

DOCUMENT NUMBER	
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# Master Services Agreement

Entered into by and between

**X-DSL Networking Solutions (Pty) Ltd**

("XDSL")

DESCRIPTION AND REGISTRATION NUMBER	a private company registered in accordance with the laws of South Africa with registration number: 2002/024167/07		
PHYSICAL ADDRESS	3rd Floor – Block B, Corobay Corner, Corobay Avenue, Menlyn, Pretoria, 0181		
POSTAL ADDRESS	P.O. Box 11708, Centurion, 0046		
FAX NO.	0866738150	EMAIL	sales@xdsl.co.za
SIGNED AT		DATE	
-----			
NAME		WHO WARRANTS THAT THEY ARE DULY AUTHORISED TO SIGN	
DESIGNATION			
SIGNATURE			
WITNESS			

**And**

CUSTOMER	
----------	--

("Customer")

DESCRIPTION AND REGISTRATION NUMBER	a private company registered in accordance with the laws of South Africa with registration number:		
PHYSICAL ADDRESS			
POSTAL ADDRESS			
VAT NUMBER		REGISTRATION NUMBER	
MAIN SWITCHBOARD NUMBER		FAX NUMBER	
PRIMARY CONTACT		DESIGNATION	
DIRECT LANDLINE NUMBER		CELL NUMBER	
FAX NO.		EMAIL	
SIGNED AT		DATE	
-----			
NAME		WHO WARRANTS THAT THEY ARE DULY AUTHORISED TO SIGN	
DESIGNATION			
SIGNATURE			
WITNESS			

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# Schedules

**Schedule 1: Fibre Service Level Agreement (SLA)**

**Schedule 2: Fibre Service Level Agreement Definitions**

**Schedule 3: Fibre Service Level Agreement Penalty Matrix**

**Schedule 4: Quotation - Schedule of Services**

## 1. Definitions

- 1.1. "**Agreement**" means this document, as well as schedules attached to it including but without limitation the XDSL Terms and Conditions, Signed Quotation, Fibre Service Level Agreement (SLA) and Fibre Service Level Agreement Definitions, Fibre Service Level Agreement Penalty Matrix, and all other schedules which form part of the Agreement;
- 1.2. "**XDSL**" means X-DSL Networking Solutions (Pty) Ltd.
- 1.3. "**Business Day**" means Monday to Friday, excluding public holidays in the Republic of South Africa;
- 1.4. "**Business Hours**" means from 08h00 to 17h00 South African Time, on Business Days;
- 1.5. "**Caged Area**" means the physical space allocated for the sole use of the Customer as more fully described in a Signed Quotation, which is segregated by means of a physically separate cage structure with independent, secured access, within the main **Colocation** area;
- 1.6. "**Critical Issue**" means when the entire company is affected by the failure of the ISP services provided by XDSL;
- 1.7. "**Co-located Equipment**" means the equipment installed at the Premises by the Customer subject to a Signed Quotation and includes without limitation servers, peripherals, routers, switches, software, databases, data cables, and uninterruptible power supplies;
- 1.8. "**Colocation**" means the provision of an empty cabinet for the installation of equipment by the Customer with necessary power in a secure, controlled environment;
- 1.9. "**Commencement Date**" means the date on which specific Services commence, being the Ready for Service Date/Commencement Date, as specified, or such other date as may be agreed between the Parties in writing;
- 1.10. "**Contract Term**" means the period for which particular ISP Services will endure, as specified in such Signed Quotation;
- 1.11. "**CPI**" means the latest available year on year increase in the Consumer Price Index (metropolitan areas, all items) as published by Statistics South Africa as at the effective date of increase;
- 1.12. "**Customer Account**" means a mechanism which allows the Customer access to the System;
- 1.13. "**Customer Data**" means data:
  - 1.13.1. transmitted to the Customer via the System (or on the Customer System as the case may be),
  - 1.13.2. stored by the Customer on the System (or on the Customer System as the case may be), or
  - 1.13.3. transmitted by the Customer via the System, in the day-to-day utilisation of a Service;
- 1.14. "**Customer System**" means the Co-located Equipment operated together by the Customer as a system;
- 1.15. "**Effective Date**" means in respect of the Master Service Agreement, the date designated as such on the signature page, or failing such designation, the Signature Date;
- 1.16. "**Fee**" means the fees and charges to be paid by the Customer to XDSL in respect of a Service provided by XDSL in terms of a Signed Quotation;
- 1.17. "**Firewall Software and Routerboard**" means the Software and Hardware (as referred to in the Fibre SLA Definitions) to enable the Customer to access and use the Internet through the XDSL facilities subject to the terms of this Agreement. XDSL shall provide established XDSL technical procedures for the use of the Services in consultation with the Customer from time to time, and the Customer agrees to follow all reasonable XDSL instructions and procedures as provided to the Customer in writing. XDSL reserves the right to amend the technical procedures from time to time, which, provided such procedures are reasonable, shall become effective with reasonable prior notice thereof to the Customer;
- 1.18. "**Good Industry Practice**" means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably be expected from a skilled and experienced service provider engaged in the provision of similar Services seeking in good faith to comply with its contractual obligations, complying with all applicable laws, codes of professional conduct, relevant codes of practice, relevant standards, building regulations, all conditions of planning and other consents;
- 1.19. "**Intellectual Property**" means any know-how (not in the public domain); invention (whether or not patented); design, trade mark, or copyright material (whether or not registered);
- 1.20. "**Malicious Code**" means anything that contains any back door, time bomb, Trojan horse, worm, drop dead device, computer virus or other computer software routine or code intended or

