

Enable Networks UFB Services Agreement

General Terms

RSP (NZ) Limited

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WHOLESALE SERVICES AGREEMENT

Between: **ENABLE NETWORKS LIMITED**, a New Zealand registered company (number 3406812) (the **LFC**):

Postal Address:	PO Box 9228, Tower Junction Christchurch 8149
Address for Service:	Enable House, 2 nd floor, 106 Wrights Road, Christchurch 8024
Fax Number:	n/a
Email Address:	sales@enable.net.nz
Account Manager:	

And: **RSP (NZ) Ltd**, [a New Zealand registered company (number) (the **Service Provider**):

Postal Address:	
Address for Service:	
Fax Number:	
Email Address:	
Account Manager:	

This Wholesale Services Agreement governs the supply of certain wholesale telecommunications services by the LFC to the Service Provider.

SIGNED for and on behalf of
ENABLE NETWORKS LIMITED by:

SIGNED for and on behalf of
RSP (NZ) Ltd by:

Signature of Authorised Person

Signature of Authorised Person

Steve Fuller

Name of Authorised Person

Name of Authorised Person

CEO

Position

Position

Date

Date

GENERAL TERMS

1. CONSTRUCTION

1.1 **Agreement:** This Agreement comprises the attached cover pages (signed by both parties), these General Terms, the Price List and each Service Order.

1.2 **Precedence:** If there is any conflict or inconsistency between any of the documents forming part of this Agreement, the order of precedence is:

- (a) any Agreement Change, Required Change, Ancillary Price Non Price List Change or Core Price Change, unless the parties otherwise agree in writing;
- (b) these General Terms;
- (c) the Price List;
- (d) each Service Order (in order of acceptance, with the most recent Service Order having the highest precedence) and, in relation to the documents forming part of the Service Order:
 - (i) the base terms of that Service Order;
 - (ii) the applicable Service Level Terms;
 - (iii) the applicable Service Description; and
 - (iv) the applicable Operations Manual; and
- (e) the cover pages.

1.3 **Defined Terms:** In this Agreement, unless the context requires otherwise:

Agreement has the meaning given in clause 1.1;

Agreement Change has the meaning given in clause 24.1(a);

Ancillary Charges means all amounts payable under this Agreement by the Service Provider for Ancillary Services, as further described in the Price List;

Ancillary Price Non Price List Change has the meaning given in clause 24.4(a);

Ancillary Service means a service or equipment set out in the Service List supplied in connection with a Wholesale Service;

Base Wholesale Services means:

- (a) the Baseband Service and ATA Voice Service;
- (b) the following Bitstream 2 Service templates:
 - (i) GPON Residential Entry (30/10 with 2.5 Mbps CIR symmetrical);
 - (ii) GPON Residential Entry - Triple Play (30/10 with 10 Mbps down/2.5 Mbps up CIR);
 - (iii) GPON Business Entry (30/10 with 5 Mbps CIR symmetrical);
 - (iv) GPON 100/50 (100/50 with 2.5 Mbps CIR symmetrical); and
 - (v) GPON 100/50 - Triple Play (100/50 with 10 Mbps down/2.5 Mbps up CIR);
- (c) the following Bitstream 3 Service template:
 - (i) GPON 100/100 (with 2.5 Mbps CIR symmetrical);
- (d) the following Bitstream 3a Service template:
 - (i) GPON 100/100 (HP 2.5 Mbps CIR symmetrical; LP 2.5 Mbps CIR symmetrical);
- (e) the Direct Fibre Access Service;
- (f) the following Bitstream 4 Service templates:
 - (i) P2P 100/100 Mbps;
 - (ii) P2P 1Gbps; and
 - (iii) P2P 10Gbps;
- (g) UFB Handover Connection Service including the 1 Gbps and 10 Gbps E-NNI ports; and
- (h) the Central Office and POI Co-location Service,

which are each further described in their applicable Service Descriptions;

Bill Rate means the average 90 day bank bill mid rate as quoted on Reuters Screen page BKBM or the equivalent page replacing page BKBM (known at the date of these terms as the FRA rate) at or about 10.45 am on the relevant date or, if at that time page BKBM or the equivalent replacement page is not available, the last rate quoted on that page before it became unavailable;

Bitstream Services has the meaning given in the Bitstream Services Operations Manual;

Business Day means a calendar day, other than a Saturday, a Sunday, a New Zealand public holiday, or a regional anniversary day in the region in which the Service Provider is providing services (as the context requires);

Business Hours means 8 a.m. to 5 p.m. on a Business Day;

Candidate Area means, in relation to a Wholesale Service, a part of the geographic area in which the Wholesale Service is available, as described in the applicable Operations Manual;

Central Office and POI Co-location Service means a service that provides co-location facilities for a Service Provider's equipment, and access to a Handover Point, at the LFC Central Office and LFC POI solely for the purposes of providing access to, and interconnection with, the LFC Network (as more particularly described in the relevant Service Description);

CFH means Crown Fibre Holdings Limited, a New Zealand registered company (number 2346751);

Change Management Forum has the meaning given in clause 25.1(a);

Charges means the Core Charges and the Ancillary Charges;

Core Charges means all amounts payable under this Agreement by the Service Provider for Wholesale Services, as further described in the Price List;

Core Price Change has the meaning given in clause 24.3(a);

Core Service Level has the meaning set out in the applicable Service Level Terms;

Effective Date means the date that this Agreement is signed by both parties or, if two dates, the later date;

Emergency means an event or circumstance requiring the LFC to take immediate action:

- (a) to protect the LFC Network, the Services or the network of any Other Service Provider; or
- (b) to respond to an actual or suspected Network Threat; or
- (c) to comply with an order or instruction of CFH, a Crown agency or any other competent authority in connection with a Network Threat which the LFC is required to comply with as a matter of law; or
- (d) to provide or safeguard network access and capacity for essential services; or
- (e) to mitigate or eliminate a threat to the safety or health of any person or property;

End User means the recipient of a service which incorporates a Service, other than a Reseller (except as otherwise provided in the definition of that term) or the Service Provider;

End User Premises means either: (i) an SDU; or (ii) an End User Tenancy, in each case which the End User owns, occupies or has control over and where LFC (End User) Equipment is (or is to be) installed and to which the Service Provider requests the LFC to provide a Service;

End User Tenancy means the occupancy of an End User (for example, an apartment, townhouse, office or shop) in a MDU to which the Service Provider requests the LFC to provide a Service; To avoid doubt, this does not include common areas within a MDU;

Exempted End User means an End User: (i) whom the Service Provider has elected not to procure to agree to be bound by the LFC (End User) Terms in accordance with clause 10.2(c)(i); or (ii) in relation to whom the Service Provider has granted the Reseller an exemption, which has the same substance to clause 10.2(c)(i), in accordance with clause 10.2(c)(ii);

External Event means an event that is caused by an act or omission of, or by any equipment of, any person other than the LFC and its contractors and agents;

Fault has the meaning given in clause 6.1(a);

Fibre Access Services means the Direct Fibre Access Service;

Force Majeure Event means an event or circumstance beyond the reasonable control of either party that makes it impossible or illegal to perform, or prevents compliance with or the performance of, a party's obligations under this Agreement, including:

- (a) fire, flood, storm, tempest, earthquake or other act of God;
- (b) any act of a public enemy, war, riot, or act of civil or military authority;
- (c) nuclear, chemical or biological contamination; and
- (d) any act of a third party (not being an employee, agent or contractor of that party) engaged in subversive or terrorist activity or sabotage,

but does not include an event to the extent that:

- (e) the effect of that event could have been substantially prevented, avoided or mitigated by:
 - (i) implementing any contracted business continuity or disaster recovery service or any contingency plan agreed between the parties or that a party has represented it has in place; or
 - (ii) exercising a reasonable standard of care; or
 - (iii) using information provided by the other party or information that is available in the public domain; or
- (f) it is an event that the party affected is or was directly responsible for; or
- (g) that event is constituted or caused by any failure of a contractor or supplier of the party seeking to rely on clause 19 unless and to the extent that the contractor or supplier was itself affected by an event that, if it occurred in relation to either party, would have been a Force Majeure Event; or
- (h) the event is constituted or caused by the insolvency of either party or a contractor or supplier of the party seeking to rely on clause 19, or lack of funds for any reason; or
- (i) risks associated with the event have been accepted by the affected party by the terms of this Agreement; or
- (j) the event is constituted or caused by a change in law;

General Terms means clauses 1 to 26 of this Agreement;

GST means goods and services tax, as defined in the Goods and Services Tax Act 1985;

Handover Point means the point in the LFC Central Office or LFC POI where a Bitstream Service is handed over from the LFC to the Service Provider;

Interconnection Point means, in respect of any dark fibre Wholesale Services, the LFC Central Office or the LFC POI and, in respect of all other Wholesale Services, the LFC POI, each as described in the applicable Service Description;

LFC Central Office means the LFC premises defined as the "Central Office" in the Operations Manuals;

LFC (End User) Equipment means any equipment or software owned, operated or controlled by the LFC (including any connecting line and all associated equipment and infrastructure) that the LFC installs on (or any of the LFC's predecessors has installed on) an End User Premises or an applicable NBAP for the purpose of providing a Service to such locations now or in the future; To avoid doubt this will include, without limitation, the ONT, but will exclude any other equipment provided to the LFC by the Service Provider for installation at any such locations and will include any such equipment or software that the LFC installs on an applicable NBAP where the Service Provider has, in accordance with the definition of NBAP, confirmed, in the relevant Service Order, that the relevant NBAP has (or is to contain) LFC (End User) Equipment;

LFC (End User) Terms means the LFC's applicable standard terms, which are intended to be entered into between the LFC and the relevant End User and relate to LFC (End User) Equipment, and which are in the form available at www.enable.net.nz, as such form may be amended from time to time by the LFC;

LFC Equipment means the LFC (End User) Equipment and the LFC (Service Provider) Equipment;

LFC Network means the telecommunications network infrastructure and LFC Equipment that the LFC uses to provide Services to the Service Provider, but excluding equipment provided to the LFC by the Service Provider for installation at any location, and anything on the Service Provider's side of the Interconnection Point;

LFC POI means the LFC premises defined as the "POI" in the Operations Manuals;

LFC (Service Provider) Equipment means any equipment or software owned, operated or controlled by the LFC (including any connecting line and all associated equipment and infrastructure) that the LFC installs on (or any of the LFC's predecessors has installed on) a Service Provider Premises, Reseller Premises or an applicable NBAP for the purpose of providing a Service to such locations now or in the future; To avoid doubt this does not include any LFC (End User) Equipment but will include an ONT (if applicable) and will include any such equipment or software that the LFC installs on an applicable NBAP where:

- (a) the Service Provider has, in accordance with the definition of NBAP, confirmed, in the relevant Service Order, that the relevant NBAP has (or is to contain) LFC (Service Provider) Equipment; or
- (b) the LFC is, in accordance with the definition of NBAP, entitled to assume the NBAP has (or will contain) LFC (Service Provider) Equipment;

Minimum Service Term means the minimum term for supply by the LFC of a Wholesale Service, being:

- (a) the period of 12 months following the applicable Service Start Date; or
- (b) any longer period specified in the applicable Service Order or otherwise agreed between the parties in writing;

Minimum Standard means a G.711A codec standard, a packetisation rate of 10ms and a maximum delay allowance for jitter of 20ms, and providing an analogue interface compliant with PTC 220 Section 5;

Multi Dwelling Unit (or MDU) means a premises containing within its boundaries more than one residential or commercial occupancy (or both); Examples of MDUs (albeit a non-exhaustive list) are set out in the relevant Operations Manuals;

NBAP (or Non-Building Access Point) means a location, other than End User Premises, Service Provider Premises or Reseller Premises, which may not have a physical address and where either LFC (End User) Equipment or LFC (Service Provider) Equipment is (or is to be) installed in order to deliver a Service; To avoid doubt, the Service Provider will determine (acting reasonably and in a manner which reflects the identity of the service recipient at the NBAP) whether the relevant NBAP has (or is to contain) LFC (End User) Equipment or LFC (Service Provider) Equipment and will confirm this in the relevant Service Order, and, unless the Service Provider notifies the LFC otherwise, the LFC shall be entitled to assume the NBAP has (or will contain) LFC (Service Provider) Equipment; Examples of NBAPs (albeit a non-exhaustive list) are set out in the relevant Operations Manuals;

Network Threat means any External Event that is likely to result in harm, degradation or loss of service to the LFC Network, the Service Provider, Other Service Providers, Resellers or End Users or a threat to national security if allowed to spread or continue;

ONT means the Optical Network Terminal that terminates the Bitstream Services in the End User Premises, Service Provider Premises, Reseller Premises or NBAP (as applicable);

Operational Readiness Programme means the programme of work to be undertaken by the Service Provider to prepare for connection to the LFC Network, including the testing and commissioning of processes, products and interfaces, as described in the Operations Manuals;

Operations Manual means the operations manual for a Wholesale Service, maintained by the LFC and available at www.enable.net.nz, as amended from time to time;

Other Service Provider means any service provider (other than the Service Provider) which is a party to a Wholesale Services Agreement with the LFC for the provision of Services;

Price Cap means a price cap for a Service published by CFH on its website;

Price List means the list of Charges payable by service providers for Wholesale Services and Ancillary Services which is available at www.enable.net.nz, as amended from time to time by the LFC;

Product Forum has the meaning given in clause 25.4;

Proposed Change has the meaning given in clause 24.7(a);

Required Change has the meaning given in clause 24.2(a);

Reseller means any person who is a customer receiving Services (or a service incorporating the Service) directly or indirectly from the Service Provider for the purposes of resale; To avoid doubt, a Reseller that receives a Service (or a service incorporating a Service) from the Service Provider for the Reseller's own internal purposes (i.e. self-consumption) will be an End User under this Agreement;

Reseller Premises means premises which the relevant Reseller owns, occupies or has control over and where LFC (Service Provider) Equipment is (or is to be) installed;

Security Requirements means the requirement under clause 8 to either have an Acceptable Credit Rating or provide a Security;

Service means a Wholesale Service or an Ancillary Service;

Service Description means the detailed description of a Service, including the applicable specifications, which is available at www.enable.net.nz, as amended from time to time by the LFC;

Service Level Terms means the description of the service levels and service rebates applicable to a Service;

Service List means the list of Services comprised in the Service Descriptions and the Price List, as amended from time to time by the LFC;

Service Order means a Service Request accepted by the LFC in accordance with clause 4.4(b)(i), and includes the Service Description, Service Level Terms, Operations Manual and Charges applicable to the Services to be provided by the LFC that are the subject of that Service Request;

Service Provider Premises means a premises which the Service Provider owns, occupies or has control over and where LFC (Service Provider) Equipment is (or is to be) installed;

Service Request means a written or electronic request for the supply of a new Wholesale Service or Ancillary Service, or a move, add, change or termination of an existing Wholesale Service or Ancillary Service provided by the LFC under this Agreement, issued by the Service Provider to the LFC in accordance with the Operations Manual applicable to that Service;

Service Start Date means the date that the LFC activates or otherwise makes available a Service ordered by the Service Provider;

Single Dwelling Unit (or SDU) means premises containing within its boundaries only one residential or commercial occupancy, excluding any part of the land used to locate, or otherwise used to connect to, a NBAP;

Temporary Interconnection Point means an Interconnection Point identified as a temporary Interconnection Point in any notice given by the LFC to the Service Provider under clause 4.4(b)(i);

Term means the duration of this Agreement, as described in clause 2.1;

Third Party Premises means any privately owned land or buildings adjacent to End User Premises, Service Provider Premises, Reseller Premises or a NBAP (as applicable) which is used (or is to be used) to connect LFC Equipment to the rest of the LFC Network in circumstances where, at the time of installation of the relevant LFC Equipment, the owner, occupier or controller of that adjacent land or building will not benefit from that connection directly by receiving a service which incorporates a Service through that connection; To avoid doubt, this does not

include End User Premises, Service Provider Premises, Reseller Premises or a NBAP;

User Network Interface or UNI has the meaning given to that term in the Operations Manuals;

Wholesale Service means any or all of the wholesale telecommunications services (and may include (where the context permits) any other services or equipment associated with the supply of those services) set out in the Service List, but does not include Ancillary Services;

Wholesale Service Category means:

- (a) the Bitstream Services; and
- (b) the Fibre Access Services; and
- (c) the Central Office and POI Co-location Service,

and each such category shall include any additional service comparable to an existing Service within that category or any replacement service for any Service within that category, as determined by the LFC from time to time; and

Wholesale Services Agreement means an agreement which is in substantially similar form to this Agreement save for the fact that it is entered into between the LFC and any Other Service Provider.

- 1.4 **Defined Terms in Other Agreement Documents:** Unless the context requires otherwise, capitalised terms used in this Agreement, but not defined in clause 1.3, have the meanings set out in the applicable Service Level Terms, Service Description or Operations Manual.

2. INITIATION

- 2.1 **Term:** This Agreement has effect from the Effective Date and will continue until terminated in accordance with clause 22.

- 2.2 **Conditions:** The LFC's performance of any obligations under this Agreement is conditional upon the Service Provider:

- (a) completing the Operational Readiness Programme to the reasonable satisfaction of the LFC;
- (b) fulfilling the Security Requirements;
- (c) connecting to the LFC Network at the applicable Interconnection Point; and
- (d) complying with its obligations with respect to the LFC (End User) Terms as required under clause 10.2(c).

- 2.3 **Reasonable Assistance:** The LFC will provide the Service Provider with such assistance as the Service Provider reasonably requires to comply with the conditions in clauses 2.2(a) and (c).

