



## **WHOLESALE MASTER SERVICES AGREEMENT**

**Between**

**METRO FIBRE NETWORKX (PROPRIETARY) LIMITED**

(Registration No. 2007/024366/07)

(Herein after Metrofibre)

**And**

---

(Registration No \_\_\_\_\_)

(Herein after the Customer)

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### 1. DEFINITIONS AND INTERPRETATION

1.1. In this Agreement, unless the context indicates a contrary intention, the following words and expressions bear the meanings assigned to them and cognate expressions bear corresponding meanings:

1.1.1. **"AFSA"** means the Arbitration Foundation of Southern Africa;

1.1.2. **"Agreement"** means this Master Services agreement, including all annexures hereto, and any Service Confirmation Schedule executed pursuant to the terms of this Agreement;

- 1.1.3. **"Customer"** means \_\_\_\_\_ a company duly registered under the company laws of the Republic of the South Africa with registration number \_\_\_\_\_ and having its principal place of business at \_\_\_\_\_;
- 1.1.4. **"Charges"** shall mean all charges and/or fees payable by the Customer to Metrofibre for the Services;
- 1.1.5. **"Confidential Information"** means any information or data which by its nature or content is identifiable as confidential and/or proprietary to a Party and/or any third party, or which is provided or disclosed in confidence;
- 1.1.6. **"Customer Equipment"** means customer premises equipment (modems, routes etc), or any networks or network equipment not owned or controlled by Metrofibre;
- 1.1.7. **"Documentation"** means the documentation supplied by Metrofibre to the Customer;
- 1.1.8. **"Effective date"** means \_\_\_\_\_ 201\_\_ notwithstanding the date of signature of this Agreement by the last Party signing;
- 1.1.9. **"ECA"** means the Electronic Communications Act 36 of 2006, as amended from time to time;
- 1.1.10. **"End User"** means those persons or entities with whom the Customer concludes End User Agreements for the resale or lease of the Services;
- 1.1.11. **"End User Agreement"** means the agreement concluded between the Customer and the End User;
- 1.1.12. **"End User Premises"** shall mean the location or locations occupied by the Customer and/or its End Users to which the Services are delivered as specified in the SCS;
- 1.1.13. **"Facilities"** shall mean any property owned, licensed or leased by Metrofibre, including points of presence ("POP"), but does not include Customer Equipment, and used to deliver the Services;
- 1.1.14. **"Force Majeure Event"** means any circumstances beyond the Parties' reasonable control including, without limitation, war, national emergency, civil disturbance, theft, fire, flood, explosion, natural disaster, unusually severe weather conditions, prohibitive legislation or regulations and failure of power or utility supplies (including electronic communications);
- 1.1.15. **"Intellectual Property"** means any know-how (not in the public domain), invention (whether or not patented), design, trademark, or copyright material (whether or not registered), goodwill, processes, process methodology and all other identical or similar intellectual property as may exist anywhere in the world and any applications for registration of such intellectual property, which specifically includes all copyright, design rights and any other proprietary rights in and to any business plans and proposals, business processes and functional and technical specifications and any related material;

- 1.1.16. **"MRC"** means monthly recurring cost as set out in the applicable Order Form;
- 1.1.17. **"Metrofibre"** means Metro Fibre Network (Proprietary) Limited, a company duly registered under the company laws of the Republic of the South Africa with registration number 2007/024366/07 and having its principal place of business at 82 Roan Crescent Corporate Park North Midrand Gauteng South Africa;
- 1.1.18. **"Metrofibre Equipment"** means any Metrofibre equipment or products, including any Facilities, or any other equipment or products which are supplied to the Customer by Metrofibre (for use in conjunction with the Services) for lease to End Users;
- 1.1.19. "Order Confirmation Schedule or OCS" means that the request for services submitted by a Wholesaler has been duly accepted by Metrofibre attached hereto as Annexure E
- 1.1.20. **"Order Form"** shall mean a request for the Services submitted by Customer to Metrofibre in a form prescribed by Metrofibre attached hereto as Annexure B;
- 1.1.21. **"Party"** means either of the signatories to this Agreement and "Parties" means both of them collectively and shall be deemed to mean and include their respective successors and permitted assigns;
- 1.1.22. **"Prime Rate"** means the prime rate published by Metrofibre's principle bankers, as certified by any representative of that bank whose appointment and designation it will not be necessary to prove;
- 1.1.23. **"Services"** means the services provided by Metrofibre to the Customer as more fully described in the Service Confirmation Schedule, including the provision of Metrofibre Equipment and Facilities;
- 1.1.24. **"Service Activation Date"** means the service activation date set forth in the Service Confirmation Schedule or the date that the Services actually commence, whichever is the earlier;
- 1.1.25. **"Service Confirmation Schedule or SCS"** means a schedule signed by both Parties in confirmation that the service ordered has been implemented and completed. and the necessary tests have been executed, and the wholesaler accepts this as the formal handover document attached hereto as Annexure D.
- 1.1.26. **"Service Levels"** means the specific performance levels applicable to the provision of the Services as set forth in the Service Level Agreement attached as Annexure C to this Agreement;