designed to:

- 1.20.1. permit access to or the use of a computer system by an unauthorised third party, or
- 1.20.2. disable, damage, erase, disrupt or impair the normal operation of a computer system;
- 1.21. "**Master Services Agreement**" means this document comprising clauses 1 to 26 and excludes reference to any Schedules hereto;
- 1.22. "**Parties**" means collectively XDSL and the Customer and the term "Party" refers to either one of them as the context may require;
- 1.23. "**Personnel**" " means any director, employee, agent, consultant, contractor or other representatives of a Party involved in the execution of their rights and obligations under this Agreement;
- 1.24. "**Prime Rate**" means the publicly quoted prime rate of interest (percent, per annum) from time to time charged by Investec Bank Limited, as certified by any manager of such bank, whose appointment and authority it shall not be necessary to prove, calculated daily and compounded monthly in arrears;
- 1.25. "**Premises**" means the building in respect of which XDSL makes Sites available and provides the Services;
- 1.26. "**Service**" means a service provided by XDSL to the Customer in terms of a Signed Quotation for Services.
- 1.27. "**Fibre Service Level Agreement**" means the document attached hereto as Schedule 1;
- 1.28. "**Fibre Service Level Agreement Definitions**" means the document attached hereto as Schedule 2;
- 1.29. "**Fibre Service Level Agreement Penalty Matrix**" means the document attached hereto as Schedule 3;
- 1.30. "**Signed Quotation**" means a goods, licence, services or work order agreed to and signed by both the Parties pursuant to this Master Services Agreement describing the specific Services to be provided by XDSL to the Customer, including all additional terms and conditions relating to such Service. The Signed Quotation for services are attached as Schedule 4;
- 1.31. "**Signature Date**" means the date of the last-dated signature of this Agreement by a Party;
- 1.32. "**Site**" means the area allocated to the Customer by XDSL for purposes as specified on the Signed

Quotation;

- 1.33. "**System**" means the equipment including without limitation servers, peripherals, routers, switches, software, databases, cables, generators, and uninterruptible power supplies which are operated together as a system by XDSL in providing a Service;
- 1.34. "**Time and Materials**" means XDSL's standard time and materials fees and charges applicable from time to time in respect of any service or installation that the Customer may request XDSL to perform on the Customer's behalf, which is not part of the standard service offering, including, without limitation, specialised cabling, equipment mounting, cabinet modifications and other similar services; and
- 1.35. "**Website**" means XDSL's website at [www.xdsl.co.za](http://www.xdsl.co.za).

## 2. Status and Precedence

- 2.1. Except where specifically provided to the contrary in a Signed Quotation for Services and then only to the extent so specified, each Signed Quotation shall be subject to this Master Services Agreement. Insofar as any term or condition in a Signed Quotation conflicts with the Master Services Agreement, the provisions of the Signed Quotation shall prevail to the extent only of that conflict.
- 2.2. Save where expressly provided to the contrary, the terms and conditions of one Signed Quotation shall not apply to any other Signed Quotation.

## 3. Duration and Termination of this Master Services Agreement

- 3.1. The Master Services Agreement shall commence on the Effective Date and shall continue thereafter indefinitely until terminated. Each Signed Quotation shall commence on the relevant Commencement Date.
- 3.2. Either Party may terminate this Master Services Agreement by giving 30 (thirty) days prior written notice to the other Party. The effect of terminating the Master Services Agreement will be to terminate the ability of either Party to enter into subsequent Signed Quotations for Services that incorporate the terms of the Master Services Agreement. Termination of the Master Services Agreement in terms of this clause will not by itself result in the termination of any Signed Quotation of Services previously entered into, or extensions of the same, that incorporate the terms of the Master Services Agreement. The terms of the Master Services

Agreement will continue in effect for purposes of such Signed Quotation of Services for the duration thereof.

