

# **MASTER SERVICES AGREEMENT**

entered into between

**NEOTEL (PTY) LTD**

**and**

**[Company]**

## Table of Contents

	Page
1. PARTIES.....	3
2. DEFINITIONS and INTERPRETATION .....	3
3. INTRODUCTION.....	6
4. AGREEMENT COMMENCEMENT DATE.....	6
5. SERVICE COMMENCEMENT DATE .....	6
6. RESOLUTIVE CONDITION .....	6
7. PROVISION OF SERVICES .....	7
8. FEES AND CHARGES .....	7
9. INVOICING.....	8
10. NEOTEL'S OBLIGATIONS .....	8
11. the CUSTOMER'S OBLIGATIONS.....	8
12. Data Privacy and Protection .....	9
13. EQUIPMENT .....	10
14. RESALE OF SERVICES .....	11
15. SAFETY AND SECURITY .....	11
16. FORCE MAJEURE .....	11
17. LIMITATION OF LIABILITY .....	12
18. SUSPENSION OF SERVICES .....	13
19. TERMINATION .....	13
20. Early Termination Costs.....	14
21. SERVICE Variations .....	14
22. DISPUTE RESOLUTION .....	14
23. CONFIDENTIALITY .....	15
24. INTELLECTUAL PROPERTY RIGHTS.....	16
25. DOMICILIA AND NOTICES.....	16
26. CESSION and ASSIGNMENT.....	17
27. GENERAL.....	17

## 1. PARTIES

1.1. The Parties to this Agreement are –

1.1.1. **Neotel (Pty) Ltd**, a private company registered under the company laws of the Republic of South Africa with registration number **2004/004619/07** and having its principal place of business at 401 Old Pretoria Main Road, Midrand, Gauteng, South Africa ("**Neotel**"); and

1.1.2. \_\_\_\_\_, a legal entity registered under the laws of \_\_\_\_\_ with registration number \_\_\_\_\_ and having its principal place of business at \_\_\_\_\_ ("**Customer**").

1.2. The Parties hereby agree as set out below.

## 2. DEFINITIONS and INTERPRETATION

2.1. Unless the context otherwise indicates, the following expressions shall have the meanings given to them:

2.1.1. "**Act**" means the Electronic Communications Act No. 36 of 2005;

2.1.2. "**Addressee**" means the Party to whom any notice is given and/or any payment is made;

2.1.3. "**Affiliate**" means, with respect to either Party, any other entity which is a subsidiary or a holding company or a subsidiary of the holding company of such Party. In regard to this definition, the terms "subsidiary" and "holding company" shall have the meaning assigned to them in Section 1 of the Companies Act No. 71 of 2008, but shall include any foreign entity which, had it been registered in terms of that Act, would fall within the ambit of such term;

2.1.4. "**Agreement**" means this master services agreement and includes all schedules and annexures which are attached to this agreement from time to time;

2.1.5. "**Announcement**" means any press or other public announcements about the Services, the Agreement or the transactions related to it;

2.1.6. "**Business Day**" means any day other than Saturday, Sunday or a public holiday officially recognized as such in the Republic of South Africa;

2.1.7. "**Charges**" means MRC, NRC, usage fees and any other charges payable under this Agreement;

2.1.8. "**Confidential Information**" means any information or data in whatever form or medium whether tangible or intangible, oral or in writing, including but not limited to, documents, materials or data which by its nature or content is or should reasonably be identifiable as confidential and/or proprietary to the Disclosing Party or which is provided or disclosed in confidence or is marked as confidential information by the Disclosing Party, and of which the Receiving Party may obtain knowledge through or as a result of the relationship created in terms of this Agreement, access to the Disclosing Party and/or the Disclosing Party's premises, or communications with the Disclosing Party's employees, representatives or independent contractors. Without limiting the generality of the foregoing, "Confidential Information" shall include but is not limited to ideas, concepts, business plans, strategies, financial statements, pricing data, operations, inventions, discoveries, formulae, processes, designs, specifications, drawings, prototypes, sample, improvements, developments, applications, marketing data, customer names, projections, trademarks, trade names, and trade secrets, any commercial, financial, technical or strategic information, whether or not the same are or may be patented, registered, or otherwise publicly protected;

2.1.9. "**Contract Term**" means the term of the applicable Services as set out in relevant COF;

2.1.10. "**Customer Device**" means equipment which is either leased or purchased from Neotel by the Customer and used in order to access the Service/s;