- 2.4 **Failure of Conditions:** The LFC may terminate this Agreement for irremediable breach under clause 22.1(a) if the Service Provider has not continued to meet the Security Requirements during the Term, and the Service Provider has not remedied that breach within the period of twenty (20) Business Days following the date that the LFC has given the Service Provider notice of such failure.

- 2.5 **Contract Management:** Each party will appoint and maintain throughout the Term a suitably qualified and experienced person as account manager. Each account manager will supervise the performance of his or her appointing party's obligations under, and liaise with the other party's account manager regarding all aspects of, this Agreement. The initial account managers appointed by each party are named on the cover page of this Agreement.

3. CONNECTING TO THE LFC NETWORK

- 3.1 **Interconnection Point:** The Service Provider is responsible for connecting to the LFC Network at the Interconnection Point. Subject to clause 3.2, the LFC may only change an Interconnection Point if a change is necessary to protect the security or integrity of that Interconnection Point in order to maintain the continuity of supply of the Wholesale Services. In the event of any such change:

- (a) the LFC will give the Service Provider not less than six months' notice, unless the change is required to respond to an Emergency (in which case the LFC will give the Service Provider as much notice as is practicable in the circumstances, acting reasonably);
- (b) the LFC will submit the proposed change to the Change Management Forum in accordance with clause 24.7 and consult in good faith with the Service Provider through the Change Management Forum during the notice period to understand the implications of the change for the Service Provider and will use all reasonable endeavours to mitigate the cost to the Service Provider of reconnection to a new Interconnection Point, and will not charge the Service Provider any fee for that reconnection;
- (c) the Service Provider will be responsible, at its own cost, for reconnecting to the LFC Network at the new Interconnection Point or Interconnection Points, including managing customer migration and data transfers; and
- (d) the change management processes set out in clauses 24 and 25 will not apply, except for the Change Management Forum consultation provisions in clauses 24.7, 25.1 and 25.2.

If a negligent act or omission of the LFC or its contractors or agents has directly given rise to the need for a change to the Interconnection Point to protect the security or integrity of that Interconnection Point, then clauses 3.1(a), (b) and (d) (but not clause 3.1(c)) will apply, and:

- (e) the LFC will reimburse the Service Provider for its reasonable costs in reconnecting to the LFC Network at the new Interconnection Point or Interconnection Points, including managing customer migration and data transfers; and

- (f) such reconnection, migration and transfers will be carried out in the way (consistent always with good industry practice) that the LFC considers to be the most efficient.

3.2 **Changes to Temporary Interconnection Points:** In addition to clause 3.1, the LFC may change the Service Provider from a Temporary Interconnection Point to a permanent Interconnection Point as follows:

- (a) the LFC will give the Service Provider not less than three months' notice;
- (b) the LFC will consult in good faith with the Service Provider during the notice period to understand the implications of the change for the Service Provider and will use all reasonable endeavours to mitigate the cost and disruption to the Service Provider of reconnection to the permanent Interconnection Point;
- (c) the LFC will not charge the Service Provider any fee for that reconnection, but will not be liable for any costs incurred by the Service Provider in connection with the change (including costs incurred by the Service Provider in connection with managing customer migration, data transfers and any equipment required to facilitate the change (including installation of such equipment)); and
- (d) the change management processes set out in clauses 24 and 25 will not apply.

3.3 **Network Management:** The LFC will pass through to the Service Provider signalling and network management information delivered to its ports, so that the Service Provider has transparency of information between the UNI port and the Interconnection Point to the extent reasonably required to enable the Service Provider to manage its services. The LFC may, with the Service Provider's consent, delegate management control of the relevant UNI ports to the Service Provider (while retaining overall management control).

3.4 **Service Provider Equipment:** In relation to all equipment (including software):

- (a) used by the Service Provider or Resellers to connect to the LFC Network; or
- (b) provided to End Users by the Service Provider or Resellers,

the Service Provider (in the case of Service Provider equipment (including software)):

- (c) is responsible for selecting, supplying and maintaining that equipment, and will ensure that each item of equipment meets applicable standards set out in the Operations Manuals;
- (d) will test that equipment to ensure that it will work in connection with the LFC Network;
- (e) will follow the LFC's reasonable directions in relation to the connection of that equipment; and
- (f) will make any modifications to that equipment that the LFC reasonably requires to avoid any danger or interference that equipment may cause to the Wholesale Services, other network operators, Other Service Providers' services, or the LFC Network,

and in the case of Reseller equipment (including software), the Service Provider will procure that the Reseller carries out each of the obligations in clauses 3.4(c) to (f).

3.5 **LFC Premises:**

- (a) If the supply of any Service requires the installation of Service Provider equipment (which for these purposes includes Reseller equipment) on the LFC's premises, the LFC will:
 - (i) ensure that the Service Provider's representatives have safe access to those premises at any time in accordance with the applicable Operations Manual so that they can install, inspect, maintain, replace or remove the equipment;
 - (ii) provide a safe and secure operating environment for the equipment;
 - (iii) use its best endeavours to protect the equipment from environmental hazards (including radio or electrical interference, power fluctuations and other abnormal environmental conditions);
 - (iv) use all reasonable endeavours to protect the equipment from alteration, repair, movement or other interference, except by the Service Provider or with the Service Provider's prior written consent;
 - (v) immediately notify the Service Provider if it becomes aware of:
 - (A) any damage or unauthorised access to the equipment; or
 - (B) that the equipment requires maintenance;
 - (vi) not damage or interfere with the equipment, and promptly notify the Service Provider if it is lost, stolen or damaged; and
 - (vii) not sell, lease, encumber, or part with possession of, that equipment.
- (b) The Service Provider will ensure that, when attending the LFC's premises, its representatives comply with the LFC's reasonable directions, and all health, safety and security policies and procedures notified to the Service Provider by the LFC during the Term.

3.6 **Capacity:** The parties acknowledge that the LFC has no responsibility for the Service Provider's decisions regarding maintaining sufficient equipment, processes and capacity (including spares, redundancy and backhaul) to operate and maintain its network and services.

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- 3.7 **LFC Consents:** Subject to clauses 10.2(c) to (j), 12.2 and 12.3, the LFC will be responsible for obtaining and maintaining any and all third party authorisations, licences and consents required by the LFC generally to operate the LFC Network, including local territorial authority, council and Land Transport Agency consents for network construction and civil works.
4. **ORDERING SERVICES**
- 4.1 **Service List:** The Service List describes the Wholesale Services and Ancillary Services available to be provided by the LFC under this Agreement. During the Term the Service Provider may request the supply of a Service in accordance with the terms of this clause 4.
- 4.2 **Pre-Qualification System:** The LFC will maintain a pre-qualification system in accordance with the Operations Manuals.
- 4.3 **Service Request:** The Service Provider may:
- (a) request the supply of a Service; or
 - (b) request a change to an existing Service; or
 - (c) terminate an existing Service,
- by completing and delivering to the LFC a Service Request, in accordance with the process set out in the Operations Manual applicable to that Service.
- 4.4 **Service Order:** The following process will govern the formation of Service Orders, except to the extent expressly varied by the Operations Manual applicable to the Wholesale Service and associated Ancillary Services that are the subject of the Service Order.
- (a) Within four Business Hours following receipt of a Service Request the LFC will acknowledge receipt.
 - (b) Following acknowledgement of receipt of a Service Request the LFC will, within the timeframe set out in the applicable Operations Manual, notify the Service Provider that either:
 - (i) the Service Request is accepted (and becomes a Service Order), setting out the order number and the planned Service Start Date for the new or changed Wholesale Service and associated Ancillary Services (as applicable); or
 - (ii) further information is reasonably required before the Service Request can be accepted, identifying the information required; or
 - (iii) if it has good cause to reject the Service Request (acting reasonably), that the Service Request is rejected, giving reason(s).
 - (c) The Service Provider may withdraw a Service Request by notice to the LFC at any time before the Service Request is accepted in accordance with clause 4.4(b)(i).
 - (d) A Service Order will bind the LFC and the Service Provider, and form part of this Agreement, from the date that the Service Request that constitutes the Service Order is accepted by the LFC in accordance with clause 4.4(b)(i).
 - (e) Unless specifically agreed otherwise in a Service Order, the Service Provider may request a change to a Service Order at any time prior to the planned Service Start Date, by notice to the LFC. Clause 4.4(b) will apply to that change request as if it was a Service Request.
 - (f) If the actual Service Start Date for a Service is later than the planned Service Start Date set out in a Service Request accepted under clause 4.4(b)(i), any service rebate payable under clause 6.5 in relation to that Service will be calculated from the planned Service Start Date.
- 4.5 **Availability:**
- (a) Notwithstanding anything to the contrary in this Agreement or any Service Order, subject to clause 4.5(b), the LFC is not obliged to make a Service available in a geographic location where either:
 - (i) the LFC has not previously made that Service available, and either:
 - (A) there is no LFC Network; or
 - (B) the LFC Network is not technically capable of providing the Service; or
 - (ii) subject to clause 4.5(c), although the Service is available at that geographic location, the further provision of that Service at that geographic location (either by itself or in combination with other Services provided at that geographic location) would exceed the capacity or technical capability of the LFC Network (but not as a result of any fault in the LFC Network) and, in the LFC's reasonable opinion, it is not economically viable to undertake the work necessary to address those capacity or technical capability issues to support the requested Service (**Upgrade Work**), and the LFC will provide reasonable supporting evidence of this to the Service Provider as soon as reasonably practical on request.
 - (b) Save as provided in clause 4.5(a)(ii) above, the LFC will be obliged to make a Service available to the extent otherwise required by this Agreement and any applicable Service Order in a geographic location where the LFC has previously made that Service available.
 - (c) Where clause 4.5(a)(ii) applies, the LFC will consult with the Service Provider as soon as reasonably practical in relation to the Upgrade Work with the objective of identifying a cost-effective solution that enables the LFC to undertake the Upgrade Work and make the requested Service available.

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- (d) The LFC will, from time to time, advise the Service Provider of the geographic locations in which the Services are available and the proposed launch dates of Services.
- 4.6 **Specifications:** The specifications of a Service are set out in the applicable Service Description. The LFC will provide the Service to meet those specifications. Subject to clause 24.6, the LFC is free to determine the manner in which it uses technology to provide a Service, provided those specifications continue to be met.
5. **SUPPLY OF SERVICES**
- 5.1 **Start Supply:** The LFC will make the supply of the Wholesale Service and associated Ancillary Services available to the Service Provider on the Service Start Date specified in the applicable Service Order or, if no Service Start Date is specified, in accordance with the provisioning service level under the applicable Service Level Terms.
- 5.2 **End Supply:**
- (a) Subject to clause 5.2(d), from 1 June 2014 the LFC may end the supply of a Wholesale Service if:
- (i) the Wholesale Service is no longer viable or the LFC is otherwise unable to continue to provide the Wholesale Service, by giving not less than 24 months' notice to the Service Provider; or
- (ii) the LFC decides, in its sole discretion, to withdraw the Wholesale Service from general availability and replace it with a new Wholesale Service, by giving not less than 12 months' notice to the Service Provider.
- (b) If the LFC gives notice under clause 5.2(a) of its intention to end the supply of a Wholesale Service it will:
- (i) attach to that notice a plan for the migration of the Service Provider from that Wholesale Service to (at the Service Provider's election) another Wholesale Service or, where applicable, to any replacement wholesale telecommunications services (Replacement Wholesale Service);
- (ii) provide reasonable assistance to the Service Provider to assist the Service Provider in migrating from that Wholesale Service to (at the Service Provider's election) another Wholesale Service or, where applicable, to any Replacement Wholesale Service;
- (iii) not accept any new Service Request for the supply of the Wholesale Service if that Service Request is received on or after the date on which the LFC makes the supply of the Replacement Wholesale Service available to the Service Provider or, where no Replacement Wholesale Service is being provided, 12 months after the date of the LFC's notice under clause 5.2(a); and
- (iv) if the notice period expires during the Minimum Service Term applicable to the Wholesale Service, continue to supply the Wholesale Service on the terms of the applicable Service Order until the expiry of that Minimum Service Term, unless the parties agree otherwise.
- (c) Early termination charges will not apply if the LFC ends the supply of a Wholesale Service under this clause 5.2.
- (d) The LFC may not end supply of a Base Wholesale Service before 31 December 2019 unless the LFC provides a replacement service:
- (i) which is approved by CFH;
- (ii) that delivers at least the performance characteristics of the withdrawn Base Wholesale Service;
- (iii) with a price which is no greater than the price of the withdrawn Base Wholesale Service; and (iv)
- which is subject to the same Price Cap as applied to the withdrawn Base Wholesale Service.
- If the requirements of this clause (d) are satisfied and a replacement service is provided by the LFC then this clause will continue to apply to that replacement service.
- 5.3 **Continuity of Supply:** A Service Order will continue until terminated in accordance with this Agreement. A change to a Service Order will not initiate a new Service Order, or cause the existing Service Order to terminate, unless expressly agreed in writing. In particular, a change to a Service Order that is implemented by the LFC electronically and does not require a physical visit to a site or Interconnection Point will not cause the Service Order to terminate.
- 5.4 **Service Standards:** When providing a Service the LFC will:
- (a) use reasonable care and skill;
- (b) meet the specifications for that Service as set out in the applicable Service Description; and
- (c) meet the Core Service Levels for that Service, as set out in the applicable Service Level Terms together with any specific service levels that the parties have agreed in writing will apply in respect of an individual Reseller or End User (subject always to the LFC's obligation to provide Wholesale Services on a non-discriminatory basis).
- 5.5 **Maintaining the LFC Network:** Without prejudice to the LFC's obligations to meet the availability and connection service levels specified in the Service Level Terms, the LFC may temporarily suspend or restrict a Service in order to carry out maintenance or development work on the LFC Network. In doing so the LFC will, unless the suspension or restriction is required to respond to an Emergency:
- (a) give the Service Provider not less than five (5) Business Days' notice of the suspension or restriction;

- (b) use best endeavours to ensure that the suspension or restriction takes place during the planned outage window for that Service, as specified in the applicable Operations Manual; and
- (c) use its best endeavours to minimise disruption to the Service Provider, Resellers and End Users; and fully reinstate the Service as soon as the maintenance or development work is completed.

6. FAULTS

6.1 Responsibility for Faults:

- (a) The LFC is responsible for monitoring, diagnosing, repairing and resolving any fault in a Wholesale Service, the LFC Network (a **Fault**) in accordance with the procedures set out in each applicable Operations Manual.
- (b) The LFC is not responsible for any fault in the Service Provider's equipment or network but may, at the Service Provider's request and cost, agree to fix such faults. Notwithstanding the foregoing and without prejudice to the Service Provider's other rights and remedies under this Agreement, where that fault arises as a result of a breach of this Agreement or any wilful or negligent act or omission by the LFC or any of its contractors or agents, the LFC will, at the request of the Service Provider, fix such fault at the LFC's sole cost.
- (c) The LFC will provide such access to the LFC's operational support systems and business support systems, documentation and training as is necessary for the Service Provider to meet its clause 6.2 obligations.

6.2 Reporting of Faults:

- (a) The Service Provider will use its best endeavours to operate, throughout the Term, a competent and sufficiently resourced Fault reporting service for its Resellers and End Users, and to report Faults in respect of any Services used for the Service Provider's internal purposes.
- (b) Until the LFC has provided the Service Provider with diagnostic tools that will, in the LFC's opinion (acting reasonably), enable the Service Provider to confirm that a Fault in relation to any Bitstream Service is a Fault that the LFC is responsible for under clause 6.1 (in this clause 6.2(b), **Diagnostic Tools**), the LFC will not be entitled to charge a "No Fault Found" Ancillary Charge in accordance with:

- (i) the Bitstream Services Operations Manual; and
- (ii) the Price List,

in relation to any Bitstream Service where the LFC diagnoses the Fault as not being a Fault that the LFC is responsible for under clause 6.1 prior to initiating a truck roll in respect of such Fault. The LFC will give the Service Provider no less than ninety (90) days' notice of the date that the Diagnostic Tools will be made available and, from the day the Diagnostic Tools are made available, this clause 6.2(b) will no longer apply.

- (c) Before reporting a Fault to the LFC the Service Provider will:
 - (i) use its reasonable endeavours to confirm the presence of the Fault;
 - (ii) perform an initial diagnosis to identify where the Fault has arisen;
 - (iii) use its reasonable endeavours to investigate the Fault and to find out all relevant information from Resellers and End Users; and
 - (iv) use its reasonable endeavours to confirm that the fault is a Fault that the LFC is responsible for under clause 6.1.
- (d) When reporting a Fault to the LFC, the Service Provider will provide to the LFC all relevant information held by the Service Provider in respect of the Fault.
- (e) If the Service Provider's diagnosis of a fault indicates that it is a Fault that the LFC is responsible for, the Service Provider will report that Fault to the LFC in accordance with the procedure set out in the applicable Operations Manual.

6.3 Fault Affecting a Wholesale Service: If the LFC discovers a Fault that affects a Wholesale Service provided to the Service Provider under this Agreement, it will promptly notify the Service Provider of that Fault.

6.4 Resolution of Faults:

- (a) The LFC will use its best endeavours to diagnose and resolve each Fault promptly, and in any event will diagnose and resolve each Fault in accordance with the applicable Core Service Levels set out in the Service Level Terms for the applicable Wholesale Service.
- (b) The Service Provider will give the LFC and its representatives such access to a Service Provider Premises as the LFC considers reasonably necessary to diagnose and resolve a Fault, and will use all reasonable endeavours to procure that Resellers, Exempted End Users and other persons controlling NBAPs (where LFC (Service Provider) Equipment is installed) or applicable Third Party Premises do the same (which may require the LFC entering the relevant Reseller Premises, End User Premises of Exempted End Users, NBAPs or Third Party Premises as a contractor to the Service Provider).