3.3. Each Signed Quotation shall endure for the Contract Term in months stipulated therein. Hereafter it will automatically be renewed on a month to month basis until a written notice of termination is received from the contracting party on no less than 1 (one) months written notice to the other Party.

3.4. In the event that XDSL fails to:

3.4.1. Reasonably comply with the provisions of paragraph 16; and/or

3.4.2. Reasonably comply with the provisions and requirements as contained in Schedule 1, Schedule 2 and Schedule 3 of this Agreement, and where specifically:

3.4.2.1. in the event of a Critical Issue persisting for a period in excess of 15 (fifteen) percent of the time in a continuous 60 (sixty) day period, and

3.4.2.2. subject to this event being directly due to, or resulting from the direct actions of XDSL, or the failure of the XDSL network; then

3.4.3. XDSL agrees to the Customer's right to terminate a Signed Quotation with immediate effect from the date of notice of such event occurring as per 3.4.2.2 (as the case may be) on no less than 1 (one) months written notice to the other Party.

3.5.

3.5.1. For avoidance of doubt, any provision of this Agreement which contemplates performance or observance subsequent to any termination or expiration of this Agreement shall survive any termination or expiration of this Agreement and continue in full force and effect.

## 4. Appointment

The Customer hereby appoints XDSL to provide the Services and facilities as set out in Signed Quotations from time to time.

## 5. Fees and Payment

5.1. The Customer shall be liable for and shall pay the Fees in respect of Services supplied pursuant to this Agreement on the basis set out in the Signed Quotation.

5.2. Unless otherwise agreed upon in writing, in terms of a Signed Quotation:

5.2.1. all Fees shall be invoiced by XDSL monthly in advance and paid in full within 30 (Thirty) calendar days of the date of XDSL's invoice;

5.2.2. all fees invoiced by XDSL, shall be for a full calendar month, back dated to the 1<sup>st</sup> of the month during which the Services commence and pro-rated if necessary.

5.2.3. the Fees referred to in this Agreement exclude all taxes (including, without limitation, value added tax and other taxes levied in any jurisdiction but excluding taxes based on the income of XDSL, duties, tariffs, rates, levies other governmental charges or expenses payable in respect of the Services), all of which shall be payable by the Customer in addition to the Fees stipulated in this Agreement.

5.3. Should the Customer dispute any amount reflected in any invoice in good faith, the Customer shall advise XDSL of such disputed amounts, together with the reasons for disputing same, in writing within 30 (thirty) days of any invoice, provided that:

5.3.1. if the Customer fails to notify XDSL of any such dispute within such 30 (thirty) day period, the Customer shall notwithstanding any dispute, nonetheless pay such amounts to XDSL;

5.3.2. the Customer shall pay all undisputed amounts in respect of such invoice; and the Customer shall not be entitled to withhold any such amount pending resolution of the dispute;

5.3.3. to the extent that the Customer wrongfully withholds any amounts due in terms of clauses 5.3.1 or 5.3.2, such wrongfully withheld amounts shall bear interest at the maximum rate permissible in law; and

5.3.4. any such dispute shall be referred for dispute resolution in accordance with clause 23.

5.4. If any payment due from Customer to XDSL, including any interest and any other charges payable thereon, is not received by XDSL by the due date of payment thereof and the Customer does not pay all such amounts within five (5) days of XDSL 's written notice calling upon the Customer to do so, then XDSL may (without limiting any other remedies it may have in terms of this Agreement or in law) in its sole discretion and upon written notice:

5.4.1. with immediate effect suspend (in whole or in part) the Services up until such time as all arrear amounts, including any interest thereon is paid in full; and/or

5.4.2. terminate:

5.4.2.1. the particular Signed Quotation of Services to which the breach relates; or alternatively

5.4.2.2. the entire Agreement (and all Signed Quotation of Services issued pursuant thereto);

on written notice to the Customer and in either of the above circumstances, XDSL shall be entitled, without limitation of its rights in law, to (a) recover from the Customer all damages XDSL may suffer by reason of such termination, all arrears in fees and other costs, charges, assessments, and reimbursements, or (b) declare to be due and payable immediately, the then present value (calculated with a discount factor of the Prime Rate) of the entire amount of monthly fees which would have become due and payable under all terminated Signed Quotations for the remaining terms of such Signed Quotation of Services (had this Agreement not been terminated). The Customer agrees to pay all such liquidated damages within 30 (thirty) days of the date of termination of this Agreement or the relevant Signed Quotation, as the case may be, XDSL and the Customer agreeing that XDSL's actual damages in such event are impossible to ascertain and that the amount set forth above is a reasonable estimate thereof; and/or

5.4.3. prevent and/or restrict the Customer's access to and/or removal of any Co-located Equipment from the Premises; and/or

5.4.4. exercise a lien over the Co-located Equipment and to use such equipment for its own benefit pending payment of any outstanding amounts.

