



TERMS AND CONDITIONS OF BUSINESS

These Terms and conditions were last updated on April 2018.

Background

These terms and conditions of business govern the relationship between Metro Fibre Proprietary Limited (“METROFIBRE” or “MFN”) and you (“Customer”) in all instances where no written Retail Master Services Agreement (“MSA”) has been formally executed by the parties and where METROFIBRE has delivered or is about to deliver its services based on the issue of a Purchase Order or Service Confirmation or where METROFIBRE has held meetings with you in respect of a proposal setting out METROFIBRE’s scope of work and fees. Alternatively, METROFIBRE services may have been requested or ordered via telephone or website.

Important Note –

1. METROFIBRE’S relationship with Customer, without exception, is premised on the fact that Customer conducts a *bona fide* Business for profit. METROFIBRE reserves the right to enter into a different contractual relationship with any Customer who does not conduct a Business.
2. **Consumer Protection Act, Number 68 of 2008 (“Consumer Protection Act”), if you are a “consumer”, as this term is defined in the Consumer Protection, your attention is drawn the provisions of clauses 6, 7, 8, 9 and 18 which may limit risk or liability of METROFIBRE or impose obligations on the Consumer or be an acknowledgement of a fact.**

Save to the extent provided for herein, these terms and conditions do not deal with service levels and any agreement in respect thereof.

Terms and Conditions

1. Definitions and Interpretation

- 1.1. In this Agreement the following terms and phrases shall have the following meaning, unless the context otherwise requires:
 - 1.1.1. **"Agreement"** shall mean, the agreement between us and you, consisting of these Terms and Conditions, any Quotation or Purchase Order signed by Customer and/or any Order or Service Confirmation issued by METROFIBRE.
 - 1.1.2. **"Billing Start Date "** shall mean the date that billing shall commence as set you in the Purchase Order or Service Confirmation.

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- 1.1.3. “**Business**” means the conduct by an entity or individual of a profession, trade or occupation for profit.
- 1.1.4. “**Business Day**” shall mean, in respect of a Service, every day excluding Saturdays, Sundays and any national holidays.
- 1.1.5. “**Charges**” shall mean Call Charges, Usage Charges, Installation Charge, Start Up Charge, Rental Charges, Monthly Fees and any other charges or fees payable by Customer to Metrofibre in respect of a Service, as set out or referred to in a Purchase Order or Service Confirmation as revised from time to time.
- 1.1.5.1. “**Call Charges**” shall mean the charges for circuit or packet switched telecommunications services payable in accordance with clause 4.
- 1.1.5.2. “**Installation Charge**” or “**Start Up Charge**” or “**Connection Charge**” shall mean a non-recurring charge for installation of a Service (including installation of any Service Equipment and construction of fibre infrastructure) payable in accordance with clause 4.
- 1.1.5.3. “**Rental Charge**” or “**Monthly Fee**” shall mean monthly recurring charges for a Service payable in accordance with clause 4.
- 1.1.5.4. “**Usage Charges**” shall mean the usage-based charges for Internet Services payable in accordance with clause 4.
- 1.1.6. “**Confidential Information**” shall mean all information (in whatever format) which: (i) relates to the Agreement; (ii) is designated as confidential by either Party; or (iii) relates to the business, affairs, networks, customers, products, developments, trade secrets, know-how and personnel of either Party (including, in the case of the Customer, Customer Data) and which may reasonably be regarded as the confidential information of the disclosing Party.
- 1.1.7. “**Customer**” or “**you**” means the person or legal entity that appointed you or enters into an order and those parties related to you or the entity that conducts or operates a *bona fide* Business.
- 1.1.8. “**Customer Data**” shall include, but not be limited to, data transmissions (including the originating and destination numbers and IP addresses, date, time and duration of voice or data transmissions, and other data necessary for the establishment, billing or maintenance of the transmission), data containing personal and/or private information of the Customer, its employees or authorised users of the Services, and other data provided to or obtained by METROFIBRE and their respective agents in connection with the provision of Services. “**Regulated Customer Data**” is that Customer Data of which the use, processing or transfer is regulated by law or regulation as “personal data” where METROFIBRE or their respective agents come into possession of such Customer Data.
- 1.1.9. “**Customer Equipment**” shall mean any hardware, software, systems, cabling and facilities provided by the Customer and used in conjunction with the Service Equipment in order to receive the Service.