- 1.1.27. **"Service Term"** means the time period, including periods of renewal, specified in each Service Confirmation Schedule during which the Services specified therein are to be provided;
- 1.1.28. **"Territory"** means Republic of South Africa;
- 1.1.29. **"VAT"** means value-added tax, chargeable under the VAT Act of 1991;
- 1.1.30. "Wholesaler" means the entity that wholesales Metrofibre services as part of the solution to the wholesaler's customers.
- 1.2. In this Agreement:
- 1.2.1. headings and the heading of the Agreement are for convenience only and are not to be used in its interpretation;
- 1.2.2. a natural person includes a juristic person and vice versa;
- 1.2.3. the singular includes the plural and vice versa; and
- 1.2.4. a Party includes a reference to that Party's successors in title and assigns allowed at law.
- 1.3. Any reference in this Agreement to:
- 1.3.1. "business hours" shall be construed as being the hours between 08h30 and 17h00 on any business day. Any reference to time shall be based upon South African Standard Time;
- 1.3.2. "days" shall be construed as calendar days unless qualified by the word "business", in which instance a "business day" will be any day other than a Saturday, Sunday or public holiday as gazetted by the government of the Republic of South Africa from time to time;
- 1.3.3. "person" means any person, company, close corporation, trust, partnership or other entity whether or not having separate legal personality; and
- 1.3.4. "writing" means legible writing and in English and excludes any form of electronic communication contemplated in the Electronic Communications and Transactions Act, No 25 of 2002.
- 1.4. The words "include" and "including" mean "include without limitation" and "including without limitation". The use of the words "include" and "including" followed by a specific example or examples shall not be construed as limiting the meaning of the general wording preceding it.
- 1.5. Terms, other than those defined in this agreement, will be given their plain English meaning, and those acronyms and phrases known in the information technology and telecommunications industries will be interpreted in accordance with their general accepted meanings;
- 1.6. Unless specifically otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or, where the last day falls on a day that is not a business day, the next succeeding business day.
- 1.7. The rule of construction that this Agreement shall be interpreted against the Party responsible for the drafting of this Agreement, shall not apply.

- 1.8. No provision of this Agreement shall (unless otherwise stipulated) constitute a stipulation for the benefit of any person (stipulatio alteri) who is not a Party to this Agreement.

## **2. COMMENCEMENT AND DURATION**

- 2.1. This Agreement shall come into effect on the Effective Date and shall continue in force for an indefinite period unless terminated by either Party in accordance with its terms.
- 2.2. The initial term of each Order Confirmation Schedule shall commence on the Service Activation Date and shall expire on the date set forth in the applicable Service Confirmation Schedule ("Initial Service Term"). After the expiry of the Initial Service Term, the Order Confirmation Schedule shall automatically renew on a month-to-month basis unless terminated by either Party on thirty (30) days' written notice.
- 2.3. Notwithstanding the termination of this Agreement, each Order Confirmation Schedule shall remain in force until termination thereof and shall remain subject to the terms of this Agreement.

## **3. APPOINTMENT**

- 3.1. Metrofibre hereby appoints the Customer as its non-exclusive Customer to resell the Services within the Territory, which appointment the Customer accepts, subject to the terms and conditions of this Agreement.
- 3.2. The Customer shall not, whether directly or indirectly, for the duration of this Agreement:
  - 3.2.1. by itself or with others, participate in any illegal, deceptive, misleading or unethical practices including, but not limited to, disparagement of the Services or Metrofibre or other practices which may be detrimental to Metrofibre or the public interest;
- 3.3. Metrofibre reserves the right, in its absolute discretion to market, promote, sell, resell and support the Services and/or any similar products or services.

## **4. METROFIBRE OBLIGATIONS**

- 4.1. Metrofibre shall make the Services available to the Customer for resale as specified in each Order Confirmation Schedule.
- 4.2. Metrofibre agree to implement, follow up and support Services, as the Parties deem appropriate under the circumstances in order to foster satisfactory business relationship between Metrofibre and the Customer and the End Users;
- 4.3. Metrofibre shall designate and maintain an Account Manager for the Customer who will liaise closely with the Customer and act as primary interface for the Customer with Metrofibre.
- 4.4. Metrofibre shall inform the Customer about new developments and modifications to the Services or required equipment;

- 4.5. In terms of the Metrofibre Equipment necessary to provide the Service, where required:
  - 4.5.1. Metrofibre shall ensure that the equipment and, in the event where the equipment consist of more than one component, that each component shall be delivered for installation only at the End User Location on or before the estimate delivery date.
  - 4.5.2. Metrofibre shall ensure that all equipment shall be installed at the End User location in accordance with the manufactures specifications at Metrofibre's standard rates.
- 4.6. Metrofibre shall be responsible for 2<sup>nd</sup> and 3<sup>rd</sup> line support services to the Customer as set out in the Service Level Agreement;