- 2.1.11. **"Customer Order Form"** or **"COF"** means the form through which the Customer accepts a quotation for services, or for any variation to a Service, setting out the details of the Service requested such as quantities, fees, Service Levels and Charges payable;
- 2.1.12. **"Customer Site Requirement Specification"** or **"CSRS"** means the document setting out the design, environmental, technical and/or operational specifications required by Neotel at the applicable Customer Site must to enable Neotel to deliver the Service in question;
- 2.1.13. **"Customer Specific Services"** means any Services where (i) the Customer has imposed any specific requirements that result in an increase to Neotel of the cost of providing such Services, included but not limited to medium, delivery route, technology specifications, non-standard service levels or a third party that Neotel is obliged to utilise; (ii) any Service that originates from and/or terminates at an international location; or (iii) any service that forms part of a group of services linked together by Neotel for feasibility purposes; and/or which are classified as 'non-standard' in the relevant COF;
- 2.1.14. **"Disclosing Party"** means either Neotel or the Customer, as the case may be;
- 2.1.15. **"Due Date"** means the date specified in the relevant invoice, or if no such date is specified, thirty (30) calendar days from the date of the invoice;
- 2.1.16. **"Effective Date"** means the date of signature of this Agreement by the Party signing last in time;
- 2.1.17. **"ICASA"** means the Independent Communications Authority of South Africa;
- 2.1.18. **"Information Regulator"** means the information regulator established or to be established in terms of the POPI Act;
- 2.1.19. **"Intellectual Property Rights"** means and includes:
- 2.1.19.1. rights relating to any patent, design, trade mark, trade or business name (including all goodwill associated with any trade mark, or any trade or business name), copyright, database, domain name, circuit topography design, and/or utility model, whether registered or not, and including the benefit of all registrations or applications to register and the right to apply for registration of any of the foregoing items and all rights in the nature of any of the foregoing items, each for their full term (including any extensions or renewals thereof) and wherever in the world enforceable; and
  - 2.1.19.2. all other intellectual property rights and forms of protection of a similar nature or having equivalent or similar effect and which may exist anywhere in the world;
- 2.1.20. **"Licences"** means the electronic communications service and electronic communications network service licences issued to Neotel on 15 January 2009, and any renewal, amendment, re-issue or equivalent thereof authorising Neotel to provide the Services;
- 2.1.21. **"Losses"** means all losses, liabilities, damages and claims, and all related costs and expenses suffered by either Party (including legal fees on the scale as between attorney and client, tracing and collection charges, costs of investigation, interest and penalties);
- 2.1.22. **"MRC"** or **"Monthly Recurring Charge"** means the monthly charges for the Services as set out in the applicable COF;
- 2.1.23. **"Neotel Equipment"** means all hardware, network facilities, and/or telecommunication facilities, which Neotel uses to provide the Services;
- 2.1.24. **"Network"** means the communication network, components and Network Equipment owned and/or operated by Neotel, including points of presence, but does not include Customer Devices, customer premises equipment (modems, routers etc), or any networks or network equipment not owned or controlled by Neotel;
- 2.1.25. **"NRC"** or **"Non-Recurring Charge"** means the implementation fee for the Services as set out in applicable COF;

- 2.1.26. **“Personal Information”** shall bear the meaning as set out in the POPI Act and includes, but is not limited to any information provided by the Customer to Neotel that is an identifying number, symbol, e-mail address, physical address, telephone number or similar assignment relating to the Customer or any customer of the Customer, which is subject to protection in terms of any statute in South Africa which imposes data protection requirements from time to time;
- 2.1.27. **“Party”** means either Neotel or the Customer and **“Parties”** means both of them collectively and shall be deemed to mean and include their respective successors and permitted assigns;
- 2.1.28. **“POPI Act”** means the Protection of Personal Information Act, 4 of 2013, as may be amended from time to time;
- 2.1.29. **“Processing”** shall bear the meaning as set out in the POPI Act;
- 2.1.30. **“Service Credits”** means service credits due to the Customer for unscheduled Service Downtime, calculated in accordance with the relevant Service Schedule;
- 2.1.31. **“Service Description”** means the detailed description of the nature and type of the applicable Service requested by the Customer;
- 2.1.32. **“Service Schedule”** means a schedule containing the Service Description and Service Levels of the applicable Service;
- 2.1.33. **“Services”** means any Neotel services provided to the Customer under a Customer Order Form;
- 2.1.34. **“Service Commencement Date”** means the date of the Service Handover Form;
- 2.1.35. **“Service Handover Form”** or **“SHF”** means the form provided by Neotel to the Customer after Neotel has completed installation and testing of the Service, or any variation to a Service, as the case may be;
- 2.1.36. **“Service Levels”** means the levels of service required in relation to the provision by Neotel of the Services;
- 2.1.37. **“Terminating Services”** means those Services that are terminated in accordance with clause 19.1.3; and
- 2.1.38. **“Termination Date”** means the date upon which this Agreement, or the applicable Terminating Services, as the case may be, terminates for any reason whatsoever.
- 2.2. Unless the context indicates otherwise, an expression which indicates: (i) any gender includes the other gender; (ii) a natural person includes a juristic person and vice versa; and (iii) the singular includes the plural and vice versa.
- 2.3. Headings are for convenience only and do not affect the interpretation of this Agreement.
- 2.4. In the event of ambiguity or conflict, and unless stated explicitly to the contrary in the relevant clause, the order of precedence in the interpretation of the Agreement shall be:
- 2.4.1. this Agreement;
- 2.4.2. the Service Schedule/s; and
- 2.4.3. the COF/s.
- 2.5. The expiration or termination of this Agreement shall not affect those provisions of this Agreement that 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.
- 2.6. The rule of construction that this Agreement shall be interpreted against the party responsible for the drafting or preparation of this Agreement, shall not apply.

- 2.7. When any number of days is prescribed in this Agreement, same shall be reckoned exclusive of the first day and inclusive of the last day unless the last day does not fall on a Business Day, in which case the last day shall be the next succeeding Business Day.
- 2.8. A law shall be construed as any law (including common law) or statute, constitution, decree, judgment, treaty, regulation, directive, by-law, order or any legislative measure of any government, local government, statutory or regulatory body or court as at the Effective Date and as amended or re-enacted from time to time, where applicable.

### 3. INTRODUCTION

- 3.1. The Customer hereby appoints Neotel to provide the Services, subject to the terms and conditions contained in this Agreement, which appointment Neotel hereby accepts.
- 3.2. Neotel shall be entitled to appoint any of its Affiliates to provide the Services, provided that Neotel shall be and remain liable with such appointee for the due and proper performance by it of all of its duties, functions and obligations under this Agreement.
- 3.3. In the event that the Parties have previously entered into any agreements for the provision of Services to the Customer, this Agreement shall, from the Effective Date hereof, supersede, substitute and replace any and all previous agreements and all Services being provided under such previous agreements shall be governed by the terms and conditions of this Agreement.