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- 1.1.10. "**Customer Site**" shall mean the physical location specified in the Purchase Order or Service Confirmation at which a Service is to be provided.
- 1.1.11. "**Effective Date**" shall mean the date on which Services are delivered to Customer or such date as specified in a Purchase Order or Service Confirmation.
- 1.1.12. "**Emergency Works**" mean works, the execution of which, at the time it is proposed to execute them, is required to put an end to, or prevent, the arising of circumstances then existing or imminent that are likely to cause: (i) danger to persons or property; (ii) the interruption of any service provided by the Network or the network generated by a third party; (iii) substantial loss to METROFIBRE or any third party; and such other works as in all the circumstances it is reasonable to execute with those works.
- 1.1.13. "**Force Majeure Event**" shall mean any cause beyond a Party's reasonable control affecting the performance of its obligations, including, but not limited to, fire, flood, explosion, accident, war, acts of terrorism, power outages, strike, embargo, governmental requirement, civil or military authority, Act of God, changes to laws or regulations, inability to secure materials or services, industrial disputes and acts or omissions of other providers of telecommunications services.
- 1.1.14. "**Internet**" shall mean the international interconnected network of networks using the TCP/IP protocol to exchange data communications.
- 1.1.15. "**IP Network**" shall mean the optical fibre infrastructure and routes (and associated hardware installations), points of presence, network hubs, and host computers owned, operated or used by METROFIBRE in connection with the provision of the Service.
- 1.1.16. "**MRC**" means the monthly fee paid by Customer for the all Services.
- 1.1.17. "**Party**" shall mean METROFIBRE or the Customer (as the context requires), and "**Parties**" shall mean both METROFIBRE and Customer.
- 1.1.18. "**Purchaser Order**" means any METROFIBRE order quotation or order for the services which has been signed by the Parties which specifically incorporates by reference the terms and conditions set out in these Terms and Conditions.
- 1.1.19. "**Service**" shall mean the specific Telecommunications Service or Internet Service provided by METROFIBRE to the Customer, and as detailed in the Service Confirmation or any applicable Purchase and/or Quotation.
- 1.1.20. "**Service Confirmation**" means a confirmation of the Services and any Purchase Order (which shall for the avoidance of doubt be annexed hereto and the content of which shall incorporate by reference herein) (and any future amendments or additions thereto) detailing the specific Service to be provided to the Customer.

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- 1.1.21. "**Terms and Conditions** " means the terms and conditions for wholesale Business Customers as set out herein.
- 1.1.22. "**Internet Service** " shall mean a service providing access to the Internet across the IP Network together with any related Service Equipment or support services.
- 1.1.23. "**Telecommunications Service** " shall mean a service providing voice and other telephony services utilising the IP Network.
- 1.1.24. "**Service Equipment**" shall mean the hardware, software, systems, cabling, and facilities provided by METROFIBRE at the Customer Site in order to make available the Service to the Customer. Service Equipment shall not include the IP Network or any hardware or software that is the subject of a separate supply contract between METROFIBRE and the Customer.
- 1.1.25. "**Service Term** " shall mean the total period for which the Service is provided as indicated in the Purchase Order or Service Confirmation. The "**Initial Service Term** " shall mean the agreed term as stated on the Service Confirmation commencing from the Billing Start Date or, if not stated, a minimum of one year from the Billing Start Date, unless the contrary is clearly indicated in the Service Confirmation.
- 1.1.26. "**Signature Date** " means the date of signature of this Agreement by the Party last signing in time.
- 1.2. Unless the context otherwise requires, in this Agreement, a reference to:
- 1.2.1. a person includes a reference to a body corporate, association or partnership;
- 1.2.2. a person includes a reference to that person's legal personal representatives, successors and permitted assigns;
- 1.2.3. any statute or statutory provision includes references to that statute or provision as amended, modified or re-enacted; and
- 1.2.4. a document is a reference to that document as supplemented or varied from time to time.
- 1.3. No provision of these Terms and Conditions and any Agreement is intended to contravene the applicable provisions of the Consumer Protection Act and therefore all provisions of the Agreement to the extent that the Agreement or any goods and services provided under the Agreement documents are governed by the Consumer Protection Act, must be treated as qualified, to the extent necessary, to ensure that the applicable provisions of the Consumer Protection Act are complied with.
- 1.4. In the event of any inconsistency between these Terms and Conditions and any Purchase Order or Sales Confirmation, the order of precedence shall be the Purchase Order, the Sales Confirmation and then the main body of these Terms and Conditions.