## **5. OBLIGATIONS OF THE CUSTOMER**

- 5.1 The Customer agrees to at all times during the term of this Agreement and in the performance of its obligations hereunder conform and adhere to industry and professional standards and use all reasonable skill and care of a professional distributor of the Service. In particular, but without prejudice to the generality of the above, the Customer shall:
  - 5.1.1. When selling the Service, provide prospective End Users with complete and detailed information about the Services and refrain from making or giving any promises, warranties, guarantees or representations, whether express or implied, concerning the Services except such as are consistent with any Documentation supplied by Metrofibre to the Customer under this Agreement; and
  - 5.1.2. Ensure that it possesses all necessary skills, experience and qualifications to perform their duties in a professional manner.
  - 5.1.3. Maintain an electronic communications network as may be reasonably required by Metrofibre so that it may discharge its obligations in terms of this Agreement. The Customer shall keep its network connected that of Metrofibre.
  - 5.1.4. The Customer warrants that it either possesses an electronic communications service license or is exempted from licensing under section 6 of the ECA. The Customer further warrants that it shall remain authorised to maintain and operate an electronic communications network for the purposes of connecting with Metrofibre's network for the duration of this Agreement.
- 5.2 The Customer shall be responsible for and hereby undertakes to:

- 5.2.1. Co-ordinate and enter into the End User Agreements with each End User and comply with its obligations specified therein;
- 5.2.2. Ensure that all the equipment, systems and operations which it uses to resell the Services to End Users shall at all times be of a minimum standard required by law and further be of a standard no less than the standards which are in compliance with the best practice for similar services;
- 5.2.3. Not to enter into any transaction or conclude any agreement or other arrangement on behalf of Metrofibre, save for any transactions contemplated in this Agreement;
- 5.2.4. At all times to honestly, fairly, accurately, and in good faith portray Metrofibre's Service to prospective End Users.
- 5.2.5. Provide 1<sup>st</sup> and 2<sup>nd</sup> line support to the End User, problems relating to the Service that cannot be resolved shall be escalated to Metrofibre.
- 5.2.6. Use adequate numbers of qualified personnel with suitable training, education, experience and skill to perform its obligations under the Agreement;

## **6. CUSTOMER ORDER PROCEDURE**

- 6.1. The Customer shall order new Services or change existing Services by submitting an Order Form to Metrofibre specifying the new and/or changed Services required.
- 6.2. Metrofibre will submit an OCS to the customer acknowledging acceptance of the signed quotation/order and is thereby obliged to provide the requested services.
- 6.3. Metrofibre shall be entitled to request, on receipt of an Order Form and prior to the issuing of the OCS in terms of clause 6.2, the following:
  - 6.3.1. Information related to the Customer's creditworthiness. For the avoidance of doubt the Parties agree that Metrofibre is authorised to conduct all reasonable credit checks and searches;
- 6.4. Each OCS shall create, subject to the terms and conditions of this Agreement, an individual contractual relationship between the Parties for the provision of the Services for the duration of the applicable Service Term. The provisions of the OCS, once signed by the Customer, shall prevail over the terms and conditions of this Agreement to the extent that there is any conflict between the provisions of the OCS and this Agreement.

## **7. CONNECTION AND SERVICE COMMENCEMENT**



- 7.1.** Metrofibre shall use best effort to ensure that the Services are made available to the Customer and/or End User on the Service Activation Date and shall promptly inform the Customer of any delay in meeting the Service Activation Date.
- 7.2.** Notwithstanding anything in this Agreement, the Services shall only commence on the Service Activation Date and there will be no obligation on Metrofibre to commence provision of the Services prior to the Service Activation Date.
- 7.3.** The Customer shall notify Metrofibre of any problems with the Services within forty eight (48) hours of the Service Activation Date, failing which, the Services shall be deemed to be accepted by the Customer. In the event that the Customer notifies Metrofibre of a problem regarding the Services within the specified time period in this clause 7.3, Metrofibre shall rectify such problem within a reasonable period of time. Metrofibre will commence billing for the service 120 hours after the Service Activation Date, unless the Customer has notified Metrofibre of a problem with the Service as per this clause.

## **8. ACCESS TO THE CUSTOMER AND/OR END USER PREMISES**

- 8.1.** The Customer shall provide Metrofibre with reasonable access to the Customer and/or End User Premises to enable Metrofibre to exercise its rights and fulfil its obligations under this Agreement, subject only to the Customer and End User's reasonable security policies.
- 8.2.** The Customer shall remain responsible for providing and maintaining the Customer and/or End User Premises at its own expense. In the event that the Customer and/or End User fails to maintain the Premises, the Customer shall reimburse Metrofibre for the any costs incurred to repair or replace any Metrofibre Equipment and/or Facilities damaged or destroyed as a result of the Customer and/or End User's failure to maintain the premises.