5.5. Monthly recurring fees shall continue to accrue and be payable by the Customer, notwithstanding XDSL's exercise of available remedies set forth in clause 5.5. XDSL's right of retention in respect of Co-located Equipment shall continue until such time as the Customer has paid all amounts due to XDSL under this Agreement in full, provided that if the Customer has not paid all arrear amounts in full within 120 (one hundred and twenty) days of XDSL's notice in terms of clause 5.5, XDSL shall be entitled to sell and/or dispose of such Equipment in satisfaction of any amounts owed by the Customer to it, consistent with applicable law.

5.6. All outstanding amounts shall attract interest at the Prime Rate. Such interest shall be calculated from the due date of payment to the date of actual payment, both days inclusive, calculated daily and compounded monthly in arrears.

5.7. All amounts due and payable by the Customer

shall be paid to XDSL via EFT in South African Rand, or such other currency as may be specified in the relevant Signed Quotation for Services, without deduction or set-off for whatever reason. The Customer will not be entitled to withhold payment of any amounts payable to XDSL in terms of this Agreement to satisfy any claim of the Customer arising from this or any other Agreement.

5.8. Where XDSL is required to perform additional Services outside of the scope as envisaged by the Signed Quotation, the Customer shall reimburse all reasonable expenses as are properly incurred by XDSL and XDSL's Personnel in fulfilling these additional Services. Such expenses include, but are not limited to, travelling, subsistence, goods and services purchased on the Customer's behalf, communications, stationery, report and presentation material. All such expenses shall be subject to the prior written approval of the Customer.

5.9. If the Parties (acting in good faith) dispute the calculation or quantum of any payment (or part thereof) but do not dispute whether the payment (or part thereof) is due and payable, then such dispute shall be referred to an independent Accountant to be agreed between the Parties (or failing agreement, appointed by the South African Institute of Chartered Accountants ("Accountant") to determine the quantum of the outstanding payment. The Accountant shall act as an expert and not as an arbitrator and will be requested to give his decision as soon as practicable and, in any event, by no later than 10 (ten) Business Days after the dispute is referred to the Accountant. The Accountant's determination shall be final and binding on the Parties and the relevant Party shall pay all amounts determined by the Auditor to be payable within 7 (seven) days of determination by the Accountant.

5.10. Where XDSL employs the services of attorneys or other debt-recovery agencies in respect of any outstanding amounts owing by the Customer then the Customer undertakes to pay on demand all legal costs incurred on the scale as between attorney and own client and including related costs such as collection commission and tracing fees.

## 6. Security of the Premises(Colocation)

6.1. XDSL shall implement security measures commensurate with Good Industry Practice in respect of the System and the Premises.

6.2. If the Customer discovers a security violation, or reasonably considers that a security violation is



- imminent, it shall immediately advise XDSL thereof in writing.
- 6.3. The Customer shall not do anything to encourage, and shall take all reasonable measures necessary to ensure that no unlawful access is gained to the Premises, the System, or the Customer System due to its default.
  - 6.4. Subject to compliance by XDSL with its obligations in terms of clause 6.1, XDSL shall not be liable for any loss, harm or damage suffered by the Customer arising out of a breach of security in respect of the System or the Premises.
  - 6.5. Risk in the Co-located Equipment shall at all time vest in the Customer, who shall be responsible for insuring same.
  - 6.6. In the event of a security violation, or if XDSL, in its sole discretion, determines that a security violation is imminent, XDSL may take whatever steps it deems necessary to protect its System and/or the Premises, including without limitation:
    - 6.6.1. changing Customers' access codes and passwords, and
    - 6.6.2. temporarily preventing access to the Customer Account or Customer System as the case may be, and
    - 6.6.3. preventing access to the System and/or Premises.
  - 6.7. The Customer shall give reasonable cooperation to XDSL in any investigation which may be carried out by XDSL relating to a security violation.
  - 6.8. If XDSL is providing a Co-location Service or a Cage Service, XDSL shall grant the Customer and its Personnel access to the Premises and Site for the purposes of installation, testing, commissioning, operation, repair, upgrade and maintenance of the Co-located Equipment at all times, provided that such access shall be subject to XDSL's access, security, health and safety policies from time to time, as published and amended on the Website from time to time. XDSL reserves the right to deny any person access who fails to, or who XDSL believes may fail to, adhere to such policies. Without limiting the foregoing XDSL reserves the right to search any person entering or leaving the Premises and the Customer shall notify its Personnel of such possibility.
  - 6.9. XDSL may relocate the Customer within the Premises on no less than 7 (seven) days' notice to the Customer.
  - 6.10. XDSL may on prior written notice to the

