proceed as contemplated herein. Failure to notify Comverge or notifying Comverge later, but still within a reasonable time, will not prevent the LICENSEE from invoking the indemnity so long as Comverge is not prejudiced by the delay. Comverge will have the exclusive right to defend any such claim, action, or allegation and make settlements thereof at its own discretion, and LICENSEE may not settle or compromise such claim, action or allegation, except with prior written consent of Comverge. LICENSEE shall give such assistance and information as Comverge may reasonably require to settle or oppose such claims. Comverge will inform the LICENSEE of any settlement.

8.2 In the event any such infringement, claim, action, or allegation is brought or threatened Comverge may, at its sole option and expense:

8.2.1 Procure for LICENSEE the right to continue use of the Comverge Software or the infringing portion thereof;

8.2.2 Modify, amend or replace the Comverge Software or infringing part thereof with other software having substantially the same or better capabilities to the extent it is commercially practicable.

8.3 *The foregoing obligations shall not apply to the extent the infringement arises as a result of (i) modifications to the Comverge Software made by any party other than Comverge or Comverge's authorized representative, (ii) a combination of the Comverge Software with third party products or services not provided or approved by Comverge, (iii) specifications solely provided by or on behalf of LICENSEE; (iv) the failure by LICENSEE to use corrections recommended by Comverge which Comverge identifies to LICENSEE as fixing or preventing infringement; or (v) intellectual property provided by or on behalf of LICENSEE to Comverge for use in connection with the Software. This Section 8 states the entire liability of Comverge with respect to infringement of any patent, copyright, trade secret or other proprietary right.*

## 9 Warranty and Limitation of Liability

Comverge warrants to LICENSEE that the Comverge Software, and any replaced or remedied software, will perform in substantial accordance with the Documentation and is fit for the purpose described in the Scope and Documentation, even if customized for LICENSEE, for a period of \*\*\* from it having been made available to the LICENSEE for use. If the Comverge Software does not perform as warranted, Comverge shall undertake to correct the non-conforming part of the Comverge Software, or if correction is reasonably not possible, replace such non-conforming part of the Comverge Software to the extent it is commercially practicable. The foregoing Warranty shall not apply to the extent that the Comverge Software is used or interfaced with other software, data or operating systems which create the issue, if the Software had been tampered with or misused, or if the Comverge Software has been modified in a manner not authorized by Comverge.

THE FOREGOING ARE LICENSEE'S SOLE AND EXCLUSIVE REMEDIES FOR BREACH OF THIS WARRANTY, but the LICENSEE is not prevented from pursuing a claim for damages, if appropriate.

The warranty set forth above is made to and for the benefit of LICENSEE only and will be enforceable against Comverge only if:

9.1.1 The Comverge Software has been properly installed. This condition only applies if Comverge did not install the software;

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- 9.1.2      The software has been used at all times in accordance with the Documentation and this Agreement.
- 9.1.3      All modifications, alterations or additions to the Comverge Software, if any, have been made by Comverge; and
- 9.1.4      LICENSEE has not made or caused to be made modifications, alterations or additions to the Comverge Software that cause it to deviate from the Documentation.

9.2      Except as set forth above, Comverge makes no warranties, whether express or implied, or statutory, regarding or relating to the Comverge Software or the Documentation, or any materials or services furnished or provided to LICENSEE under this Agreement. Specifically, Comverge does not warrant that the Comverge Software will be error free or will perform in an uninterrupted manner. To the maximum extent allowed by law, Comverge specifically disclaims all implied warranties of merchantability and fitness for a particular purpose (even if Comverge had been informed of such purpose), but save as provided for in this Agreement, with respect to the Comverge Software, Documentation and support and with respect to the use of any of the foregoing. Comverge shall not be subject to any indirect or consequential loss as defined in the NEC 3 Professional Services Contract for the DRAPP.

9.3      Comverge's maximum aggregate liability (whether in contract, tort or any other form of liability) for damages or loss, howsoever arising or caused, whether or not arising from Comverge's negligence but except in respect of the indemnity provided as per clause 8 above, shall in no event be greater than the the limitation of liability as found in NEC 3 Professional Services Contract for the DRAPP , save that in the event such damage or loss is related to support, such recoverable loss or damage for that particular event will not be greater than the \*\*\* .

9.4      No employee, agent, representative or affiliate of Comverge has authority to bind Comverge to any oral representations or warranty concerning the Comverge Software. Any written representation or warranty not expressly contained in this Agreement is unenforceable.

#### 10 Embedded Reporting/Compliance Routine; Audit Rights/Quarterly Reports

10.1      The Comverge Software contains or may contain in future versions an automated reporting routine that will automatically identify and analyze certain aspects of Comverge Software use and performance, as well as the operator and operating environment, and among other things, transmit electronic reports to Comverge. Comverge will provide LICENSEE, on request, with a description of these routines and LICENSEE agrees not to disrupt or interfere with them without the prior written agreement of Comverge. Comverge will be entitled to inspect the installation and configuration of the Comverge Software from time to time on reasonable notice.

10.2      LICENSEE shall keep and maintain full, accurate and detailed records regarding the License and the number of Subscribers of the Comverge Software. Comverge or its representatives shall be entitled to review and audit such books and records and/or LICENSEE's compliance with the provisions of this Agreement from time to time during normal business hours upon reasonable notice to LICENSEE, which notice shall either be personally delivered by rapid courier service or mailed by certified or registered mail to a party at its address as set forth herein.

10.3      Commencing ninety (90) days from the Effective Date, LICENSEE will provide Comverge with calendar quarterly reports setting forth the total number of Subscribers. LICENSEE will provide Comverge with all such reports within thirty (30) days of the end of each calendar quarter.

#### 11 Miscellaneous

11.1 Ownership of Comverge Software, Documentation. LICENSEE acknowledges and agrees that Comverge owns all proprietary rights, including patent, copyright, trade secret, trademark and other such proprietary rights, in and to the Comverge Software and any corrections, remedial modifications, maintenance upgrades, updates or other modifications, including custom modifications, or derivative works thereof, whether made by Comverge, LICENSEE or any third party.

11.2 Force Majeure. Neither Party will incur any liability to the other on account of any loss or damage resulting from any delay or failure to perform all or any part of this Agreement if such delay or failure is caused, in whole or in part, by event, occurrences, or causes beyond its control and without negligence of the parties. Such events, occurrences or causes will include, without limitation, acts of God, strikes, lockouts, riots, acts of war, earthquakes, fire and explosions, but the ability to meet financial obligations is expressly excluded.

11.3 Severability. If any term, condition or provision in this Agreement is found to be invalid, unlawful or unenforceable to any extent, the Parties shall endeavor in good faith to agree to such amendments that will preserve, as far as possible, the intentions expressed in this Agreement. If the Parties fail to agree on such an amendment, such invalid term,

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condition or provision will be severed from the remaining terms, conditions and provisions, which will continue to be valid and enforceable to the fullest extent permitted by law.

11.4 Standard Terms of LICENSEE . With the exception of Task Orders pursuant to the NEC 3 Professional Services Contract for the DRAPP, no terms, provisions or conditions of any purchase order, acknowledgement or other business form that LICENSEE may use in connection with the acquisition or licensing of the Comverge Software will have any effect on the rights, duties or obligations of the parties under, or other otherwise modify, this Agreement, regardless of any failure of Comverge to object to such terms, provisions, or conditions.

11.5 Public/Announcements/Publicity . LICENSEE and Comverge agree to cooperate regarding public relations activities, including public announcements, joint press releases, and other activities to be mutually agreed. Neither Party will perform such activities without the prior written consent of the other Party, which consent shall not be unreasonably withheld. Provided, however, that upon execution of this Agreement, Comverge shall have the right to issue a press release announcing that the Parties have entered into the Agreement without obtaining the prior written consent of LICENSEE.

11.6 Headings . Headings herein are for convenience of reference only and shall in no way affect the interpretation of the Agreement.

IN WITNESS WHEREOF, the authorized representatives of the Parties hereby bind the Parties by signing below:

Comverge SA, (Pty Ltd) (“Comverge”)

By: /s/ David D. Ellis

Print Name: David D. Ellis

Title: Managing Director, Comverge International

Date: 14 December 2011

\_\_\_\_\_ (“LICENSEE”)

By:

Print Name:

Title:

Date:

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# SOFTWARE ACCEPTANCE TESTING ACKNOWLEDGEMENT

Eskom Holdings Limited (Eskom), who has entered into a contract with Converge South Africa, where those underlying contract documents contain a Software License and Support Agreement ("SWLA"), hereby acknowledges the following: .

- (1) Eskom has accepted the Software pursuant to Section 2.5 of the SWLA.
- (2) Such Acceptance does not otherwise effect, modify, or change any other provisions of the contract documents and any related obligations or responsibilities of either party.
- (3) The person below is authorized to bind Eskom.

## Acceptance

By signing here below, the Employer agrees to the above:

Signature(s) /s/ J. H. Thorby \_\_\_\_\_

Name(s) J. H. Thorby \_\_\_\_\_

Capacity Demand Response Manager \_\_\_\_\_

For the  
Employer Eskom \_\_\_\_\_

(Insert name and address of organisation)

The signatory warrants that he/she is  
duly authorised to sign this contract on  
behalf of the *Employer*      Date

Name &  
signature of  
witness    /s/ H. Umley      1 December 2011

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## SCHEDULE A1

In the case of a conflict between a provision in this Schedule and a provision in the Agreement, such conflicting provision of the Schedule shall prevail over the conflicting provision of the Agreement, but only with regard to the items addressed in this Schedule.

1. **Description of Converge Software** : IntelliSOURCE Version 2.
2. **License Fees**: As per the Price List of the NEC Professional Services Contract for the DRAPP.
3. **License Term** : For the duration of the contract, as per the Contract Data of the NEC Professional Services Contract for the DRAPP.
4. **Designated Equipment/ Production Site**:  
  
**Location**: \*\*\* for the DRAPP.
5. **Support and Maintenance**:

As set out in the Price List of the NEC Professional Services Contract for the DRAPP.

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## SCHEDULE A2

In the case of a conflict between a provision in this Schedule and a provision in the Agreement, such conflicting provision of the Schedule shall prevail over the conflicting provision of the Agreement, but only with regard to the items addressed in this Schedule

### ARTICLE I: DEFINITIONS

1. **“Enhancement”**: The term “Enhancement” shall mean changes to the Comverge Software, either as agreed upon between Comverge and LICENSEE and contemplated under the Agreement, or as agreed upon in a separate proposal subsequent to delivery and installation of the Comverge Software.
2. **“Error”**: The term “Error” shall mean the failure of the Comverge Software to operate in material conformance with its functional, performance, operational and other specifications as set forth in its published Documentation.
3. **“Error Correction”**: The term “Error Correction” shall mean either a modification or addition that, when made or added to the Comverge Software, brings the operation of the Comverge Software into substantial material conformity with its Module Documentation, or a procedure or routine that when observed in the regular operation of the Comverge Software avoids the practical adverse effect of such nonconformity. Updates may constitute Error Corrections.
4. **“Workaround”**: The term “Workaround” means a set of procedures that users may follow to circumvent or mitigate the impact of an Error, notwithstanding that the Error still exists.