6.5 Service Rebate:

- (a) The LFC will provide each Service to meet or exceed the Core Service Levels set out in the Service Level Terms applicable to that Service, in accordance with clause 5.4.
- (b) If the LFC fails to meet a Core Service Level it will, subject to clause 6.5(c) and the applicable Service Level Terms, credit an amount equal to the applicable service rebate set out in the Service Level Terms (a service rebate) to the next invoice

payable for that Service or, if no further invoice is payable in respect of that Service, will pay or otherwise refund the amount to the Service Provider.

- (c) No service rebate will be payable for a failure to meet a Core Service Level if that failure was caused by the suspension, restriction or cessation of the applicable Service in accordance with clauses 5.2(a), 21 or 22 (excluding where the Service Provider exercises its right to terminate pursuant to clauses 22.1(a) or 22.1(b) or 22.1(d).
- (d) If, as a result of one incident or set of circumstances, the LFC fails to meet two or more Core Service Levels in respect of an instance of a Service provided in respect of the same End User at the same End User Premises, the LFC will only be obliged to provide a rebate for the failure to meet one of those Core Service Levels (the greater of the rebates).
- (e) If, as a result of one incident or set of circumstances, the LFC fails to meet two or more Core Service Levels in respect of an instance of a Service provided to the Service Provider at the same Service Provider Premises and used for the Service Provider's internal purposes, the LFC will only be obliged to provide a rebate for the failure to meet one of those Core Service Levels (the greater of the rebates).

7. PAYMENT

7.1 Charges:

- (a) The Service Provider will pay the Charges, plus GST (if any) in accordance with this clause 7.
- (b) Except as expressly provided otherwise in this Agreement, recurring Charges (as indicated in the Price List) will be invoiced in advance, and transactional and ancillary Charges (as indicated in the Price List) will be invoiced in arrears.
- (c) The LFC will ensure that the Charges do not exceed the Price Caps. In addition, prior to 31 December 2019, the LFC will ensure that:
 - (i) the Charges for a Base Wholesale Service (other than the Central Office and POI Co-location Service) do not exceed the greater of:
 - (A) the Price Cap for that Base Wholesale Service published by CFH on its website as at 10 February 2012; and
 - (B) any Price Cap for that Base Wholesale Service subsequently approved by the Change Management Forum in accordance with clause 25.3 and approved by CFH,**(Protected Price Cap)**; and
 - (ii) in respect of any replacement service provided by the LFC in accordance with clause 5.2(d), the charges for that replacement service do not exceed the Protected Price Cap for the Base Wholesale Service that the replacement service replaces.

7.2 Additional Charges: The LFC may charge (as part of the Ancillary Charges) the Service Provider on a time and materials basis, in accordance with the schedule of hourly rates for LFC personnel set out in the Price List, to recover any costs that it incurs (acting reasonably):

- (a) as a direct result of any rework required to implement a change to a Service Order made in accordance with clause 4.4(e), where the LFC has commenced fulfilment of the Service Order before the change request is made;
- (b) in the identification, diagnosis and resolution of any fault, and restoration of the Wholesale Service or LFC Network (as applicable), if the fault:
 - (i) is caused by an act or omission of, or by any equipment of, the Service Provider, a Reseller or an Exempted End User; or
 - (ii) subject to clause 6.2(b), falls outside the scope of the LFC's responsibilities (set out in clause 6.1); or
 - (iii) is reported by the Service Provider but cannot be identified or replicated by the LFC after the LFC has used all reasonable endeavours to do so,but will seek the Service Provider's express authorisation before diagnosing or resolving a clause 7.2(b)(ii) fault unless the diagnosis or resolution is required to respond to an Emergency. The LFC will reimburse the Service Provider for any amount charged by the LFC to the Service Provider for any clause 7.2(b)(ii) or 7.2(b)(iii) fault that is subsequently found to be a Fault for which the LFC is responsible, together with interest on that amount at the Bill Rate (as at the date the Service Provider made the payment) plus 2% for the period from the date the Service Provider made the payment to the date of reimbursement by the LFC;
- (c) as a direct result of any Fault that the Service Provider has knowledge of, but fails to diagnose and report in accordance with clauses 6.2(c) and 6.2(d); and
- (d) as a direct result of any failure by the Service Provider to give to, or procure for, the LFC and its representatives such access (at the appointed time(s) agreed between the LFC and the Service Provider) to:
 - (i) Service Provider Premises;
 - (ii) Reseller Premises;
 - (iii) End User Premises of an Exempted End User;
 - (iv) NBAPs where LFC (Service Provider) Equipment is installed;

- (v) Third Party Premises adjacent to Service Provider Premises, Reseller Premises or a NBAP where LFC (Service Provider) Equipment is installed;

in each case as is reasonably required by the LFC to diagnose and resolve a Fault or perform a Service Order. To avoid doubt, this clause 7.2(d) is not intended to extend the scope of the Service Provider's obligations with respect to obtaining access consents beyond that set out in clause 12 below.

7.3 Invoices: The LFC will issue a valid GST invoice to the Service Provider for the Charges and GST each month in accordance with the billing procedure set out in the Operations Manual. The Service Provider will be liable for all Charges and GST applicable to each Service provided from the later of:

- (a) each applicable Service Start Date; or
- (b) the requested Service Start Date as set out in the relevant Service Order,

provided that if any other date has been agreed between the parties in writing as the date the Service is to be activated or otherwise made available then, provided the applicable Services commence on such date the Service Provider will be liable for all Charges and GST applicable to the relevant Service from that date. The Service Provider will provide the LFC with sufficient information to allow the LFC to allocate any amount received to a particular invoice.

7.4 Expiry of right to issue an invoice:

- (a) Subject to clause 7.4(b), the LFC will not issue an invoice for any Charges more than ninety nine (99) days after the date of supply of the Service to which those Charges relate.
- (b) If the LFC (acting reasonably) requires additional information from the Service Provider to prepare an invoice:
 - (i) it will, promptly following the date of supply of the applicable Service (and in any event no more than sixty (60) days after that date), notify the Service Provider of its requirements, clearly specifying the additional information required; and
 - (ii) the Service Provider will, within twenty (20) days following the date of receipt of the LFC's notice, provide such information as is reasonably within the scope of the LFC's requirements.
- (c) If the Service Provider fails to comply with clause 7.4(b)(ii), the ninety nine (99) day period set out in clause 7.4(a) will be extended by a period equal to the additional number of days it takes the Service Provider to provide the information (so that the LFC has a further twenty (20) days following receipt of the information to issue an invoice).

7.5 Payment:

- (a) Subject to clauses 7.5(c) and 7.6, the Service Provider will pay each invoice issued by the LFC on or before the 20th day of the month following the month in which the invoice is issued without withholding any amount or making any deduction.
- (b) The LFC may apply any payment received in reduction of any amount that the Service Provider owes to the LFC, and (save where the Service Provider is withholding payment under this Agreement in the event of an unresolved dispute in relation to an Invoice Error under clause 7.6 or an unresolved dispute under clause 7.7), may set off any amount that the Service Provider owes to the LFC against any amount payable by the LFC to the Service Provider.
- (c) The Service Provider may apply any payment received in reduction of any amount that the LFC owes to the Service Provider, and may set off any amount that the LFC owes to the Service Provider against any amount payable by the Service Provider to the LFC.
- (d) No payment will be made by credit card.

7.6 Dealing with Invoice Error Disputes:

- (a) If the Service Provider reasonably and in good faith believes there is a manifest error in either the Charges in an invoice or in the calculation of the amount of an invoice (Invoice Error), the Service Provider may give notice to the LFC before the due date setting out in full details of:
 - (i) the invoice;
 - (ii) the Invoice Error;
 - (iii) the grounds for the Service Provider's belief that the Invoice Error exists; and
 - (iv) the amount by which the Service Provider believes that the LFC has overcharged or undercharged it by reason of the Invoice Error.
- (b) Where the Service Provider believes the LFC has overcharged it by reason of an Invoice Error, the Service Provider may withhold payment of the amount it believes it has been overcharged until the issue has been resolved in accordance with this clause 7.6. Whenever payment is withheld under this clause 7.6(b) the Service Provider must, within ten (10) Business Days after the due date, give the LFC a full extract detailing each withheld Charge.
- (c) If the Service Provider fails to follow the notice requirements set out in clause 7.6(a), then any right under clause 7.6 to withhold payment of the amount it believes it has been overcharged does not apply.
- (d) Following the giving of any notice of an Invoice Error, the Service Provider and the LFC must treat that notice as a dispute notice and resolve the dispute in accordance with clause 20. If the parties cannot resolve the dispute in accordance with the procedure in clause 20.2, the Service Provider and the LFC must refer the dispute to expert decision under clause 20.4.

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- (e) If it is agreed by the parties or decided under clause 20 that an Invoice Error exists in an invoice, depending on whether the amount properly payable by the Service Provider is more than the amount paid (an underpayment) or less than the amount paid (an overpayment), then:
- (i) in the case of an underpayment, the Service Provider must forthwith pay to the LFC the amount of the difference between the amount paid and the amount properly payable, plus interest on that amount at the Bill Rate (as at the date the Service Provider made the underpayment) plus 2% for the period from the date the Service Provider made the underpayment to the date of payment, or the date clause 7.8 becomes applicable, whichever is earlier, and the LFC will record that payment in a separate statement of account to be issued by the LFC for the following month;
 - (ii) in the case of an overpayment, the LFC must forthwith pay to the Service Provider the amount of the difference between the amount paid and the amount properly payable, plus interest on that amount at the Bill Rate (as at the date the Service Provider made the overpayment) plus 2% for the period from the date the Service Provider made the overpayment to the date of payment, or the date clause 7.8 becomes applicable, whichever is earlier, and the LFC will record that payment in a separate credit note to be issued by the LFC for the following month; or
 - (iii) in the case of an Invoice Error that affects three or more of any five consecutive invoices and constitutes an overpayment by the Service Provider that is more than 5% of the amount properly payable by the Service Provider under such invoices, the LFC must forthwith pay to the Service Provider the amount of the difference between the amount paid and the amount properly payable, plus interest on that amount at the Bill Rate (as at the date the Service Provider made the first overpayment) plus 4% for the period from the date the Service Provider made the first overpayment to the date of payment, or the date clause 7.8 becomes applicable, whichever is earlier, and the LFC will record that payment in a separate credit note to be issued by the LFC for the following month.
- (f) If it is agreed by the parties or decided under clause 20 that an Invoice Error does not exist, the Service Provider must forthwith pay any amount withheld plus interest on the amount withheld at the Bill Rate (as at the date of the invoice) plus 2% for the period from the day after the due date to the date of payment of the amount withheld, or the date clause 7.8 becomes applicable, whichever is earlier.

7.7 Other Invoice Disputes:

- (a) Regardless of whether or not the Service Provider has previously given notice of an Invoice Error in relation to any invoice, the Service Provider may give the LFC a dispute notice in respect of that invoice, provided that a dispute notice cannot be given later than ninety nine (99) days after the date of the invoice. Any dispute notice under this clause 7.7(a) must comply with clause 20.2 and set out details of the invoice, the disputed amount and the grounds for the dispute together with any available supporting evidence. The Service Provider and the LFC must resolve the dispute in accordance with section 20.
- (b) If a dispute under clause 7.7(a) is resolved in favour of the Service Provider, the LFC must forthwith pay the amount agreed or found to have been overpaid plus interest at the Bill Rate (as at the date of the overpayment) plus 2% on the overpaid amount for the period from the date the overpayment was made to the date of refund of the overpayment or the date clause 7.8 becomes applicable, whichever is earlier, and the LFC will record that payment in a separate credit note to be issued by the LFC for the following month.
- (c) If a dispute under clause 7.7(a) is resolved in favour of the LFC, the Service Provider must forthwith pay the amount agreed or found to have been underpaid plus interest at the Bill Rate (as at the date the underpayment became due) plus 2% on the underpaid amount for the period from the date the underpayment was paid to the date of payment of the balance or the date clause 7.8 becomes applicable, whichever is earlier, and the LFC will record that payment in a separate statement of account to be issued by the LFC for the following month.

7.8 Interest on Unpaid Amounts: Where:

- (a) subject to clauses 7.5(c) and 7.6, an amount due from the Service Provider under clause 7.5(a) remains unpaid on the date that payment is due under clause 7.5(a), the Service Provider must pay interest on that amount at the Bill Rate (as at the date that payment was due) plus 5% for the period from the date that payment was due to the date of payment of that amount, in addition to the amount due under clause 7.5(a); and
- (b) an amount due from the LFC or the Service Provider under clause 7.6(e), 7.7(a), 7.7(b) or 7.7(c) remains unpaid on the 20th Business Day after the date the dispute is resolved, that party must pay interest on that amount at the Bill Rate (as at that 20th Business Day) plus 5% for the period from that 20th Business Day to the date of payment of that amount, in addition to the amount due under clauses 7.6(e), 7.7(a), 7.7(b) or 7.7(c).

8. SECURITY REQUIREMENTS

8.1 Acceptable Credit Rating:

- (a) The Service Provider will have an Acceptable Credit Rating if it has a credit rating of not less than BBB (Standard & Poor's), Baa (Moody's Investor Services) or BBB (Fitch).
- (b) If the Service Provider has a credit rating that meets or exceeds the Acceptable Credit Rating, it will provide to the LFC documentary evidence, to the LFC's reasonable satisfaction, that the Service Provider has a credit rating that meets or exceeds the Acceptable Credit Rating, within twenty (20) Business Days following the Effective Date. The LFC may subsequently require that the Service Provider provide that documentary evidence again at any time that the LFC has reasonable grounds to believe that the Service Provider does not have an Acceptable Credit Rating.

8.2 Security:

- (a) If the Service Provider:
 - (i) has not provided the documentary evidence required by the LFC to the LFC's satisfaction in accordance with clause 8.1; or
 - (ii) fails to pay an undisputed invoice by its due date without an explanation reasonably satisfactory to the LFC,

the LFC may require the Service Provider to provide, and maintain until further notice, security to cover amounts payable by the Service Provider under this Agreement (Security). The Security is to be in the form of (at the Service Provider's discretion) either:

- (A) a cash prepayment; or
- (B) a bank guarantee, letter of credit or performance bond, in a form acceptable to the LFC (acting reasonably) and, in the case of a bank guarantee or a letter of credit, from a bank with a credit rating that meets or exceeds the Acceptable Credit Rating; or

with the LFC's approval (not to be unreasonably withheld) a guarantee from the parent company of the Service Provider in a form acceptable to the LFC (acting reasonably), provided that the parent company has a credit rating that meets or exceeds the Acceptable Credit Rating.

- (b) The LFC will specify the amount of the Security, provided that the LFC may not specify an amount greater than the LFC's reasonable estimate of the total value of Charges likely to be payable by the Service Provider under this Agreement:
 - (i) in the case of the Security to be provided for the period of three months following the Effective Date, during the fourth and fifth months, taking into account the forecasts provided by the Service Provider under clause 11; and
 - (ii) in the case of any other period, based on the Charges payable by the Service Provider under this Agreement during the previous two consecutive month period.
- (c) If:
 - (i) this Agreement is terminated; or
 - (ii) after the date the Security is provided, the Service Provider:
 - (A) provides the documentary evidence required by the LFC to the LFC's satisfaction in accordance with clause 8.1; and
 - (B) pays any undisputed invoice and thereafter pays all undisputed invoices by their due dates for a period of 12 months,

the LFC will return to the Service Provider any Security that is not required to cover any amount owed by the Service Provider to the LFC.

8.3 Provide Security:

- (a) The Service Provider will provide Security (including any adjusted Security required under clause 8.3(b)) to the LFC within twenty (20) Business Days of the LFC's notice to the Service Provider that the Security (or additional Security) is required.
- (b) At six month intervals after the Security is provided the Service Provider may request, or the LFC may require, the amount of the Security to be adjusted. The adjusted Security is to meet the requirements of clause 8.2.

8.4 **Apply Security:** The LFC may, without recourse to the Service Provider, deduct any overdue amount owed by the Service Provider under this Agreement (other than amounts that are subject to a dispute in accordance with clauses 7.6 or 7.7) from any Security, and if it does so it will promptly notify the Service Provider of the amount deducted. Any such deduction will be without prejudice to the Service Provider's continuing obligation to maintain the Security in accordance with the requirements of clause 8.2. The Service Provider will ensure that, within ten (10) Business Days of receiving notice of such deduction, it provides any additional Security required to restore compliance with clause 8.2.

9. THE SERVICE PROVIDER'S RESPONSIBILITIES

9.1 General Responsibilities: The Service Provider will:

- (a) not interfere with the reasonable use of Wholesale Services by the other customers of the LFC or any other network operator;
- (b) only use the Wholesale Services for the provision of telecommunications services to Resellers and End Users and for its own internal purposes provided that any Services used for the Service Provider's internal purposes must not comprise more than 25% of the Services to be supplied by the LFC to the Service Provider in any year, and any other purposes contemplated by this Agreement and, for the avoidance of doubt, not for any purpose that could interfere with or damage the LFC Network; and
- (c) not infringe or otherwise diminish any of the LFC's intellectual property rights in relation to the Wholesale Services.

9.2 Voice service: If the Service Provider offers a voice service to End Users:

- (a) the LFC will, on request by the Service Provider, provide an ATA voice port meeting the Minimum Standard at the End User Premises to enable the Service Provider to provide the voice service; and
- (b) the Service Provider may, by notice to the LFC, request that the LFC provide an alternative codec or design to that offered by the LFC under clause 9.2(a). The LFC will consider any request in good faith and charge reasonable set-up fees at the rates set out in the Price List for testing and commissioning that new ATA configuration.