Customer inspect the Customer's installation and Co-located Equipment to ensure compliance with the building regulations and restrictions agreed between the Parties.

- 6.11. The Customer shall maintain the Site in a neat and tidy state and shall, upon termination of the Signed Quotation of Services in respect of any such area return the Site to its original state, fair wear and tear accepted.

## 7. Intellectual Property

- 7.1. Unless otherwise stipulated in a Signed Quotation:
  - 7.1.1. nothing in this Agreement will be construed as effecting an assignment of Intellectual Property owned by either Party to the other, and
  - 7.1.2. nothing in this Agreement will be construed as the grant of a licence of Intellectual Property owned by either Party to the other.
- 7.2. As part of the provision of the Services, the Customer may be provided with software owned by third parties subject to a licence from such third parties. The Customer agrees to comply with all licence terms imposed by such third parties in its use of such software, including any such licence terms appended to this Agreement or a Signed Quotation.
- 7.3. XDSL hereby grants to the Customer a non-exclusive license for the term to use Firewall Software and Routerboard in accordance with the further provisions of this Agreement. For the avoidance of doubt, all rights in and to such Software vest in XDSL.

## 8. Suspension of Service

- 8.1. XDSL reserves the right to suspend the provision of the Services to the Customer under the following circumstances:
  - 8.1.1. where the Customer has not made payment of monies owing to XDSL by due date as set out in clause 5,
  - 8.1.2. where such suspension is necessary to maintain security as set out in clause 6,
- 8.2. XDSL reserves the right to suspend Services as set out in clause 8.1, provided that XDSL shall use reasonable commercial endeavours to notify the Customer of any such suspension.
- 8.3. The period of suspension shall remain in force and effect until such time as the reason/s for the suspension has been remedied in terms of this Agreement.

## 9. Data & Content

- 9.1. While XDSL recognises the Customer's right to privacy of its data, the Customer agrees that XDSL may monitor the Customer's use of the System so as to ensure that the System is operating properly.
- 9.2. XDSL has no knowledge of or interest in the data transmitted to, stored on or accessed from the Co-located Equipment by the Customer, subject to the further terms of this Agreement. XDSL has moreover no duty to monitor any content made available or published through the System, subject to the provisions of clause 11.
- 9.3. The Customer agrees that no action shall lie against XDSL for any damages howsoever arising as a result of any act or omission relating to the transmission of data to and from the Co-located Equipment, its storage on the Co-located Equipment or its publication using the Co-located Equipment to third parties, and the Customer further indemnifies and holds XDSL harmless in respect of any action brought by a third party resulting from such acts or omissions.

## 10. Maintenance

- 10.1. XDSL may be required to suspend access to the System in order to carry out routine maintenance to the System, provided that XDSL shall endeavour to undertake same at times of low traffic volume.
- 10.2. XDSL shall use best endeavours to advise the Customer within a reasonable time of the time and expected duration of such suspension of Service due to maintenance.
- 10.3. Notwithstanding the above, XDSL may suspend access to the System without notice should maintenance be necessary in an emergency, whereas scheduled maintenance is subject to notification. XDSL may agree to a variation if requested but this is not to exceed 48 hours from the initial scheduled maintenance.

## 11. Statutory Compliance

- 11.1. The Customer further notes that XDSL is obliged to comply with certain statutory provisions including, but not limited to those set out in:
  - 11.1.1. the Regulation of Interception of Communications and Provision of Communication-related Information Act (Act 70 of 2003), and
  - 11.1.2. the Film and Publications Act (Act 65 of 1996), and
  - 11.1.3. The Electronic Communications and

Transactions Act (Act 25 of 2002).

- 11.2. XDSL's compliance with such statutory provisions may include steps which would otherwise constitute infringements of the Customer's privacy, such as the interception of the Customer's communications or the examination of Customer Data. The Customer agrees that no action shall lie against XDSL for any damages howsoever arising as a result of such steps, and the Customer further indemnifies and holds harmless XDSL in respect of any action brought by a third party resulting from such steps in relation to the Customer's System.