### ARTICLE II: SUPPORT AND MAINTENANCE SERVICES

Section 2.01 - Comverge's Obligation to Provide Support and Maintenance Services : Provided that LICENSEE is not in breach of the NEC Professional Services Contract for the DRAPP and subject to the provisions contained herein, Comverge will use reasonable commercial efforts to perform Computer Software, discovery, root cause analysis and recommended solutions for reported Errors and upload management of Updates, Error Corrections and Workarounds (as defined herein and purchased by LICENSEE) (collectively the “Support and Maintenance Services”). In addition, Comverge will provide other services outside of the scope of Section 2.04(a) and Section 2.04(b) of this Schedule A2, on a per request basis, as provided in Section 4.01 of this Schedule A2 .

Section 2.02 - Reporting Errors : LICENSEE may initiate Support and Maintenance Services by placing a telephone call to Comverge Technical Support (“ **Comverge TS** ”) at (888)-565-5525 or by e-mail at techsupport@comverge.com; for **Network Down** LICENSEE Service Requests (defined in Section 2.03(a) below) the preferred method of initiation is by telephone. Normal business hours for Comverge TS are Monday through Friday from 12:00 pm RSA to 8:00 pm RSA, including federal holidays if such holidays are not also public holidays in the Republic of South Africa (“Hours”). Comverge shall use commercially reasonable efforts to provide support for times outside of those provided herein.

Section 2.03 - Prioritization : Comverge will classify and prioritize Support and Maintenance Service calls as either LICENSEE Service Requests (“**CSR**”) or Technical Inquiries. CSR priority levels and **Technical Inquiries** are defined below:

- a. “ **Network Down CSR** ” refers to an Error of ceased or significantly limited functionality and related processing or data generation capabilities, as well as other Comverge Software related issues that severely affect the ability of Comverge Software to function as intended.
  - b. “ **Top Priority CSR** ” refers to an Error moderately affecting functionality and related processing or data generation capabilities, as well as other Comverge Software related issues that moderately affect the ability of Comverge Software to function as intended.
-

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- c. “ **Medium Priority CSR** ” refers to an Error affecting Comverge Software functionality that does not affect the ability of Comverge Software to function substantially as intended.
- d. “ **Technical Inquiry** ” refers to a request for a general understanding of particular Comverge Software functionality. Technical Inquiries shall receive the lowest priority.

Section 2.04 - Support and Maintenance Service Requests : Comverge shall provide telephonic Support and Maintenance Services for LICENSEE, as set out in the Scope and will receive payment as per the Contract Data.

The Support and Maintenance Services are as follows:

a. Network DOWN, TOP OR MEDIUM CSR.

(i) **Comverge TS receives LICENSEE call.** Comverge TS will respond within 4 hours of the call being logged, in the following manner:

- Confirm all details of the call with LICENSEE;
- Log the call and issue a unique reference ID;
- Discuss the problem with LICENSEE;
- Determine the priority of the Error according to the definitions above; and
- Present the actions to be taken.

(ii) **Remote access resolution process.** If possible, Comverge will diagnose the reported Error remotely and attempt to determine the issue causing the Error. If the issue can be resolved remotely, Comverge will update LICENSEE with details of the proposed resolution; resolve the issue causing the Error as allowed by LICENSEE and request that the CSR be closed. LICENSEE will confirm to Comverge that the issue causing the Error has been resolved and the CSR will be closed. After diagnosis, if it is determined that the issue causing the Error is **not** associated with the Comverge Software, and thus outside of the scope of Support and Maintenance Services, or to the extent the agreed upon hours for Support and Maintenance Services have already been exceeded, then Comverge will charge LICENSEE, and LICENSEE agrees to pay, for the services that were performed, in accordance with Section 4.01 hereof.

(i) **Commitment to Resolution and Closure.** Comverge TS will continue diagnosing reported Errors in accordance with Section 2.04 (a) (ii) and 2.04 (a)(iii), with management escalation in accordance with Section 2.05 below, until the Error is resolved.

(v) **Escalation process.** Comverge will escalate resolution of any Error in accordance with Section 2.05 below. The purpose of the escalation process is to progressively inform and involve a higher level of Comverge management in an effort to ensure that all reasonable actions are being taken to resolve the Error. Comverge TS will notify LICENSEE at each escalation point.

(vi) **Status reports.** Comverge will provide LICENSEE with status reports describing the actions being taken and the progress being made towards Error resolution. The status reports will be provided at each escalation point and, once the highest level of escalation has been reached, on a daily basis for a **Network Down** CSR, a bi-weekly basis for a **Top Priority** CSR and a weekly basis for a **Medium Priority** CSR,.

b. Technical INQUIRIES.

(i) **Comverge TS receives LICENSEE call.** Comverge TS will respond in the following manner:

- Confirm all details of the call with LICENSEE;
  - Log the call and issue a unique report reference ID; and
  - Provide telephone consultative assistance.
-

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(ii) **Technical Inquiry Process.** Technical assistance and/or escalation will continue until the **Technical Inquiry** has been resolved. If the **Technical Inquiry** leads to an Error discovery, the Error will be logged and the CSR procedures described in Section 2.04(a) will be followed. If, in Comverge's discretion it is deemed necessary, details of the **Technical Inquiry** and the Comverge TS findings will be forwarded to the Comverge Professional Service Group who will contact LICENSEE with a further plan of action.

(iii) **Escalation.** Comverge TS will escalate Technical Inquiries as considered necessary, and in accordance with Section 2.05 below, within applicable departments of Comverge, until the Inquiry is resolved.

(iv) **Status reports.** Comverge will provide LICENSEE with status reports describing the actions being taken and the progress being made towards resolution of the **Technical Inquiry** . The status reports will be provided in intervals mutually agreed upon with LICENSEE.

Section 2.05 - Escalation : An unresolved **CSR** or if necessary, **Technical Inquiry** , will be escalated within Comverge according to Schedule B . Escalation times can be advanced at the request of LICENSEE or at the discretion of Comverge TS, or can be deferred by written acknowledgement of LICENSEE. Escalation stops when an agreed upon course of action for resolution has been reached with LICENSEE. In the event that the agreed upon course of action for resolution does not resolve the **CSR** or **Technical Inquiry** , the escalation resumes from the point where placed on hold.

Section 2.06 - Conditions to Support and Maintenance Services : Comverge shall be obligated to provide Support and Maintenance Services, conditioned upon: (a) the receipt of a phone call or e-mail by Comverge TS from LICENSEE stating with reasonable accuracy the **CSR** issue or **Technical Inquiry** , (b) LICENSEE's satisfaction of all of its duties and obligations under the of the NEC Professional Services Contract for the DRAPP (c) the existence of an unaltered version of Comverge Software, with the exception of alterations performed by Comverge, or a Comverge agent authorized in writing by Comverge to perform such Comverge Software alterations, and (d) the existence of Comverge Software that has not been damaged by LICENSEE abuse or misuse, or database schema changes including but not limited to table, field and index changes or by any other actions whatsoever, including acts of God, not attributable to Comverge.

### ARTICLE III: LICENSEE OBLIGATIONS

Section 3.01 - LICENSEE Acknowledgement : The LICENSEE acknowledges the obligation to perform the following troubleshooting steps specified below prior to initiating Support and Maintenance Services with Comverge. In the event that Comverge determines that the troubleshooting steps in Section 3.02 below were not performed prior to initiating Support and Maintenance Services, and the resulting issue could have been resolved by following the troubleshooting steps outlined in Section 3.02 below, the resulting issue in question does not pertain to the Comverge Software or the resulting issue does pertain to the Comverge Software but the agreed upon hours for Support and Maintenance Services have been exceeded, then Comverge will charge LICENSEE, and LICENSEE agrees to pay, for the services in accordance with Section 4.01 hereof or in the latter case in accordance with Section 2.04 hereof.

Section 3.02 - Troubleshooting : Prior to contacting Comverge TS, LICENSEE will use commercially reasonable efforts to resolve an issue with the Comverge Software by: (a) screening for false alarms, (b) performing diagnostics through a series of troubleshooting techniques, which shall include a configuration, a hardware and network review, and (c) categorizing the urgency of the issue.

Section 3.03 - Reporting: LICENSEE shall keep an accurate event log of the activity of the Comverge Software, noting prior failures and resolutions. Upon request, LICENSEE shall provide this information to Comverge TS.

Section 3.04 - Access : Intentionally Left Blank.

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Section 3.05 - Trained Technicians : LICENSEE shall, at all times, employ a minimum of one (1) technician trained in the use and operation of the Comverge Software.

Section 3.06 - Network and Hardware : LICENSEE acknowledges that network and hardware maintenance, as well as any applicable warranties, fall outside of the scope of the Support and Maintenance Services provided by Comverge, and are the responsibility of LICENSEE except as may otherwise be expressly provided in the NEC 3 Professional Services Contract for the DRAPP. Comverge will provide LICENSEE a technician for assistance with network or hardware issues for a fee to be determined at time of request, as presented in Section 4.01 hereof.

#### ARTICLE IV: OTHER SERVICES

Section 4.01 - Other Services : Comverge shall provide the development work, as provided in the Scope and Price List of the NEC Professional Services Contract for the DRAPP. To the extent services are required outside of the Scope of the NEC Professional Services Contract for the DRAPP and this Agreement, the Parties shall mutually agree to those services and pricing.

Additionally, Comverge will provide an on-site technician for assistance with network and connectivity issues and/or testing, for a fee to be determined upon request, or as per the NEC.

#### ARTICLE V: WARRANTY AND DISCLAIMER

COMVERGE AGREES TO USE REASONABLE EFFORTS AND SKILL TO PROVIDE THE SUPPORT AND MAINTENANCE SERVICES DESCRIBED IN THIS SCHEDULE A2. A REQUEST BY LICENSEE FOR ANY SERVICE THAT IS BEYOND THE SCOPE, IS NOT BINDING ON COMVERGE UNLESS COMVERGE AGREES IN WRITING TO PROVIDE SUCH SERVICE, OR IF OTHERWISE DETERMINED IN TERMS OF THE NEC PROFESSIONAL SERVICES CONTRACT FOR THE DRAPP. THIS SCHEDULE A2 CONSTITUTES A SERVICE AGREEMENT AND NOT A PRODUCT WARRANTY. EXCEPT FOR THE EXPRESS LIMITED WARRANTY PRESENTED IN **SECTION 9** OF THIS SOFTWARE LICENCE AND SUPPORT AGREEMENT PART OF THE NEC PROFESSIONAL SERVICES CONTRACT FOR THE DRAPP, COMVERGE MAKES NO WARRANTIES, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, REGARDING THE SUPPORT AND MAINTENANCE SERVICES, ANY OTHER SERVICES, ANY ERROR CORRECTION, WORKAROUND, NEW RELEASE, TRAINING, INSTALLATION OR UPDATE FOR THE COMVERGE SOFTWARE. COMVERGE SPECIFICALLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMITATION, WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, AND NONINFRINGEMENT SAVE AS PROVIDED FOR HEREIN.

#### ARTICLE VI: LIMITATION OF LIABILITY

The liability of Comverge for any damages resulting from any course of action taken while performing any Support and Maintenance or Other Services hereunder, shall be limited to \*\*\*.

#### ARTICLE VII: SOFTWARE MAINTENANCE/ INSTALLATION/ TRAINING

Section 7.01 - New Releases and Updates : Comverge may, in its sole discretion, develop any Updates or New Releases to Comverge Software; however, Comverge has no obligation to develop or sell Upgrades or New Releases.