## **9. ACCEPTABLE USE OF NETWORK AND SERVICES**

- 9.1.** The Customer is solely responsible for ensuring that End Users use the Services lawfully and that the Customer and its End Users comply with all applicable laws and with Metrofibre's Acceptable Use Policy published on [www.Metrofibre.co.za](http://www.Metrofibre.co.za).
- 9.2.** The Customer indemnifies Metrofibre and holds it harmless against any claims:
- 9.2.1. arising from a breach of this clause 9; and/or
- 9.2.2. By third parties in respect of prohibited or unlawful activities conducted by the Customer or its End Users.
- 9.3.** The Customer shall not (and shall ensure that the End Users and other third parties, shall not) take any steps or fail to take any steps which directly or indirectly:

- 9.3.1. rearrange, disconnect, remove, attempt to repair, or otherwise tamper with the Services, without the prior written consent of Metrofibre;
- 9.3.2. damage Metrofibre's network (or any networks interconnected to Metrofibre) or any part thereof;
- 9.3.3. cause Metrofibre to breach any of its licence terms or any provision of applicable legislation;
- 9.3.4. cause the imposition of any lien or encumbrance on the Facilities and/or Metrofibre Equipment;
- 9.3.5.** Constitutes an abuse of the Services (in the reasonable opinion of Metrofibre).

## **10. SUSPENSION OF SERVICES**

- 10.1.** Metrofibre may lawfully suspend, withdraw all or part of any Service at any time until further notice to the Customer if, in Metrofibre's reasonable discretion:
  - 10.1.1. the continued provision of the Services will cause Metrofibre to breach an applicable law or be in contravention of its Licenses;
  - 10.1.2. the Customer and/or the End User is in breach of or otherwise is not complying with any of the provisions of this Agreement; and
  - 10.1.3. Any overdue tax invoice for charges billed by Metrofibre to the Customer remains unpaid for longer than 7 (seven) days after written notice to the effect has been served on the customer.
- 10.2.** The exercise of Metrofibre's right to suspend the Services under this clause 10 is without prejudice to any other remedy available to Metrofibre under this Agreement and does not constitute a waiver of Metrofibre's right to subsequently terminate the Agreement.
- 10.3.** Where Metrofibre has suspended the Services in terms of clause 10.1, Metrofibre may:
  - 10.3.1. refuse to reconnect the Services unless precluded by any law or order of court; and
  - 10.3.2. if it agrees to reconnect the Services, require the Customer to pay a reconnection fee in advance as a pre-condition to making the Services available again.
  - 10.3.3. The Customer remains liable for the applicable fees payable in terms of this agreement during any period of suspension in the circumstances contemplated in 10.3.2 , provided that any suspension in terms shall be subject to the provisions of the SLA

## **11. FEES AND CHARGES**

- 11.1.** All payments payable by the Customer in terms of each OCS shall be paid in full without deduction or demand, free of exchange, to Metrofibre, and the Customer shall not be entitled to withhold any part of such payments or to make anything but the full payments due to Metrofibre in terms of each OCS.
- 11.2.** Metrofibre shall be entitled to adjust the fees and Charges as a result of any regulatory, economical or government imposed factors that impact on such fees and Charges
- 11.3.** The rates payable by the Customer to Metrofibre as set out in each OCS hereof shall escalate annually on the annual anniversary date of the Service Commencement Date of the OCS to such rates as may be agreed between the Parties. Should the Customer not agree to the rate changes, the service may be cancelled with no further penalty payable by the Customer.
- 11.4.** Any charges incurred by Metrofibre in the provision of the Service/s will be increased when increases are applied by the suppliers of these services and products to Metrofibre, notification will be provided in writing within 14 days of Metrofibre be made aware of any pending increases. Should the price increase not be agreed to by the Customer, the service may be cancelled without any further penalty payable by the Customer.

## **12. INVOICING**

- 12.1.** Invoices rendered by Metrofibre in respect of the Services shall be rendered monthly in advance, except for Charges that are dependent upon usage of the Services, which shall be billed in arrears. Billing for partial months shall be pro-rated based on a calendar month.
- 12.2.** All invoices are due payable within thirty (30) days after the date of statement.
- 12.3.** If payment is not received by Metrofibre for any reason whatsoever by the due date for payment, then the Customer shall be liable to pay to Metrofibre (and without prejudice to any other right or remedy of Metrofibre):
- 12.3.1.** Any resulting bank or other charges incurred by Metrofibre consequent thereupon; and
- 12.3.2.** Any associated reasonable administrative charges including interest that has accrued on the unpaid amount up until the amount (as provided for in clause 12.4) has been received by Metrofibre.
- 12.4.** If any amount is overdue, the Customer shall pay interest on the overdue amount at prime rate plus 2% (two percent), such interest to run from the date upon which payment of the relevant amount became due until payment thereof has been made in full (together with interest).