## 12. Indemnity and Limitation of Liability

- 12.1. Notwithstanding the form (whether in contract, delict, or otherwise) in which any legal action may be brought, XDSL's maximum liability for general and/or direct damages for any breach of this Agreement or any act or omission arising during the course and scope of fulfilling its obligations in terms of this Agreement, shall be limited to an aggregate amount of all the Fees paid by the Customer to XDSL in respect of the Services set out in the Signed Quotation relevant to the breach during the preceding 3 (three) month period. Such maximum amount shall be an aggregate amount for all claims arising out of the causes mentioned.
- 12.2. Under no circumstances shall XDSL entertain liability for general and/or direct damages for any breach of this Agreement if Fees payable by the Customer as set out in 5.3.1 are overdue.
- 12.3. Under no circumstances shall either Party be liable for any special, indirect, consequential or like damages which may arise pursuant to this Agreement (or any act or omission arising during the course and scope of fulfilling its obligations in terms of this Agreement), including, without limitation, any damages arising due to any loss of profits or loss of business.

## 13. Assignment & Subcontracting

- 13.1. The Customer shall not be entitled to cede, assign, delegate or otherwise transfer the benefit or burden of all or any part of this Agreement or any Signed Quotation for Services without the prior written consent of XDSL.
- 13.2. XDSL may sub-contract its obligations under this Agreement, provided that XDSL shall remain liable for performance of such subcontractor. XDSL shall not be required to disclose the terms or payment provisions of any sub-contract

entered into with respect to XDSL's obligations under this Agreement.

#### **14. Relationship between the Parties**

- 14.1. Nothing in this Agreement shall be construed as:
  - 14.1.1. Constituting a temporary employment service as contemplated in section 198 of the Labour Relations Act, 1995.
  - 14.1.2. creating a partnership between the Parties and neither Party shall have any authority to incur any liability on behalf of the other or to pledge the credit of the other Party.
- 14.2. The Parties shall at all times owe each other a duty of good faith.
- 14.3. The relationship between the Parties will not be an exclusive one and both Parties will be free to enter into agreements similar to this one with third parties.

#### **15. No Solicitation**

Neither Party shall during the currency of the Agreement or for a period of 12 (twelve) months following the termination thereof directly or indirectly solicit or offer employment to any Personnel of the other Party who was involved in the implementation or execution of this Agreement, and shall not employ or contract in any manner with any such Personnel of the other Party without the written consent of the other Party.

#### **16. Warranties**

- 16.1. XDSL warrants that:
  - 16.1.1. it has the facilities, infrastructure, capacity and capability to provide the Services;
  - 16.1.2. it will provide the Services:
    - 16.1.2.1. with promptness and diligence and in a workmanlike manner and in accordance with Good Industry Practice;
    - 16.1.2.2. in accordance with all applicable laws and regulations.
- 16.2. Save for the foregoing warranties, and any specific warranties that may be contained in the Signed Quotation for Services, the Services and Site are provided "as is" and "as available" and without any further warranty of any nature whatsoever, whether express or implied, including without limitation warranties of merchantability, fitness for purpose, title or non-infringement of intellectual property rights.

#### **17. Publicity**

XDSL invests in marketing its Customers' businesses and promoting interconnection between its customers. The Customer therefore agrees to XDSL issuing a news release about the Customer's use of XDSL services from time to time, subject to the Customer's prior written approval of the wording of any such release.

#### **18. Confidential Information**

- 18.1. Each Party expressly undertakes to retain in confidence all information (including, with respect to Customer, the identification of other customers of XDSL) and know-how, in whatever form transmitted, including, but not limited to, information concerning its past, present and future business affairs, business plans, operations or systems of such Party ("Disclosing Party") or another Party whose information the Disclosing Party has in its possession under obligations of confidentiality, disclosed in any way to it (the "Receiving Party") that the Disclosing Party has identified as being proprietary and/or confidential or that, by the nature of the circumstances surrounding the disclosure, ought in good faith to be treated as proprietary and/or confidential ("Confidential Information"). The Receiving Party shall treat the Confidential Information with the same degree of care, and will make no use of such Confidential Information during the existence of this Agreement except as otherwise specified herein.
- 18.2. The Receiving Party shall have no obligation to maintain the confidentiality of information that:
  - 18.2.1. it received rightfully from another party without restrictions on disclosure prior to its receipt from the Disclosing Party;
  - 18.2.2. the Disclosing Party has disclosed to an unaffiliated third party without any obligation to maintain such information in confidence;
  - 18.2.3. is independently developed by the Receiving Party; or
  - 18.2.4. is ordered to be disclosed by an order of court or other adjudicative body.
- 18.3. Except as otherwise provided, the Receiving Party shall not disclose, disseminate, distribute or use any of the Disclosing Party's Confidential Information to any third party without the Disclosing Party's prior written permission;
- 18.4. The Parties agree that a breach of the terms of this clause 18 would result in irreparable harm to the Disclosing Party for which a remedy in damages would be inadequate. The Parties