2. Service Provision

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- 2.1. METROFIBRE shall provide the Service to the Customer as indicated in the Purchase Order and Services Confirmation.
- 2.2. Service Levels shall be specified in the Service Confirmation and shall include the basic service levels set out at clause 5.5 hereof. Notwithstanding the foregoing, at any time Customer may enter into a bespoke MSA and service level agreement (“**SLA**”) to receive designated levels of service, 24-hour telephonic support and fault logging as provided for in the SLA as the case may be.
- 2.2 Before Service delivery commences, METROFIBRE is entitled to carry out, to METROFIBRE's satisfaction, appropriate credit checks against the Customer, to which the Customer hereby consents.
- 2.2 In addition to the terms set out in these Terms and Conditions, the Services shall be subject to all mandatory legal requirements in the jurisdiction where the Service is to be provided, including but not limited to the regulatory environment and data protection requirements.
- 2.3 Without releasing it from any of its obligations, METROFIBRE shall be entitled at any time, and without notice, to use subcontractors to perform some or all of its obligations.
- 2.4 An Agreement, these Terms and Conditions and any Purchase Order or Service Confirmation for a Service provided hereunder are agreed expressly on the condition that the Customer shall not resell, charge, transfer or otherwise dispose of the Service (or any part thereof) to any third party.
- 2.5 METROFIBRE reserves the right from time to time to vary, suspend, terminate the services provided if the services are unavailable or if any agreement allowing METROFIBRE to render the Services is terminated, to change the configuration of the IP Network or the Service Equipment, or to change any applicable access code for receipt of a Service, provided always that such change does not materially affect the relevant Service. METROFIBRE shall use commercially reasonable endeavours to give the Customer timeous notice of any such changes, variations or changes to access codes.
- 2.6 These Terms and Conditions shall commence on the Signature Date of any Purchase Order and shall continue until the service terms for all Services set out in each Service Confirmation have expired or terminated, unless terminated earlier in terms of this Agreement. Notwithstanding the forgoing, these terms and conditions shall be replaced to the extent provided by the entry of the Parties into a MSA and a bespoke SLA if applicable.
- 2.7 After the Initial Service Term, a Service shall be automatically renewed on a monthly basis on the same terms and conditions (except for pricing) or on any amended terms if mutually agreed in writing or as provided for in a Purchase Order or Service Confirmation.
- 2.8 Customer shall not be entitled to claim against METROFIBRE (unless a MSA and SLA has been entered into) or withhold payment for any temporary Service failure or malfunction or failure of Metrofibre networks, facilities, Services, or coverage.

3 Service Activation

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- 3.1 After installation of a Service, but prior to the activation of a Service, METROFIBRE shall conduct such tests as it considers to be appropriate to determine that all necessary work has been done to provide the Service to the Customer and, upon successful completion of such tests, METROFIBRE shall use reasonable endeavours to deliver a Service Confirmation to the Customer.
- 3.2 The Billing Start Date for the Service shall be:
- 3.2.1 where the Service as set out in the Service Confirmation can be implemented by means of a billing change and/or system configuration changes, the activation date, acceptance date or commencement date as indicated on the Purchase Order or Service Confirmation;
- 3.2.2 where the Service is a new service and/or requires on-site installation to be performed, the event described below that occurs first in time: -
- 3.2.2.1 The activation or acceptance date set out in any Purchase Order or Service Confirmation; or
- 3.2.2.2 The date the Customer first uses the Service, being the deemed "Acceptance Date" and "Service Activation Date"; or
- 3.2.2.3 In the case where Customer through no fault of METROFIBRE fails to deliver a confirmation schedule to METROFIBRE, to use the Service or to complete its obligations necessary to use the Service, then the date on which METROFIBRE delivers a Customer Service Confirmation (which shall also be the "Completion of Connection" or deemed "Service Activation" date).

4 Charges and Payment terms

- 4.1 The Customer shall pay the Charges in accordance with this clause 4. Customer will be liable to pay the fees and charges specified in any Purchase Order or Service Confirmation monthly in arrears promptly on or before the last day of each month.
- 4.2 Subject to the provisions of clauses 4.3 and 7.5, the Charges shall not be increased during the Initial Service Term.
- 4.3 Call Charges to:
- 4.3.1 South African numbers shall be determined with regards to the relevant call termination rates as applicable from time to time.
- 4.3.2 International numbers shall be determined in accordance with the rates and billing methodologies as charged by the upstream international termination partners from time to time which shall be set out in the invoice
- 4.4 Charges shall accrue from the Billing Start Date and may be invoiced by METROFIBRE for:
- 4.4.1 Call Charges and/or Usage Charges monthly in arrears or advance as determined in the applicable Purchase Order or Service Confirmation.
- 4.4.2 Installation Charges and/or Start Up Charges METROFIBRE on or at any time after the Effective Date.
- 4.4.3 Rental Charges and/or Monthly Fees monthly in advance. Service(s) provided for part of a month will be charged on a pro-rata basis.