9.3 Multiple Service Providers:

- (a) In this clause 9.3:

Primary Service Provider means a provider of a Bitstream Service to an End User, either directly or via a Reseller, that uses a UFB Standard Wholesale Service as an input;

Secondary Service Provider means a provider of a service (such as Multicast) to the same End User, either directly or via a Reseller, as the Primary Service Provider that uses the same physical infrastructure as the UFB Standard Wholesale Service purchased by the Primary Service Provider; and

UFB Standard Wholesale Service means a Wholesale Service of a standard that meets or exceeds the minimum standard for the residential Wholesale Service (being 30 Mbps downstream, 10 Mbps upstream with 2.5 Mbps CIR symmetrical).

- (b) If a Primary Service Provider requests cancellation of the UFB Standard Wholesale Service for an End User (and it is the only Primary Service Provider to the relevant End User), the LFC will notify the Secondary Service Provider that the Primary Service Provider has cancelled the UFB Standard Wholesale Service for that End User.
- (c) Upon receipt of the notification under clause 9.3(b), the Secondary Service Provider may, by notifying the LFC within five (5) Business Days:
 - (i) become the Primary Service Provider for the End User and provide a Bitstream Service that uses a UFB Standard Wholesale Service as an input to that End User; or
 - (ii) cancel the Wholesale Service that the Secondary Service Provider was purchasing to service that End User.
- (d) If the Secondary Service Provider does not make an election within the timeframe required under clause 9.3(c), the LFC may cancel the Secondary Service Provider's Wholesale Service in respect of the relevant End User on ten (10) Business Days' notice.
- (e) If the Secondary Service Provider's Wholesale Service is cancelled under clause 9.3(c) or 9.3(d), no early termination charges will apply.

10. END USERS

10.1 Responsibility: The Service Provider:

- (a) is responsible, and acknowledges that (save as otherwise provided in clauses 10 and 12) the LFC is not responsible, for all interactions with Resellers and End Users, including provisioning, billing, customer services, contact with the police and other government authorities, fault reporting and dispute management; and
- (b) acknowledges that the LFC is not responsible for the use of Wholesale Services by Resellers, End Users and any other third parties (whether authorised by the Service Provider or not), including the content of any data or information that they send or receive using Wholesale Services.

10.2 Supply of Services:

- (a) The Service Provider will ensure that each contract it has with a Reseller (in clauses 10.2(a) and (b), a counterparty) for the supply or use of a Service, or a service which incorporates a Service, contains terms with the effect that:
 - (i) the counterparty consents to the Service Provider sharing information about that counterparty with the LFC, to the extent necessary for the LFC to provide the Services;
 - (ii) the counterparty will not damage or tamper with any device provided by the LFC for the delivery of that service and will follow the Service Provider's instructions in relation to all such devices;
 - (iii) the LFC does not confer any right or benefit on the counterparty; and
 - (iv) all liability of the LFC is excluded, to the maximum extent permitted by law.
- (b) The Service Provider will ensure that its contract with the counterparty requires the counterparty to ensure that each contract it has with a Reseller for the supply or use of a Service, or a service which incorporates a Service, contains terms equivalent to those required by clause 10.2(a), as if the Reseller was a counterparty.
- (c) The Service Provider will procure, on behalf of the LFC, that each End User receives and agrees to be bound by the LFC (End User) Terms, provided that the Service Provider may elect not to procure that an End User agrees to be bound by the LFC (End User) Terms in any of the following circumstances:
 - (i) where the Service Provider determines (acting reasonably) that an End User is a large business customer of the Service Provider; and
 - (ii) where the customer of the Service Provider is a Reseller, in which case the Service Provider must procure that the Reseller will procure that each End User who receives a service which incorporates a Service receives and agrees to be bound by the LFC (End User) Terms, provided that the Service Provider may grant the Reseller an exception which has the same substance to sub-clause (i) above,

in which case the Service Provider will issue the LFC with a notice of such election in accordance with sub-clause (g) below. This sub-clause (c) is not intended to apply where the receipt of a service which incorporates a Service by an End User does not include or involve the provision, location or use of LFC (End User) Equipment on the relevant End User Premises or NBAP as part of that service.

- (d) The LFC acknowledges and agrees that the Service Provider's obligation under clause 10.2(c) to procure that an End User agrees to be bound by the LFC (End User) Terms will be discharged if the Service Provider procures that the End User:

- (i) receives the LFC (End User) Terms (which the LFC acknowledges may be done by providing the End User with a physical copy of the terms or by disclosing the terms verbally over the phone or by other electronic means, including (by way of example) providing a link to where the terms are available online or issuing the End User with an email attaching a copy of the terms); and
 - (ii) clearly agrees to be bound by the LFC (End User) Terms (which the LFC acknowledges may be done in writing, verbally or by some other means, including completion of an online confirmation or tick box),
- in each case, before the date on which the LFC is scheduled to carry out installation of relevant LFC (End User) Equipment or, if no installation work is required, the planned Service Start Date with respect to that Service. Without prejudice to the foregoing or sub-clause (f) below, the Service Provider will (upon request) provide the LFC with evidence, to the LFC's reasonable satisfaction, that the Service Provider has complied with the above requirements, provided that the LFC may only make such a request within 3 months after the Service Start Date and after it has used reasonable endeavours (but failed) to sign up LFC (End User) Terms directly with the relevant End User.
- (e) In the case of an Exempted End User notified to the LFC in accordance with sub-clause (g) below, the LFC will not seek to bind that Exempted End User to LFC (End User) Terms at any point while the relevant Service/s are being provided with respect to the Exempted End User.
 - (f) The Service Provider's liability to the LFC for any failure by it to procure that an End User agrees to be bound by the LFC (End User) Terms under clause 10.2(c) (but not any liability arising under clause 10.2(g) and clause 12.3(c)(i)) will cease at the earlier of:
 - (i) the point in time that the Service Provider discharges its obligations under 10.2(d) above;
 - (ii) the point in time that the LFC itself obtains written confirmation from the End User that the End User is bound by the LFC (End User) Terms. The LFC will (upon request) confirm to the Service Provider whether it has obtained such written confirmation, provided that the Service Provider may only make such a request within 3 months after the Service Start date; or
 - (iii) the point in time that the LFC commences installation at an End User Premises.
 - (g) In the case of an Exempted End User the Service Provider agrees to notify the LFC of its election not to procure that the relevant End User agrees to be bound by the LFC (End User) Terms together with name and location details of the Exempted End User and its End User Premises or NBAP (as applicable) either within the relevant Service Request (if possible) or by such other method as may be agreed between the Service Provider and the LFC (each acting reasonably).
 - (h) If the Service Provider or a Reseller procures that an End User agrees to be bound by the LFC (End User) Terms then the LFC acknowledges and agrees that the LFC has prepared the LFC (End User) Terms and, accordingly, the LFC (and not the Service Provider and not the Reseller) is responsible for the content of the LFC (End User) Terms (including whether rights and obligations of the kind included in the LFC (End User) Terms are legally enforceable).
 - (i) Sub-clauses (c) to (h) inclusive relate only to LFC (End User) Equipment and do not limit anything in this Agreement that relates more generally to the LFC Network or the LFC (Service Provider) Equipment.
 - (j) If the Service Provider includes in any contract with an Exempted End User terms that limit or exclude the liability of the Service Provider or any other person in connection with the provision of telecommunications services that rely in whole or in part on a Service, then the Service Provider will ensure that the LFC, its contractors and agents receive the benefit of a substantially similar limit or exclusion in connection with the construction, installation, inspection, maintenance, replacement or removal of LFC (End User) Equipment. Where the customer of the Service Provider is a Reseller, the Service Provider must procure that the Reseller complies with the requirements under this clause 10.2(j), as if references to "Service Provider" were to "Reseller".

10.3 Representations and Contact with End Users:

- (a) The Service Provider will not, except as expressly provided for under clauses 10.2 or 12.3:
 - (i) represent that the LFC participates in the supply of services to the Service Provider's Resellers or End Users, other than as a wholesale supplier to the Service Provider; or
 - (ii) represent that there will be a continuing relationship between the LFC and any of the Service Provider's Resellers or End Users.
- (b) The LFC will not, except as contemplated by the LFC (End User) Terms (the relevant content of which shall apply equally as regards Exempted End Users even though such End Users do not agree to be bound by the LFC (End User) Terms):
 - (i) represent that the LFC participates in the supply of services to the Service Provider's Resellers or End Users, other than as a wholesale supplier to the Service Provider; or
 - (ii) represent that there will be a continuing relationship between the LFC and any of the Service Provider's Resellers or End Users.
- (c) Neither the LFC nor the Service Provider will attribute blame for a fault, the need for maintenance of a network or the suspension of a Service to the other party if it would be misleading, unethical, deceptive or defamatory to do so.

10.4 No Relationship with the LFC: No obligation or other legal relationship is created between the LFC and the Service Provider's Resellers or End Users by this Agreement (other than, in the case of End Users, by virtue of the LFC (End User) Terms or under clause 10.2(j)). This Agreement does not confer any right, benefit or privilege on any such Reseller or End User.

10.5 No Contact: The LFC will not contact any Reseller or End User in relation to any service, which incorporates a Service, and is provided to that Reseller or End User without the Service Provider's prior consent, except:

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- (a) to the extent provided for in clauses 10.2(c) to (j) inclusive, 12.3 or the Operations Manual (in each case, including as regards Exempted End Users);
 - (b) in the case of contact with End Users who are not Exempted End Users, in order for the LFC to enforce its rights under the LFC (End User) Terms or pursuant to clause 10.2(j); or
 - (c) for the purpose of allowing the LFC to undertake marketing to promote the LFC, the LFC Network and the use of the LFC Network generally, provided that such marketing is not targeted at any particular Reseller or End User and does not promote or otherwise relate to any particular service (dependent on a Service).

11. FORECASTING

11.1 **Forecasting Report:** Within ten (10) Business Days following each of:

- (a) the Effective Date; and
- (b) the last day of each subsequent calendar month during the Term,

the Service Provider will provide a report to the LFC setting out its forecast for the volume of orders applicable to each Wholesale Service Category (other than the Central Office and POI Co-location Service) for each month of the period of six (6) consecutive months following the month in which the forecast is provided (**Forecasting Report**).

11.2 **Scope of Forecasting Report:** Each Forecasting Report is to set out, for each Wholesale Service Category (other than the Central Office and POI Co-location Service), the Service Provider's forecast for that Wholesale Service Category by reference to each applicable Candidate Area. The requirements of the Forecasting Report are set out further in the Operations Manuals.

12. LFC EQUIPMENT

12.1 **Title:**

- (a) Title to all LFC Equipment will remain with the LFC at all times unless otherwise expressly agreed in writing. The parties acknowledge that, although the LFC will retain title to LFC Equipment, this will not prevent or restrict the Service Provider's access to the services provided under this Agreement in any way.
- (b) The Service Provider will not:
 - (i) enter into any agreement dealing with the LFC Equipment, other than to grant the End User the right to use the LFC (End User) Equipment in connection with the provision of services to the End User; or
 - (ii) encumber the LFC's title to the LFC Equipment or expose that title to third party claims, and will notify the LFC if the Service Provider becomes aware of any third party claim; or
 - (iii) do any other thing that might affect the LFC's ownership of the LFC Equipment.

12.2 **Access to LFC (Service Provider) Equipment:**

- (a) If the supply of any Service requires any LFC (Service Provider) Equipment to be installed on Service Provider Premises, Reseller Premises or NBAPs the Service Provider will:
 - (i) obtain any third party authorisation, licence or consent, including for access to any applicable Third Party Premises, necessary for the LFC to construct, install (including pre-installation design work), inspect, maintain, relocate or replace that LFC (Service Provider) Equipment at, or remove it from, those locations together with acknowledgement (in a manner to be determined in the sole discretion of the Service Provider) from the owner of the relevant Service Provider Premises, Reseller Premises or NBAP that the LFC (not the owner of the relevant Service Provider Premises, Reseller Premises or NBAP) will own that LFC (Service Provider) Equipment. To avoid doubt, the LFC will promptly notify the Service Provider if the LFC becomes aware of any such required authorisation, licence or consent; and
 - (ii) subject to (b) below, use all reasonable endeavours to provide or procure safe access for the LFC's representatives to those locations and any applicable Third Party Premises so that the LFC's representatives can construct, install (including pre-installation design work), inspect, maintain, replace, relocate or remove LFC (Service Provider) Equipment.
- (b) In accessing the Service Provider Premises, Reseller Premises, a NBAP or any applicable Third Party Premises, the LFC will comply with any applicable and reasonable policies, procedures and existing arrangements for access, provided that copies of such policies and procedures (and reasonable details of any such existing access arrangements) are given to the LFC in advance.
- (c) The Service Provider acknowledges that until all required authorisations, licences or consents are obtained, the LFC is not obliged to proceed with (or complete or continue) the relevant installation or work and/or the supply of Services to the relevant Service Provider Premises, Reseller Premises or NBAP and shall have no liability arising from any failure to do so. In addition, the LFC will be entitled to charge the Service Provider the "Inability To Complete Request" fee whenever:
 - (i) having received a Service Request, where the LFC's representatives arrive at the relevant Service Provider Premises, Reseller Premises or NBAP to install LFC (Service Provider) Equipment at those premises, the owner, occupier or controller of the relevant Service Provider Premises, Reseller Premises or NBAP fails to consent to the actual works required for installation of the relevant LFC (Service Provider) Equipment before the commencement of those works, provided that the LFC (or its representative) will use reasonable endeavours to explore alternative installation options, where practical and only to the extent the alternative does not add installation cost or create installation delay for the LFC, with a view to obtaining such consent; or

- (ii) the LFC's representatives are denied access to, or otherwise not provided timely and safe access to the relevant Service Provider Premises, Reseller Premises or NBAP such that any construction, installation (including pre-installation design work), inspection, maintenance, replacement or relocation of the relevant LFC (Service Provider) Equipment cannot be carried out or completed.
- (d) Save as provided above in this clause 12.2, the LFC acknowledges and agrees that it is responsible for obtaining any additional authorisation, licence or consent relating to land or buildings which is used (or is to be used) by the LFC to connect LFC (Service Provider) Equipment to the rest of the LFC Network.

12.3 Access to LFC (End User) Equipment: If the supply of any Service requires any LFC (End User) Equipment to be installed on End User Premises or a NBAP then:

- (a) the LFC will be responsible for obtaining any building or land owner authorisation, licence or consent, including for access to any applicable Third Party Premises, necessary for the LFC to construct, install (including pre-installation design work), inspect, maintain, replace or relocate and own that LFC (End User) Equipment at, or remove it from, those End User Premises or NBAPs, and to connect that LFC (End User) Equipment to the rest of the LFC Network, subject to and in accordance with the following:

- (i) the Service Provider will use all reasonable endeavours to obtain and provide to the LFC contact and other information (including information that the LFC reasonably requests the Service Provider to obtain and provide because the LFC considers it necessary for the LFC to properly assess what authorisations, licences or consents are necessary, and after that to obtain those authorisations, licences or consents) about:

- (A) an End User and the End User Premises or a NBAP (including, in the case of an End User Tenancy, contact information for the relevant MDU building owner or body corporate (as applicable)); and

- (B) the broader circumstances of, or affecting, the End User and the End User Premises or a NBAP, including whether any Third Party Premises may be involved,

and the Service Provider shall use its reasonable endeavours to ensure that all such information is correct and complete at the time it is provided, provided that the Service Provider has no liability to the LFC in the event that information provided by the End User is not accurate;

- (ii) the LFC will have sole discretion as to the extent to which it uses any rights or powers available to it (including under the Telecommunications Act 2001) to obtain, maintain, or enforce such required authorisation, licence or consent; and
- (iii) any conditions which a third party seeks to impose on the giving of its authorisation, licence or consent in respect of Third Party Premises must be acceptable to the LFC (acting reasonably).

For this purpose, payment by the LFC of any rental or other fee, or an amount on account of the third party's costs or expenses, in connection with procuring or maintaining that authorisation, licence or consent shall be considered unreasonable;

- (b) where the End User is not an Exempted End User:

- (i) the Service Provider will procure that an End User, who occupies the End User Premises or NBAP (in each case whether as a tenant, licensee or otherwise) and is not the sole or joint owner of those End User Premises or NBAP, agrees to obtain the authorisation and consent of the owner(s) of the End User Premises or NBAP for the LFC to construct, install (including pre-installation design work), inspect, maintain, replace or relocate and own the LFC (End User) Equipment at, or remove it from, those End User Premises or NBAP; To avoid doubt the Service Provider's obligations under this sub-clause (b)(i) will be discharged when it has complied with its obligations under clause 10.2(c) in accordance with clauses 10.2(d) and (f);

and the Service Provider agrees that if:

- (ii) having been requested to do so by the LFC (or its representative) the End User (or its representative) fails to consent to the actual works required for installation of the relevant LFC (End User) Equipment, before the commencement of those works, provided that the LFC (or its representative) will use reasonable endeavours to explore alternative installation options, where practical and only to the extent the alternative does not add installation cost or create installation delay for the LFC, with the End User (or its representative) with a view to obtaining its consent; or
- (iii) having been requested to do so by the LFC (or its representative) the End User (or its representative) fails to confirm that the End User is bound by the LFC (End User) Terms, before the commencement of any work required to install the relevant LFC (End User) Equipment; or
- (iv) the LFC's representatives are denied access to, or otherwise not provided timely and safe access to, End User Premises or a NBAP such that any construction, installation (including pre-installation design work), inspection, maintenance, replacement or relocation of the relevant LFC (End User) Equipment cannot be carried out or completed then:
 - (A) in the case of (ii), (iii), and (iv) above, the LFC is not obliged to proceed with (or complete or continue) the relevant installation or work and/or the supply of Services to those End User Premises or NBAP; and
 - (B) subject to clause 12.3(f), in the case of (ii) and (iv) above, the LFC will be entitled to charge the Service Provider the "Inability To Complete Request" fee for each such occurrence. For the avoidance of doubt, the LFC will not be entitled to charge the "Inability To Complete Request" fee in any instance where: (a) installation of LFC (End User) Equipment has not proceeded due to the End User choosing to retain existing telecommunications services and/or telecommunications infrastructure at the End User Premises or End User Tenancy as the case may be; and (b) where it is not possible to install LFC (End User)

Equipment and retain existing telecommunications infrastructure at that End User Premises or End User Tenancy as the case may be.