agree that in the event of such breach or threatened breach, the Disclosing Party shall be entitled to seek an interdict to prevent the breach or threatened breach, in addition to remedies otherwise available for such specific performance or injunctive relief, that the Disclosing Party has an adequate remedy at law.

## 19. Termination and Breach

- 19.1. XDSL shall tender return of the Co-located Equipment immediately upon termination of the Schedule of Services to which it pertains, subject to the provisions of clause 5.5.4.
- 19.2. Should either Party fail to comply with any of its obligations or commit a breach of this Agreement and fail to remedy such default or breach within 7 (seven) days after having received a written notice to do so, or be placed in provisional or final liquidation, or judicial management, or enter into any compromise or scheme of arrangement with its creditors, or fail to satisfy a judgment taken against it within 10 (ten) days, the other Party shall be entitled to terminate this Agreement on written notice to the defaulting Party.
- 19.3. The provisions of this clause will not affect the rights of the Parties to claim damages in respect of a breach of any of the provisions of this Agreement.

## 20. Termination Assistance

Upon termination of this Agreement or any Signed Quotation of Services, subject to due payment by the Customer of all undisputed amounts due and payable to XDSL, XDSL shall render such reasonable assistance to the Customer so as to enable the Customer to migrate any Services affected by such termination to a service provider of the Customer's choice.

## 21. Domicilium & Notices

- 21.1. The Parties choose their addresses where they will accept service of any notices/documents for all purposes arising from or pursuant to this Agreement, the addresses set out on the data sheet of this Master Services Agreement:
- 21.2. Any Party shall be entitled from time to time by written notice to the other, to vary its physical address to any other physical address within the Republic of South Africa which is not a post office box, or to vary its other domicilium contact details.
- 21.3. The Parties record that whilst they may

correspond via email during the term of this Agreement for operational reasons, no formal notice required in terms of this Agreement, nor any amendment or variation to this Agreement may be given or concluded via email.

- 21.4. Notwithstanding anything to the contrary contained or implied in this Agreement, a written notice or communication actually received by one of the Parties from another, including by way of fax, shall be adequate written notice or communication to such Party.
- 21.5. Notices/documents shall be deemed to be delivered:
  - 21.5.1. if delivered by hand at the physical address, upon the date of delivery;
  - 21.5.2. if delivered by registered post at the postal address, 7 (seven) days after posting thereof; and
  - 21.5.3. if delivered by way of fax, on the date and time of the sending of such fax as evidenced by a fax confirmation report.

## 22. Applicable Law & Jurisdiction

This Agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa and all disputes, actions and other matters relating thereto shall be determined in accordance with such law.

## 23. Dispute Resolution

- 23.1 In the event of there being any dispute or difference between the Parties arising out of this Agreement, the said dispute or difference shall on written demand by any Party be submitted to arbitration in Johannesburg in accordance with the AFSA rules.
- 23.2 Should AFSA, as an institution, not be operating at that time or not be accepting requests for arbitration for any reason, then the arbitration shall be conducted in accordance with the AFSA rules for commercial arbitration (as last applied by AFSA) before an arbitrator appointed by agreement between the parties to the dispute or failing agreement within 10 (ten) business days of the demand for arbitration, then any party to the dispute shall be entitled to forthwith call upon the chairperson of the Johannesburg Bar Council to nominate the arbitrator, provided that the person so nominated shall be an advocate of not less than 10 (ten) years standing as such. The person so nominated shall be the duly appointed arbitrator in respect of the dispute. In the event of the attorneys of the parties to the dispute failing to agree on

any matter relating to the administration of the arbitration, such matter shall be referred to and decided by the arbitrator whose decision shall be final and binding on the parties to the dispute.