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- 4.5 Any invoice for Charges shall be due on issue of the invoice and shall be paid by the Customer within thirty **(30) days** of delivery of an invoice to the Customer.
- 4.6 You may not withhold or offset payment due to Metrofibre, except where you have informed us of a good faith query of our invoice or statement of account. Where the query is valid, you may withhold such fees that are the subject of the query until the matter has been resolved. Any other item on an invoice or statement that is not queried must be paid on the due date.
- 4.7 A certificate signed by our Chief Financial Officer of the amount due by you and the date on which it is to be paid will be evidence of the correctness of the amount owed.
- 4.8 To the extent permitted in terms of applicable law, any amount not paid by you on the due date of statement will bear interest for our benefit from the due date until the date of payment. **The rate of interest is the published rate of interest by the Standard Bank of South Africa Limited or 15% per annum whichever is the higher.**
- 4.9 All Charges or other sums which may from time to time be due, owing or incurred to METROFIBRE are stated exclusive of value added tax and any similar sales tax, levy or duty which shall be payable by the Customer and invoiced by METROFIBRE at the then prevailing rate where the Service is provided.

5. METROFIBRE Obligations

- 5.1 In performing its obligations under this Agreement, METROFIBRE shall at all times exercise the reasonable skill and care of a competent provider of Internet related services and Telecommunications Services.
- 5.2 METROFIBRE shall use reasonable endeavours to ensure that each Service will conform to any service descriptions and/or service levels as set out, or referred to, in the Purchase Order or Service Confirmation and/or any applicable ancillary service level agreements. Where no
- 5.3 Except as expressly set out in this Services Agreement, all warranties, representations or agreements, with respect to the provision of a Service or otherwise, whether oral or in writing and whether express or implied, either by operation of law, statute or otherwise, are excluded to the fullest extent permitted by law.**
- 5.4 METROFIBRE warrants that it is duly organised, validly existing and in good standing under the laws of South Africa and possesses all the authority and necessary licenses and/or permits as required under law to enter into and perform its obligations hereunder.
- 5.5 The basic service level for connectivity is premised on the following:
- There is no redundancy offered in access or network ports at the Equipment.
 - Single fibre entry
 - NID has 1 x access port configured
 - NID has 1 x network port configured
 - NID has option of one power supply either AC or DC

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5.6 Metrofibre guarantees :

- 5.6.1 8 hour response time;
- 5.6.2 Mean time to respond – 24 hours; and
- 5.6.3 Uptime availability of 96%.

5.7 If Services are disrupted, Customer must telephone 087 151 4049 or log a fault at <https://helpdesk.metrofibre.co.za> to report the problem and Metrofibre shall attend to resolution thereof in a reasonable time period.

6. Service Suspension

6.1 METROFIBRE may, at its sole discretion and without prejudice to any right which it might have to terminate this Agreement, elect to immediately suspend the provision of the Service (or part thereof) at any time in any of the following circumstances:

6.1.1 METROFIBRE has reasonable grounds to consider it is entitled to terminate the Service and/or this Agreement pursuant to clause 7;

6.1.2 METROFIBRE is obliged to comply with an order, instruction or request of a court, government agency, emergency service organisation or other administrative or regulatory authority;

6.1.3 METROFIBRE needs to carry out Emergency Works to the IP Network or Service Equipment;

6.1.4 METROFIBRE has reasonable grounds to consider that the Service is being used fraudulently or illegally or in violation of clause 8.13;

6.1.5 METROFIBRE has reasonable grounds to consider that the Customer has not or will not or is unable to make any payment which is due or is to fall due to METROFIBRE hereunder;

6.2 If METROFIBRE exercises its right to suspend the Service (or part thereof) pursuant to clauses 6.1.2 or 6.1.3 it shall, whenever reasonably practicable, give prior notice of such suspension to the Customer, such notice to state the grounds of such suspension and its expected duration. METROFIBRE shall in such circumstances use all reasonable endeavours to resume the Service as soon as is practically possible.

6.3 If the Service (or part thereof) is suspended as a consequence of the breach, fault, act or omission of the Customer, the Customer shall pay to METROFIBRE all reasonable costs and expenses incurred by the implementation of such suspension and/or recommencement of the provision of the Service.

6.4 METROFIBRE shall not be liable for any loss, damage or inconvenience suffered by the Customer as a result of any suspension made pursuant to clause 6.1, except to the extent that such suspension is made pursuant to clause 6.1.3 and for reasons which are solely and directly attributable to the negligence of METROFIBRE.