- 12.5.** All Charges for the Services are exclusive of applicable taxes. Except for taxes based on Metrofibre. Net income, the Customer will be responsible for all applicable taxes. All VAT is payable upon receipt of a valid VAT invoice
- 12.6.** In the event of any dispute arising as to the amount or calculation of any fee or Charge which is payable by Customer; the dispute shall first be referred to the Financial Directors of the Parties. Should the dispute not be resolved within 7 working days, then the matter shall be referred for determination to independent auditors. They shall act as experts and their decision shall be final and binding on Metrofibre. and Customer. The Party at fault, as determined by the independent auditors, shall make payment towards the expenses for the engagement of the independent auditors' services.

### **13. SERVICE LEVELS AND MAINTENANCE**

- 13.1.** The OCS shall set forth the service levels specifically applicable to the Services ordered by the Customer.
- 13.2.** Metrofibre. shall conduct scheduled maintenance in respect of the Services in such a manner that it does not cause unreasonable outage or interruption of the Services. In the event that scheduled maintenance requires a Service interruption or outage, Metrofibre. shall exercise commercially reasonable efforts to:
- 13.2.1. provide Customer with seven (7) days' prior written notice of such scheduled maintenance;
- 13.2.2. work with Customer in good faith to attempt to minimize any disruption in Customer's services that may be caused by such scheduled maintenance; and
- 13.2.3. perform such scheduled maintenance during the non-peak hours of 12:00 a.m. (midnight) until 6:00 a.m. local time where reasonably possible.

### **14. TERMINATION**

- 14.1.** Termination for Convenience;
- 14.1.1. Either Party shall be entitled to terminate this Agreement by providing the other Party with 30 (thirty) days' prior written notice to that effect.
- 14.1.2. Termination in accordance with clause 14.1.1 above shall not affect the Service Term of any OCS, which shall continue, in full force and effect, in accordance with the terms and conditions of this Agreement as if this Agreement had not been terminated, until the end of the Service Term of the OCS.
- 14.1.3. Notwithstanding the Service Term set out in the OCS, the Customer shall be entitled in its sole discretion and without cause, to terminate one or more OCS's (the "Terminating

Services”) by giving METROFIBRE 30 (thirty) days’ prior written notice, which termination shall be subject to the early termination charges set out in clause 15 below.

## **14.2. Termination for cause**

14.2.1. In the event that there is a breach by either Party, the non-defaulting Party shall be entitled to provide the defaulting Party with 30 (thirty) days’ written notice to remedy such breach, including but not limited to breaches set out below:

14.2.1.1. a meeting of that Party convened to consider or pass a resolution, or a declaration is made in respect of that Party, a petition is presented in respect of that Party, legal proceedings are commenced by or in respect of that Party or any other step is taken, for the provisional or final winding-up, sequestration, judicial management, curatorship or dissolution of that Party’s assets, business, undertaking or estate or with a view to a composition, assignment or arrangement with such Party’s creditors;

14.2.1.2. the Party being or becoming unable (or admitting its inability) to pay its debts generally as they fall due or being (or admitting to being) otherwise insolvent or stopping, suspending or threatening to stop or suspend payment of all or a material part of its debts or making a general assignment or arrangement or composition with, or for the benefit of, its creditors (or any class of them);

14.2.1.3. any business rescue proceedings under the Companies Act, 2008, being commenced against it or a resolution being proposed to place the Party under supervision under the Companies Act, 2008, at any duly convened meeting of the shareholders or board of directors of the Party;

14.2.1.4. any liquidator, curator, judicial manager, business rescue practitioner or similar officer being appointed in respect of the Party or any part of its assets, undertaking, business or estate or such entity (or any organ of that person or entity) requests such appointment;

14.2.1.5. the Party committing any act which, if it were a natural person, would be an act of insolvency as contemplated in the Insolvency Act;

14.2.2 The non-defaulting Party shall be entitled to terminate this Agreement, where the defaulting Party fails to remedy, where it is capable of remedy, or persists in, any breach of any of its obligations under this Agreement after having been required to do so within a period of 30 (thirty) days.

## **15. EARLY TERMINATION COSTS**

15.1 The termination fee shall be calculated on the outstanding fees and Charges for each of the terminating OCS (“Terminating Services”) as at the termination date and will be determined as follows:

- 15.1.1 in the event that the Terminating Services are terminated prior to the Service Commencement Date thereof, the Customer shall be liable for the lower of the actual costs incurred by Metrofibre in implementing the Service or the "NRC", plus 3 (three) months of the MRC;
- 15.1.2 In the event that the Terminating Services are terminated subsequent to the Service Commencement Date thereof and the Term for the Terminating Services is 12 (twelve) months or less; 20% of the monthly MRC for the remainder of the Service Term of the Terminating Services;
- 15.1.3 In the event that the Terminating Services are terminating subsequent to the Service Commencement Date thereof and the Service Term for the Terminating Services is greater than 12 (twelve) months; 20% of the monthly MRC for the Terminating Services for the remainder of the first 12 (twelve) months (if any) and 10% of the MRC for the Terminating Services for each month of the remaining Service Term thereafter.
- 15.1.4 The Parties acknowledge that the early termination charges set forth in clauses 15 are a genuine estimate of the actual damages that Metrofibre will suffer and are not construed as penalties for the purposes of this Agreement.
- 15.2 In the event where Metrofibre cannot restore service within 60 days after a force major incident has occurred, the customer will have the right to terminate services at no cost