- (c) in the case of an Exempted End User:
 - (i) the Service Provider (and not the Exempted End User and not the Reseller) will be liable to the LFC under this Agreement for ensuring that:
 - (A) the LFC has the right to construct, install (including pre-installation design work), inspect, maintain, replace, relocate or remove any LFC (End User) Equipment; and
 - (B) the owner of the End User Premises of the Exempted End User or a NBAP (as applicable) acknowledges (in a manner to be determined in the sole discretion of the Service Provider) that the LFC (not the owner of the End User Premises of the Exempted End User or NBAP) will own any LFC (End User) Equipment, that may at any time be installed on the End User Premises of the Exempted End User or a NBAP (as the case may be) but only to the extent such rights would have been conveyed to the LFC, or otherwise permitted, under the LFC (End User) Terms;

and the Service Provider agrees that if:

- (ii) having been requested to do so by the LFC (or its representative) the End User (or its representative) fails to consent to the actual works required for installation of the relevant LFC (End User) Equipment (including pre-installation design work), before the commencement of those works, provided that the LFC (or its representative) will use reasonable endeavours to explore alternative installation options, where practical and only to the extent the alternative does not add installation cost or create installation delay for the LFC, with the End User (or its representative) with a view to obtaining its consent; or
 - (iii) the LFC's representatives are denied access to, or otherwise not provided timely and safe access to, the End User Premises or a NBAP such that any construction, installation (including pre-installation design work), inspection, maintenance, replacement or relocation of the relevant LFC (End User) Equipment cannot be carried out or completed, then:
 - (A) the LFC is not obliged to proceed with (or complete or continue) the relevant installation or work and/or the supply of Services to those End User Premises or the NBAP (as the case may be); and
 - (B) subject to clause 12.3(f), the LFC will be entitled to charge the Service Provider the "inability to complete request" fee for each such occurrence;
- (d) in any case the Service Provider acknowledges that:
 - (i) until all required authorisations, licences or consents are obtained, the LFC is not obliged to proceed with (or complete or continue) the relevant installation or work and/or the supply of Services to the relevant End User Premises or NBAP; and
 - (ii) if the LFC has used its reasonable endeavours to obtain each required authorisation, licence and consent then the LFC shall have no liability arising from any failure to obtain them (except where the LFC elects to proceed with the relevant installation or work and/or the supply of Services to the relevant End User Premises or NBAP notwithstanding this);
- (e) where the customer of the Service Provider is a Reseller, the Service Provider must procure that the Reseller complies with this clause 12.3, as if references to "Service Provider" were to "Reseller"; and
- (f) the LFC will not be entitled to charge the "Inability To Complete Request" fee in any instance where:
 - (i) the relevant LFC work is work other than: (a) the installation (including pre-installation design work) of the relevant LFC (End User) Equipment; or (b) other LFC work required by an End User in respect of LFC (End User) Equipment which is initiated by way of a Service Request; or
 - (ii) the LFC (or its representative) has made an appointment with the End User (or its representative) for the purpose of obtaining access to the relevant End User Premises or a NBAP, and the relevant End User (or its representative) fails to provide access, or fails to provide safe access, at the time agreed between the LFC (or its representative) and the End User (or its representative).

12.4 LFC (Service Provider) Equipment: The Service Provider will, in relation to all LFC (Service Provider) Equipment installed on premises not owned or controlled by the LFC (including Service Provider Premises, Reseller Premises or a NBAP):

- (a) use its best endeavours to provide a safe and secure operating environment;
- (b) use its best endeavours to protect the LFC (Service Provider) Equipment from environmental hazards (including radio or electrical interference, power fluctuations and other abnormal environmental conditions) and ensure that the LFC (Service Provider) Equipment is not altered, repaired, serviced, removed or moved, except with the LFC's prior written consent;
- (c) use its best endeavours to ensure that the LFC (Service Provider) Equipment is not used other than in accordance with the terms of the applicable Operations Manual;
- (d) immediately notify the LFC if it becomes aware of any damage or unauthorised access to the LFC (Service Provider) Equipment or if the LFC (Service Provider) Equipment requires maintenance; and
- (e) if requested by the LFC, return the LFC (Service Provider) Equipment to the LFC when it is no longer required by the Service Provider, and take reasonable care to ensure that the LFC (Service Provider) Equipment is not damaged while being returned.

- 12.5 **Fit For Purpose:** The LFC will ensure that all LFC Equipment is safe, free from material defects and fit for the purpose of providing the applicable Wholesale Services.

13. PERSONAL PROPERTY RIGHTS

- 13.1 **Interpretation:** Terms used in this clause 13 have the meaning given in the Personal Property Securities Act 1999 (**PPSA**).
- 13.2 **No Beneficial Interest:** Acquiring a Service does not give the Service Provider any property rights or beneficial interest in any part of the LFC Network. Neither the supply of any LFC Equipment to, nor use of any LFC Equipment by, the Service Provider or any End User gives any beneficial interest in that LFC Equipment to either the Service Provider or any End User.
- 13.3 **Security Interest:** If any lease or bailment of LFC Equipment to the Service Provider or any End User constitutes a security interest for the purposes of the PPSA, the LFC may perfect its security interest by registering a financing statement in the Personal Property Securities Register. This clause 13.3 constitutes a security agreement for the purposes of the PPSA.
- 13.4 **Waiver:** The Service Provider waives its PPSA rights:
- (a) to receive a copy of any verification statement in respect of any financing statement or financing change statement registered by the LFC;
 - (b) to receive a notice that the LFC intends to sell any personal property over which a security interest is granted (Goods), or to retain the Goods on enforcement of the security interest granted to the LFC under this Agreement;
 - (c) to object to a proposal by the LFC to retain Goods in satisfaction of any obligation owed by the Service Provider to the LFC;
 - (d) to receive a statement of account on the sale of Goods;
 - (e) to redeem Goods; and
 - (f) where any Goods become installed in or affixed to other goods, to receive notice of removal of the accession and to apply to the Court for an order relating to removal of the accession.
- 13.5 **Further Assistance:** The Service Provider will provide all information and do all things reasonably required by the LFC to ensure that the LFC has a perfected security interest in the Wholesale Service and LFC Equipment under the PPSA, including by registration of a financing statement.

14. INTELLECTUAL PROPERTY RIGHTS

- 14.1 **Rights:**
- (a) All property rights (including copyright, trademarks, design and other intellectual property rights) contained in or relating to any software, equipment or other materials forming part of a Service, or otherwise provided by the LFC under a Service Order, belong to the LFC or its licensors (**LFC IP**).
 - (b) Subject to clause 10.3, neither party will use the name, trade name or logo of the other party without that party's prior written consent, except that the Service Provider may use the name, trade mark or logo of the LFC in referring to the LFC as a wholesale supplier to the Service Provider.
- 14.2 **LFC IP (excluding software):** The LFC grants to the Service Provider a non-exclusive, non-transferable licence to use, subject to clause 14.1(b), the LFC IP (excluding software) during the Term, only to the extent required to exercise its rights and perform its obligations under this Agreement or to provide services to its Resellers or End Users using a Service and for no other purpose. To the extent that a Reseller or an End User requires a right to use the LFC IP (excluding software) in order to use the services provided by the Service Provider which have the Services as an input, then the LFC grants to the Service Provider the right to sub-licence the use of the LFC IP (excluding software) to that Reseller or End User.
- 14.3 **Software:** If the LFC provides any software to the Service Provider in connection with the supply of Services:
- (a) the LFC grants a non-exclusive, non-transferable and royalty-free licence to the Service Provider to use that software during the Term for the purposes of providing telecommunications services using the Services, and such other purposes expressly contemplated by this Agreement, in accordance with this Agreement and any other terms on which the software is ordinarily licensed or that the LFC notifies to the Service Provider in writing prior to making available that Service to the Service Provider. To the extent that a Reseller or an End User requires a right to use the software in order to use the services provided by the Service Provider which have the Services as an input, then the LFC grants to the Service Provider the right to sub-licence the use of the software to that Reseller or End User;
 - (b) any applicable software licence fee is incorporated within the Core Charges such that there will be no additional cost to the Service Provider associated with its use or sub-licensing of the software;
 - (c) the Service Provider will not copy, modify or reverse assemble the software except as expressly agreed with the LFC; and
 - (d) (the Service Provider will implement any software upgrades provided by the LFC within the timeframe reasonably specified by the LFC.
- 14.4 **IP Indemnity:** The LFC will indemnify the Service Provider against any cost, damage or loss (including reasonable legal costs) suffered or incurred by the Service Provider as a direct result of any claim by a third party that the Service Provider's use or sub-licensing of any software licensed to it by the LFC, or use of Services or LFC (Service Provider) Equipment provided by the LFC, in accordance with this Agreement infringes any patent, copyright, design, trade name, trade mark, service mark or other intellectual property rights of that third party (a claim), provided that the Service Provider:
- (a) does not admit liability or settle any claim without the LFC's prior written consent; and

- (b) permits the LFC (at the LFC's cost) to defend the claim, and renders all reasonable assistance to the LFC for that purpose.

The Service Provider shall give the LFC written notice of the claim by the third party for which the indemnity is claimed under this clause 14.4 within ten (10) Business Days of becoming aware of it.

15. INFORMATION

- 15.1 **Confidential Information:** Each party will treat the arrangements contemplated by this Agreement and all information (in whatever form) of a confidential nature provided under or in connection with it (together, Confidential Information) as confidential and will not use that information or disclose it to any person except:

- (a) as required by law or by the rules of any stock exchange, provided that (where possible) the party required to disclose the information will notify the other party beforehand; or
- (b) to its employees, agents and contractors to the extent necessary to perform its obligations under this Agreement or exercise any rights under this Agreement; or
- (c) where the information is already in the public domain (but not where it is in the public domain as a result of a breach of this clause 15); or
- (d) with the other party's prior written consent.

15.2 General Disclosure:

- (a) Notwithstanding clause 15.1, the LFC may disclose the Service Provider's Confidential Information:
 - (i) to third party suppliers (including other network operators) only to the extent necessary to enable those suppliers to supply all or part of a Service;
 - (ii) to comply with its obligations under the Deed of Undertaking between the LFC and the Crown;
 - (iii) to CFH and Government agencies for reporting purposes;
 - (iv) to credit reporting organisations so that they can run credit checks on the LFC's behalf; and
 - (v) to other third parties solely on a need to know basis for the purposes of billing and credit management, planning, provisioning, operating, maintaining or reconfiguring the LFC Network, and to otherwise give effect to the purpose that the Confidential Information was provided for,

provided that LFC may not disclose the Service Provider's Confidential Information under clause 15.2(a)(i) to any service provider competitor of the Service Provider in any part of New Zealand, without the Service Provider's prior written consent.

- (b) Notwithstanding clause 15.1, either party may disclose the other party's Confidential Information to its holding company. For the purposes of this clause 15.2(b), "holding company" shall have the meaning given in section 5 of the Companies Act 1993, as if the word "company" in that section included any body corporate, wherever incorporated);
- (c) Neither party will disclose the other party's Confidential Information to any third party or a holding company pursuant to clause 15.2(b) above (other than, in respect of disclosure by the LFC, under clauses 15.2(a)(ii) and 15.2(a)(iii)) without first informing the recipient of the confidential nature of the information and requiring the recipient of that Confidential Information to comply with the terms of this clause 15.

- 15.3 **Privacy:** The LFC will not collect and hold information about Resellers and End Users, including generating information within the LFC Network when a Service is used, or provide this information to the LFC's employees, contractors, agents, suppliers and network operators except for lawful purposes connected with the LFC's business operations and in full compliance with clauses 15.1 and 15.2 and the Privacy Act 1993 (including its applicable codes).

- 15.4 **Announcements:** Neither party will issue any press release or public announcement concerning this Agreement without the other party's prior written consent. The Service Provider acknowledges that the LFC intends to publish a copy of this Agreement on its website. This clause 15 will not apply to limit that publication.

16. RECORDS

- 16.1 **Maintain Records:** The LFC will, at all times, use reasonable endeavours to maintain, store and archive up to date, accurate and complete records of all invoices, reports, Services ordered and supplied, operating processes and procedures and other records relating to its performance under this Agreement. The Service Provider will, at all times, use reasonable endeavours to maintain, store and archive up to date, accurate and complete records of all Services ordered and supplied, in accordance with normal commercial practices.

- 16.2 **Assistance:** Each party will provide any information (including copies of any records to be maintained under clause 16.1 and other assistance that the other party may reasonably require to perform its obligations under this Agreement, and ensure that all such information provided to the other party is correct and complete.

17. INDEMNITIES

- 17.1 **Common Indemnity:** Each party (the indemnifying party) will indemnify the other party against any cost, damage or loss suffered or incurred by the other party under or in connection with this Agreement as a result of any:

- (a) unlawful or malicious act or omission of the indemnifying party;
- (b) fraud or wilful default of the indemnifying party;

- (c) personal injury or death caused by a negligent act or omission of the indemnifying party; or
- (d) breach by the indemnifying party of clauses 15.1 and 15.3.

17.2 LFC Indemnity:

- (a) The LFC will, subject to clauses 17.2(b) and 18.2, indemnify the Service Provider (including its personnel, contractors, agents and representatives) against any loss of, or damage to, tangible property (to the extent only of the Service Provider's loss, including arising from any third party claims) arising as a direct result of:
 - (i) the LFC's breach of clause 3.5; or
 - (ii) any wilful or negligent act or omission of the LFC or any contractor or agent of the LFC in providing the Service including in their construction, installation, inspection, maintenance, replacement or removal of any LFC Equipment in the premises of the Service Provider and any third party (including an End User).
- (b) Subject to clause 18.2, the aggregate liability of the LFC for all costs, damages and losses arising under or in connection with this clause 17.2 is limited to:
 - (i) for all acts or omissions giving rise to any loss or damage relating to any of the Bitstream Services (or any additional or replacement Service within the same Wholesale Service Category), a maximum of \$2,000,000 for each of the Bitstream Services;
 - (ii) for all acts or omissions giving rise to any loss or damage relating to any of the Fibre Access Services (or any additional or replacement Service within the same Wholesale Service Category), a maximum of \$2,000,000 for each of the Fibre Access Services; and
 - (iii) for all acts or omissions giving rise to any loss or damage relating to the Central Office and POI Co-location Service (or any additional or replacement Service within the same Wholesale Service Category), a maximum of \$20,000,000,

and the aggregate liability of the LFC for all costs, damages and losses arising under or in connection with this clause 17.2 shall not exceed a maximum of \$20,000,000.

17.3 Service Provider Indemnity:

- (a) The Service Provider will, subject to clauses 17.3(b) and (c) and 18.2, indemnify the LFC (including its personnel, contractors, agents and representatives) against:
 - (i) any loss of, or damage to, tangible property (but to the extent only of the LFC's loss, including arising from any third party claims) arising as a direct result of any wilful or negligent act or omission of the Service Provider, Reseller or any contractor or agent of the Service Provider or Reseller in the Service Provider's or Reseller's (or their respective contractor's or agent's):
 - (A) construction, installation, inspection, maintenance, replacement or removal of any Service Provider or Reseller equipment in the LFC's premises or the premises of any third party; or
 - (B) use of any LFC (Service Provider) Equipment installed on premises not owned or controlled by the LFC; or
 - (ii) any claim by any Reseller or End User relating solely and directly to any services which incorporate a Service, except where:
 - (A) that claim is a direct result of any breach of this Agreement by the LFC or any unlawful, wilful or negligent act or omission of the LFC or any contractor or agent of the LFC; or
 - (B) the Service Provider has discharged its obligations under clause 10.2(c) in accordance with clauses 10.2(d) and (f) provided that this sub-clause (B) shall not apply in the case of any Exempted End User; or
 - (iii) any loss of, damage to, or interference with, LFC (End User) Equipment caused by the End User (including interference with the LFC's right to construct, install, inspect, maintain, replace, own or remove any LFC (End User) Equipment) that may at any time be installed on End User Premises or a NBAP, but only where (in any such case) the End User is an Exempted End User or the Service Provider has not discharged its obligations under clause 10.2(c) in accordance with clauses 10.2(d) and (f).
- (b) Subject to clause 18.2, the aggregate liability of the Service Provider for all costs, damages and losses arising under or in connection with clauses 17.3(a)(i) and (ii) is limited to:
 - (i) for all acts or omissions giving rise to any loss or damage relating to any of the Bitstream Services (or any additional or replacement Service within the same Wholesale Service Category), a maximum of \$2,000,000 for each of the Bitstream Services;
 - (ii) for all acts or omissions giving rise to any loss or damage relating to any of the Fibre Access Services (or any additional or replacement Service within the same Wholesale Service Category), a maximum of \$2,000,000 for each of the Fibre Access Services; and
 - (iii) for all acts or omissions giving rise to any loss or damage relating to the Central Office and POI Co-location Service (or any additional or replacement Service within the same Wholesale Service Category), a maximum of \$20,000,000,

and the aggregate liability of the Service Provider for all costs, damages and losses arising under or in connection with clause 17.3(a)(i) and (ii) shall not exceed a maximum of \$20,000,000.