### 4. AGREEMENT COMMENCEMENT DATE

- 4.1. This Agreement shall commence on the Effective Date and shall thereafter remain in force for a period of twelve (12) calendar months (the "**MSA Initial Period**").
- 4.2. Subject to the provisions of clause 19.1.1, the Parties agree that upon the expiry of the MSA Initial Period, as well as upon expiry of subsequent renewal periods, this Agreement shall renew automatically on the same terms and conditions for successive periods equal to the MSA Initial Period.

### 5. SERVICE COMMENCEMENT DATE

- 5.1. The Services shall commence on the Service Commencement Date and shall thereafter remain in force for the Contract Term agreed to by the Parties in the COF (the "**COF Initial Period**").
- 5.2. The Parties agree that, upon the expiry of the COF Initial Period, as well as upon expiry of subsequent renewal periods, the Contract Term shall renew automatically on the same terms and conditions for successive periods of twelve (12) calendar months unless either Party notifies the other Party in writing at least sixty (60) calendar days prior to the expiry of the COF Initial Period or the end of any subsequent renewal period, as applicable, that the Contract Term of the applicable COF will not be so extended.

### 6. RESOLUTIVE CONDITION

- 6.1. In the event that the Customer is a legal entity that is not registered in South Africa and/or any Services involve payment to Neotel in a currency other than South African Rand, this Agreement shall be subject to the resolute condition that Neotel obtains the necessary approval from South African Reserve Bank by no later than 17h00 on a date which is six (6) months after the Effective Date.
- 6.2. The cessation of the Agreement in terms of clause 6.1 shall, unless the Parties otherwise agree in writing, not affect any liability incurred by the Parties prior to the date of cessation hereof.
- 6.3. The Parties will co-operate in good faith to procure the fulfilment of the resolute condition as soon as reasonably possible after the Effective Date.
- 6.4. The resolute condition may not be waived, in whole or in part, by the Parties. The Parties may however, extend the relevant date for fulfilment thereof set out in clause 6.1 to such later date as may be agreed in writing between the Parties.

6.5. Neither of the Parties will, subject to clause 6.2, have any claim against the other in terms hereof or arising from the failure of the resolutive condition, save for any claims arising from a breach of clause 6.3.

## 7. PROVISION OF SERVICES

7.1. For the duration of this Agreement, the Customer shall obtain the Services as it requires from Neotel in terms of this Agreement, the Service Schedule and the COFs concluded from time to time.

7.2. Neotel shall not be committed to supply any Services to the Customer until a COF in respect of the required Services has been signed by the Customer.

7.3. In providing the Services to the Customer, Neotel reserves the right to utilise any technology which it has available and which it considers at its discretion as most suitable and reasonable to render Services unless the applicable Service Schedule expressly states that specific technology will be used.

7.4. Neotel reserves the right to utilise any spare transmission capacity provided that such use of spare capacity does not have an adverse effect on the provision of the Services to the Customer.

7.5. The Services shall be used by the Customer in accordance with the terms and conditions of this Agreement.

7.6. Each COF shall constitute an agreement between the Parties subject to and regulated by this Agreement.

## 8. FEES AND CHARGES

8.1. The Customer shall pay to Neotel the Charges agreed between the Parties in terms of each COF on or before the Due Date without any set off or other deduction, including any taxes as may be imposed on the Customer.

### 8.2. Taxes

8.2.1. The following shall not be included in any Charges specified in any COF and shall be for the account of the Customer:

8.2.1.1. Value Added Tax;

8.2.1.2. any other tax (including withholding taxes in terms of clause 8.2.2, penalties and interest on tax where applicable) which Neotel becomes obligated to pay arising directly out of this Agreement, exclusive of taxes based on the gross income of Neotel. The Customer agrees that if any such taxes, penalties and interest are applicable, the amount to be paid to Neotel shall be grossed up so that Neotel receives a net amount equal to that to which it would have been entitled to under this Agreement prior to the imposition of such taxes, penalties or interest; and

8.2.1.3. import or customs duties and charges including extraordinary duties and charges which are in excess of, or are subsequently imposed on, those then current duties and charges which are already included in the Charges as reflected in any COF or Service Schedule.

8.2.2. Should the Customer be required to pay any withholding taxes directly to the relevant government, statutory or regulatory body in the country that the Customer receives the Services, the Customer shall submit to Neotel copies of all documentation submitted to, and received from, such government, statutory or regulatory body, relating to each payment made by the Customer in terms of this Agreement to enable Neotel to apply for a foreign tax credit from Neotel's relevant government, statutory or regulatory body.

8.2.3. In the event that Neotel's relevant government, statutory or regulatory body refuses any claim from Neotel for foreign tax credits to which Neotel is entitled under this Agreement, as a result of the foreign tax credit not being claimable or the failure by the Customer to comply with the terms of clause 8.2.2, Neotel shall invoice the Customer for the full value of the relevant claim and the Customer shall be obliged to make payment thereof to Neotel.

8.2.4. The benefit of any reduction in any of the taxes or duties specified in clause 8.2.2 shall be passed on to the Customer.



### 8.3. Fixed Charges

- 8.3.1. Unless stated to the contrary in the relevant Service Schedule and subject to clauses 8.3.2 and 8.3.3 and 8.4, the monthly Charges set out in each applicable COF shall be fixed for duration of the Contract Term thereof.
- 8.3.2. Neotel shall be entitled to adjust the monthly Charges in the event that any regulatory, or government imposed factors impact on such fees and charges.
- 8.3.3. Neotel shall be entitled to amend the Charges for Session Initiation Protocol (SIP), Primary Rate Interface (PRI) and/or any other Telco voice carrier-class Services from time to time and will provide the Customer with thirty (30) calendar day's written notice to that effect.