## **16. EFFECTS OF TERMINATION**

- 16.1 Termination of this Agreement and/or a OCS in whole or in part, however caused, shall be without prejudice to any rights or liabilities accrued at the date of termination.
- 16.2 On termination of this Agreement and/or a OCS:
- 16.2.1 all benefits (including rights of use and licences) conferred upon the Customer in terms of this Agreement and/or a OCS, shall immediately cease and the Customer shall have no claim, whatsoever, against Metrofibre. for the loss of such benefits;
- 16.1.1 the Customer shall return all Facilities and/or Metrofibre equipment located on the Customer Premises and/or End User premises or facilitate Metrofibre's removal of such Facilities and/or Metrofibre. Equipment; and
- 16.1.2 the Customer shall promptly return to Metrofibre or otherwise dispose of as Metrofibre may instruct all samples, technical pamphlets, catalogues, advertising materials, specifications and other materials, documents or papers whatsoever sent to the Customer and relating to Metrofibre's business (other than correspondence which has passed between the Parties)

which the Customer may have in its possession or under its control. The Customer shall also return to Metrofibre its Confidential Information.

16.2 The termination of this Agreement and/or a OCS shall not of itself give rise to any liability on the part of Metrofibre. to pay any compensation to the Customer, including but not limited to, for loss of profits or goodwill.

16.3

16.4 Metrofibre shall be entitled to cancel all orders for Services placed by the Customer prior to the termination date, whether or not such orders have been accepted by Metrofibre, without incurring any liability of any nature to the Customer.

## **17 RELATIONSHIP**

17.1 Metrofibre undertakes to treat the Customer no less favourably than its other Customers offering substantially the same terms and conditions to similarly placed Customers.

17.2 The relationship of the Parties in terms of this Agreement shall be that of independent contractors and no partnership or joint venture is hereby created between Metrofibre and the Customer.

17.3 The Customer shall in all its dealings with regard to the provision of Metrofibre Services to End Users make it clear to the End Users that it is acting on its own account as a Customer reselling the Services and not as an agent of Metrofibre.

17.4 Save as specifically herein contemplated:

17.4.1 this Agreement does not constitute the Customer as the legal representative, employee or servant of Metrofibre;

17.4.2 this Agreement does not constitute the employees of the Customer as being the employees of Metrofibre; and

17.4.3 the Customer shall have no authority to assume any obligation of any kind on behalf of Metrofibre or to bind or commit Metrofibre in any way.

## **18 INTELLECTUAL PROPERTY RIGHTS**

18.1 Nothing contained in this Agreement shall be construed to confer or be deemed to confer on either Party the Intellectual Property Rights of the other Party.

18.2 Each party indemnifies the other party against all crimes, actions, damages, liabilities, costs and expenses, including reasonable attorney's fees and expenses, arising out of any claims of infringement of any patent, trade secret, copyright, trademark, service mark, trade name or similar proprietary right of any third party, which claim arises directly or indirectly out of the infringement by a Party of the intellectual Property Rights of the other Party

- 18.3 Metrofibre retains all right, title and interest in and to its Intellectual Property that is used in connection with the Services. In particular, Metrofibre retains all right, title and interest in all Intellectual Property rights in and to work products, deliverables, documentation, reports, designs, formulae, methodologies, software, proposals, specifications, feasibility reports and systems, whether used to provide or as are developed or created as part of the Services.
- 18.4 Metrofibre shall retain all right, title and interest in all Intellectual Property developed or generated pursuant to and as part of the performance of the Services provided under this Agreement.

## **19 CONFIDENTIALITY**

- 19.1 Each Party undertakes that it shall not at any time disclose to any person any Confidential Information, except as permitted by clause 19.2.
- 19.2 Each Party may disclose the other Party's confidential information:
- 19.2.1 to its employees, officers, representatives or advisers who need to know such information for the purposes of carrying out the Party's obligations under this agreement. Each party shall ensure that its employees, officers, representatives or advisers to whom it discloses the other Party's Confidential Information comply with this clause 19; and
- 19.2.2 as may be required by law, court order or any governmental or regulatory authority.
- 19.3 No party shall use any other party's Confidential Information for any purpose other than to perform its obligations under this agreement.

## **20 INSURANCE**

- 20.1 The Customer shall for the continued duration of this Agreement have and maintain in force sufficient insurance to cover both its obligations and liabilities under this Agreement and ensure that each End User likewise maintains sufficient insurance.
- 20.2 The Customer must ensure that the End User is aware of the Metrofibre interest in the equipment installed at their premises.