Section 7.02 - Installation : Comverge shall install the Comverge Software and train designated LICENSEE employees for the initial installation and shall be compensated as provided in the Price List. Comverge shall not be responsible for providing or installing any Upgrades or New Releases.

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#### ARTICLE VIII: PAYMENT

Section 8.01 - Training and Installation : The Training and Installation feeds are included in the Price List.

Section 8.02 - Payment for Support and Maintenance Services and Continuation of Services : LICENSEE shall pay Comverge the Support and Maintenance Fee as per the Price List and in accordance with the Contract Data of the NEC Professional Services Contract for the DRAPP.

Section 8.03 - Costs : LICENSEE shall pay all direct costs incurred by Comverge in providing any Support and Maintenance Services, Other Services, training or installation in accordance with the Price List and shall be paid as agreed in the Contract Data of the NEC Professional Services Contract for the DRAPP.

Section 8.04 - Terms of General Applicability : Neither the continuation of Support and Maintenance Services nor the provision of any Other Services, training, installation or software maintenance of any kind shall be deemed to be an extension of the Warranty Period provided in the Agreement. Should LICENSEE fail to make any timely payments under this Agreement, Comverge may exercise its remedies in terms of the contract.

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## SCHEDULE B ESCALATION

Activity	Priority				Contact
	Network Down	Top	Medium	Technical Inquiries	
Call acknowledgement & prioritization of call	***	***	***	***	***
Action Plan presented to LICENSEE	***	***	***	***	***
Technical Management Level Escalation	***	***	***	***	***
Director Level Escalation	***	***	***	***	***
** Normal business hours for Comverge TS are daily Monday through Friday from 12:00 am RSA to 8:00 pm RSA, including federal holidays if such holidays are not also public holidays in the Republic of South Africa ("Hours")					

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## Price List

### Key Assumptions on which pricing is based

Pricing is based on the following assumptions. The price may change if modifications are made hereto.

- Definitions of the \*\*\* of the \*\*\*
- Role of the \*\*\* in \*\*\*and \*\*\*
- The *Employer* will specify \*\*\* and \*\*\* with contributions from the \*\*\* and \*\*\* will implement for their customers.
- \*\*\*
- Settlement Process will occur as outlined in this Scope

In addition to the assumptions there are a number of items that may affect pricing and Scope but are not yet fully mandated. These items include:

- \*\*\* of the \*\*\* from \*\*\* by the \*\*\* as reflected in this Scope
  - Future inclusion of \*\*\*
  - Movement of primary \*\*\*
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## Appendix B - 'Full' Pricing Matrix

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\*\*\* Indicates material has been omitted pursuant to a Confidential Treatment Request filed with the Securities and Exchange Commission. A complete copy of this agreement has been filed separately with the Securities and Exchange Commission.

ESKOM HOLDINGS SOC LTD      CONTRACT NUMBER 4600043033  
Demand Response Aggregation Pilot Programme

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## Learnings

### B. The Employer Learnings Basis of Estimate

The Learnings portion of the *Employer / Consultant* project is a \*\*\* that would likely be \*\*\* by \*\*\*. Its purpose is to obtain \*\*\* throughout the duration of the Contract, rather than achieve \*\*\* under the Learnings portion of the project.

To execute this obligation, the \*\*\* will provide up to \*\*\* in the most cost-effective manner while maintaining a \*\*\*, the \*\*\* and \*\*\* as a \*\*\*. The *Consultant* does not guarantee that it will \*\*\* any \*\*\* for this \*\*\* and procurement of all \*\*\*.

Pricing is based on the recommendation provided below where the MWs are recruited under the \*\*\* and dispatched by the \*\*\*.

The Parties agree that the Learnings portion will be achieved through a \*\*\* where the \*\*\* through its \*\*\* with \*\*\*. When Load Providers are being recruited for the Learnings program, all customer contact will be provided by \*\*\* so that the customer is interacting with \*\*\*.

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**Exclusive of VAT**

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<b>***:</b>				
<b>a) ***:</b>				
- ***	***	***	***	***
- ***	***	***	***	***
- ***				
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### **Annexure C**

#### Supplier Development and Localisation (SD&L) Commitments

The *Consultant* will be required to submit an implementation plan indicating timelines and milestones 21 days after contract award. The *Consultant* shall submit quarterly SD&L Progress Reports to the *Employer's Agent*. The quarters are calendar quarters being January to March, April to June, July to August and September to December.

SD&L Progress Reports shall be submitted within 7 days of the end of the quarter to which the report relates.

The following are commitments with regard to SD&L

#### **Skills Development Proposal**

<b>Organising Framework for Occupations Occupational Group</b>	<b>Proposed Number of Persons to be Trained in Gauteng</b>
***	***
***	***
***	***
***	***
***	***
***	***
***	***
***	***
***	***
<b>Total Number of Persons to be Trained</b>	***

#### **Job Creation Proposal**

<b>Organising Framework for Occupations Occupational Group</b>	<b>Proposed Number of Jobs to be created in Gauteng</b>
***	***
***	***
***	***
***	***
***	***
***	***
***	***
***	***
***	***
***	***
***	***
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***	***
***	***
***	***
***	***
***	***
<b>Total Number of Jobs to be Created</b>	***

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**Localisation Spend**

**Criteria**

**Proposed Localisation Targets**

Local content to South Africa ***
Local content local to site - GAUTENG ***
Procurement from Large Black Suppliers (Powertech, Ozone, ACCvantage) ***

COMVERGE, INC.

**EXECUTIVE EMPLOYMENT AGREEMENT**

THIS EXECUTIVE EMPLOYMENT AGREEMENT (this "Agreement") is entered into as of this 28<sup>th</sup> day of October, 2011, by and between Greg Allarding, an individual ("Executive"), and Comverge, Inc., a Delaware corporation (the "Company"). The Executive and Company are collectively referred to as "Parties" and individually as "Party".

WHEREAS, the Company has employed and wishes to continue to employ Executive to provide personal services to the Company and wishes to provide Executive with certain compensation and benefits in return for such services;

WHEREAS, the Executive and Company desire to mutually terminate the past employment arrangement and now wish to enter the current Agreement; and

WHEREAS, Executive wishes to be employed by the Company, and to provide personal services to the Company in return for certain compensation and benefits.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the Executive and the Company hereby agree as follows:

**SECTION 1. EMPLOYMENT BY THE COMPANY.**

1. **Employment Agreement.** Upon the date of execution of this Agreement (the "Employment Date"), the Executive's continued employment with the Company shall be pursuant to the terms stated herein.

2. **Position and Duties.** Executive shall serve in the position of Senior Vice President, Operations, with such powers, duties, and/or responsibilities as are assigned to Executive by the Company's Chief Executive Officer and/or Chief Operating Officer or his delegate. Executive will devote his best efforts, time, and attention exclusively to the business of the Company, and shall faithfully and efficiently discharge all duties and responsibilities assigned to him hereunder. Executive shall comply with all Company policies, procedures and practices as may now exist or which from time to time may be implemented.

3. **Location.** Executive's primary office location shall be in Norcross, Georgia. Executive acknowledges that the Company's business extends across the entire United States and elsewhere and that, from time to time, however, Executive's duties may require him to travel and to work at other locations, including but not limited to other Company office locations.

4. **Term.** The term of Executive's employment hereunder shall commence as of the Employment Date and shall continue through December 31, 2014, unless earlier terminated pursuant to the provisions of this Agreement. Unless, within ninety (90) days prior to any then-scheduled expiration of the Term, either party notifies the other in writing of its desire not to renew this Agreement, the Term shall automatically be extended for an additional period of one (1) year from the applicable succeeding anniversary of the Employment Date.

**SECTION 2. COMPENSATION, BENEFITS AND OWNERSHIP.**

1. **Compensation.** Executive shall be paid a salary, and shall be eligible to receive incentive compensation and relocation assistance, as described in Exhibit A attached hereto. All compensation payable

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pursuant to any plan or program described in Exhibit A shall be governed by and subject to the applicable plan or program documents, which may from time to time be amended, modified or terminated on such terms and in such manner as is permitted in respect of the applicable plan or program.

2. ***Company Benefits*** . Subject to the satisfaction of the general rules for eligibility and participation under the Company's standard employee benefit plans and practices, Executive shall be allowed to participate in the Company's standard employee benefit plans and practices which may be in effect from time to time during the term of Executive's employment and are provided by the Company to its employees generally. Such participation shall be governed by the applicable plan documents, and the Company reserves the right, in its discretion, to amend, modify, or discontinue any benefit plan or practice.

3. ***Section 280G Limitation*** . In the event that any payments to which Executive becomes entitled in accordance with the provisions hereof, or in connection with any plans or programs referred to in Exhibit A or Section 2.2 hereof, would otherwise be deemed to constitute "parachute payments" (each one, a "Parachute Payment") within the meaning of Section 280G of the Internal Revenue Code of 1986, as amended and the regulations and administrative guidance thereunder (the "Code"), then such payments will be subject to reduction to the extent necessary to assure that Executive receives only the greater benefit of receiving (a) the amount of those payments which would constitute such a Parachute Payment or (b) the amount which yields Executive the greatest after-tax amount of benefits after taking into account any excise tax imposed on the payments provided to Executive pursuant to this Agreement (or on any other benefits to which Executive may be entitled in connection with the Change in Control or the subsequent termination of service) under Section 4999 of the Code.

### **SECTION 3. ASSIGNMENT OF INTELLECTUAL PROPERTY.**

1. ***Ownership and Assignment of Intellectual Property*** . All processes, products, methods, improvements, discoveries, inventions, ideas, creations, trade secrets, know-how, machines, programs, designs, routines, subroutines, techniques, ideas for formulae, writings, books and other works of authorship, business concepts, plans, projections and other similar items, as well as all business opportunities discovered, conceived, designed, devised, developed, perfected or made by Executive, whether alone or in conjunction with others and within the course of Executive's job responsibilities to the Company, and related in any manner to the actual or anticipated business of the Company or to actual or anticipated areas of research and development of the Company (all of the foregoing collectively, the "Intellectual Property"), shall be promptly disclosed to and are the property of the Company, and Executive hereby assigns, transfers and conveys all of the Intellectual Property and all of Executive's rights therein to the Company. The term "Intellectual Property" shall be given the broadest interpretation possible and shall include any Intellectual Property conceived, designed, devised, developed, perfected or made by Executive during off-duty hours and away from the Company's premises, as well as those conceived, designed, devised, developed, perfected or made in the regular course of Executive's performance under this Agreement.

2. ***Post-Employment Assignment of Intellectual Property***. In consideration of the benefits provided pursuant to this Agreement, particularly those benefits conferred by Section 6.5 and any stock option or similar rights pursuant to any Company plans in which Executive was a participant, all Intellectual Property discovered, conceived, designed, devised, developed, perfected or made by Executive following the termination of this Agreement shall be Intellectual Property covered by the scope of Section 3.1 if it was conceived, in whole or in part, while this Agreement remains in effect. All Intellectual Property conceived, designed, devised, developed, perfected or made by Executive within twelve (12) months after termination of this Agreement shall be disclosed to the Company, and shall be presumed to have been conceived, designed, devised, developed, perfected or made by Executive during the Term, and Executive shall have the burden of proving otherwise by clear and convincing evidence in order to successfully rebut such presumption.