### 8.4. Exchange Rate Fluctuations

- 8.4.1. Where any Charges under this Agreement are based on an exchange rate, that rate shall be quoted in the relevant Schedule and/or COF to this Agreement.
- 8.4.2. The Customer agrees to bear the risk in any variation in the exchange rate of the South African Rand against the applicable Foreign Currency in accordance with the terms set out in the relevant Service Schedule, and Neotel shall be entitled to increase or reduce the amount due by the Customer in respect of the Service accordingly.

## 9. INVOICING

- 9.1. Neotel will invoice the Customer for each Service provided under this Agreement from the Service Commencement Date thereof. The NRC will be invoiced following the Service Commencement Date, MRC will be invoiced in advance of the month to which it relates, and all usage-based fees will be invoiced in arrears.
- 9.2. Neotel shall, in relation to all fees due under this Agreement, provide the Customer with a detailed monthly statement of account (together with all related tax invoices) setting out the amount due and payable by the Customer.
- 9.3. All tax invoices shall be payable by the Customer by the Due Date by cheque or by electronic funds transfer into a banking account specified by Neotel in writing.
- 9.4. If any amount is overdue, the Customer shall pay interest on the overdue amount at Nedbank's prevailing prime overdraft rate of interest plus two percent (2%), compounded monthly in arrears and calculated on a three hundred and sixty five (365) calendar day year, and as certified by any representative of that bank whose appointment and designation it will not be necessary to prove, 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).

## 10. NEOTEL'S OBLIGATIONS

- 10.1. Neotel shall not do, or permit to be done, anything in relation to the Services which may reasonably be expected to damage or materially interfere in any way whatsoever with the proper normal operation of the Customer's network.
- 10.2. In providing the Services, Neotel shall comply with this Agreement and any applicable law.
- 10.3. Neotel warrants that it has obtained all necessary approvals and licences required in relation to provision of the Services and shall provide a copy of same upon request.
- 10.4. Where Neotel is or becomes aware that there is any violation or contravention contemplated in this clause 10, it will co-operate to the extent reasonably necessary and provide the Customer with the necessary information to assist in identifying, preventing or remedying or rectifying such violation or contravention.

## 11. the CUSTOMER'S OBLIGATIONS

- 11.1. In making use of the Services, the Customer shall:



- 11.1.1. comply with all requirements contained in the Customer Site Requirements as signed by the Customer prior to the installation of any Customer Device or Neotel Equipment at a Customer Site;
- 11.1.2. comply with this Agreement and any applicable law; and
- 11.1.3. use reasonable efforts to comply with the Acceptable Usage Policy located at [http://www.neotel.co.za/wps/portal/neotel\\_legal](http://www.neotel.co.za/wps/portal/neotel_legal) and to ensure that its employees, customers and any other persons permitted by the Customer to make use of the Services, comply with such policy.

11.2. The Customer warrants that:

- 11.2.1. it has obtained all necessary approvals required in relation to receipt of the Services and shall provide a copy of same upon request; and
- 11.2.2. in the event that it procures Services, defined as “electronic communications network services” in the Act, for use by parties other than the Customer, it has obtained a licence under the Act to supply same or is exempted from the licensing requirement, and shall provide a copy thereof upon request.

- 11.3. The Customer shall use reasonable efforts to ensure that it, its employees, customers and/or any other persons permitted by the Customer to make use of the Services, do not by any act, or omission, damage, interfere with or impede the operation of the Service or Network provided by Neotel.
- 11.4. Where the Customer is or becomes aware that there is any violation or contravention contemplated in this clause 11, it will co-operate to the extent reasonably necessary and provide Neotel with the necessary information to assist in identifying, preventing or remedying or rectifying such violation or contravention.
- 11.5. The Customer shall, at no cost to Neotel, provide Neotel with adequate access to, and space within, such Customer premises, data processing and communication facilities as is reasonably required for delivery of the Services. In the event that the Customer is not the owner of the building/property where such access and/or space is required, it is the obligation of the Customer to obtain the signature of the owner thereof before Neotel is able to undertake any such activities.

## 12. Data Privacy and Protection

- 12.1. The Customer hereby consents to the Processing by Neotel of its Personal Information and any other information that the Customer may provide to Neotel for all purposes related to providing the Services.
- 12.2. Neotel may collect Personal Information from and disclose Personal Information to other service providers of Neotel, including credit bureaux (in order to perform credit and background checks), banks (to process transactions), research companies (that assist Neotel to understand market trends), and collection agencies (for the collection of outstanding accounts). The Customer consents to the collection and/or disclosure of its Personal Information for these purposes.
- 12.3. Neotel may, from time to time, store, transfer and Process Personal Information in and to countries outside of the Republic of South Africa. Neotel shall take all reasonable steps necessary to ensure that any Personal Information transferred outside of the Republic of South Africa is protected and is Processed as required by the POPI Act and the applicable data protection laws in that country. By submitting its Personal Information to Neotel, the Customer consents to the transfer, processing or storage of its Personal Information outside of the Republic of South Africa.
- 12.4. Neotel shall-
  - 12.4.1. use its best efforts to keep Personal Information confidential and shall not disclose any Personal Information to any other person except as required by law, save to the extent set out herein;
  - 12.4.2. utilise reasonable technical and organisational measures in accordance with best industry practice for the purpose of complying with its obligations in terms of clause 12.4.1;
  - 12.4.3. at all times strictly comply with the POPI Act and other applicable laws, regulation or code relating to data protection in South Africa, or other requirements enforced by any relevant industry or self-regulatory body within the Republic of South Africa in the provision of the Services; and