## **21 WARRANTIES**

- 21.1 Each Party hereby warrants unto and in favour of the other Party:
- 21.2 it is a company duly incorporated and validly existing under the Law;
- 21.3 it has full power, authority and legal right to execute this Agreement, to assume the obligations contained in this Agreement, and further to perform and observe the terms and provisions hereof;
- 21.4 the Party and its representative(s) has the requisite power, right and authority to enter into and perform the obligations to be assumed or performed by it in accordance with this Agreement and any other documents to be executed in accordance with this Agreement and the obligations



- assumed by it under this Agreement constitute legal, valid, binding and enforceable obligations in accordance with the terms hereof;
- 21.5 to the best of the Party's knowledge and belief, all facts and circumstances material to this transaction, or which would be material or would be reasonably likely to be material and which may affect the willingness of the Parties to enter into this Agreement are known to the Party, have been disclosed by the Party to the other Party;
- 21.6 as at the Signature Date, no legal proceedings of any kind or administrative proceedings in terms of any law, which shall prevent either Party from fulfilling its obligations in terms of this Agreement, have been instituted against such Party;
- 21.7 at all times during the currency of this Agreement neither Party has any obligations/duties to third parties which, if discharged, shall prevent the Party from fulfilling its obligations in terms of this Agreement; and
- 21.8 all necessary action has been taken to authorise the execution and performance of this Agreement and the execution and performance of this Agreement will not contravene any provision of, or constitute a default under, any other agreement or instrument to which it is a Party or by which it or its property may be bound.
- 21.9 Metrofibre does not make any representations or warranties in respect of the quality or functionality of the Metrofibre Equipment. The Customer shall only be entitled to rely on the warranties and indemnities provided by the original equipment manufacturer in respect of the Metrofibre Equipment, which warranties and indemnities shall be enforced directly against the original equipment manufacturer and not against Metrofibre.

## **22 INDEMNITIES**

- 22.1 The Customer hereby indemnifies and holds Metrofibre harmless against all loss, damage, costs and/or expenses which Metrofibre may suffer or incur and any and all claims which may be brought against Metrofibre by any third party in respect of any loss, liability, damage, costs and/or expenses of any nature whatsoever as a consequence of or which may arise from or is attributable to the engagement of the Customer, the provision of the Services by the Customer or any acts or omissions on the part of the Customer.
- 22.2 The Customer shall be required to obtain an indemnity in the End User Agreement on substantially the same basis as clause 22.1 above in favour of Metrofibre from each and every End User, in terms of which each End User indemnifies Metrofibre against any and all losses, claims or damages which the End User or anyone who enters their property may suffer as a result of the Services.

## **23 LIMITATION OF LIABILITY**

- 23.1 Neither Party shall be liable to the other Party for any indirect or consequential loss or damage (including any loss of profit/contract/opportunity) which may be suffered by the other Party under or in connection with this Agreement

- 23.2 Neither Party shall be liable to the other Party for any indirect or consequential loss or damage (including any loss of profit/contract/opportunity) which may be suffered by the other Party under or in connection with this Agreement.
- 23.3 Subject to Clauses 23.3 and 23.4, the total liability of either Party under or in connection with this Agreement shall, to the extent permitted by Law, not exceed the aggregate value of the Services that have been carried out under this Agreement .over the previous 6(six)months from the date upon which the claim arose.
- 23.4 Where the insurance cover of any insurance policy that is procured by either Party under this Agreement, which is capable of being called upon to cover any liability/damage, exceeds the aggregate cap of liability specified in Clause 23.2., such aggregate cap of liability shall not compromise the insurance cover that can be claimed by either Party to cover the liability/damage in question. Accordingly, the imposition of such aggregate cap of liability shall not be construed as a stipulatio alteri in favour of any insurer who would otherwise be liable to make payment from the insurance cover to cover a claim that is in excess to such aggregate cap of liability under such insurance policy.
- 23.5 This Clause 23 shall not limit liability of either Party in any case of fraud, deliberate default or reckless misconduct by either Party.

## **24 FORCE MAJEURE**

- 24.1 A force majeure event shall occur when either Party is prevented or restricted directly or indirectly from performing all or any of that Party's obligations in terms of this Agreement by reason of Force Majeure, which shall constitute a "Force Majeure Event" for the purposes hereof.
- 24.2 The exclusive remedy of a Party affected by a Force Majeure Event ("the Affected Party") constitutes that:
- 24.3 it shall be relieved of performance of its obligations in terms of this Agreement during the period that such event and its consequences continue (but only to the extent it is so delayed or prevented from performing partially or at all by the Force Majeure Event), and, provided that notice has been given in terms of Clause 24.1, shall not be liable for any delay or failure in the performance of any of its obligations in terms of this Agreement or losses or damages whether general, special or consequential which the other Party ("the Unaffected Party") may suffer due to or resulting from any such delay or failure; or
- 24.4 The Affected Party shall give written notice to the Unaffected Party at the earliest possible opportunity in writing of the occurrence of the event constituting the Force Majeure Event, together with details thereof and a good faith estimate of the period of time for which it shall endure.
- 24.5 At all times whilst a Force Majeure Event continues, the Parties shall meet at regular intervals to discuss and investigate, and if possible, to implement other practical ways and means to overcome the consequences of such a Force Majeure Event, with the objective of achieving the import and intent of this Agreement without unreasonable delay.
- 24.6 The Affected Party shall use all reasonable endeavours to mitigate the effects of the Force Majeure Event on its ability to perform under this Agreement and to terminate the circumstances

giving rise to a Force Majeure Event as soon as reasonably possible and upon termination of the event giving rise thereto, shall forthwith give written notice thereof to the Unaffected Party.