3. ***Written Assignments*** . Executive shall execute and deliver, both during the Term and thereafter in connection with a severance agreement required under Section 7.5(g) to and in favor of the Company such assignments (including patent, trademark and copyright assignments), documents, instruments and

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applications (including patent, trademark or copyright applications) as the Company may deem appropriate or necessary to claim, secure, acquire, perfect, defend, enforce and/or assign any and all rights and privileges in and to or arising from the Intellectual Property. Executive shall also, both during the Term and thereafter, cooperate with the Company, and to render such assistance as the Company may reasonably require, in connection with any process (whether administrative, judicial or otherwise) associated with the Company's efforts to claim, secure, protect, perfect, defend, assign and/or enforce such rights and privileges in favor of the Company and its successors, licensees and assigns. Executive shall also, both during the Term and thereafter, promptly disclose to the Company fully and in writing any Intellectual Property that Executive may conceive, make, or develop, in whole or in part, by himself or jointly with others, (a) whether or not it is conceived, made, developed or worked on by Executive during his Term with the Company; (b) whether or not the Intellectual Property was created at the suggestion of the Company; (c) whether or not the Intellectual Property was reduced to drawings, written description, documentation, models or other tangible form; and (d) whether or not the Intellectual Property is related to the business of the Company.

4. **Work Made for Hire.** Executive acknowledges and agrees that any work of authorship comprising Intellectual Property shall be deemed to be a "Work Made for Hire," to the extent permitted by the United States Copyright Act (17 U.S.C. § 101 (2000)). To the extent that any such work of authorship may not be deemed to be a Work Made for Hire, Executive hereby irrevocably assigns all ownership rights in and to such work to the Company. If any such work of authorship cannot be assigned, Executive hereby grants to the Company an exclusive, assignable, irrevocable, perpetual, worldwide, sub-licensable (through one or multiple tiers), royalty-free, unlimited license to use, copy, reproduce, distribute, modify, adapt, alter, translate, improve, create derivative works of, practice, publicly perform, publicly display and digitally perform and display such work in any media now known or hereafter known. Outside the scope of his employment, Executive agrees not to (a) practice, display, copy, reproduce, distribute, transfer, modify, adapt, alter, translate, improve, or create derivative works from, or otherwise use, any such work of authorship or (b) incorporate any such work of authorship into any product or invention unrelated to the Company's business. To the extent moral rights (as defined by applicable law) may not be assignable under applicable law and to the extent the following is allowed by the laws in the various countries where moral rights exist, Executive hereby irrevocably waives such moral rights and consents to any action of the Company that would violate such moral rights in the absence of such consent.

5. **No License Granted.** Executive acknowledges and agrees that nothing in this Agreement shall be deemed to grant, by implication, estoppel, certain rules of construction, or otherwise, (a) a license from the Company to Executive to make, develop, use, license, disclose, or transfer in any way any Intellectual Property or (b) a license from the Company to Executive regarding any of the Company's existing or future ownership rights.

#### **SECTION 4. CONFIDENTIALITY.**

1. **Confidentiality Obligation .** Executive acknowledges and agrees that he has and will have access to Proprietary, Trade Secret and Confidential Information (as those terms are defined below in Section 4.2) as a result of his employment with the Company, and that such information constitutes valuable, special and unique property of the Company. Without limiting the generality of the foregoing, Executive expressly acknowledges that, in the course of performing his services pursuant to this Agreement, he will obtain or learn Confidential and Proprietary Information regarding the Company including, without limitation information regarding the Company's operations, financial results, pricing, customers, suppliers and other matters. Accordingly, at all times while employed by the Company, and continuing for a period of three (3) years with respect to Proprietary and Confidential Information, and for whatever time Trade Secret Information remains a Trade Secret under applicable law, following the termination of his employment with the Company for whatever reason, Executive shall neither use nor disclose, nor permit any person or entity within his reasonable control to use or disclose, any Proprietary, Trade Secret, and Confidential Information, and shall maintain and protect the secrecy of the Proprietary, Trade Secret, and Confidential Information,

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except to the extent required in the ordinary course of Executive's employment with the Company, and then only subject to the direction and control of the Company. Additionally, Executive shall cause all persons and entities within his reasonable control to use their respective best effort(s), to maintain and protect the secrecy of the Proprietary, Trade Secret and Confidential Information. Executive further acknowledges that in the performance of his job duties to this Agreement, he will have access to and be informed of the Proprietary and Confidential Information (as described in Section 4.2) belonging to customers of Company, and that he shall return to the Company any such information within his actual or indirect possession and comply with any restrictions concerning such information within his possession and comply with any restrictions concerning such information that have been imposed upon Company by its customers with respect to the use, disclosure, or return information.

2. **Definition of Proprietary, Trade Secret and Confidential Information** . As used in this Agreement the term "Proprietary, Trade Secret and Confidential Information" means any non-public knowledge, information or property relating to, or used or possessed by, the Company (or its customers, as the case may be), and includes, without limitation, the following: trade secrets, patents, copyrights, software (including, without limitation, all programs, specifications, applications, routines, subroutines, techniques, code and ideas for formulae); ideas, information, concepts, data, drawings, designs and documents; names of clients, customers, but not limited to employees, agents, contractors and suppliers; business plans, marketing plans and marketing information; financial, pricing, and cost information and other business records; and all copies of any of the foregoing. Trade Secrets shall be such information defined by applicable law as a Trade Secret.

3. **Return of Confidential Information** . Executive agrees that he shall immediately, upon the request of the Company, return to the Company all Proprietary, Trade Secret, and Confidential Information and any other tangible material containing, prepared on the basis of, or reflecting any Proprietary, Trade Secret, and Confidential Information (whether prepared by the Company, Executive or otherwise) and shall not retain any copies, extracts or other reproductions, in whole or in part, of such Proprietary, Trade Secret, and Confidential Information.

4. **Return of Company Property** . All products, records, designs, patents, trademarks, copyrights, plans, manuals, memoranda, lists and other documents or other property of the Company or any of its affiliates in the possession or control of Executive and all records compiled by the Executive which pertain to the business of the Company or its affiliates, shall be and remain the property of the Company and shall be subject at all times to its discretion and control. Likewise, all correspondence with customers or affiliates of the Company, all reports, records, charts, and advertising materials and any data pertaining to the Company, its affiliates or the business of the Company or its affiliates that are held by or on behalf of Executive shall be delivered promptly to the Company without request on the date Executive's employment with the Company terminates or at any other time promptly upon request by the Company.

5. **Nature of Obligation** . The obligations of Executive set forth in this Section 4 are in addition to, and not in lieu of, any of Executive's duties or the Company's rights and remedies, at law or in equity, with respect to the Company's Proprietary, Trade Secret, and Confidential Information and property. The Company may pursue all such rights and remedies, as well as remedies for the breach of the provisions set forth herein. Also, the Proprietary, Trade Secret, and Confidential Information and other property referenced in this Section 4 constitute valuable property of the Company or its customers, the ownership of which is not dependent upon the performance by the Company of any of its obligations under this Agreement or the performance of any legal, statutory or other duty, if any, to Executive. Accordingly, Executive shall perform its obligations under this Section 4 regardless of any alleged or actual breach or failure to perform by the Company.

4.6 **Post Termination Activities** . Executive acknowledges and agrees that, during the course of his employment with the Company, he had access to the Company's Proprietary, Trade Secret and Confidential Information, and that disclosure to or use of such information by a competitor of the Company would cause the Company irreparable harm. Executive agrees and acknowledges that should he engage in the restricted

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activities as set forth in Section 5 hereof, he will inevitably disclose the Company's Proprietary, Trade Secret and Confidential Information.

## **SECTION 5. NONCOMPETITION AGREEMENT.**

In consideration of the compensation paid or payable to Executive by the Company pursuant to this Agreement (including, but not limited to, Section 2 hereof), Executive hereby agrees as follows:

5.1 Executive acknowledges that the Company's business is international in scope, that its customers may not be restricted to any country, and that in the performance of his duties as set forth in this Agreement, Executive shall perform services on behalf of the Company in all countries in which the Company does business. During the term of this Agreement, Executive will devote all of his working time and energies to the Company, and will not, without the Company's express written permission, own, work for or provide services to any other entity, whether as an owner, partner, agent, representative, consultant, officer, director, independent contractor or employee. Notwithstanding the foregoing, Executive is permitted to own up to 1% of any class of securities of any corporation in competition with the Company that is actively traded on a national securities exchange or through NASDAQ.

5.2 As and for the consideration granted herein, Executive hereby covenants that he will not, within the Territory and during the Noncompetition Period, without the prior written consent of the Company, engage in any Restricted Activities for or on behalf of any corporation, partnership, venture or other business entity which is engaged in *Competitive Services*. The term "*Noncompetition Period*" means the period beginning on the date of this Agreement and ending two (2) years after the date Executive's employment with the Company ends or is terminated for any reason. The term "*Restricted Activities*" means having ownership of or being employed by as an employee, agent, or representative, or as an independent contractor or otherwise, and providing services similar to the services Executive provides to the Company. The term "*Competitive Services*" means (a) the business of providing energy management related services, including, without limitation, load control or demand management products and services, energy capacity, energy efficiency, advanced metering solutions, or (b) other activities, products or services of the type conducted, authorized, offered, or provided by the Company as of the date Executive's employment with the Company is terminated. The term "*Territory*" means anywhere in the United States where, under Executive's leadership, the Company is providing services or conducting business. Executive acknowledges that the United States is included within the geographic scope of the Company's business and is the Territory for or in which Executive performs services for the Company.

## **SECTION 6. NONSOLICITATION AGREEMENT**

6.1 During the term of this Agreement and for a period of two (2) years after Executive's employment is terminated for any reason, Executive will not, directly or indirectly, individually or on behalf of any other person, firm, partnership, corporation, or business entity of any type, solicit, induce or attempt to solicit or induce any current employee or consultant of the Company, to terminate his or her employment relationship or other engagement with the Company.

6.2 During the term of this Agreement and for a period of two (2) years after Executive's employment is terminated for any reason, Executive will not, directly or indirectly, individually or on behalf of any other person, firm, partnership, corporation, or business entity of any type, solicit, divert, or take away, or attempt to solicit, divert, or take away, in whole or in part, any Protected Customer of the Company with whom Executive had *Material Contact* for the purpose of engaging in, providing or selling *Competitive Services*. For purposes of this Agreement, "*Protected Customer*" shall mean any person, partnership or corporation or business entity of any type to whom the Company has sold its products or services or actively solicited to sell its products or services. "Material Contact" means contact between Executive and a customer or potential customer of the Company (i) with whom or which Executive had dealings on behalf of the Company; (ii) whose dealings with the Company are or were coordinated or supervised by Executive; (iii)

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about whom Executive obtained Proprietary, Trade Secret and Confidential Information in the ordinary course of business as a result of Executive's employment or other engagement with the Company; or (iv) who receives products or services of the Company, the sale or provision of which results or resulted in compensation, commissions, or earnings, for Executive within the two (2) years prior to the termination of Executive's employment with the Company.

6.3 **Enforcement** . The existence of any claim or cause of action of Executive against the Company, whether predicated on this Agreement or otherwise, shall not preclude the Company's enforcement of these covenants.