- 12.4.4. not, at any time copy, compile, collect, collate, Process, mine, store, transfer, alter, delete, interfere with or in any other manner use Data for any purpose other than providing the Services to the Customer other than with the express prior written consent of the Customer.
- 12.5. The Parties record that all Data, in whatever form, is the Customer's Intellectual Property. Accordingly, the Customer retains all right, title and interest in and to the Data.
- 12.6. The Customer acknowledges that it is primarily responsible for complying with any data protection obligations imposed in terms of any law, including the common law, and shall obtain any consents necessary for the disclosure of Personal Information to Neotel for the purposes of this Agreement.
- 12.7. The Customer shall separate any Personal Information from any other Data provided to Neotel for the purpose of providing the Service and shall designate the Personal Information as such before disclosing or otherwise making it available to Neotel.
- 12.8. The Customer shall immediately notify Neotel if there is any change to its Personal Information, or to correct any errors in the Customer's account or Customer information. The Customer may at any time request access to, rectification or deletion of, the Personal Information held by Neotel in relation to the Customer
- 12.9. The Customer is entitled to withdraw its consent to the Processing of its Personal Information by giving written notice to Neotel together with the grounds therefor; provided that the lawfulness of the Processing of Personal Information before such withdrawal will not be affected or the withdrawal will not affect any Processing that:
- 12.9.1. is necessary to carry out actions for the conclusion or performance of any agreement between Neotel and the Customer;
- 12.9.2. complies with an obligation imposed by law on Neotel;
- 12.9.3. protects a legitimate interest of the Customer; or
- 12.9.4. is necessary for pursuing the legitimate interests of Neotel or a third party to whom the Personal Information is supplied.
- 12.10. The Customer is entitled to:
- 12.10.1. object, by written notice to Neotel, to the Processing of its Personal Information on reasonable grounds, unless legislation provides for such Processing;
- 12.10.2. lodge a complaint to the Information Regulator, established or to be established in terms of the POPI Act, regarding the alleged unlawful processing of the Customers personal information by Neotel. The Information Regulator's contact details will be published in the Government Gazette and/or by the Information Regulator, once it is established.

### 13. EQUIPMENT

- 13.1. The Customer is responsible for ensuring that all equipment or devices, including Customer Devices, used by the Customer to access the Services are kept in a secure location and taking all practical steps to restrict access to the security and configuration parameters of all such equipment or devices to only those individuals who are actively involved in activities for which use of the information is required.
- 13.2. **Customer Devices**
- 13.2.1. In the event that Neotel provides the Customer with a Customer Device, it will be provided on either a purchase or lease basis, as further set out in the relevant Service Schedule.
- 13.2.2. In relation to such relevant Customer Devices, the Customer undertakes to ensure, at all times, that-
- 13.2.2.1. until such time as the full purchase price of such Customer Device has been paid by the Customer, the provisions of clauses 13.1 and 13.3.2 apply and are complied with in relation to the Customer Device;

- 13.2.2.2. it and its authorized representatives shall ensure that the correct configurations of the Customer Devices and other devices used to access the Network, are done; and
- 13.2.2.3. the configuration parameters as provided to the Customer on the Service Handover Form are kept confidential.

### 13.3. Neotel Equipment

- 13.3.1. All Neotel Equipment shall be and remain the property of Neotel.
- 13.3.2. Accordingly, where Neotel Equipment is in the possession, or under the control, of the Customer, the Customer agrees:
  - 13.3.2.1. not to remove or allow the Neotel Equipment to be removed from the Customer site without Neotel's consent;
  - 13.3.2.2. to keep the Neotel Equipment in good condition and complete;
  - 13.3.2.3. not to allow the Neotel Equipment to be encumbered by operation of law or otherwise;
  - 13.3.2.4. to allow Neotel to inspect the Neotel Equipment at reasonable times;
  - 13.3.2.5. to accept all risk in the Neotel Equipment, taking reasonable steps to protect the Neotel Equipment from loss and/or damage; and
  - 13.3.2.6. to return such Neotel Equipment to Neotel on the termination of the Contract Term of the applicable Services, alternatively, replace such Neotel Equipment with new equipment of the same standard, quality and specification.

## 14. RESALE OF SERVICES

Unless agreed in writing between Neotel and the Customer, the Customer shall not resell any of the Services provided under this Agreement, except to Affiliates of the Customer. Where the Customer resells a Service to an Affiliate, Customer itself will remain liable to Neotel for performance of all relevant obligations under this Agreement and for all relevant actions or in-actions of such Affiliate. For the avoidance of doubt, the use of the Services within the Customer's own network to carry internet traffic of end users of the Customers products and services will not constitute resale of such Services.

## 15. SAFETY AND SECURITY

- 15.1. Each Party agrees to comply with safety and security procedures notified to them by the other Party and with the requirements of the Occupational Health and Safety Act No. 85 of 1993.
- 15.2. All access to the Customer sites by Neotel and its employees, agents and contractors shall be in terms of the Customer's safety and security procedures, as amended from time to time.
- 15.3. The Parties shall each at their own cost and expense take whatever steps as are necessary to discharge their respective obligations in terms of this Agreement and applicable laws to ensure the health and safety of the other Party's employees, agents, directors, sub-contractors and members of the public.
- 15.4. The Customer shall be entitled to request Neotel to remove any employee, agent or contractor from its team if it is of the reasonable opinion that such person is a security or safety risk. Any such request shall be in writing and shall stipulate the reasons for the Customer believes the requested removal.