- 23.3 Any party to the arbitration may appeal the decision of the arbitrator or arbitrators in terms of the AFSA rules for commercial arbitration.
- 23.4 Nothing herein contained shall be deemed to prevent or prohibit a party to the arbitration from applying to the appropriate court for urgent relief or for judgment in relation to a liquidated claim.
- 23.5 Any arbitration in terms of this clause 23 (including any appeal proceedings) shall be conducted *in camera* and the Parties shall treat as confidential details of the dispute submitted to arbitration, the conduct of the arbitration proceedings and the outcome of the arbitration.
- 23.6 The provisions of this clause 23 will continue to be binding on the Parties notwithstanding any termination or cancellation of the Agreement.
- 23.7 The Parties agree that the written demand by a party to the dispute in terms of clause 23.1 that the dispute or difference be submitted to arbitration, is to be deemed to be a legal process for the purpose of interrupting extinctive prescription in terms of the Prescription Act, 1969

## 24. Force Majeure

- 24.1. Neither Party shall be liable for any delay in performing or any failure to perform any obligations under this Agreement due to any cause beyond their reasonable control, including but without being limited to any of the following: strikes, lock outs or other industrial action, sabotage, terrorism, civil commotion, riot, invasion, war, threat of or preparation for war, fire, explosion, storm, flood, subsidence, epidemic or other natural physical disaster, impossibility of the use of railways, shipping aircraft, motor transport or other means of public or private transport; any act or policy of any state or government or other authority having jurisdiction over either Party, sanctions, boycott or embargo.
- 24.2. Upon the occurrence of any delay or failure referred to in clause 24.1, the provisions of this Agreement affected shall be suspended for as long as the cause in question continues to operate, provided that if that cause has not ceased to operate within 2 (two) months from when it first arose, this Agreement may be

terminated by either Party on written notice to the other Party.

## 25. Interpretation

In this Agreement:

- 25.1. clause headings are for convenience and are not to be used in its interpretation;
- 25.2. unless the context indicates a contrary intention an expression which denotes any gender includes the other genders, a natural person includes a juristic person and vice versa, and the singular includes the plural and vice versa;
- 25.3. references to clauses, schedules, parts, annexes and sections are, unless otherwise provided, references to clauses, schedules, parts, annexes and sections of this Agreement;
- 25.4. cross-references to clauses in a specific schedule, part, annexure or section shall be a cross-reference to clauses in such schedule, part, annexure or section unless specifically stated otherwise;
- 25.5. when any number of days is prescribed, the number of days shall be calculated on the basis that the first day is excluded and the last day is included, provided that if the last day is not a Business Day, the last day shall be the ensuing Business Day;
- 25.6. any reference to an enactment contained in the Agreement is to the enactment as at the Effective Date of this Agreement, as amended or re-enacted from time to time;
- 25.7. where figures are referred to in numerals and in words, if there is any conflict between the two, the words shall prevail;
- 25.8. terms other than those defined within the Agreement will be given their plain English meaning, and those terms, acronyms, and phrases known in the information and communication technology industry will be interpreted in accordance with their generally accepted meanings;
- 25.9. any reference to "days" shall be construed as being a reference to calendar days unless qualified by the word "Business"; and

## 26. General

- 26.1. This Agreement constitutes the entire Agreement between the Parties in respect of the subject matter hereof and neither Party shall be bound by any undertakings, representations, warranties or promises not recorded in this

Agreement.

- 26.2. No variation or consensual cancellation of this Agreement and no addition to this Agreement, including this clause shall be of any force or effect unless reduced to writing and signed by the Parties or their duly authorised representatives. No variation by way of email will be of any force or effect.
- 26.3. No waiver of any of the terms and conditions of this Agreement will be binding or effectual for any purpose unless expressed in writing and signed by the Party giving same, and any such waiver will be effective only in the specific instance and for the purpose given. No failure or delay on the part of either Party hereto in exercising any right, power or privilege hereunder will operate as a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.
- 26.4. Should any of the terms and conditions of this Agreement be held to be invalid, unlawful or unenforceable, such terms and conditions will be

severable from the remaining terms and conditions which will continue to be valid and enforceable. If any term or condition held to be invalid is capable of amendment to render it valid, the Parties agree to negotiate an amendment to remove the invalidity.

- 26.5. This Agreement will be governed by and construed in accordance with the law of the Republic of South Africa and all disputes, actions and other matters relating thereto will be determined in accordance with such law.
- 26.6. Subject to clause 23, the Parties hereby consent and submit to the jurisdiction of the South Gauteng High Court of South Africa, in any dispute arising from or in connection with this Agreement.
- 26.7. The signatories hereto acting in representative capacities warrant that they are authorised to act in such capacities.
- 26.8. Each Party shall bear and pay its own fees and costs of and incidental to the negotiation, drafting, preparation and execution of this Agreement.