6.4 **Reasonable Covenants** . Executive acknowledges and agrees that the covenants set forth in this Section 6 are necessary and reasonable to protect the Company and the conduct of its business and are a fair and reasonable restraint on Executive in light of the activities and business of the Company on the date of execution of this Agreement and the future plans of the Company; and that such covenants are also to be construed and enforced in light of the activities and business of the Company (including business activities in the planning stage) on the date of termination of Executive's employment with the Company. Executive acknowledges that he will not suffer any undue hardship as a result of the covenants set forth in Sections 4, 5 and 6 and that he will be able to pursue his occupation notwithstanding his obligations under Sections 4, 5 and 6.

6.5 **Survival** . The provisions of this Section 6 shall survive any termination of this Agreement and are subject to paragraph 8 of this Agreement.

## **SECTION 7. TERMINATION OF EMPLOYMENT.**

7.1 **Certain Definitions. As used herein, the following terms shall have the following definitions:**

(a) **Affiliate** . "Affiliate" shall mean an affiliate of the Company, as defined in Rule 12b-2 promulgated under Section 12 of the Securities Exchange Act of 1934, as amended from time to time.

(b) **Cause** . A termination by the Company with "Cause" shall include (without limitation) (i) non-performance in the roles and duties, as assigned; (ii) Executive's breach of any material provision of this Agreement; (iii) Executive's material breach of any written Company policy contained in the Company's manual of policies and procedures; or material non-compliance with any lawful direction given by the Company's Chief Executive Officer or his/her delegate; (iv) Executive's failure to perform his job duties in accordance with the Company's expectations as determined by the Company's Chief Executive Officer and/or Chief Operating Officer in their sole discretion; (v) Executive's Disability (subject to Company's legal obligations); (vi) Executive's fraud with respect of the business or affairs of the Company; (vii) the commission by Executive, or entering of a plea of *nolo contendere* with regard to, a felony or a crime involving moral turpitude; or (viii) alcohol abuse or illegal drug use by Executive; *provided however* , that in the event of Executive's breach as set forth in Sections 7(b)(i) and (ii) above, no Cause for termination shall be deemed to exist for any such breach that is curable and which in fact is cured by Executive within thirty (30) days after notice of such termination has been delivered to Executive, and in the event of Executive's breach, as set for in Section 7(b)(viii) above, no Cause shall be deemed to exist if the Executive and Company agree on a remedial program for Executive and so long as Executive in all respects complies with the requirements of such program. During the time of Executive's participation in any remedial program as set forth above, Executive shall, if directed by the Company, be on a paid leave of absence away from the Company's premises .

(c) **Change in Control** . For purposes of this Agreement, "Change in Control" means the occurrence of any of the following events if, following such occurrence, a Board Change (as

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hereinafter defined) occurs:

(i) any person becomes the beneficial owner, directly or indirectly, of securities of the Company (not including in the securities beneficially owned by such person any securities acquired directly from the Company or its affiliates) representing fifty percent (50%) or more of the combined voting power of the Company's then outstanding voting securities; or

(ii) a merger or consolidation of the Company is consummated with any other corporation, other than (A) a merger or consolidation which would result in the voting securities of the Company outstanding immediately prior thereto continuing to represent (either by remaining outstanding or by being converted into voting securities of the surviving or parent entity) more than fifty percent (50%) of the combined voting power of the voting securities of the Company or such surviving or parent equity outstanding immediately after such merger or consolidation; or

(iii) there is consummated an agreement for the sale or disposition by the Company of all or substantially all of the Company's assets (or any transaction having a similar effect), other than a sale or disposition by the Company of all or substantially all of the Company's assets to an entity, at least fifty percent (50%) of the combined voting power of the voting securities of which are owned by stockholders of the Company in substantially the same proportions as their ownership of the Company immediately prior to such sale, provided that such transferee entity confirms in writing that it is bound by the terms of this Agreement.

In the event that the foregoing definition of Change in Control does not comply with the requirements of Section 409A of the Code, and an amount, benefit or item of compensation hereunder would be subject to Section 409A of the Code, but would not be so subject if the definition of Change in Control above complied with the requirements of Section 409A of the Code, then with respect only to such amount, benefit or item of compensation, the term "Change in Control" shall mean a "change in control event" within the meaning of Treas. Reg. §1.409A-3(i)(5).

(d) *Board Change.* "Board Change" means any change in directors after giving effect to any of the transactions described above as a result of which the individuals serving on the Board prior to such transaction no longer comprise at least a majority of the directors on the Board immediately after giving effect to such transaction.

(e) *Good Reason.* A termination by the Executive for "Good Reason" means termination by Executive following (i) a reduction in Executive's Annual Salary or other material component of compensation (excluding stock options or similar grants) required to be paid pursuant hereto without Executive's prior written consent; or (ii) the Company's relocation of the Executive, without the Executive's consent, to a permanent location more than seventy-five (75) miles from the location specified in Section 1.2 of this Agreement; *provided however*, that no Good Reason for Executive's termination shall be deemed to exist unless (i) Executive gives notice to the Company of the action or condition which would constitute Good Reason within sixty (60) days of the initial existence of such action or condition, (ii) the action or condition which would constitute Good Reason is not cured by the Company within the 30-day period after the timely provision of the notice required herein, and (iii) Executive effects the termination for Good Reason within thirty (30) days after the expiration of the 30-day cure period. After such thirty (30) day period, Executive shall be deemed to have waived any right to terminate this Agreement pursuant to this Section 7.1(e).

(f) *Non-Renewal.* A non-renewal of this Agreement as provided in Section 1.4 shall not be considered a termination under any provision of this Section 7 and, upon such non-renewal by either party and the termination of this Agreement, and Company shall be required to pay to Executive only the amounts specified in Section 7.5 (a).

**7.2 Death by Executive.** This Agreement shall terminate upon Executive's death.

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7.3 **By the Company** . The Company shall have the right to terminate Executive's employment with the Company, at any time, with or without Cause. For avoidance of doubt, the parties agree that Executive has no right to continue at any time in any office of the Company after being removed from such office in the manner provided in the Company's bylaws or other applicable provisions of the Company's governing law and instruments.

7.4 **By Executive** . Executive may terminate his employment with the Company at any time, upon providing thirty (30) days advance notice, either with or without Good Reason. In the event Executive terminates his employment with the Company with Good Reason, such notice shall specify the grounds for such termination, and the Company shall have the opportunity to cure such grounds for termination in accordance with the provisions of Section 7.1(e).

### **7.5 Severance Pay, Other Post-Employment Payments and Acceleration of Benefits Upon Certain Terminations.**

(g) *Termination by the Company for Cause or by Executive without Good Reason* . If the Company terminates Executive's employment for Cause, or Executive terminates his employment without Good Reason, then in either such event, Executive shall not be entitled to any severance pay, and shall only be entitled to (i) any unpaid, but earned, salary, (ii) any unpaid but earned vacation in accordance with Company policy then in effect and (iii) any incurred but unpaid ordinary and necessary business expenses properly documented by Executive in accordance with the Company's then effective expense reimbursement policy.

(h) *Termination by the Company Without Cause, or by Executive for Good Reason* . Subject to subsection 7.5(c) below, if the Company terminates Executive's employment without Cause, or Executive terminates his employment with Good Reason, then in such event, Executive shall be entitled to all payments allowed pursuant to subsection 7.5(a) above and, provided Executive executes a Severance Agreement and General Release, severance pay in the amount of the sum of (i) twelve (12) months' annual base salary as specified in Exhibit A, plus (ii) an amount equal to the amount of Executive's bonus payment for the last complete year of service prior to termination, times a fraction, the numerator of which is the number of days in the year of Executive's termination through the date of such termination, and the denominator of which is 365 (or in the case of leap years, 366). The benefits provided pursuant to this Section 7.5(b) shall not include any stock option or similar grants and Executive's rights concerning any stock option or similar grants shall be exclusively determined by applicable Company policies or plans concerning such grants.

(i) *Certain Terminations Following a Change in Control* . Notwithstanding the provisions of Section 7.5(b) above, in the event the Company terminates Executive's employment without Cause, or Executive terminates his employment with Good Reason, concurrently with or within twelve (12) months following a Change in Control, then, in lieu of the payments specified in Section 7.5(b), Executive shall be entitled to all payments allowed pursuant to subsection 7.5(a) above and, provided Executive executes a Severance Agreement and General Release, severance pay in the amount of eighteen (18) months' annual base salary as specified in Exhibit A, plus an amount equal to the amount of Executive's bonus payment, if any, for the last complete calendar year prior to the Executive's termination of employment. In such event, all unvested options to purchase Company stock held by Executive shall immediately vest and become exercisable and all restricted stock granted to Executive shall immediately vest and the legend providing restrictions on the sale or transfer of such stock related to such vesting shall be removed at the request of the Executive.

(j) *Continuation of Benefits* . In the event the Company terminates Executive's employment without Cause, or Executive terminates his employment with Good Reason, and Executive qualifies for and becomes entitled to the severance pay provided pursuant to Section 7.5

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(b) or (c) above, as applicable: (1) the Company shall continue to provide benefits referred to in Section 2.2 during the period Executive is entitled to severance payments under this Agreement, subject to and in accordance with Executive's COBRA rights and the provisions of the applicable plan documents, and the Company reserves the right, in its discretion, to amend, modify, or discontinue any benefit plan or practice; and (2) if Executive elects to participate in COBRA coverage for which he and/or his family is eligible under the Company's then-effective health plans, the Executive shall pay to the Company on a monthly or quarterly basis, as the case may be, an amount equal to the co-payment amount for which the Executive would have been responsible had he remained an employee during the COBRA coverage period and the Company shall pay to the plan administrator on behalf of Executive the entire cost of the COBRA coverage. Executive agrees to a netting of payments where applicable.

(k) *Death or Disability* . Any termination of this Agreement by reason of Executive's death or disability shall not give rise to any severance payment hereunder, but shall be without prejudice to any benefits payable to Executive or his estate under applicable company benefits relating to such event. For purposes of this Agreement, the term "Disability" shall mean the Executive's inability to perform his duties, in all material respects, because of illness, physical or mental disability, or other incapacity that continues for an uninterrupted period of one hundred eighty (180) days. Executive's unvested stock options and restricted stock not otherwise vested shall vest upon the death or disability of Executive as provided in, and subject to the provisions of, applicable Company policies or plans concerning the grants to Executive of unvested stock options and restricted stock.

(l) *Timing of Payments* . All severance payments provided pursuant to Section 7.5(b) above, as applicable, that are measured by Executive's annual base salary shall begin as provided by Section 7.5(g) (except as otherwise required by Section 10.11) and shall thereafter be paid at such times and in accordance with the Company's payroll policies and procedures as if Executive were still employed by the Company; and all amounts of severance pay with respect to bonus payments shall be prorated over the period of such payment, and payments of a proportional amount of such bonus payments shall begin as provided by Section 7.5(g) (except as otherwise required by Section 10.11) and shall thereafter be paid at such times as base salary payments are made. All severance payments provided pursuant to Section 7.5(c) above, as applicable, that are measured by Executive's annual base salary shall be paid in one lump sum amount as provided by Section 7.5(g) (except as otherwise required by Section 10.11).