## 16. FORCE MAJEURE

- 16.1. A Party shall not be liable for a failure to perform any of its obligations in terms of this Agreement in so far as it is able to prove that:
  - 16.1.1. such failure was due to an impediment beyond its reasonable control;

- 16.1.2. it could not reasonably have been expected to have taken such impediment and its effects upon such Party's ability to perform into account at the time of conclusion of this Agreement; and
- 16.1.3. it could not reasonably have avoided or overcome the impediment or at least its effects and, for purposes of this clause 16, the following events (which list is not exhaustive) shall be deemed to be impediments beyond the control of each of the Parties, namely:
- 16.1.3.1. war, whether declared or not, civil war, civil violence, riots and revolutions, acts of piracy, acts of sabotage;
  - 16.1.3.2. natural disasters such as violent storms, cyclones, earthquakes, floods and destruction by lightning;
  - 16.1.3.3. acts of authority, whether lawful or unlawful, apart from acts for which the Party seeking relief has assumed risk; and
  - 16.1.3.4. acts and omissions of any other electronic communications provider or any utility provider, including but not limited to electricity 'load-shedding' activities.
- 16.2. Relief from liability for non-performance by reason of the provisions of this clause shall commence on the date on which the Party seeking relief gives notice of the impediment relied upon and shall terminate upon the date on which such impediment ceases to exist, provided that if the impediment continues for a period of more than sixty (60) consecutive calendar days, the other Party shall be entitled to terminate those Services affected by such event by written notice to the Party seeking relief.

## 17. LIMITATION OF LIABILITY

- 17.1. The Parties agree that any liability to the other Party for Losses hereunder shall be limited to direct damages.
- 17.2. Without in any way limiting or derogating from the provisions of clause 17.1, the Parties agree that the total amount of either Party's liability arising out of the performance of its obligations under this Agreement and whether in contract, delict, breach of statutory duty or otherwise, shall be limited to the total fees paid by the Customer under this Agreement for the Services giving rise to the liability in the preceding twelve (12) month period.
- 17.3. Notwithstanding anything to the contrary in this Agreement, the Parties agree that they shall not under any circumstances, unless prohibited by law, be liable to one another for any Losses which are regarded in law as indirect, special, incidental, consequential, punitive or exemplary damages and which damages arise out of or in connection with this Agreement.
- 17.4. Without limiting the provisions of this clause 17 in any way, Neotel shall not be liable to the Customer for:
- 17.4.1. the failure of Neotel to supply and/or deliver any Services and/or provide installation of any equipment on a specified date unless such date has been agreed to in writing and such failure is solely attributable to Neotel. The recourse available to the Customer shall be limited to Service Credits, for such Service as set out in the applicable Service Schedule; and/or
  - 17.4.2. the interruption, suspension or termination of the Services for reasons falling within the ambit of clause 16 (Force Majeure); and/or
  - 17.4.3. any costs arising from unauthorised access to and/or use of any equipment or devices, including Customer Devices, used by the Customer to access the Services by the Customer or any third party acting on behalf of the Customer; and/or
  - 17.4.4. loss or damage arising as a result of lost, damaged or corrupted data due to reasons that are not attributable to Neotel.
- 17.5. Nothing contained in this clause 17 shall limit the Customer's liability in respect of Charges incurred for Services.

## 18. SUSPENSION OF SERVICES

- 18.1. Neotel may, on seven (7) calendar days prior written notice, lawfully suspend all or part of any Service until further notice to the Customer if, in Neotel's reasonable discretion:
- 18.1.1. the continued provision of the Service will cause Neotel to breach an applicable law or be in contravention of its Licences;
  - 18.1.2. the Customer is in breach of any material provision of this Agreement and such breach remains unremedied notwithstanding prior written notice of breach from Neotel; or
  - 18.1.3. any overdue tax invoice for charges billed by Neotel to the Customer remains unpaid.
- 18.2. The exercise of Neotel's right to suspend the Services under this clause 18 is without prejudice to any other remedy available to Neotel under the Agreement and does not constitute a waiver of Neotel's right to subsequently terminate the Agreement.
- 18.3. Where Neotel has suspended the Services in terms of clause 18.1.1 or 18.1.3, and the Customer has remedied the applicable breach to the reasonable satisfaction of Neotel, Neotel may not unreasonably refuse to reconnect the Services but may require the Customer to pay a reconnection fee in advance as well as such other conditions that Neotel considers reasonable in the circumstances, as a pre-condition to making the Services available again.

## 19. TERMINATION

### 19.1. Termination for convenience

- 19.1.1. Either Party shall be entitled to terminate the Agreement by providing the other Party with sixty (60) calendar days' prior written notice to that effect.
- 19.1.2. Termination in accordance with clause 19.1.1 shall not affect the term of any COF, 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 term thereof.
- 19.1.3. Notwithstanding the Contract Term set out in the COF, the Customer shall be entitled in its sole discretion and without cause, to terminate one or more COF's by giving Neotel sixty (60) calendar days' prior written notice. The termination of these Terminating Services shall be subject to the early termination charges set out in clause 20.
- 19.1.4. In the event that the Customer has not provided Neotel with the counter-signed Customer Site Requirements Specification granting permission for Neotel to trench, install and/or to mount the required infrastructure at the Customer Site within 14 calendar days from the date of receipt of the drawings of the planned route and/or mounting position in question, Neotel shall be entitled to terminate the COF in question with immediate effect. All Services terminated in terms of this clause shall be subject to the early termination charges set out in clause 20.1.1.

### 19.2. Termination for cause

Without prejudice to any rights and remedies that may have accrued, either Party may terminate this Agreement with immediate effect upon written notice if the other Party:

- 19.2.1. ceases to trade (either in whole, or as to any part involved in the performance of this Agreement); or
- 19.2.2. has a court order issued against it placing it under final liquidation. For the avoidance of doubt, where a Party is undergoing business rescue in accordance with the Companies Act No. 71 of 2008, and for so long as that Party is still complying with its obligations under this Agreement, subject to clause 18.1.3, the other Party may not terminate the Agreement in accordance with this clause 19.2.