7. Term and Termination

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- 7.1 The Customer agrees to comply with any Initial Service Term commitment or the Parties shall enter into a written retail master services agreement and SLA.
- 7.2 Notwithstanding the activation date or service delivery commencement date, these Terms and Conditions take effect on the date of the signature of the Purchase Order by the party last signing in time and continue in force for the Initial Term or term described in the Purchase Order or Service Confirmation. Billing shall be calculated from the activation date or Billing Commencement Date.
- 7.3 Notwithstanding the provisions of this clause 7, if the provisions of the Electronic Communications and Transactions Act applies to the terms of this agreement and Customer is a 'Consumer' as defined in the Consumer Protection Act, Customer may terminate this Agreement on notice to this effect within 5 (five) days after the transaction is concluded if Customer has procured the Services as a result of direct marketing.
- 7.4 Either Party may terminate this Agreement:
- 7.4.1 subject to the provisions of the Service Detail, on at least **90 days** written notice to take effect on or at any time after expiry of the relevant Initial Service Term;
 - 7.4.2 immediately by notice if, in relation to the Service, the other Party has committed a material breach which is incapable of remedy;
 - 7.4.3 immediately by notice if, in relation to the Service, the other Party has committed a material breach capable of remedy, but which it fails to remedy within ten (10) Business Days of having been notified of such breach; or
 - 7.4.4 immediately by notice if, in relation to the Service, a Force Majeure Event subsists for a continuous period exceeding three (3) months;
 - 7.4.5 if the other has a receiver or an administrative receiver appointed over it or over any part of its undertaking or assets or passes a resolution for winding up (other than for the purpose of a bona fide scheme of solvent amalgamation or reconstruction) or a court of competent jurisdiction makes an order to that effect or if the other becomes subject to an administration order or enters into any voluntary arrangement with its creditors or ceases or threatens to cease to carry on business, or undergoes or is subject to any analogous acts or proceedings under any foreign law, or commences business rescue proceedings.
- 7.5 The termination by Customer of this Agreement in terms of clause 7.4.1 above shall entitle METROFIBRE to charge the full balance of the outstanding MRC for the remainder of the Initial Term together with any Installation Charge, Connection Charge, Usage Charge and the costs of any third party service to provide the Services ("early termination charge") which amounts shall become due and payable with effect from the date of such termination.
- 7.6 Where Customer is a "Consumer", as this term is defined in the Consumer Protection Act, Customer may terminate any Service on the giving of 20 (twenty) business days' written notice in which case Metrofibre shall be entitled to charge an early termination charge as provided for in clause 7.7 ("**early termination charge**").
- 7.7 The early termination charge, which the Customer hereby acknowledges to be a reasonable cancellation penalty shall be equal to:

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- 7.7.1 In respect of MRC, 20% of the Fees that would have become due and payable for balance of the Initial Period; and
- 7.7.2 Any Installation Charge(s); and
- 7.7.3 any other third-party termination charges or other costs or expenses incurred by METROFIBRE for the cancellation of related services or equipment provided to METROFIBRE in connection with the Service(s); and
- 7.7.4 the cost of any equipment installed at the behest of Customer facilitating the delivery of the Services.
- 7.8 The early termination charge shall apply when your account is not in arrears at the time of early cancellation. If you request a cancellation while your account is in arrears, or where you have breached the terms of this Agreement, Metrofibre may cancel this Agreement and claim payment for the full remainder of the contract period. Metrofibre will only grant you early cancellation after you have paid and we have received the early Cancellation Charge.
- 7.9 METROFIBRE may terminate the Agreement immediately by notice if a suspension of a Service to a Customer pursuant to clauses 6.1.4 or 6.1.5 has continued for a period of at least 20 (twenty) business days.
- 7.10 If METROFIBRE has reasonable grounds to consider that there has been a violation of clause 7.4, METROFIBRE may notify the Customer and require it to remedy the violation in the event of an incident involving a violation of public law or regulation or an imminent threat to the IP Network, immediately; or in all other cases, within forty-eight (48) hours. If the Customer fails to notify METROFIBRE that such a remedy has been effected in accordance with this clause 7.10 or if METROFIBRE reasonably determines that the violation is continuing or is likely to occur again, METROFIBRE may terminate this Agreement (or relevant Service) immediately upon notice to the Customer.
- 7.11 Notwithstanding the provisions of clause 6, METROFIBRE may terminate the Agreement on seven (7) days' notice if the Customer fails to make any payment, when due, in accordance with the terms of this Agreement.
- 7.12 Without prejudice to accrued rights or obligations, upon termination of the Agreement:
- 7.12.1 all Services shall terminate immediately;
- 7.12.2 notwithstanding the provisions of clause 4, all accrued Charges not yet invoiced shall become due and shall be paid by the Customer immediately on receipt of an invoice;
- 7.12.3 where the termination is as a result of breach of the Customer, any applicable early termination charges will become due and payable immediately; and
- 7.12.4 each Party shall promptly return to the other Party all copies of the other Party's Confidential Information and, if requested, verify to the other Party that it has done so.
- 7.13 Termination of this Agreement shall not affect a clause that necessarily or by its context requires survival of this Agreement.