(m) *Requirements Regarding Eligibility to Receive Severance Payments* . Notwithstanding any of the other provisions hereof, the Company shall not be obligated to make and shall not make the severance payments provided under Section 7.5(b) or (c) above unless Executive executes and delivers to the Company within thirty (30) days from the date on which the Executive's employment is terminated, and does not at any time after execution and delivery withdraw or revoke, a Severance Agreement containing a general release in a form reasonably acceptable to the Company and the assignment as set forth in Section 3.3. Furthermore, in the event Executive initially qualifies to receive the payments and benefits provided under this Section 7.5, but then fails to comply with his obligations under this Agreement (including without limitation Sections 3, 4, 5 and 6 hereof), the Company's obligations under this Section 7.5 shall terminate.

(n) *Termination of other Compensation and Benefits* . Except as otherwise required by applicable law or as provided above in this Section 7.5, Executive's eligibility for or entitlement to any other compensation or benefits shall cease immediately upon termination of this Agreement and Executive's employment with the Company, with the exception of certain benefits that cease at the termination of the pay period.

(o) *Characterization of Payments under Section 409A*. For purposes of Section 409A of the Code (including, but not limited to, to application of the exceptions for short-term deferrals and for "separation pay only upon an involuntary separation from service"): (i) each payment provided

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for under this Section 7.5 is hereby designated as a separate payment, rather than a part of a larger single payment or one of a series of payments; and (ii) with respect to the severance payments and benefits to which Executive may become entitled under Section 7.5 of this Agreement and which are not in substitution or replacement of “nonqualified deferred compensation” (within the meaning of Section 409A of the Code), a termination of Executive's employment by the Company without Cause or by Executive for Good Reason is intended to constitute an “involuntary separation from service” and, in turn, a “substantial risk of forfeiture” (within the meanings of Section 409A of the Code).

**7.6 *Effect of Termination*** . Termination of Executive's employment with the Company shall not limit, affect, or discharge Executive's obligations under Sections 3, 4 5 and 6 of this Agreement and shall not release the Company from its obligations to make payments or provide benefits required by Sections 2.2 and 7.5 of this Agreement following such termination (subject to the limitations provided in Section 7.3). All other obligations as to periods after the date of termination shall cease, without prejudice to the rights and remedies for events or breaches prior to the date of termination.

**7.7 *Waiver*** . The Company may waive or defer exercising its power to terminate this Agreement, but such waiver or deferral shall not thereby (a) establish a policy, interpretation, or course of performance that may be used to construe, limit or affect the express terms of this Agreement, (b) preclude the Company from exercising its rights or remedies hereunder or otherwise on any other occasion or from using the breach as support for the exercise of its power to terminate on any future occasion or (c) limit the ability of the Company to revoke such waiver or deferral and exercise its power to terminate this Agreement if it determines that the condition giving rise to a power to terminate has continued, or if the Company determines in good faith that it was not fully aware of all facts and circumstances of such condition, or if such waiver or deferral may be retracted at common law.

## **SECTION 8. CERTAIN REMEDIES.**

With respect to each and every breach or violation or threatened breach or violation by Executive of Sections 3, 4, 5 and 6 of this Agreement, the Company, in addition to all other remedies available at law or in equity, including, but not limited to, specific performance of the provisions hereof, shall be entitled to enjoin the commencement or continuance thereof and may, without notice to Executive, apply to any court of competent jurisdiction for entry of an immediate restraining order or injunction, without the necessity of proving either inadequacy of legal remedies or irreparable harm and without the necessity of posting a bond. The Company shall also be entitled to the recovery of reasonable attorney's fees and expenses incurred in conjunction with any such proceeding.

## **SECTION 9. SEVERABILITY AND REFORMATION.**

The provisions of this Agreement are severable, and any judicial determination that one or more of such provisions, or any portion thereof, is invalid or unenforceable shall not affect the validity or enforceability of any other provisions, or portions thereof, but rather shall cause this Agreement to first be construed in all respects as if such invalid or unenforceable provisions, or portions thereof, were modified to terms that are valid and enforceable and provide the greatest protection to the Company's business and interests; *provided, however* , that if necessary to render this Agreement enforceable, it shall be construed as if such invalid or unenforceable provisions, or portions thereof, were omitted.

## **SECTION 10. GENERAL PROVISIONS.**

**10.1 *Notices*** . Any notices provided hereunder must be in writing and shall be deemed effective upon the earlier of personal delivery (including personal delivery by fax) or the third day after mailing by first class mail, to the Company at its primary office location and to Executive at Executive's address as listed on

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the Company payroll.

10.2 **Waiver** . If either party should waive any breach of any provision of this Agreement, he or it shall not thereby be deemed to have waived any preceding or succeeding breach of the same or any other provision of this Agreement.

10.3 **Complete Agreement** . Except for the Proprietary Information Restrictions on Content and Inventions Agreement (“PIIA Agreement”) and other standard Company policies and procedures to which Executive has agreed, this Agreement constitutes the complete, final and exclusive embodiment of the agreement of the Company and Executive with regard to the subject matter hereof, and supersedes and replaces in all respects any previous agreements solely regarding Executive's employment by the Company, Executive's compensation, severance, bonus, incentive opportunities or other plans or the terms thereof. To the extent there is any conflict between this Agreement and the PIIA Agreement, this Agreement shall control. This Agreement is entered into without reliance on any promise or representation other than those expressly contained herein, and this Agreement cannot be modified or amended except in a writing signed by Executive and an authorized officer of the Company. Employee represents and acknowledges that he has not executed and does not rely upon any other retention, severance or other agreements which have not been expressly identified in this Agreement and that the Company shall have no obligations under any such agreements. Employee further acknowledges that this Agreement supersedes any previous retention incentives, employment agreements, severance agreements or other agreements, whether or not expressed in writing, and the Company's obligation to pay any retention incentive or severance benefit other than those obligations set forth herein have terminated and are null and void.

10.4 **Counterparts** . This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

10.5 **Headings** . The headings of the sections hereof are inserted for convenience of reference only and shall not be deemed to constitute a part hereof or affect the meaning or interpretation of any of the provisions hereof.

10.6 **Successors and Assigns** . This Agreement is intended to bind, inure to the benefit of, and be binding upon, the successors and assigns of the Company, including the surviving entity of any merger, consolidation, share exchange or combination of the Company with any other entity. Notwithstanding the foregoing, Executive may not assign, transfer or delegate any of Executive's duties or obligations hereunder, and Executive may not assign or transfer any of Executive's rights hereunder without the written consent of the Company.

10.7 **Choice of Law and Venue** . All questions concerning the construction, validity and interpretation of this Agreement shall be governed by the law of the State of Georgia. Any dispute arising out of, or concerning, this Agreement or the employment relationship between the parties, shall be resolved exclusively in a federal or state court of competent jurisdiction located in Georgia. To the extent necessary, the parties hereby submit to, and agree not to contest, the jurisdiction of such courts.

10.8 **Representations** . Each party represents and warrants to the other that he or it has full power and authority to enter into and perform this Agreement and that his or its execution and performance of this Agreement shall not constitute a default under or breach of any of the terms of any agreement to which he or it is a party or under which he or it is bound. Each party represents that no consent or approval of any third party is required for his or its execution, delivery and performance of this Agreement or that all consents or approvals of any third party required for his or its execution, delivery and performance of this Agreement have been obtained.

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10.9 **Withholding** . Any and all amounts payable under this Agreement, including without limitation, amounts payable under Section 2.1 or Section 7.1(c) hereof, are subject to withholding for such federal, state, and local taxes as the Company, in its reasonable judgment, determines to be required pursuant to any applicable law, rule or regulation.

10.10 **Survival** . The provisions of Sections 3, 4, 5, 7, 8, 9 and 10 of this Agreement shall survive the termination of this Agreement for whatever reason.

10.11 **Section 409A**. If the Executive is a “key employee,” as defined in Section 416(i) of the Code (without regard to paragraph 5 thereof), except to the extent permitted under Section 409A of the Code, no benefit or payment that is subject to Section 409A of the Code (after taking into account all applicable exceptions to Section 409A of the Code, including but not limited to the exceptions for short-term deferrals and for “separation pay only upon an involuntary separation from service”) shall be made under this Agreement on account of the Executive's “separation from service,” as defined in Section 409A of the Code, with the Company until the later of the date prescribed for payment in this Agreement and the first day of the seventh calendar month that begins after the date of the Executive's separation from service (or, if earlier, the date of death of the Executive).

IN WITNESS WHEREOF, the Company and Executive have executed this Agreement to be effective as of the day and year first above written.

THE “COMPANY”

COMVERGE, INC.

By: /s/ R. Blake Young

Name: R. Blake Young

Title: President and Chief Executive Officer

Dated: October 28, 2011

“EXECUTIVE”

By: /s/ Gregory Allarding

Name: Greg Allarding

Title: Senior Vice President, Operations

Dated: October 28, 2011

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## Exhibit A

<b>Annual Salary</b>	Executive shall be paid at the rate of \$214,000 per annum.
<b>Annual Cash Incentive 1</b>	For the 2011 calendar year, Executive shall have the opportunity to earn an annual bonus equal to 35% of his annual salary based on the achievement of performance criteria established by the Compensation Committee. Executive has been extended a one-time sign on bonus of \$50,000.
<b>Sign On Bonus</b>	Executive acknowledges that as of the execution of this Agreement he has already received \$25,000 of that bonus. The second payment of \$25,000 shall be due and payable to Executive upon his final move to Atlanta
<b>Relocation Assistance</b>	Executive has been afforded relocation assistance in an amount up to \$100,000 and assigned a relocation coordinator.
<b>Annual Equity Incentive</b>	Executive shall be eligible to participate in the Senior Vice President Equity Opportunity established by the Company. The threshold for the opportunity is 100% of base salary reflected in equity, target is 125% of base salary reflected in equity and maximum is 150% of base salary reflected in equity. <i>(See also, Footnote 1 herein).</i>

1 The compensation committee will set Target, Threshold, and Maximum performance levels for Annual Cash and Equity incentives. The Threshold performance level is the minimum level of performance required as a condition of earning any incentive. The Target performance level is the level of performance at which the executive, operating division or company is expected to perform. The Maximum performance level is the highest level of payout. The committee has discretion to grant or not grant such Annual Cash or Annual Equity Incentives, if in its reasonable discretion, is in the best interests of the Company.

**SEVERANCE AGREEMENT AND GENERAL RELEASE**

This Severance Agreement and General Release (“Agreement”) is made and entered into on this 4<sup>th</sup> day of October, 2011 by and between Comverge, Inc. (hereinafter referred to as “Company”), and Christopher Camino (hereinafter referred to as “Employee”).

**W I T N E S S E T H**

**WHEREAS**, Employee has been employed by the Company as Executive Vice President of Sales and Chief Marketing Officer pursuant to an Executive Employment Agreement (“Employment Agreement”) dated June 21, 2010.

**WHEREAS**, The Company has decided not to renew the Employment Agreement and to end Employee's employment relationship with the Company; and,

**WHEREAS**, Employee will have continuing obligations to the Company as set forth herein; and,

**WHEREAS**, the parties have decided to settle all rights, claims, and demands which Employee has against or may have against the Company arising from the non-renewal of the Employment Agreement and/or Employee's termination of employment with the Company; and

**WHEREAS**, the Company and Employee desire to set forth their respective rights, duties and obligations and desire complete accord and satisfaction of all claims arising therefrom;

**NOW THEREFORE**, for and in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Company and Employee hereby agree as follows:

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**1. Company's Agreements.**

(a) Employee's Employment Agreement has not been renewed pursuant to notice that Employee received on August 31, 2011 and, as a result, his employment is terminated effective December 31, 2011. Upon Employee's execution and non-revocation of this Agreement, and subject to the Employee's fulfillment of his obligations contained herein, the Company agrees to pay Employee as severance pay the amount of One Hundred Sixty Two Thousand Five Hundred Dollars (\$162,500), which represents six (6) months of Employee's base salary, less any withholdings that are required under federal and state law. This severance will be paid in equal amounts from January 1, 2012 until June 30, 2012 in accordance with the Company's normal pay periods.