### 19.3. Breach

Either Party shall be entitled to terminate this Agreement in the event of the other Party committing a material breach of any of the terms of the Agreement and failing to remedy such breach within a period of thirty (30) calendar days after receipt of written notice drawing its attention to the breach and demanding that it be remedied.

## 20. Early Termination Costs

20.1. Unless stated to the contrary in the relevant COF, the termination fee for all Services other than Customer Specific Services shall be calculated on the outstanding Charges for each of the Terminating Services as at the Termination Date thereof and will be determined as follows:

20.1.1. In the event that the Terminating Services are terminated prior to the Service Commencement Date thereof, the Customer shall be liable for an amount equal to the NRC, plus six (6) months of the MRC;

20.1.2. In the event that the Contract Term for the Terminating Service is twelve (12) months or less, 100% of the MRC for the remainder of the Contract Term of the Terminating Service;

20.1.3. In the event that the Contract Term for the Terminating Service is greater than twelve (12) months, 100% of the MRC for the Terminating Service for the remainder of the first twelve (12) months (if any), and 50% of the MRC for the Terminating Service for each month thereafter; and

20.1.4. In the event that the Terminating Service is terminated subsequent to the COF Initial Period and the Contract Term has been renewed automatically in accordance with clause 5.2, 50% of the MRC for the Terminating Service for each month thereafter.

20.2. The termination fee for all Customer Specific Services shall be set out in the relevant Service Schedule.

20.3. The amounts referred to in clauses 20.1 and 20.2 shall be in addition to all Charges payable in the ordinary course in respect of the applicable COF for the Terminating Services, plus any other Services which continue unchanged, as at the Termination Date.

## 21. SERVICE Variations

If either of the Parties wishes to make a change, modification or adjustment to any element of any Service, the following procedure will apply:

21.1. The Party who requests the change will forward a change request to the other Party, setting out the details of the change request;

21.2. Neotel will investigate the feasibility, cost implications and impact of the change request on the Services and notify the Customer of the results of this impact study;

21.3. If the Customer makes a decision to proceed with the change request after considering the impact study, the Customer shall give Neotel a written instruction to proceed with that change on the basis set out in the impact study; and

21.4. Such instruction shall be incorporated into a new COF, which is intended to supercede any previous COF signed by the Parties for the Service/s in question. No change will be implemented until such COF has been signed by both Parties.

21.5. If the Parties cannot agree upon the necessary amendments, the change request will not be implemented.

## 22. DISPUTE RESOLUTION

22.1. In the event of any dispute arising between the Parties under this Agreement or any Service, the Parties will act in good faith to attempt to settle the dispute through discussions between senior representatives (which may include the respective CEO's or their nominees) of the Parties within thirty (30) calendar days of a Party giving the other Party notice of the issue in dispute.

22.2. Any dispute which cannot be resolved by the Parties within the thirty (30) calendar day period, as provided in clause 22.1, shall be resolved by arbitration in the English language by a single arbitrator appointed by the



Arbitration Foundation of South Africa and in accordance with the Rules of the Arbitration Foundation of South Africa. The arbitration shall be held in Johannesburg.

- 22.3. Each Party expressly consents to any arbitration being conducted as a matter of urgency, and irrevocably authorises the other to apply, on behalf of the Parties, in writing, to the secretariat of AFSA in terms of article 23(1) of the aforesaid rules for any such arbitration to be conducted on an urgent basis.
- 22.4. Either Party may appeal the decision of the arbitrator within a period of 10 (ten) Business Days after the arbitrator's ruling has been handed down by giving written notice to that effect to the other Party. The appeal shall be dealt with in accordance with the rules of the Foundation by a panel of 3 (three) arbitrators appointed by the Foundation. The arbitrator's decision shall be final and binding on the Parties after the expiry of the 10 (ten) Business Day period from the date of the arbitrator's ruling, if no appeal has been lodged by any Party, and may be made an order of court at the instance of and by either Party.
- 22.5. Notwithstanding the provisions of clauses 22.1 to 22.3, either Party shall have the right to seek relief by way of interim relief from any court of competent jurisdiction, pending the outcome of the arbitration or at any time.
- 22.6. Any arbitration in terms of clause 22.2 (including any appeal proceedings) shall be conducted in camera and the Parties shall treat as confidential details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration.

### 23. CONFIDENTIALITY

23.1. Both Parties agree and undertake:-

23.1.1. except as permitted by this Agreement, not to disclose or publish any Confidential Information, including this Agreement, without the prior written consent of the other Party;

23.1.2. except as permitted by this Agreement, not to use the Confidential Information for any purpose whatsoever without the prior written consent of the other Party;

23.1.3. to restrict the dissemination of the Confidential Information to only those of its employees who are actively involved in activities for which use of the Confidential Information is authorised and then only on a 'need to know' basis and to take all practical steps, both before and after disclosure, to impress upon its employees who are given access to Confidential Information, the secret and confidential nature thereof.

23.2. The Parties acknowledge that the Confidential Information disclosed by the Disclosing Party to the other Party or which otherwise comes to the knowledge of the receiving Party, the Disclosing Party has not conferred any rights of whatever nature in such Confidential Information on the receiving Party.

23.3. Confidential Information excludes information which is lawfully in the public domain at the time of disclosure or subsequently becomes lawfully part of the public domain; becomes available to the receiving Party from a source other than the Disclosing Party or is disclosed pursuant to a requirement or request by operation of law, regulation, court order or as a consequence of any judicial proceedings to which a Party is a party.

23.4. The onus to establish whether the Confidential Information falls within the exclusions referred to in clause 23.3 shall rest on the receiving Party. The information disclosed in terms of this Agreement shall not be deemed to be within the foregoing exclusions merely because such information is embraced by more general information in the public domain or in a Party's possession. Any combination of features will not be deemed to be within the foregoing exclusions merely because individual features are in the public domain or in a Party's possession but only if the combination itself is in the public domain or in a Party's possession.