8 Customer Obligations

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- 8.7 The Customer shall grant or shall procure the grant to METROFIBRE or its authorised representatives of such rights of access to each Customer Site, including any necessary licences, waivers or consents to enable it to perform its obligations or exercise its rights under this Agreement. The Customer shall advise METROFIBRE in writing of all health and safety rules and regulations and any other reasonable security requirements applicable at the Customer Site, and METROFIBRE shall use all reasonable endeavours to observe and ensure that its employees and authorised representatives observe such regulations and requirements as advised whilst at the Customer Site.
- 8.8 The Customer shall provide METROFIBRE with such facilities and information as METROFIBRE may reasonably require, to enable it to perform its obligations or exercise its rights under the Agreement.
- 8.9 The Customer warrants and undertakes that it shall:
- 8.9.1 use the Service Equipment only for the purpose of receiving the Service and in accordance with METROFIBRE's reasonable instructions from time to time and/or any software licence that may be provided with the Service Equipment;
 - 8.9.2 not move, modify, relocate, or in any way interfere with the Service Equipment (or any words or labels on the Service Equipment) or the Network;
 - 8.9.3 not cause the Service Equipment to be repaired or serviced except by an authorised representative of METROFIBRE;
 - 8.9.4 insure and keep insured all Service Equipment installed at each Customer Site against theft and damage;
 - 8.9.5 not create or allow any charges, liens, pledges or other encumbrances to be created over the Service Equipment. Title to the Service Equipment shall at all times belong and remain with METROFIBRE, an METROFIBRE affiliate or their subcontractors;
 - 8.9.6 permit METROFIBRE to inspect, test, maintain and replace the Service Equipment at all reasonable times;
 - 8.9.7 comply with METROFIBRE's reasonable instructions in relation to the modification of the Customer Equipment to enable the Customer to receive the Service, at its own expense; and
 - 8.9.8 upon termination of a Service, allow METROFIBRE access to each Customer Site to remove the Service Equipment. Should any construction or alteration to the Customer Site have occurred to facilitate any Service, METROFIBRE is not obliged to restore the Customer Site to the same physical state as prior to Service delivery.
- 8.10 Customer agrees to indemnify, defend and hold Metrofibre (including its employees, agents, directors and shareholders) from an against any claim for any damages by any third party as a result of the breach of the above warranties and any term of this Agreement, and against all legal costs (including costs on an attorney and own client scale).
- 8.11 The Customer shall be liable for any and all damage to Service Equipment or the IP Network which is caused by:
- 8.11.1 the act or omission of the Customer (including but not limited to Customer's employees, agents, contractors, suppliers or officers) or the Customer's breach of the terms of this Agreement; or

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8.11.2 malfunction or failure of any equipment or facility provided by the Customer or its agents, employees, or suppliers, including but not limited to the Customer Equipment.

8.12 The Customer warrants that it holds and shall continue to hold such licences and/or other authorisations as are required under any relevant legislation, regulation or administrative order, to receive the Services and to run and connect the Customer Equipment to the Network and Service Equipment. METROFIBRE reserves the right to disconnect any Customer Equipment where the Customer has failed to comply with the provisions of this clause 8.12 and METROFIBRE shall in no event be liable in respect of the Customer's failure to comply with this clause 8.12.

8.13 The Customer warrants and undertakes that it shall in its use of the Services comply with:

8.13.1 any relevant legislative and regulatory provisions and shall not use the Services for any illegal or immoral purpose; and

8.13.2 the current version of the METROFIBRE Acceptable Use Policy (the "Policy"). The applicable Policy shall be available on the METROFIBRE website. The Customer shall, prior to commencing its use of the Service(s), read and understand the Policy. METROFIBRE reserves the right to change the Policy from time to time, effective upon posting of the revised Policy on its website and by notice to the Customer;

and the Customer shall indemnify METROFIBRE in respect of any and all losses, damages, costs or expenses resulting from or arising out of any breach of the warranties set out in this clause 8.7 and/or any third party claim or allegation arising out of or relating to the use of the Service, and which relates to any act or omission of the Customer which is, or if substantiated would be, a breach of this clause 8.13.

9 Liability and Disclaimer

9.7 You use the Metrofibre Services at your sole responsibility and risk.

9.8 Subject to clauses 9.11 and 10, Metrofibre's total liability to the Customer arising in connection with the Agreement shall be limited to:

9.8.1 For any event or series of connected events a value equal to six times the value of the average monthly billing of the affected Service(s); and

9.8.2 notwithstanding clause 9.1.1, a maximum amount in aggregate in any twelve (12) month period of twelve times the value of the average monthly billing of the affected Service(s); the average being calculated using three months of billing prior to the aforementioned event or series of connected events.