(b) Employee will remain employed by the Company until December 31, 2011 and during that time, he will continue to receive his regular, base salary in accordance with the Company's normal payroll practices, subject to all withholding requirements under federal or state law. Except as provided herein, Employee will be entitled to participate in all Company provided benefit plans to which Employee is eligible. Employee shall not be eligible to participate in any bonus or incentive programs or plans.

(c) Employee will be paid accrued and unused PTO and work related expenses through December 31, 2011 on the next normal pay period after December 31, 2011.

(d) After December 31, 2011, Group Medical and Dental benefits may be continued for up to eighteen (18) months at Employee's expense by completion and submittal of the form provided by Human Resources or its designee.

(e) Except as specifically provided herein, Employee shall be entitled to no other payments from the Company.

**2. Employee's Agreements.**

(a) Employee acknowledges and agrees that he has received sufficient notice of the non-renewal of the Employment Agreement and that, other than as provided herein the Company shall

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have no further obligations to Employee. As a material inducement to the Company to enter into this Agreement, Employee hereby irrevocably and forever releases the Company and its parent and/or related companies, subsidiaries, or affiliates, and their past, present and future officers, directors, employees, agents and attorneys (collectively "Releases") from any and all charges, claims, complaints, demands, liabilities, rights, obligations, promises, causes of action, costs, damages at law, expenses (including attorneys' fees and costs actually incurred), and suits hidden, of any nature whatsoever, known or unknown, which Employee ever had, may have, or now has arising from or related to, directly or indirectly, the non-renewal of the Employment Agreement, Employee's employment by the Company or any other events which have occurred as of the date of this Agreement, including but not limited to any claims arising under Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Medical Leave Act, the Age Discrimination in Employment Act and any and all other federal and state laws or statutes. Notwithstanding the foregoing, Employee does not release any claims under the Age Discrimination in Employment Act that may arise after the execution of this Agreement.

(b) Employee agrees that from August 31, 2011 until September 30, 2011, Employee has devoted all his working hours to transitioning his job duties and work activities to Bud Vos and George Hunt and that after September 30, 2011, Employee shall not be required to report to the Company's offices unless requested to do so. From September 30, 2011 and until December 31, 2011, Employee agrees to be available to provide additional information to the Company regarding the areas that were within his responsibility and answer questions or assist in the resolution of issues as they arise.

(c) Effective December 31, 2011, Employee's employment by the Company shall terminate.

(d) Employee agrees that he will continue to receive his base salary payable in accordance with the Company's normal pay period, until December 31, 2011, but that he will not be entitled to any bonus or incentive pay from the Company for calendar year 2011.

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(e) The parties agree that from September 30, 2011 until December 31, 2011, and during the six-month period of January 1, 2012 through June 30, 2012, Employee is unrestricted from seeking other employment, and such employment shall not affect the Employee's entitlement to the payments from the Company described herein. In the event that Employee obtains employment during the period of September 30, 2011 through December 31, 2011, and is eligible for employer provided benefits through such employer, Employee agrees that he will immediately notify the Company of such employment, that his employment with the Company shall terminate on the date of such notification and that his right to continued participation in any Company sponsored employee benefit plans shall cease in accordance with the terms of such plans.

(f) Employee acknowledges that the Company has agreed to pay Employee severance pay during the period of January 1, 2012 through June 30, 2012 that the Company is otherwise not obligated to pay. Employee agrees that such severance pay is conditioned upon Employee's continued performance of the following tasks through June 30, 2012:

(1) At the request of the Company's Chief Executive Officer or his designee, Employee shall be available at reasonable times to respond to questions or provide advice to the Company on matters that were within Employee's area of responsibility while employed by the Company.

(2) Employee shall fully and completely cooperate with the Company with respect to any requests for assistance and shall provide a timely response to any such request.

(3) Employee shall, from time to time and as requested, perform such other tasks that are within Employee's knowledge, skill or experience to perform as directed by the Company's Chief Executive Officer or his designee.

Employee's failure or refusal to perform these tasks to the satisfaction of the Company's Chief Executive officer, in his sole discretion, may result in the forfeiture by Employee of any remaining severance

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payments.

(g) Employee represents and agrees that he will keep the terms, the amount, and the fact of this Agreement completely confidential and he will not hereafter disclose such information to anyone except for tax advisors, attorneys, and as he may be required to do so by law. Employee further agrees that he will not engage in any conduct which is designed to disparage or has the effect of disparaging the Company or any of its officers, parent, subsidiary, affiliate, or related companies or their agents, employees or representatives.

(h) Employee represents and warrants that he has been encouraged to seek advice from anyone of his choosing, including his attorney, accountant or tax advisor prior to his signing it; that this Agreement represents written notice that he do so; that he has been given the opportunity and sufficient time to seek such advice; that he has carefully read and fully understands all of the provisions of this Agreement; and that he is voluntarily entering into this Agreement. **Employee understands that he may take up to twenty-one (21) days to consider whether or not he desires to enter into this Agreement.** Employee further represents and warrants that he was not coerced, threatened or otherwise forced to sign this Agreement, and that his signature appearing hereinafter is genuine.

(i) Employee represents and acknowledges that, in executing this Agreement, he does not rely and has not relied upon any representation or statement made by any of the Releasees or by any of the Releasees' agents, representatives, or attorneys with regard to the subject matter, basis, or effect of this Agreement.

### 3. **Other Agreements.**

(a) Employee understands and acknowledges that he has seven (7) days after his acceptance and execution of this Agreement to revoke this Agreement. Should Employee choose to revoke his acceptance and execution of this Agreement within that seven (7) day period, he must submit such revocation in writing to Tracy Caswell, Senior Counsel of the Company prior to the expiration of the seven (7) day period. After such seven (7) day period, this Agreement will be irrevocable.

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(b) Employee represents and acknowledges that he has not executed and does not rely upon any other severance or other obligations of the Company which are not contained in the Employment Agreement and that the Company shall have no obligations under any other severance or other agreement other than this Agreement. Employee further acknowledges that this Agreement supersedes any previous severance or other agreements regarding Employee's employment, right to payment from the Company or severance benefits, whether or not expressed in writing, and the Company's obligation to pay any severance or other benefit other than those obligations set forth herein have terminated and are null and void. This Agreement supersedes and terminates any prior agreements, whether written or otherwise, between Employee and the Company or any predecessor of the Company, except that Employee's post employment obligations contained in the Employment Agreement shall continue in full force and effect in accordance with the terms of the Employment Agreement and Employee shall remain obligated to comply with standard Company policies through and including his last day of employment.

(c) Employee warrants that he will deliver to the Company all property belonging to the Company no later than his date of termination. Employee acknowledges and agrees that payment from the Company under this Agreement is contingent upon the return of all Company property.

(d) The Company and Employee agree that the failure of the Company to insist upon any one or more instances relating to the performance of any of the terms, covenants, or conditions of this Agreement shall not be construed as a waiver or relinquishment of any right granted hereunder or of the future performance of any such term, covenant, or condition.

(e) The Company and Employee agree that this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, heirs, executors, administrators, and representatives. Neither this Agreement nor any right hereunder may be assigned by Employee.

(f) The Company and Employee agree that this Agreement sets forth the full and complete understanding of the parties with respect to the matters addressed herein and that the validity of

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this Agreement and any of the provision hereof shall be interpreted, construed, and determined and according to the laws of the Commonwealth of Pennsylvania.

**4. Employee Statement .**

**I have read and understand this entire Agreement. I understand that I have Twenty One (21) days to consider whether or not I desire to enter into this Agreement. I understand that I have seven (7) days to revoke this Agreement even after I provide a signed copy to the Company. After the expiration of such seven (7) day period, this Agreement will be binding upon me and will be irrevocable.**

**I understand that by signing this Agreement, I am giving up rights I may have. I understand I do not have to sign this Agreement.**

Christopher Camino

/s/ Christopher Camino

Date: October 4, 2011

Comverge, Inc.

/s/ Steve K. Moffitt

By: Steve K. Moffitt

Date: October 4, 2011

**SEVERANCE AGREEMENT AND GENERAL RELEASE**

This Severance Agreement and General Release (“Agreement”) is made and entered into on this 14<sup>th</sup> day of October, 2011 by and between Comverge, Inc. (hereinafter referred to as “Company”), and Edward J. Myszka (hereinafter referred to as “Employee”).

**W I T N E S S E T H**

**WHEREAS**, Employee has been employed by the Company as the Executive Vice President of Program Delivery pursuant to an Executive Employment Agreement (“Employment Agreement”) dated September 29, 2009 and amended on September 1, 2010.

**WHEREAS**, The Company has decided to terminate the Employment Agreement without cause and to end Employee's employment relationship with the Company; and,

**WHEREAS**, the parties have decided to settle all rights, claims, and demands which Employee has against or may have against the Company arising from the termination of the Employment Agreement and/or Employee's termination of employment with the Company; and

**WHEREAS**, the Company and Employee desire to set forth their respective rights, duties and obligations and desire complete accord and satisfaction of all claims arising therefrom;

**NOW THEREFORE**, for and in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Company and Employee hereby agree as follows:

1. **Company's Agreements.**

(a) Employee's Employment Agreement and his employment will be terminated effective December 31, 2011. Upon Employee's execution and non-revocation of this Agreement, and subject to the Employee's fulfillment of his obligations contained herein, the Company agrees to pay Employee as severance pay the amount of Two Hundred and Fifty Thousand Dollars (\$250,000), which

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represents twelve (12) months of Employee's base salary, less any withholdings that are required under federal and state law. This severance will be paid at such times and in accordance with the Company's payroll policies and procedures as if Employee were still employed by the Company.

(b) Additionally, upon Employee's execution and non-revocation of this Agreement, and subject to the Employee's fulfillment of his obligations contained herein, the Company agrees to pay employee as severance pay an amount equal to the amount of Employee's bonus payment for the last complete year of service prior to termination, times a fraction, the numerator of which is the number of days in the year of Executive's termination through the date of such termination, and the denominator of which is 365, which is \$21,900, less any withholdings that are required under federal and state law. This severance will be pro-rated over the period of such payment, and payments of a proportional amount of such bonus payment shall be paid at such times as the base salary payments are made in accordance with Section 1(a) above.

(c) Employee will remain employed by the Company until December 31, 2011 and during that time, he will continue to receive his regular, base salary in accordance with the Company's normal payroll practices, subject to all withholding requirements under federal or state law. During that time period, Employee will be entitled to participate in all Company provided benefit plans to which Employee is eligible. Employee shall not be eligible to participate in any bonus or incentive programs or plans.

(d) Employee will be paid accrued and unused PTO and work related expenses through December 31, 2011 on the next normal pay period after December 31, 2011.