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- (c) Subject to clause 18.2, the aggregate liability of the Service Provider for all loss, damage or interference arising under or in connection with clause 17.3(a)(iii) is limited to \$20,000,000.
- (d) The Service Provider shall not be liable under clause 17.3(a)(iii) in respect of an End User who, at the time of the loss, damage or interference that would otherwise give rise to liability under clause 17.3(a)(iii), has ceased to be a customer of the Service Provider.
- 17.4 **Parties to Mitigate:** Each party will take reasonable steps to mitigate any loss incurred as a result of any act or omission by the other party (whether or not claimable under an indemnity).
- 17.5 **Contribution:** The obligations to indemnify set out in clauses 17.1 to 17.3 (inclusive) will not apply to the extent that the other party directly contributes to the applicable cost, damage or loss.
- 17.6 **Conduct of Claims:** If either party (referred to in this clause as the indemnified party) becomes aware of a matter that may give rise to a claim under clauses 17.1, 17.2 or 17.3 against the other party (referred to in this clause as the indemnifying party) then the indemnified party must give the indemnifying party written notice of the claim within twenty (20) Business Days of becoming aware of it. The indemnifying party will have no liability under clauses 17.1, 17.2 or 17.3:
- (a) if the indemnified party admits liability or settles any claim without the indemnifying party's prior written consent, such consent not to be unreasonably withheld; or
- (b) unless the indemnified party permits the indemnifying party (at the indemnifying party's cost) to defend the claim, and renders all reasonable assistance to the indemnifying party for that purpose.
- 17.7 **Related Indemnity Claims:** Where an act or omission giving rise to loss or damage under clauses 17.2(a) or 17.3(a)(i) or (ii) (as the case may be) is attributable to more than one Service in more than one Wholesale Service Category, such act or omission will be deemed subject to the greatest of the liability caps applicable to those Services.
18. **LIABILITY**
- 18.1 **Maximum Liability:**
- (a) The aggregate liability of the LFC to the Service Provider for all costs, damages and losses arising under or in connection with this Agreement during any 12 month period is limited to the lesser of:
- (i) the aggregate value of the Charges paid and payable by the Service Provider during that period; and
- (ii) \$500,000.
- (b) The aggregate liability of the Service Provider to the LFC for all costs, damages and losses arising under or in connection with this Agreement during any 12 month period is limited to the lesser of:
- (i) the aggregate value of the Charges paid and payable by the Service Provider during that period; and
- (ii) \$500,000.
- (c) Clauses 18.1(a) and 18.1(b) will not limit the liability of:
- (i) each party for fraud;
- (ii) the Service Provider to pay the Charges; and
- (iii) each party under the clause 17.1 indemnity, the LFC under the clauses 14.4 and 17.2 indemnities, and the Service Provider under the clause 17.3 indemnity.
- 18.2 **Exclusions:** Neither party has any liability to the other in contract, tort (including negligence), equity, under statute or otherwise for any economic loss, loss of data, loss of revenue, loss of anticipated profit or savings, or for any indirect or consequential loss or damage, however caused.
- 18.3 **No Other Warranties:** All representations and warranties not expressly set out in this Agreement, whether implied by law or based on any oral or written representations not expressed in this Agreement or otherwise, are excluded to the maximum extent permitted by law.
- 18.4 **Consumer Guarantees Act:** The Service Provider:
- (a) acknowledges that it is acquiring the Services for the purposes of a business and that the Consumer Guarantees Act 1993 does not apply; and
- (b) will, to the maximum extent permitted by law, exclude the application of the Consumer Guarantees Act 1993 from all agreements between the Service Provider and its Resellers and End Users that in any way relate to the Services.
- 18.5 **No Liability to Third Parties:**
- (a) Neither the LFC nor any third party engaged by the LFC (including their officers, employees, contractors and agents) (each an interested party) confers any benefit, right or privilege on any person other than the Service Provider under this Agreement.
- (b) No interested party (other than the LFC), will be liable to the Service Provider for loss or damage of any kind solely by virtue of the supply of Services under this Agreement.
- (c) For the purposes of the Contracts (Privity) Act 1982, clauses 18.5(a) and (b) confer a benefit upon each interested party.

18.6 **Service Provider Insurance:**

During the Term, and for a period of two years following the effective date of termination, the Service Provider will, at its own expense, ensure that it maintains adequate insurance (including cover for, without limitation, public liability, property damage and business interruption) in respect of its potential liability for loss or damage arising under or in connection with this Agreement, including:

- (a) for a sum insured of not less than \$2,000,000 in respect of the relevant liability amounts set out in clauses 17.3(b)(i) and (ii) for any claim or series of claims arising out of one event; and
- (b) (for a sum insured of not less than \$20,000,000 in respect of the relevant liability amount set out in clause 17.3(b)(iii) for any claim or series of claims arising out of one event.

The Service Provider will, at the LFC's request, promptly provide such evidence as the LFC may reasonably require (including a copy of each insurance policy and certificate of currency) to demonstrate that the Service Provider has complied with clause 18.6(a) and (if applicable) clause 18.6(b).

18.7 **LFC Insurance:**

- (a) During the Term, and for a period of two years following the effective date of termination, the LFC will, at its own expense, ensure that it maintains adequate insurance in respect of its potential liability for loss or damage under this Agreement, including public liability insurance for a sum of not less than \$20,000,000 for any claim or series of claims arising out of one event.
- (b) The LFC will, at the Service Provider's request, promptly provide such evidence as the Service Provider may reasonably require (including a copy of each insurance policy and certificate of currency) to demonstrate that the LFC has complied with clause 18.7(a).

19. **FORCE MAJEURE**

19.1 **Obligations Suspended:** Neither party will be liable to the other party for any failure to perform its obligations under this Agreement (other than the Service Provider's obligation to pay the Charges for Services already provided) during the time and to the extent that such performance is prevented by reason of a Force Majeure Event.

19.2 **Required Actions:** The party affected by the Force Majeure Event will notify the other party as soon as practicable after the Force Majeure Event occurs and use reasonable endeavours to:

- (a) provide information regarding the extent of its inability to perform and an estimate of the time required to overcome the Force Majeure Event;
- (b) remedy or mitigate the effect of the Force Majeure Event;
- (c) complete its obligations under this Agreement to the greatest extent practicable, as quickly as is practicable, with regard to the nature and effect of the Force Majeure Event; and
- (d) upon cessation of the effects of a Force Majeure Event, give notice to the other party of such cessation as quickly as practicable.

19.3 **Charges:** The Service Provider will not be required to pay any Charges for a Service to the extent that the Service is not provided due to a Force Majeure Event.

20. **DISPUTE RESOLUTION**

20.1 **Compliance:** If any dispute arises out of this Agreement, neither party will commence proceedings relating to the dispute unless that party has first complied with this clause 20. The parties will continue to comply with their obligations under this Agreement during the dispute resolution process.

20.2 **Notice of Dispute:** The party claiming a dispute has arisen will give notice to the other party setting out full particulars of the dispute. The parties will use all reasonable endeavours to resolve the dispute by discussion, negotiation or other informal means, including by escalation to the Chief Executive of each party if the dispute is not resolved within the period of ten (10) Business Days following the date of the notice of dispute.

20.3 **Mediation:** If the parties do not resolve the dispute within twenty (20) Business Days of the date of the clause 20.2 notice (or any longer period agreed in writing) then the parties may agree to refer the dispute to mediation by a single mediator. The mediator, and location of the mediation, will be appointed by the chairperson of LEADR New Zealand Inc., or the nominee of that chairperson. The dispute will be mediated in accordance with the standard mediation agreement of the New Zealand chapter of LEADR.

20.4 **Expert Decision:** Where the parties must in accordance with this Agreement, or have agreed in writing to, refer a dispute to expert decision (Expert Referral Agreement), the following provisions will apply:

- (a) the expert will be appointed by agreement between the parties. However, if the parties cannot agree on the expert within five (5) Business Days of the Expert Referral Agreement, then an appropriately qualified and experienced expert will be appointed at the written request of either party by the Chair of the Telecommunications Carriers' Forum. The party making this request will use, and where possible ensure that the Chair of the Telecommunications Carriers' Forum uses, best endeavours to ensure that the appointment of the expert occurs no later than fifteen (15) Business Days from the date of the Expert Referral Agreement. The party making this request must copy the request to the other party;
- (b) to be eligible for appointment, the expert must be independent and impartial, experienced in the relevant area of telecommunications and will preferably be experienced in dispute resolution procedures. Unless the parties agree otherwise, he or she must not have performed any duties, whether as an employee, consultant or contractor, for any of the

parties or any related company (as defined in section 2(3) of the Companies Act 1993) during a 12 month period prior to the date the dispute notice was given;

- (c) the expert may seek independent legal advice regarding the appropriate procedures for resolution of the dispute;
- (d) the expert must adopt a procedure which, in the expert's opinion, is the most simple and expeditious procedure practicable in the circumstances;
- (e) the parties will provide the expert with any information that the expert reasonably requires in a timely manner. The expert is entitled to make a decision in the absence of the information requested being provided, but subject to a reasonable time being given to the relevant party to provide that information;
- (f) the expert will act as an expert and not as an Arbitrator under the Arbitration Act 1996. The expert will be entitled to rely on the expert's own judgement and opinion;
- (g) the expert will provide the parties with a draft decision for comment prior to finalising it. The expert must provide the parties with a reasonable period in which to comment on the draft decision and must take any comments received during that period into account in finalising a decision;
- (h) the expert must provide a decision (which must include reasons for that decision) to the parties in writing as soon as reasonably practicable and, in the absence of manifest error or bad faith, that decision will be final and binding upon the parties. Either party has ten (10) Business Days from the date the decision is provided to assert that the expert's decision contains a manifest error or the expert has acted in bad faith;
- (i) the expert must use all reasonable endeavours to reach a final decision within forty (40) Business Days after appointment, and the parties must co-operate reasonably with the expert to achieve that timetable;
- (j) except as set out in clause 20.4(k), the costs of the expert will be borne equally by the parties. Each party will bear its own costs in relation to the expert's decision; and
- (k) where a party has asserted that the expert's decision contains a manifest error or the expert has acted in bad faith, and such assertion is not upheld in that party's favour by the relevant court or other authority, then the party making the assertion will bear the costs (that is, all court or other authority costs) of both parties.

20.5 **Arbitration:** If the parties do not resolve the dispute within twenty (20) Business Days of the date of the clause 20.2 notice (or any longer period agreed in writing) then (except where the dispute has been referred to expert decision under clause 20.4) either party may refer the dispute to arbitration, in accordance with the current protocol of the Arbitrators' and Mediators' Institute of New Zealand Inc. (**AMINZ**). The arbitration will be conducted by a single arbitrator appointed by the president of AMINZ, as soon as possible at Auckland in accordance with the provisions of the Arbitration Act 1996. The award of the arbitrator will be an award with reasons and the reasons will form part of the award. The award of the arbitrator will be final and binding on the parties and, to the extent that it is lawful to do so, the parties waive any right of appeal or review.

20.6 **Costs:** The parties will bear their own costs and an equal share of the expenses of the mediation or the arbitration unless, in the context of an arbitration, the arbitrator determines that a party will bear some proportion or all of the costs of the other party.

20.7 **Urgent Relief:** Nothing in this clause 20 prevents either party from seeking urgent injunctive or interlocutory relief.

21. SUSPENSION OF SERVICES

21.1 **Suspension:** The LFC may, subject to clause 21.2, immediately and without liability suspend or restrict any or all of the Services at any time:

- (a) in response to an Emergency; or
- (b) if the Service Provider has committed a material and irremediable breach of this Agreement, or a material remediable breach that is not remedied in accordance with clause 22.1(b); or
- (c) if the LFC reasonably suspects fraud or any other illegal activity by the Service Provider (or its employees, agents or contractors) in connection with any Service; or
- (d) if an insolvency event (defined in clause 22.1(d)) occurs in relation to the Service Provider; or
- (e) if the Service Provider fails to maintain compliance with the Security Requirements.

21.2 **Proportionate Response:** The LFC may only exercise its rights under clause 21.1 to suspend or restrict a Service to the extent, and for the period of time, that such suspension or restriction is reasonably necessary.

21.3 **Notice:** The LFC will provide as much prior notice of the suspension as is possible in the circumstances or, if no prior notice is possible, will notify the Service Provider as soon as possible after the suspension commences.

21.4 **Recommendation:** The LFC will recommence providing a suspended Service as soon as reasonably possible in the circumstances after it decides, in its sole discretion (but acting reasonably), that the reason for the suspension has ceased.

21.5 **Continued Payment:** If any Services are suspended or restricted in accordance with clause 21.1, the Service Provider will not pay the Charges for the Services that have been suspended and will continue to pay the Charges for the Services that have not been suspended.

22. TERMINATION

22.1 **Immediate Termination:** Either party (the terminating party) may terminate this Agreement or any Service Order at any time by giving the other party notice in writing if:

- (a) the other party commits a material breach of this Agreement that is not capable of being remedied; or
- (b) the other party commits a material breach of this Agreement that is capable of being remedied, but that is not rectified within twenty (20) Business Days of that party receiving written notice of the material breach from the terminating party; or
- (c) a Force Majeure Event substantially prevents, hinders or delays the other party from performing its obligations under this Agreement for sixty (60) consecutive days; or
- (d) an insolvency event occurs in relation to the other party, being:
 - (i) the presentation of an application for its liquidation that is not discharged within thirty (30) days of filing or demonstrated to the terminating party to be frivolous or vexatious before the expiry of that thirty (30) day period; or
 - (ii) any step taken in or toward the making of any compromise, proposal or deed of arrangement with all or some of its creditors; or
 - (iii) the appointment of a liquidator, receiver, statutory manager, or similar official, to that party; or
 - (iv) the suspension or threatened suspension of the payment of its debts; or
 - (v) cessation of a whole or any relevant part of its business in New Zealand; or
 - (vi) the enforcement of any security against the whole or a substantial part of its assets; or
 - (vii) any analogous insolvency event or proceedings.

22.2 **Minor Breaches:** For the purpose of clauses 22.1(a) and 22.1(b), repeated breaches of the same obligation or a series of minor breaches of different obligations which taken together have a material impact on a party may constitute a material breach of this Agreement.

22.3 **Termination of this Agreement by Notice:**

- (a) Subject to clause 22.3(b), the LFC may terminate this Agreement by 12 months' notice to the Service Provider, but if it does so any Service Order with a Minimum Service Term that has not yet expired will continue until the expiry of that Minimum Service Term (subject to the Service Provider's continued payment of the Charges).
- (b) The LFC may not issue a notice to terminate this Agreement pursuant to clause 22.3(a) before 1 January 2020.
- (c) The Service Provider may terminate this Agreement at any time by sixty (60) days' notice to the LFC, but if it does so during the Minimum Service Term of any then-current Service Order the LFC may require the Service Provider to pay the early termination charges (if any) set out in the Service List.

22.4 **Ending a Service Order:**

- (a) If the LFC has given notice to the Service Provider in accordance with clause 5.2 ending the supply of a Wholesale Service and associated Ancillary Services, the Service Order governing the supply of that Wholesale Service and associated Ancillary Services will, subject to clause 5.2 and unless the parties agree otherwise, end on the date specified in the LFC's notice.
- (b) The Service Provider may terminate a Service Order at any time, by twenty (20) Business Days' notice to the LFC given in accordance with clause 4.3, but if it does so during the applicable Minimum Service Term the LFC may require the Service Provider to pay the early termination charges (if any) set out in the Service List. No such early termination charges shall be payable where a Service Order is terminated by the LFC pursuant to clause 5.2 or by the Service Provider pursuant to clauses 22.1 or 24.6(d)(ii).

22.5 **No New Service Requests:** The LFC may, in its sole discretion and by notice to the Service Provider:

- (a) if the LFC has the right to terminate this Agreement, instead cease to accept any Service Request; or
- (b) if the LFC has the right to terminate a Service Order, instead cease to accept any Service Request related to that Service Order.

23. **CONSEQUENCES OF TERMINATION**

23.1 **Disconnection:**

- (a) If any Service Order is terminated, or comes to an end, in accordance with clause 22.4:
 - (i) the LFC will, subject to clause 5.2, cease to fulfil that Service Order;
 - (ii) to the extent that the Service Provider's connection to the LFC Network at an Interconnection Point is only relevant to the Wholesale Service that is the subject of that Service Order:
 - (A) the LFC will disconnect the Service Provider from the LFC Network at that Interconnection Point; and
 - (B) the Service Provider will promptly remove the Service Provider's equipment from that Interconnection Point; and
 - (iii) each party will immediately return to the other party any information, or other item, which is related to the Wholesale Service that is the subject of that Service Order (but not to any continuing Wholesale Service), which is in its possession and that belongs to the other party.

- (b) If this Agreement is terminated:
- (i) the LFC will, subject to clause 22.3(a) cease to fulfil, and terminate, all Service Orders and disconnect the Service Provider from the LFC Network at each Interconnection Point, so that the Service Provider is no longer able to receive the Wholesale Services;
 - (ii) the Service Provider will promptly remove the Service Provider's equipment from each Interconnection Point and any other location within the possession or control of the LFC;
 - (iii) each party will immediately return to the other party any information or other item that is in its possession and that belongs to the other party; and
 - (iv) the LFC will return any Security to the Service Provider in accordance with clause 8.2(c).