9.9 Subject to clause 9.11 but otherwise notwithstanding anything else in this Agreement, neither Party shall in any event be liable to the other for indirect or consequential losses or otherwise for harm to business, loss of revenues, loss of anticipated savings or lost profits, whether or not reasonably foreseeable at the time when the Agreement was entered into.

9.10 The Customer acknowledges that METROFIBRE is unable to exercise editorial or other control over any content placed on or accessible through the Customer's use of the Services and METROFIBRE shall have no liability as to the quality, content or accuracy of information received through or as a result of the use of the Services.

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9.11 Nothing in this Agreement shall serve to limit either Party's liability in respect of death or personal injury caused by or arising from its negligence, or any liability arising pursuant to the clauses 4, 8.12, 8.13, and 11.

10 Force Majeure

Notwithstanding anything herein to the contrary, neither Party shall be liable to the other for any delay, failure in performance of any part of this Agreement (other than for payment obligations set out in clause 4) or damages suffered to the extent that such delay or failure is attributable to a Force Majeure Event. Subject to clause 7.4.4, any such delay or failure shall suspend the Agreement until the Force Majeure Event ceases and the length of the suspension shall extend the affected Initial Service Term(s).

11 Intellectual Property, IP Addresses and Domain Names

11.7 The Customer acknowledges:

11.7.1 that any and all patents, registered and unregistered designs, copyrights, trademarks and all other intellectual property rights whatsoever and wherever enforceable, which are used in connection with the Service and/or Service Equipment, shall remain the sole property of METROFIBRE, its contractors or suppliers; and

11.7.2 without limitation to the foregoing, that the Customer shall not be entitled to use the name, trademarks, trade names or other proprietary identifying marks or symbols of METROFIBRE without METROFIBRE's prior written consent.

12 Confidentiality

12.7 Subject to clause 12.2, each Party hereunder, shall:

12.7.1 only use Confidential Information for the purposes of the Agreement;

12.7.2 only disclose Confidential Information to a third party with the prior written consent of the other Party (except that either Party may disclose Confidential Information on a need to know-basis, to its employees, agents or contractors, including professional advisors or auditors; and

12.7.3 ensure that any third party to whom Confidential Information is disclosed executes a confidentiality undertaking substantially similar to the terms of this clause 12.

12.8 The provisions of clause 12.1 shall not apply to any Confidential Information which: (i) is in or comes into the public domain other than by breach of this clause 12; or (ii) is or has been independently generated by the recipient Party; or (iii) is properly disclosed pursuant to a separate written consent or a statutory obligation, the order of a court of competent jurisdiction or the requirement of a competent regulatory body.

13 Assignment

Neither Party may assign, charge, transfer or otherwise dispose of the Agreement or any rights or obligations therein in whole or in part, without the written consent of the other Party (which consent shall not be unreasonably withheld or unduly delayed or conditioned), except that METROFIBRE may

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assign any and all of its rights and obligations hereunder: (i) to any METROFIBRE affiliate; (ii) to a third party pursuant to any sale or transfer of substantially all the assets or business of METROFIBRE or an METROFIBRE affiliate; or (iii) to a third party pursuant to any financing, merger, or reorganisation of METROFIBRE or an METROFIBRE affiliate.

14 General

- 14.7 Severability. If any provision of the Agreement, including any limitation, is held by a court or any governmental agency or authority to be invalid, void or unenforceable, the remainder of this Agreement shall nevertheless remain legal, valid, and enforceable.
- 14.8 No Waiver. Failure or delay by either Party to exercise or enforce any right or benefit conferred by the Agreement, including METROFIBRE'S right to deliver invoices in accordance with clause 4, shall not be deemed to be a waiver of any such right or benefit nor operate so as to bar the exercise or enforcement thereof or of any other right or benefit on any later occasion.
- 14.9 Relationship. Nothing in this Agreement and no action taken by the Parties pursuant to this Agreement shall constitute or be deemed to constitute between the Parties a partnership, agency, association, joint venture or other co-operative entity.
- 14.10 Third Party Beneficiaries. Except as otherwise contemplated by this Agreement, nothing herein will create or confer any rights or other benefits in favour of any person other than the Parties.
- 14.11 Variation. METROFIBRE reserves the right to amend and change its Terms and Conditions from time to time (or any part thereof) and shall make available to Customers revised terms and Conditions.