(e) Company agrees that effective December 9, 2011, Employee will be entitled to keep and will own Employee's Apple computer and monitor. Provided however, that prior to December 9, 2011 Employee agrees to submit the Apple computer to Company's IT department so that Company can confirm that all Company data and information has been removed from the computer.

(f) After December 31, 2011, Group Medical and Dental benefits may be continued for

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up to eighteen (18) months at Employee's expense by completion and submittal of the form provided by Human Resources or its designee.

(g) Except as specifically provided herein, Employee shall be entitled to no other payments from the Company.

## 2. **Employee's Agreements.**

(a) Employee acknowledges and agrees that as a material inducement to the Company to enter into this Agreement, Employee hereby irrevocably and forever releases the Company and its parent and/or related companies, subsidiaries, or affiliates, and their past, present and future officers, directors, employees, agents and attorneys (collectively "Releases") from any and all charges, claims, complaints, demands, liabilities, rights, obligations, promises, causes of action, costs, damages at law, expenses (including attorneys' fees and costs actually incurred), and suits hidden, of any nature whatsoever, known or unknown, which Employee ever had, may have, or now has arising from or related to, directly or indirectly, the non-renewal of the Employment Agreement, Employee's employment by the Company or any other events which have occurred as of the date of this Agreement, including but not limited to any claims arising under Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Medical Leave Act, the Age Discrimination in Employment Act and any and all other federal and state laws or statutes. Notwithstanding the foregoing, Employee does not release any claims under the Age Discrimination in Employment Act that may arise after the execution of this Agreement.

(b) Employee agrees that he will continue to report to Comverge's Norcross, Georgia office and perform his normal job duties until October 20, 2011. From October 20, 2011 through and including November 27, 2011, Employee acknowledges that he will not be required to report to any Comverge office. During that time period, Employee shall be obligated to be available to consult with the Company in the event such consultation is necessary as determined by the Company's Chief Executive Officer in his sole discretion. It is the intention of the parties that Employee's obligation to consult with

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the Company during this period will be limited to those events which, in the sole discretion of the Company's Chief Executive Officer, constitute an emergency.

(c) For the period of November 28, 2011 through and including December 9, 2011, Employee shall be expected to report to Comverge's Norcross, Georgia office and to perform such tasks, duties and responsibilities as are required by the Company and commensurate with Employee's position.

(d) For the period of December 12, 2011 through and including December 16, 2011, Employee shall not be required to report to any Comverge office, but Employee agrees to make himself available by telephone for any work related discussions in which Employee's input is required.

(e) For the period of December 19, 2011 through and including December 30, 2011, Employee shall not be required to report to any Comverge office or be available by telephone, provided that, in the event of an emergency as determined in the sole discretion of the Company's Chief Executive Officer, Employee will make himself available by telephone for consultation with the Company. Employee acknowledges that his time out of the office from December 19, 2011 through and including December 30, 2011 will count as Paid Time Off.

(f) Effective December 31, 2011, Employee's employment by the Company shall terminate.

(g) Employee agrees that he will continue to receive his base salary payable in accordance with the Company's normal pay periods, until December 31, 2011, but that he will not be entitled to any bonus or incentive pay for calendar year 2011.

(h) Employee acknowledges that the Company has agreed to pay Employee severance pay as outlined herein during the period of January 1, 2012 to December 31, 2012. Employee acknowledges that such severance pay is conditioned upon Employee's agreement to be available to consult with the Company on an as needed basis for a minimum of forty (40) hours per month. Should Employee provide consulting services in excess of forty (40) hours per month, the Company agrees to pay Employee at a rate of \$150.00 per hour for such services. Provided, however, that if at any time during

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the period of January 1, 2012 to December 31, 2012 Employee accepts full time employment with another employer, Employee's obligation to provide the consulting services set forth in this Section(h) shall immediately terminate.

Employee's refusal to provide the minimum of forty (40) hours of consulting services per month on an as needed basis as outlined herein will result in the forfeiture by Employee of any remaining severance payments.

(i) Employee represents and agrees that he will keep the terms, the amount, and the fact of this Agreement completely confidential and he will not hereafter disclose such information to anyone except as he may be required to do so by law. Employee further agrees that he will not engage in any conduct which is designed to disparage or has the effect of disparaging the Company or any of its officers, parent, subsidiary, affiliate, or related companies or their agents, employees or representatives.

(j) Employee represents and warrants that he has been encouraged to seek advice from anyone of his choosing, including his attorney, accountant or tax advisor prior to his signing it; that this Agreement represents written notice that he do so; that he has been given the opportunity and sufficient time to seek such advice; that he has carefully read and fully understands all of the provisions of this Agreement; and that he is voluntarily entering into this Agreement. **Employee understands that he may take up to twenty-one (21) days to consider whether or not he desires to enter into this Agreement.** Employee further represents and warrants that he was not coerced, threatened or otherwise forced to sign this Agreement, and that his signature appearing hereinafter is genuine.

(k) Employee represents and acknowledges that, in executing this Agreement, he does not rely and has not relied upon any representation or statement made by any of the Releasees or by any of the Releasees' agents, representatives, or attorneys with regard to the subject matter, basis, or effect of this Agreement.

### 3. **Other Agreements.**

(a) Employee understands and acknowledges that he has seven (7) days after his

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acceptance and execution of this Agreement to revoke this Agreement. Should Employee choose to revoke his acceptance and execution of this Agreement within that seven (7) day period, he must submit such revocation in writing to Tracy Caswell, Senior Counsel of the Company prior to the expiration of the seven (7) day period. After such seven (7) day period, this Agreement will be irrevocable.

(b) Employee represents and acknowledges that he has not executed and does not rely upon any other severance or other obligations of the Company which are not contained in the Employment Agreement and that the Company shall have no obligations under any other severance or other agreement other than this Agreement. Employee further acknowledges that this Agreement supersedes any previous severance or other agreements regarding Employee's employment, right to payment from the Company or severance benefits, whether or not expressed in writing, and the Company's obligation to pay any severance or other benefit other than those obligations set forth herein have terminated and are null and void. This Agreement supersedes and terminates any prior agreements, whether written or otherwise, between Employee and the Company or any predecessor of the Company, except that Employee's post employment obligations contained in the Employment Agreement shall continue in full force and effect in accordance with the terms of the Employment Agreement and Employee shall remain obligated to comply with standard Company policies through and including his last day of employment. Notwithstanding the foregoing, Employee's Indemnification Agreement dated August 24, 2006 shall remain in full force and effect and this Agreement shall not supersede the terms and conditions contained in the Indemnification Agreement.

(c) Employee warrants that he will deliver to the Company all property belonging to the Company no later than his date of termination. Employee acknowledges and agrees that payment from the Company under this Agreement is contingent upon the return of all Company property.

(d) The Company and Employee agree that the failure of the Company to insist upon any one or more instances relating to the performance of any of the terms, covenants, or conditions of this Agreement shall not be construed as a waiver or relinquishment of any right granted hereunder or of the

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future performance of any such term, covenant, or condition.

(e) The Company and Employee agree that this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, heirs, executors, administrators, and representatives. Neither this Agreement nor any right hereunder may be assigned by Employee.

(f) The Company and Employee agree that this Agreement sets forth the full and complete understanding of the parties with respect to the matters addressed herein and that the validity of this Agreement and any of the provision hereof shall be interpreted, construed, and determined under and according to the laws of the State of Georgia.

#### **4. Employee Statement .**

**I have read and understand this entire Agreement. I understand that I have twenty one (21) days to consider whether or not I desire to enter into this Agreement. I understand that I have seven (7) days to revoke this Agreement even after I provide a signed copy to the Company. After the expiration of such seven (7) day period, this Agreement will be binding upon me and will be irrevocable.**

**I understand that by signing this Agreement, I am giving up rights I may have. I understand I do not have to sign this Agreement.**

Edward J. Myszka

/s/ Edward J. Myszka

Date: October 14, 2011

Comverge, Inc.

/s/ Steve K. Moffitt

By: Steve K. Moffitt

Date: October 14, 2011

**COMVERGE, INC.****List of Subsidiaries**

6D Comverge, Inc.  
Alternative Energy Resources, Inc.  
Clean Power Markets, Inc.  
Comverge Energy Management, Inc.  
Comverge Energy Partners, Ltd.  
Comverge Canada, Inc.  
Comverge Giants, LLC  
Comverge Utah, Inc.  
Enerwise Global Technologies, Inc.  
PES NY, LLC  
Public Energy Solutions NY, LLC  
Public Energy Solutions, LLC  
Public Electric, Inc.  
Comverge South Africa (Pty), Ltd.  
Comverge International, Ltd. (Cyprus)

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We hereby consent to the incorporation by reference in the Registration Statement on Form S-8 (No. 333-168199) and Form S-3 (No. 333-161400) of Comverge, Inc. of our report dated March 15, 2012 relating to the financial statements, financial statement schedule and the effectiveness of internal control over financial reporting, which appears in this Form 10-K.

PricewaterhouseCoopers LLP (signed)  
Atlanta, Georgia  
March 15, 2012

## CERTIFICATIONS

I, R. Blake Young, certify that:

1. I have reviewed this Annual Report on Form 10-K of Comverge, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

/s/R. Blake Young

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R. Blake Young

President and Chief Executive Officer

(Principal Executive Officer)

March 15, 2012

## CERTIFICATIONS

I, David Mathieson, certify that:

1. I have reviewed this Annual Report on Form 10-K of Comverge, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

/s/David Mathieson

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David Mathieson

Executive Vice President and Chief Financial Officer

(Principal Financial Officer)

March 15, 2012

**CERTIFICATIONS PURSUANT TO  
18 U.S.C. SECTION 1350 AS ADOPTED PURSUANT TO  
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the Annual Report of Comverge, Inc., a Delaware corporation (the “Company”), on Form 10-K for the year ended December 31, 2011, as filed with the Securities and Exchange Commission on the date hereof (the “Report”), R. Blake Young, Chief Executive Officer of the Company, does hereby certify, pursuant to 18 U.S.C. §1350, that to his knowledge:

(1) The Report fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended; and

(2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

/s/R. Blake Young

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R. Blake Young

President and Chief Executive Officer

March 15, 2012

The foregoing certification is being furnished solely to accompany the Report pursuant to 18 U.S.C. §1350, and is not being filed for purposes of Section 18 of the Securities Exchange Act of 1934, as amended, and is not to be incorporated by reference into any filing of the Company under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended, whether made before or after the date hereof, regardless of any general incorporation language in such filing.

**CERTIFICATIONS PURSUANT TO  
18 U.S.C. SECTION 1350 AS ADOPTED PURSUANT TO  
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the Annual Report of Comverge, Inc., a Delaware corporation (the “Company”), on Form 10-K for the year ended December 31, 2011, as filed with the Securities and Exchange Commission on the date hereof (the “Report”), David Mathieson, Chief Financial Officer of the Company, does hereby certify, pursuant to 18 U.S.C. §1350, that to his knowledge:

(1) The Report fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended; and

(2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

/s/David Mathieson

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David Mathieson

Executive Vice President and Chief Financial Officer

March 15, 2012

The foregoing certification is being furnished solely to accompany the Report pursuant to 18 U.S.C. §1350, and is not being filed for purposes of Section 18 of the Securities Exchange Act of 1934, as amended, and is not to be incorporated by reference into any filing of the Company under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended, whether made before or after the date hereof, regardless of any general incorporation language in such filing.