23.2 **Charges for early termination of a Service Order:** If the Service Provider terminates a Service Order under clause 22.3(c) or clause 22.4(b) during the Minimum Service Term, or if the LFC terminates a Service Order under clause 22.1(a), (b) or (d), then the LFC may require the Service Provider to pay the early termination charges (if any) set out in the Service List. To avoid doubt, no early termination charges will be payable in the event of termination of a Service Order by the LFC or the Service Provider under clause 22.1(c).

23.3 **Survival:** Termination and early termination charges will be without prejudice to any rights or obligations either party may have under this Agreement. Termination does not affect any rights or responsibilities under this Agreement that are intended to survive termination, including clauses 1 (Construction), 7 (Payment), 8 (Security Requirements), 14.4 (IP Indemnity), 15 (Information), 16 (Records), 17 (Indemnities), 18 (Liability), 20 (Dispute resolution), 23 (Consequences of termination) and 26 (General).

24. CHANGES

24.1 Agreement Changes:

- (a) If the LFC wishes to propose an Agreement Change, being:
- (i) a change to an Operations Manual (but not a change to an Operations Manual to add a new Service template for an existing Service), if that change is likely to result in a significant change to the Service Provider's procedures, facilities or systems or any additional material costs being incurred by the Service Provider;
 - (ii) a non-trivial change to the General Terms, the Price List (but not an Ancillary Price Change, a Core Price Change or any addition of new Services or new Service templates for existing Services to the Price List), a Service Description (but not the addition of a new Service template to a Service Description), any Service Level Terms or a Service Order,

it will notify the Service Provider of such proposal and comply with the requirements of clauses 24.7 and 25 with respect to consulting and obtaining the Change Management Forum's prior approval of the proposed Agreement Change, in each case prior to making any such Agreement Change. If the LFC considers (acting reasonably) that the Agreement Change is only relevant to the Service Provider and not Other Service Providers (a **Bilateral Agreement Change**), the LFC may choose to negotiate that change directly with the Service Provider and, if the LFC and the Service Provider (each acting in their sole discretion) agree to the proposed Bilateral Agreement Change, but subject also to approval by CFH, implement the proposed Bilateral Agreement Change with the Service Provider without first having to comply with the requirements of clauses 24.7 and 25.

- (b) If the Service Provider wishes to propose an Agreement Change, being:
- (i) a change to an Operations Manual (but not a change to an Operations Manual to add a new Service template for an existing Service), if that change is likely to result in a significant change to the LFC's procedures, facilities or systems or any additional material costs being incurred by the LFC; or
 - (ii) a non-trivial change to the General Terms, the Price List (but not an Ancillary Price Change, a Core Price Change or any addition of new Services or new Service templates for existing Services to the Price List), a Service Description (but not the addition of a new Service template to a Service Description), any Service Level Terms or a Service Order,

it will notify the LFC of such proposal. If the LFC considers (acting reasonably) that the Agreement Change proposed by the Service Provider is not a Bilateral Agreement Change and therefore relevant to one or more Other Service Providers, the LFC will comply with the requirements of clauses 24.7 and 25 with respect to consulting and obtaining the Change Management Forum's prior approval of the proposed Agreement Change, in each case prior to making any such Agreement Change. If the LFC considers (acting reasonably) that the Agreement Change proposed by the Service Provider is a Bilateral Agreement Change, the LFC may choose to negotiate that change directly with the Service Provider and, if the LFC and the Service Provider (each acting in their sole discretion) agree to the proposed Bilateral Agreement Change, but subject also to approval by CFH, implement the proposed Bilateral Agreement Change with the Service Provider without first having to comply with the requirements of clauses 24.7 and 25.

- (c) For the purposes of clauses 24.1(a)(ii) and 24.1(b)(ii), a "non-trivial change" includes a change that is likely to:
- (i) materially alter the LFC's or the Service Provider's rights or obligations under this Agreement;
 - (ii) impose material additional costs on the Service Provider or the LFC (including if the change is likely to result in a significant change to the Service Provider's or the LFC's procedures, facilities or systems); or
 - (iii) materially alter the Services being provided to the Service Provider.

If the Service Provider (acting reasonably) disagrees with the LFC's assessment of what is a "non-trivial" change it may require the LFC to undertake consultation with the Change Management Forum in accordance with clause 24.7 to

determine whether or not the proposed Agreement Change is a “non-trivial change”. In the event of continuing disagreement between the LFC and the Service Provider and any Other Service Providers after such consultation, the question will be finally determined by way of a vote of the Change Management Forum in accordance with clause 25.3, provided that (notwithstanding clause 25.3(b)(iii)) such vote shall require an affirmative majority vote of not less than 75% of the voting participants at the Change Management Forum (and for clarity the LFC’s vote shall be treated the same as the vote of any voting service provider member).

- (d) Subject to sub-clause (e) below, after:
- (i) complying with its obligations under clauses 24.7 and 25 with respect to completing consultation on the proposed Agreement Change and obtaining approval for the Agreement Change from the Change Management Forum, if required under clauses 24.1(a) or 24.1(b); and
 - (ii) the Agreement Change has been approved by CFH, the LFC:
 - (A) may implement that Agreement Change if proposed by the LFC; and
 - (B) must implement that Agreement Change if it has been proposed by the Service Provider,
- in each case by giving the Service Provider at least sixty (60) Business Days’ prior notice of implementation.
- (e) In the case of any Agreement Change, if either the LFC or the Service Provider requires additional time to make any consequent change to its procedures, facilities or systems (the Requesting Party) it will notify the other party. The time for those consequent changes will, to the extent required by the Requesting Party, be extended:
- (i) automatically, for up to forty (40) Business Days; or
 - (ii) such other period as agreed by the LFC and the Service Provider.

24.2 Required Changes:

- (a) The LFC may propose a Required Change by notice to the Service Provider, being a change to:
- (i) the General Terms, a Service Description, the Price List, any Service Level Terms, an Operations Manual or a Service Order for the purpose of giving effect to any change required by law or any change that the LFC considers (acting reasonably) necessary to give effect to any regulatory change (including any determination, direction or decision by a regulatory authority, or the introduction of any regulations, standard terms determination or undertaking);
 - (ii) the General Terms, a Service Description, the Price List, any Service Level Terms, an Operations Manual or a Service Order for the purpose of complying with any non-discrimination obligations owed by the LFC to the Crown, provided that the LFC must not make a change to the General Terms, a Service Description, the Price List, any Service Level Terms, an Operations Manual or a Service Order pursuant to this clause 24.2(a)(ii) where that change:
 - (A) will result in the terms of the General Terms, a Service Description, the Price List, any Service Level Terms, an Operations Manual or a Service Order being less favourable to the Service Provider; and
 - (B) is being made to make the General Terms, a Service Description, the Price List, any Service Level Terms, an Operations Manual or a Service Order consistent with the terms of a Wholesale Services Agreement between the LFC and any Other Service Provider which was entered into by the LFC after the Effective Date of this Agreement; or
 - (iii) a Service Description, any Service Level Terms, an Operations Manual or a Service Order, the technology used to provide a Service or the LFC Equipment, in each case for the purpose of responding to the discovery of a systemic defect in the LFC Network, the LFC Equipment or any associated LFC support systems, which in each such case will or is reasonably likely to materially affect the Services,

and subject to clause 24.2(c) below, the LFC will comply with the requirements of clause 24.7 with respect to consulting with the Change Management Forum prior to making any such Required Change.

- (b) After the Required Change has been approved by CFH the LFC may:
- (i) for a Required Change described in clauses 24.2(a)(i) or 24.2(a)(ii), implement that change by giving the Service Provider at least twenty (20) Business Days’ prior notice of implementation; and
 - (ii) for a Required Change described in clause 24.2(a)(iii), implement that change by giving the Service Provider at least sixty (60) Business Days’ prior notice of implementation,
- provided that if the Service Provider requires additional time to make any consequent change to its procedures, facilities or systems it will notify the LFC. The time for those consequent changes will, to the extent required by the Service Provider, be extended:
- (iii) automatically, for up to twenty (20) Business Days; and
 - (iv) at the discretion of the LFC, acting reasonably and in good faith, for a further twenty (20) Business Days or such other period as agreed by the LFC and the Service Provider.
- (c) If the LFC considers (acting reasonably) that the Required Change is urgent:
- (i) it will submit the Required Change for approval by CFH at the same time the Required Change is submitted for consultation in accordance with clause 24.7;

- (ii) it may, subject to approval by CFH, implement the Required Change: (A) by not less than twenty (20) Business Days' prior notice to the Service Provider; and (B) before completing consultation in accordance with clause 24.7, provided the LFC will continue consultation until the clause 24.7 process is completed; and
- (iii) it will promptly implement, in accordance with clause 24.2(b), any subsequent amendment to the Required Change approved by CFH in accordance with clause 24.7.

24.3 Changes to Core Charges:

- (a) The LFC may propose a change to, or addition, deletion or replacement of, a Core Charge (**Core Price Change**) by notice to the Service Provider (provided that the Core Charges may not in any case prior to 31 December 2019 exceed the Price Caps), in which case the LFC must complete consultation in accordance with clause 24.7. To avoid doubt, changes to the Core Charges do not require the approval of CFH where it is a change to an existing Core Charge and that Core Charge remains under the relevant Price Cap.
- (b) After completing consultation in accordance with clause 24.7, the LFC may implement the Core Price Change by giving the Service Provider at least sixty (60) Business Days' prior notice of the Core Price Change.
- (c) A Core Price Change will not apply to a Service Order before the expiry of the applicable Minimum Service Term unless it is a Required Change proposed in accordance with clause 24.2. If, pursuant to clause 24.2, a Core Price Change is a Required Change the LFC may apply the Core Price Change to a Service Order before the expiry of the applicable Minimum Service Term, provided that if the applied Core Price Change results in an increase to the Core Charge:
 - (i) the Service Provider may terminate the Service Order by not less than twenty (20) Business Days' prior notice to the LFC given in accordance with clause 4.3; and
 - (ii) no early termination charges will be payable by the Service Provider in relation to that early termination.
- (d) The LFC will not increase an individual Core Charge more than once in any 12 month period.

24.4 Changes to Ancillary Charges: In addition to any changes to the Ancillary Charges made in accordance with the Price List and without limiting the LFC's rights to change Ancillary Charges in accordance with the Price List:

- (a) the LFC may propose a change to, or addition, deletion or replacement of, an Ancillary Charge (**Ancillary Price Non Price List Change**) by notice to the Service Provider (provided that the Ancillary Charges may not in any case prior to 31 December 2019 exceed the Price Caps), in which case the LFC must complete consultation in accordance with clause 24.7. To avoid doubt, changes to the Ancillary Charges do not require the approval of CFH where it is a change to an existing Ancillary Charge and the Ancillary Charge remains under the relevant Price Cap. After completing consultation with the Change Management Forum in accordance with clause 24.7, the LFC may implement the Ancillary Price Non Price List Change by giving the Service Provider at least 60 Business Days' prior notice of the Ancillary Price Non Price List Change; and
- (b) an Ancillary Price Non Price List Change will not apply to a Service Order before the expiry of the applicable Minimum Service Term unless it is a Required Change proposed in accordance with clause 24.2. If, pursuant to clause 24.2, an Ancillary Price Non Price List Change is a Required Change the LFC may apply the Ancillary Price Non Price List Change to a Service Order before the expiry of the applicable Minimum Service Term provided that if the applied Ancillary Price Non Price List Change results in an increase to the Ancillary Charge: the Service Provider may terminate the Service Order by not less than 20 Business Days' prior notice to the LFC given in accordance with clause 4.3; and no early termination charges will be payable by the Service Provider in relation to that early termination.

24.5 Price Cap Changes:

- (a) Prior to 31 December 2019, if the LFC is considering proposing to CFH that there should be an increase in a Price Cap for a Base Wholesale Service (other than the Central Office and POI Co-location Service), it must first complete consultation in accordance with clause 24.7 and obtain approval of the Change Management Forum in accordance with clause 25.3 before submitting its proposal (**Price Cap Proposal**) to CFH for its approval.
- (b) The LFC will promptly notify the Service Provider if it submits a Price Cap Proposal to CFH for approval (and in any event will so do within five (5) Business Days of making a submission).
- (c) The parties acknowledge that if CFH agrees to change a Price Cap in accordance with a Price Cap Proposal, CFH will update the Price Caps on its website, but such change will not take effect for 12 months following the date of CFH's approval.

24.6 Changes to Technology or LFC Equipment:

- (a) Subject to clause 24.2(a)(iii), the LFC may propose, by notice to the Service Provider:
 - (i) a change to the technology used to provide a Service (a **Technology Change**); or
 - (ii) without limiting its obligation to meet the Core Service Levels, any modification or substitution of any of the LFC Equipment provided that the LFC continues to meet the specifications for a Service as set out in the applicable Service Description (an **LFC Equipment Change**).
- (b) Without prejudice to the LFC's rights under clause 24.2(a)(iii), where a proposed Technology Change or LFC Equipment Change is in the reasonable opinion of the LFC likely to affect or impact upon the Service Provider, the LFC must consult in accordance with clause 24.7 for no less than ninety (90) days following the date of any notice given under clause 24.6(a).
- (c) Without prejudice to the LFC's rights under clause 24.2(a)(iii), following completion of consultation in accordance with clause 24.6(b) and clause 24.7, the LFC may implement the Technology Change or LFC Equipment Change:

- (i) for a minor change, by giving the Service Provider at least 3 months' notice of implementation; or
- (ii) for a major change, by giving the Service Provider at least 12 months' notice of implementation.

Whether a Technology Change or LFC Equipment Change is a "minor" or "major" change shall be determined by an affirmative majority vote of service provider members in attendance at the final Change Management Forum meeting relating to consultation on the Technology Change or LFC Equipment Change.

- (d) For any Technology Change or LFC Equipment Change:
 - (i) the LFC will provide all reasonable assistance to the Service Provider to migrate to the new technology or LFC Equipment to be used to provide the Services; and
 - (ii) if the Service Provider (acting reasonably) considers that the Technology Change or LFC Equipment Change proposed by the LFC is likely to result in a significant change to the Service Provider's procedures, facilities or systems or impose any additional material costs on the Service Provider, the Service Provider may terminate any affected Service Order prior to the relevant change being made operational by the LFC. For the avoidance of doubt, clause 22.4(b) shall apply to such termination.
- (e) In making any LFC Equipment Change, the LFC will:
 - (i) ensure that any such modified or substituted LFC Equipment is fully compatible with the LFC Network and the current Service Descriptions; and
 - (ii) use reasonable efforts to ensure that any such modified or substituted LFC Equipment is fully compatible with all other equipment, software and technology that the LFC Equipment interoperates with.

24.7 Change Consultation and Change Management Forum Approval:

- (a) If the LFC wishes to make:
 - (i) an Agreement Change proposed by either the LFC or the Service Provider (including a Wholesale Service withdrawal in accordance with clause 5.2(a)), that is not a Bilateral Agreement Change;
 - (ii) a Required Change;
 - (iii) a Core Price Change;
 - (iv) an Ancillary Price Non Price List Change;
 - (v) a change to an Interconnection Point in accordance with clause 3.1 (but not a change from a Temporary Interconnection Point to a permanent Interconnection Point under clause 3.2)
 - (vi) a Price Cap Proposal;
 - (vii) a Technology Change;
 - (viii) an LFC Equipment Change; or
 - (ix) any other type of change to this Agreement that this Agreement requires be referred to the Change Management Forum,

(each a **Proposed Change**), the LFC must submit that Proposed Change to the Change Management Forum for consultation in accordance with clause 25. A Bilateral Agreement Change is not a Proposed Change.

- (b) The LFC must consult in good faith with the Service Provider and all Other Service Providers (each an **Affected Party**) on each Proposed Change through the Change Management Forum in accordance with clause 25 to ensure that the LFC, CFH and all Affected Parties understand the potential consequences of the Proposed Change and the related positions and material concerns of each Affected Party.
- (c) The parties acknowledge and agree that:
 - (i) prior to 31 December 2019:
 - (A) the LFC may only implement an Agreement Change if the relevant change has been approved by the Change Management Forum in accordance with clause 25.3. In accordance with clauses 24.1(a) and (b), a Bilateral Agreement Change does not require approval by the Change Management Forum;
 - (B) the LFC may only implement a Price Cap Proposal if the Price Cap Proposal has been approved by the Change Management Forum in accordance with clause 25.3 and approved by CFH;
 - (ii) the LFC may only implement an Agreement Change or a Required Change with the prior approval of CFH and on request the LFC will provide to the Service Provider reasonable evidence of such approval; and
 - (iii) if CFH approves a Price Cap Proposal then CFH will implement the change in accordance with clause 24.5(c).
- (d) Subject to clause 24.7(c), following completion of Change Management Forum consultation on a Proposed Change, if required, the LFC:

- (i) will reasonably consider any responses relating to the Proposed Change provided to the LFC through the consultation process;
 - (ii) may make any amendments to the Proposed Change that the LFC considers appropriate to reflect the consultation;
 - (iii) will submit any Proposed Change (as amended) for approval by CFH (where required); and
 - (iv) will, subject to approval by CFH (where required) and, where required in accordance with clause 24.7(c), the prior approval of the Change Management Forum, implement the Proposed Change.
- (e) In the event that a Proposed Change is referred to the Change Management Forum for consultation, and the Proposed Change is a change which directly relates to the LFC and any other local fibre company (as that term is defined within section 156AB of the Telecommunications Act 2001) (the **Other LFCs**), the LFC and the Other LFCs may agree that the Proposed Change is conducted through a joint consultation process (a **Joint Change Management Forum**), to be conducted as follows:
- (i) Where any Proposed Change conducted through a Joint Change Management Forum requires the approval of the Change Management Forum under clause 25.3, voting for that Proposed Change will be conducted separately for the LFC and the Other LFCs. The Service Provider will only be permitted to participate in voting in relation to any Other LFC's wholesale services agreement if it is entitled to vote on such a matter under its wholesale services agreement with that Other LFC.
 - (ii) If the Service Provider (acting reasonably) does not agree that the Proposed Change should be conducted through a Joint Change Management Forum, it may require the LFC to undertake consultation with the Change Management Forum in accordance with clause 25 to determine whether or not the Proposed Change should be conducted through a Joint Change Management Forum. In the event of continuing disagreement between the LFC and the Service Provider and any Other Service Providers after such consultation, the question will be finally determined by way of a vote of the Change Management Forum in accordance with clauses 25.3(b), provided that (notwithstanding clause 25.3(b)(iii)) such vote shall require an affirmative majority vote of not less than 75% of the voting participants at the Change Management Forum (and for clarity the LFC's vote shall be treated the same as the vote of any voting service provider member).
 - (iii) Subject to clauses 24.7(e)(i) and (ii), the requirements of clause 25 (and all of the related provisions in this Agreement) will apply to the Joint Change Management Forum.