15 Notices

- 15.7 Except as otherwise expressly provided for herein, any notice required or authorised to be given under the Agreement shall be delivered by hand, prepaid registered post, by facsimile transmission or by email to the address stated on the first page of this Agreement and shall be deemed to have been served (unless the contrary is proven):
- 15.7.1 If delivered by hand, on the next Business Day;
 - 15.7.2 If sent by registered post, 10 Business Days after such posting;
 - 15.7.3 If sent by facsimile transmission, the next Business Day;
 - 15.7.4 If sent by email and the message is not returned, the next Business Day.
- 15.8 Notwithstanding the provisions of this clause, any legal notice that has been sent or transmitted and that have been received by the other party shall be deemed to have been delivered in accordance with the terms of this Agreement.

16 Entire Agreement

This Agreement sets out the entire agreement between METROFIBRE and the Customer, superseding all prior or contemporaneous representations, agreements or understandings concerning the subject matter addressed herein.

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17 Dispute Resolution

- 17.7 If the Customer wishes to dispute any invoice or part of an invoice falling due in accordance with clause 4.5, the Customer shall, before the invoice is due for payment, deliver a notice in writing to METROFIBRE setting out the nature of its dispute, including: (i) date and number of disputed invoice; (ii) amount in dispute; (iii) reason for dispute; and (iv) supporting documentation, as appropriate. Any undisputed part of a disputed invoice shall be paid by the Customer in accordance with clause 4.5. The Parties shall use all reasonable endeavours to resolve such payment disputes as soon as is reasonably practicable.
- 17.8 In the event of there being any dispute or difference between the Parties arising out of this Agreement the said dispute or difference shall on written demand by METROFIBRE be submitted to arbitration in Pretoria in accordance with the AFSA rules, which arbitration shall be administered by AFSA
- 17.9 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.
- 17.10 The Parties agree that the commencement of arbitration proceedings shall be deemed to be a legal process for the purpose of interrupting extinctive prescription in terms of the Prescription Act, 1969.

18 Customer Data and Privacy

- 18.7 The Customer acknowledges that METROFIBRE and its respective contractors will, by virtue of the provision of Services, come into possession of Customer Data.
- 18.8 Metrofibre complies with applicable data legislation and you are responsible for complying with your obligations under applicable laws governing data. Metrofibre shall not verify your compliance with the terms of any applicable legislation.
- 18.9 METROFIBRE has implemented and maintains appropriate technical and organisational measures to protect Customer Data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access and against other unlawful forms of processing. The Customer acknowledges that it has a right to access Regulated Customer Data upon written notice and have any agreed errors in such Regulated Customer Data rectified.
- 18.10 The Customer acknowledges and agrees that METROFIBRE and its respective subcontractors may use or process Customer Data:
- 18.10.1 in connection with the provision of Services;
 - 18.10.2 to incorporate Customer Data into databases controlled by METROFIBRE for the purpose of administration, provisioning, billing and reconciliation, verification of Customer identity and solvency, maintenance, support and product development, fraud detection

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and prevention, sales, revenue and customer analysis and reporting, market and customer use analysis, and
18.10.3 to communicate to the Customer by voice, letter, fax or email regarding products and services of METROFIBRE.

The Customer may withdraw consent for such use, processing or transfer of Customer Data as set out above by sending a written notice to METROFIBRE to such effect, unless it is required to (i) provision, manage, account and bill for the Services; (ii) carry out fraud detection; or (iii) comply with any statutory obligation, regulatory requirement or court or other public authority order.

18.11 The Customer warrants that it has obtained and will obtain all legally required consents and permissions from relevant parties (including data subjects) for the use, processing and transfer of Customer Data as described in this clause 18.

18.12 Metrofibre is not responsible for Customer Data stored or transmitted on our system.

18.13 Customer consents to Metrofibre transferring data across country borders to enable us to comply our obligations under any order, Purchase Order or Service Confirmation. You are solely responsible for determining that any transfer across a border complies with applicable laws.

18.14 Customer agrees to indemnify, defend and hold us harmless (and our employees, directors, agents and shareholders) from and against any claim, loss, damage, cost or liability (including legal costs on an attorney on own client basis) arising out of or in connection with your obligations under this clause.

18.15 On reasonable notice, a party shall provide the other with the information that it has regarding data and its processing that is necessary for a party to comply with applicable legislation. Both parties shall take reasonable precautions to secure the integrity of data and prevent unauthorised access, corruption and loss of data.

18.16 Our records shall be *prima facie* evidence of the Service provided to you.

19 Governing Law and Jurisdiction

This Agreement shall be governed and construed in accordance with South African law, and the Parties hereto irrevocably agree to the exclusive jurisdiction of the South African courts.