## **25 DISPUTE RESOLUTION**

- 25.1 In the event of there being any dispute or difference between the Parties arising out of this Agreement and/or any OCS, the said dispute or difference shall on written demand by either party be submitted to arbitration in Sandton in accordance with the AFSA rules, which arbitration shall be administered by AFSA
- 25.2 Nothing herein contained shall be deemed to prevent or prohibit a Party to the arbitration from applying to the appropriate court for urgent relief or for judgment in relation to a liquidated claim.
- 25.3 The Parties agree that the written demand to the dispute in terms of clause 25.1 that the dispute or difference be submitted to arbitration is to be deemed to be a legal process for the purpose of interrupting extinctive prescription in terms of the Prescription Act, 1969.

## **26 NOTICES AND DOMICILIA**

- 26.1 The Customer selects as its domicilia citandi et executandi the physical addresses, fax numbers and email addresses as specified below for the purposes of giving or sending any notice provided for or required under this Agreement.
- 26.2 Metrofibre selects as its domicilia citandi et executandi the physical addresses, fax numbers and email addresses as specified below for the purposes of giving or sending any notice provided for or required under this Agreement.

Physical Address

82 Roan Crescent,

Corporate Park North

Old Pretoria Road

Midrand

Gauteng

Marked for attention of Gary Webster

provided that a Party may change its domicilium or its address for the purposes of notices to any other physical address or telefax number by written notice to the other Party to that effect. Such change of address will be effective 5 (five) business days after receipt of the notice of the change.

- 26.3 All notices to be given in terms of this Agreement will be given in writing and will:
- 26.3.1 be delivered by hand or sent by telefax or email;
- 26.3.2 if delivered by hand during business hours, be presumed to have been received on the date of delivery. Any notice delivered after business hours or on a day which is not a business day will be presumed to have been received on the following business day; and
- 26.3.3 if sent by telefax or email during business hours, be presumed to have been received on the date of successful transmission of the telefax or email. Any telefax or email sent after business hours or on a day which is not a business day will be presumed to have been received on the following business day.

26.4 Notwithstanding the above, any notice given in writing, and actually received by the Party to whom the notice is addressed, will be deemed to have been properly given and received, notwithstanding that such notice has not been given in accordance with this clause 26.

## **27 APPLICABLE LAW AND JURISDICTION**

27.1 This Agreement will in all respects be governed by and construed under the laws of the Republic of South Africa.

27.2 The Parties hereby consent and submit to the non-exclusive jurisdiction of the South Gauteng High Court, Johannesburg in any dispute arising from or in connection with this Agreement.

## **28 GENERAL**

28.1 This Agreement constitutes the whole of the agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no warranty, undertaking, representation, term or condition relating to the subject matter of this Agreement (not incorporated in this Agreement) shall be binding on either of the Parties. This Agreement supersedes and replaces any and all agreements between the Parties (and other persons, as may be applicable) and undertakings given to or on behalf of the Parties (and other persons, as may be applicable) in relation to the subject matter hereof.

28.2 No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties.

28.3 No waiver, suspension or postponement by any Party of any right arising out of or in connection with this Agreement shall be of any force or effect unless in writing and signed by such Party. Any such waiver, suspension or postponement will be effective only in the specific instance and for the purpose given.

28.4 Any provision or clause of this Agreement which is or becomes unenforceable for any other reason whatsoever, shall (only and only to the extent that it is so unenforceable) be treated as pro non scripto and the remaining provisions and clauses of this Agreement shall remain of full force and effect.

28.5 The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

28.6 Neither this Agreement nor any rights or obligations hereunder may be ceded, delegated or assigned by the Customer without the prior written consent of Metrofibre.

SIGNED at \_\_\_\_\_ on the \_\_\_\_\_ of \_\_\_\_\_ 2016

Duly authorised for and on behalf of  
METROFIBRE NETWORKX (PTY) LTD

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of Signatory

\_\_\_\_\_  
Designation of Signatory

SIGNED at \_\_\_\_\_ on the \_\_\_\_\_ of \_\_\_\_\_ 2016

Duly authorised for and on behalf of  
the Customer

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of Signatory

\_\_\_\_\_  
Designation of Signatory

CUSTOMER PARTICULARS	
Name	
Company Registration No	
Registered Address	
CUSTOMER DOMICILIUM CITANDI ET EXECUTANDI	
Physical Address	
Postal Address	
Fax No	
Email	
Marked for attention of	
Effective Date	
Service Representative	
Email	
Telephone numbers	

ANNEXURE B – ORDER CONFIRMATION SCHEDULE

ANNEXURE C – SERVICE CONFIRMATION SCHEDULE