23.5. The receiving Party shall protect the Confidential Information in the manner, and with the endeavour of a reasonable person protecting his own Confidential Information.

23.6. The Parties record that this clause 23 shall not be applicable where either Party discloses Confidential Information to its attorneys or auditors, provided that such disclosure is reasonably required by the Disclosing Party for the purposes of conducting its business activities.



23.7. This clause 23 is severable from the rest of the Agreement and shall remain valid and binding on the Parties for a period of five (5) years after the termination or expiration of the Agreement.

23.8. The Parties acknowledge and agree that, for the purposes of Section 64(1) of the Promotion of Access to Information Act, No. 2 of 2000, the Confidential Information is provided in confidence by the Parties.

**24. INTELLECTUAL PROPERTY RIGHTS**

24.1. 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.

24.2. Each Party indemnifies the other Party against all claims, actions, damages, liabilities, costs and expenses, including reasonable attorney’s fees and expenses, arising out of any claims of infringement, passing-off and/or unlawful competition in relation to 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 unlawful and/or unauthorised use by a Party of the Intellectual Property Rights of the other Party.

**25. DOMICILIA AND NOTICES**

25.1. Each of the Parties choose as their domicilia citandi et executandi (domicilium) for the purposes of giving any notice, the serving of any process or for any other purpose arising from this Agreement at:

<u>Name</u>	<u>Physical Address</u>
Neotel	Neovate Office Park 401 Old Pretoria Main Road Midrand Johannesburg
For the attention of the General Manager - Legal and Contracts	

<u>Name</u>	<u>Physical Address</u>
Customer	_____
	_____
	_____
Marked for the attention of:	_____

- 25.2. Each of the Parties shall be entitled from time to time, by written notice to the other to vary its domicile to any other address within the Republic of South Africa which is not a post office box or poste restante.
- 25.3. Any notice given and any payment made by any Party to the other which:
- 25.3.1. is delivered by hand during the normal business hours of the Addressee at the Addressee's domicile for the time being shall be presumed, until the contrary is proved by the Addressee, to have been received by the Addressee at the time of delivery;
  - 25.3.2. is posted by prepaid registered post from an address within the Republic of South Africa to the Addressee at the Addressee's domicile for the time being shall be presumed, until the contrary is proved by the addressee, to have been received by the Addressee on the eighth day after the date of posting.
- 25.4. Any communication required to be in writing in terms of this Agreement shall only be valid if either written or printed in a paper based form. No data message (as defined in the Electronic Communications and Transactions Act 25 of 2002), including an email, SMS and recorded voice message, sent by either party shall amend this Agreement or the rights and duties of the Parties in any manner, unless such a data message is reduced to paper and signed by the Parties. Data messages (as defined above) sent by either Party to the other shall be deemed to be received by the receiving Party only when the receiving Party responds thereto, and for the purpose of this clause an auto-response shall not be a response by the receiving Party.

## 26. CESSION and ASSIGNMENT

- 26.1. Subject to clause 26.2, no rights, duties or liabilities under this Agreement may be ceded, assigned, transferred, conveyed or otherwise disposed of by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld.
- 26.2. Neotel is entitled to cede, transfer and make over its right, title and interest in and to any and all debts and receivables due and/or payable to Neotel under this Agreement, both future and present arising under this Agreement, as security or otherwise. The Customer hereby recognises and consents to such cession and/or transfer (including any splitting of claims that may arise) and agrees that the prohibitions of clause 26.1 shall not apply to any such cession and/or transfer.

## 27. GENERAL

- 27.1. The Parties shall co-operate and consult with each other in good faith regarding the implementation of this Agreement with a view to achieving the aims and objectives of this Agreement.
- 27.2. No Party shall be regarded as having waived, or be precluded in any way from exercising any right under or arising from this Agreement by reason of any Party having at any time granted an extension of time for, or having shown any indulgence to the other Party with reference to any payment or performance hereunder, or having failed to enforce, or delayed in the enforcement of any right of action against the other Parties.
- 27.3. Neither Party relies in entering into this Agreement upon any warranties, representations, disclosures or expressions of opinion which have not been incorporated into this Agreement as warranties or undertakings.
- 27.4. This Agreement,
- 27.4.1. together with all Schedules and other attachments referenced herein, constitutes the entire agreement between the parties on this subject and no variation, modification or consensual cancellation of this Agreement shall be of any force or effect unless reduced to writing and signed by both Parties;
  - 27.4.2. supercedes any previous written or oral agreement between the Parties in relation to the matters dealt with in this Agreement and shall be the terms governing the provision of all

Services contracted for by the Customer, irrespective of the date upon which this agreement was concluded; and

27.4.3. may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same Agreement as at the date of signature of the Party last signing one of the counterparts.

27.5. If any provision of this Agreement is construed to be illegal or invalid, the illegal or invalid provisions will be treated as being deleted from this Agreement and no longer incorporated, but all other provisions of this Agreement will continue to be binding on the Parties.

27.6. The validity of this Agreement, its interpretation, respective rights and obligations of the Parties and all other matters arising out of it or its termination, for any reason whatsoever shall be determined in accordance with the laws of the Republic of South Africa.

27.7. Each Party will bear and pay its own legal costs and expenses of and incidental to the negotiation, drafting, preparation and implementation of this Agreement.

Signed at:

Signed at:

Date:

Date:

For and on behalf of **Customer**

For and on behalf of **Neotel**

Signature

Signature

\_\_\_\_\_

\_\_\_\_\_

Name

Name

\_\_\_\_\_

\_\_\_\_\_

I warrant that I have been duly authorised to sign this Agreement

I warrant that I have been duly authorised to sign this Agreement