24.8 Trivial changes: The LFC may, by giving at least twenty (20) Business Days' prior notice to the Service Provider, make:

- (a) a change to the General Terms, the Price List (but not an Ancillary Price Change or a Core Price Change), a Service Description, any Service Level Terms or a Service Order, in each case that the LFC (acting reasonably) considers trivial; or
- (b) a change to an Operations Manual that the LFC (acting reasonably) considers is not likely to result in a significant change to the Service Provider's procedures, facilities or systems.

The LFC will include reasonable details of the proposed change in its notice to the Service Provider. If the Service Provider (acting reasonably) disagrees with the LFC's assessment of what is a "trivial change" it may require the LFC to undertake consultation with the Change Management Forum in accordance with clause 24.7 to determine whether or not any proposed change under this clause 24.8 is a "trivial change". In the event of continuing disagreement between the LFC and the Service Provider and any Other Service Providers after such consultation, the question will be finally determined by way of a vote of the Change Management Forum in accordance with clauses 25.3(b), provided that (notwithstanding clause 25.3(b)(iii)) such vote shall require an affirmative majority vote of not less than 75% of the voting participants at the Change Management Forum (and for clarity the LFC's vote shall be treated the same as the vote of any voting service provider member).

24.9 Merger of Proposed Changes: Where any two or more Proposed Changes relate to the same underlying proposal by the LFC (as determined by the LFC, acting reasonably), such Proposed Changes may be consolidated in a single Change Management Forum process. Any such consolidation shall not otherwise affect any specific consultation, notice, approval, implementation or any other requirement of this Agreement in relation to any Proposed Change.

24.10 Other Changes:

- (a) Where the LFC wishes to introduce a new Service, the LFC may:
 - (i) at its discretion, refer the proposed Service Description, Operations Manual and/or Service Level Terms for that new Service, and/or the proposed changes to the Price List to add that new Service and associated Charges, to the Product Forum for consultation; and
 - (ii) subject to approval by CFH (where required), only implement the Service Description, Operations Manual (if applicable) and Service Level Terms (if applicable) for the new Service, and the proposed changes to the Price List to add that new Service and associated Charges, by giving the Service Provider at least twenty (20) Business Days' notice of such change prior to implementation.
- (b) Where the LFC wishes to introduce a new Service template, the LFC may:
 - (i) at its discretion, refer any proposed change to a Service Description and/or Operations Manual to add the new Service template, and/or any proposed change to the Price List to add that new Service template and associated Charges, to the Product Forum for consultation; and
 - (ii) only implement a change to a Service Description and Operations Manual to add a new Service template, or a change to the Price List to add that new Service template and associated Charges, by giving the Service Provider at least twenty (20) Business Days' notice of such change prior to implementation.
- (c) The LFC may only implement a change to the LFC (End User) Terms by giving the Service Provider at least thirty (30) Business Days' notice of such change prior to implementation.

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- (d) Other than as set out in clauses 24.1 to 24.9, 24.10(a), 24.10(b) and 24.10(c), no change to the General Terms, a Service Description, the Price List, any Service Level Terms, an Operations Manual or a Service Order will be binding unless the change is in writing and signed by the authorised representatives of both parties.
- 24.11 **Regulation:** If a Wholesale Service, or a service that is substantially the same as that service, is subject to a standard terms determination or a determination under the Telecommunications Act 2001, then this Agreement will cease to apply to that Wholesale Service from the date that the determination comes into effect.

25. CHANGE MANAGEMENT FORUM

25.1 Change Management Forum - Establishment and Role:

- (a) The LFC will establish and operate a multi-party change management forum (**Change Management Forum**), which will be open to the Service Provider and all Other Service Providers, provided that no service provider (including the Service Provider) will be obliged to participate in the Change Management Forum.
- (b) The purpose of the Change Management Forum is to:
- (i) encourage open communication, consultation and collaboration between the LFC, the Service Provider and Other Service Providers, and between the Service Provider and Other Service Providers, relating to this Agreement and Wholesale Services Agreements; and
 - (ii) allow for a formal vote on any proposed Agreement Change (other than a Bilateral Agreement Change), and any other type of change which this Agreement requires to first be approved by the Change Management Forum, with each such vote to take place once the LFC has concluded consultation with the Change Management Forum in accordance with clauses 24 and 25; and
 - (iii) allow for a formal vote on any other matter that this Agreement expressly requires to be determined by a vote of the Change Management Forum.
- (c) The Change Management Forum will subject to clause 25.3 below:
- (i) be open to CFH, the Ministry of Business, Innovation and Employment and the Commerce Commission, who may attend as observers only;
 - (ii) consider any wholesale pricing issues regarding the Services (subject to compliance with the Commerce Act 1986), including in relation to the Price Caps;
 - (iii) consider any issues with the form and content of the General Terms, Service Descriptions, Service Level Terms and Operations Manuals including operational issues associated with implementation of this Agreement and Wholesale Services Agreements and delivery of the Services; and
 - (iv) consider issues associated with the withdrawal and replacement of Wholesale Services, provided that the Change Management Forum may from time to time (at its discretion) refer technical or operational issues or other matters relating to the Services to the Product Forum for further consideration in accordance with clause 25.4.
- (d) The Change Management Forum will operate in accordance with procedures and rules to be known as the "Change Management Forum Processes" as set out in more detail at clauses 25.2 and 25.3 below.

25.2 Change Management Forum Processes – General:

- (a) Subject to clause 25.3 below, the Change Management Forum Processes will be developed by the LFC in consultation with the Service Provider, all Other Service Providers and with CFH. The Change Management Forum Processes will promote the purpose of the Change Management Forum as outlined in clause 25.1 above.
- (b) The Change Management Forum Processes will be consistent with the following principles:
- (i) the LFC, the Service Provider and all Other Service Providers participating in the Change Management Forum (in this clause 25.2, the service provider members) will be required to act at all times in good faith in their dealings with each other in the Change Management Forum;
 - (ii) if the LFC has an issue that is to be considered by the Change Management Forum, it will communicate with the service provider members, providing them with appropriate details of the LFC's position at that time and information which will facilitate open communication and collaboration on the issue;
 - (iii) where a Proposed Change involves matters involving solely technical, operational or non-commercial issues, the Change Management Forum should, where practical, make use of the Product Forum noted in clause 25.4 below to consider the relevant issues;
 - (iv) the Service Provider may raise issues for the Change Management Forum to consider;
 - (v) if the issue is not material the period for consultation may be relatively short and the manner of consultation more abbreviated. If the issue is material, then the period for consultation will be longer and the manner of consultation more fulsome, enabling reasonable time for service provider members to evaluate and respond to the LFC's position on the issue (and vice versa). In determining the materiality of the issue and consequently the period and manner of consultation, the LFC will act reasonably and give due consideration to the likely impact of the issue on service providers generally;
 - (vi) where appropriate, meetings will be held to allow a reasonable level of discussion of the views of the service provider members and the LFC's position in response. The LFC and service provider members will ensure that appropriately qualified and empowered representatives attend these meetings;

- (vii) although the Change Management Forum Processes will set out timeframes for the consultations, it is envisaged that the LFC and service provider members will meet and communicate as often as is reasonable within these timeframes to achieve the purpose of the Change Management Forum;
- (viii) the Change Management Forum Processes will therefore also need to envisage evolution or change in the LFC's position following or during any consultation. In this case, it may be necessary for the LFC to consult again on the issue if the evolution or change is relatively material; and
- (ix) during the Change Management Forum consultations, the LFC and service provider members should aim to achieve a consensus on issues where possible.

25.3 Change Management Forum Processes - Formal Voting:

- (a) With respect to any Proposed Change that requires the approval of the Change Management Forum under this Agreement, the LFC will send to the Service Provider and all Other Service Providers (in this clause 25.3, the voting service provider members), CFH, the Ministry of Business, Innovation and Employment and the Commerce Commission by no later than thirty (30) days prior to the proposed vote of the Change Management Forum, a notice containing:
 - (i) a reasonably detailed explanation of the Proposed Change(s);
 - (ii) a brief summary of the discussion held and result(s) (if any) of the Change Management Forum consultation on the Proposed Change(s);
 - (iii) the proposed amendment(s) to the General Terms, the Price List, a Service Description, any Service Level Terms, an Operations Manual or a Service Order required to effect the Proposed Change(s);
 - (iv) the date, time and location of the proposed Change Management Forum vote on the Proposed Change(s);
 - (v) the anticipated effective date(s) of implementation of the Proposed Change(s) if such Proposed Change(s) were to be made in accordance with clause 24.7(d); and
 - (vi) a confirmation of the number of service providers eligible to vote on the Proposed Change(s) as voting service provider members.
- (b) For any Change Management Forum vote on a Proposed Change, the procedure for voting shall be determined at the relevant meeting by the voting service provider members in attendance at the relevant meeting with the agreement of the LFC (each acting reasonably and consistent with the purpose and intent of clauses 24 and 25), provided that in all cases:
 - (i) there will be one vote per voting service provider member (including in circumstances where a voting service provider member has more than one representative at the Change Management Forum);
 - (ii) where any voting service provider member (the first voting service provider member) is a related company (as that term is defined in the Companies Act 1993) of a second voting service provider member, the first voting service provider member and the second voting service provider member shall be deemed to be one voting service provider member for the purposes of clause 25.3(b)(i) and shall be entitled to cast no more than one vote. The same principle shall apply if a voting service provider member is a related company of more than one other voting service provider member;
 - (iii) except as provided in clauses 24.1(c) and 24.8, all votes to approve any Proposed Change will require an affirmative vote of not less than 75% of the votes cast by voting service provider members in attendance at the relevant meeting and the affirmative vote of the LFC (exercisable in its sole discretion). The identity of each voting service provider member casting an affirmative vote shall be disclosed to the LFC;
 - (iv) where the vote is in relation to a Price Cap Proposal, the vote must be conducted in a manner that, except as set out in clause 25.3(b)(v), ensures that the Service Provider and the Other Service Providers are not aware of each other's votes;
 - (v) any such approval of a Proposed Change shall not be considered binding on the Service Provider and all Other Service Providers until the LFC has provided written confirmation to the Change Management Forum (which it agrees to do promptly and in any event within five (5) Business Days of the vote) that those voting service provider members voting in favour of the Proposed Change represent service providers comprising no less than 50% of the total aggregate demand of all service providers for all Services (measured on a fibre circuit basis). For the avoidance of doubt, exercise of its obligation under this clause 25.3(b)(v) shall not oblige the LFC to disclose specific information concerning the Service Provider's or any Other Service Providers' utilisation of fibre circuits to any party; and
 - (vi) once such confirmation is provided by the LFC, the Change Management Forum vote on the Proposed Change shall be final and binding on the Service Provider and all Other Service Providers and the LFC shall be entitled to effect the Proposed Change in accordance with clause 24.7(d).
- (c) Notwithstanding anything in this Agreement, the Service Provider may not refer any issue arising out of a Proposed Change as a dispute once the Proposed Change has been approved in accordance with this clause 25.3.

25.4 Product Forum:

- (a) The LFC will also participate in a multi-party product forum (**Product Forum**), which will be open to the Service Provider, all Other Service Providers, any other local fibre company (as that term is defined within section 156AB of the Telecommunications Act 2001), CFH, the Ministry of Business, Innovation and Employment and the Commerce Commission, provided that no service provider (including the Service Provider) will be obliged to participate in the Product Forum. To avoid doubt, the intention is that the Product Forum will comprise technical and/or operational representatives and experts from the LFC, the Service Provider and all Other Service Providers who wish to participate.

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- (b) The purpose of the Product Forum will include consideration of technical and/or operational issues in relation to the Services and this Agreement which the Change Management Forum refers to it from time to time in accordance with clause 25.1(c) above, or otherwise, through its own initiative.
- (c) The Product Forum will operate in accordance with procedures and rules to be known as the "Product Forum Processes" which will be developed by the Product Forum in due course.
- 25.5 **Commerce Act:** Nothing in this clause 25 or otherwise in this Agreement obliges either party to enter into any arrangements or take any action that would amount to a breach of the Commerce Act 1986.
26. **GENERAL**
- 26.1 **Entire Agreement:** This is the entire agreement between the parties in relation to the Services and supersedes all prior agreements, understandings and representations.
- 26.2 **Notices:** Every notice or other communication given under or in connection with this Agreement will be made in writing, addressed to the other party and personally delivered, posted by pre-paid registered mail or sent by fax or email to the address, fax number or email address of that party specified on the cover page of this Agreement, or such other address, fax number or email address as is notified by that party to the other party. No notice or communication will be effective until received. A notice or other communication sent:
- (a) by prepaid registered mail will be considered to have been received by the addressee three (3) days after it was posted; (b) by fax will be considered to have been received by the addressee on the Business Day that it is sent or, if sent outside Business Hours, when Business Hours recommence; and
- (c) by email will be considered to have been received at the time that the email leaves the communications system of the sender, provided that the sender does not receive any related error message at the time of sending and has received an automated delivery receipt from the communications system of the recipient.
- 26.3 **Relationship:** Nothing expressed or implied in this Agreement will be deemed to constitute either party as the partner, agent or joint venturer of the other party.
- 26.4 **Comply with Laws:** Each party will comply with the Civil Defence Emergency Management Act 2002, the Telecommunications Act 2001, the Telecommunications (Interception Capability) Act 2004 and all other applicable laws, and mandated industry standards and codes, at all times when performing its obligations and exercising its rights under this Agreement.
- 26.5 **Assignment:** Either party may assign any of its rights and obligations under this Agreement to any other person, provided that it has obtained the prior written consent of the other party with such consent not to be unreasonably withheld. Any change in the effective management or control of the Service Provider or the Service Provider's parent company, through whatever means, where management or control passes to a service provider (or a person who had management or control of a service provider) whose agreement with the LFC has been terminated for material breach or an insolvency event will be deemed an assignment of this Agreement requiring the LFC's prior written consent.
- 26.6 **Subcontracting:** Each party may subcontract the performance of its obligations under this Agreement, but if it does so it will remain fully responsible and liable for all work carried out by the contractor, all materials used by the contractor and all acts and omissions of the contractor.
- 26.7 **Further Assurances:** Each party will (at its own expense) promptly do everything reasonably required to give full effect to this Agreement.
- 26.8 **No Waiver:** No waiver by either party of its rights under this Agreement will be effective unless in writing and signed by that party. If either party delays or fails to enforce any of its rights under this Agreement, this will not constitute a waiver by that party of that or any other right available to it.
- 26.9 **Remedies Cumulative:** The rights, powers and remedies in this Agreement are cumulative and are not exclusive of any rights, powers or remedies provided by law. The exercise of any of the rights, powers and remedies provided in this Agreement will not prejudice the exercise of any other right, power or remedy under this Agreement or at law.
- 26.10 **Severability:** If one or more of the terms of this Agreement is, or becomes, unenforceable, invalid or illegal for any reason, that term will be deemed to be modified to the extent necessary to remedy such unenforceability, invalidity or illegality. If this is not possible then that provision will be severed from this Agreement, without affecting the enforceability, validity or legality of any other term of this Agreement.
- 26.11 **Governing Law:** This Agreement is governed by the laws of New Zealand. The parties submit to the non-exclusive jurisdiction of the Courts of New Zealand.
- 26.12 **Interpretation:** When interpreting this Agreement:
- (a) any reference to a party includes that party's successors in title and permitted assigns (and, where the context permits, its personnel, contractors, agents and representatives);
- (b) a gender includes each other gender;
- (c) the singular includes the plural and vice versa;
- (d) any agreement not to do something constitutes an agreement not to suffer, permit or cause that thing to be done;
- (e) any reference to a consent requires the prior written consent of the person required to give that consent;

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- (f) a reference to any legislation, policy or standard includes a modification of that legislation, policy or standard or, in the case of legislation, legislation enacted in substitution for that legislation and any regulation or other instrument issued or made under that legislation;
 - (g) reference to a clause is to a clause of this Agreement, and any heading to a clause is included for ease of reference only and not to have any effect on interpretation;
 - (h) the words include and including are deemed to be followed by the words "without limitation";
 - (i) reference to a person includes an individual, partnership, body corporate, association, trust, governmental or local authority, or any other entity, whether corporate or unincorporated;
 - (j) where a word is defined, its other grammatical forms have a corresponding meaning;
 - (k) all currency references are to New Zealand dollars and all amounts payable are payable in New Zealand dollars; and
 - (l) a reference to any day that is not a Business Day will be deemed to be a reference to the next Business Day.

