|  |
| --- |
| **Between: Surf Telecoms Ltd (“Surf”) and (“Customer”)** |
| **Customer Details:** |  |  |
| **Full Company Name:** |  |  | **Our Reference**:  |
| **Company Registered** **Address:**  |  |  | **Customer Reference:**       |
| **Contact Name:**  |  | **Telephone Number:** |  |  | **Commencement Date**: Insert Date |
| **Email Address:**  |  |  |  |  | **Term**:  |
|  |  |  |  | **Payment Instalment Period**: |
|  |  |  |  |
| **Authorisation:** |
| We agree to be bound by the Agreement (as defined in sub-clause 1.1 (Definitions and interpretation) of the attached terms and conditions). |
| **Signed by a duly authorised representative of Surf Telecoms Limited:** | **Date:** | Insert Date Signed |
| **Sign Here:** | ............................................. | **Name:**  |  | **Title:** | Insert Title |
|  |  |  |  |  |  |
| **Signed by a duly authorised representative of the Customer:** | **Date:** | Insert Date Signed |
| **Sign Here:** | ............................................. | **Name:** |  | **Title:** |  |
|  |
| **Billing Details (if different from above):** |
| **Contact Name:** | Insert Name | **Telephone:**  | Insert Number | **Email:** | Insert Email |
| **Full Address:** | Insert Address | **Purchase Order No:** | Insert if supplied |

**Conditions to the Agreement for the Provision of Optical Fibre Services**

**Background:**

1. SURF and WPD are wholly owned subsidiaries of Western Power Distribution plc.
2. SURF has installed the Cable either on part of the Distribution System which WPD owns and operates or in SURF's underground ducts.
3. SURF has agreed to grant to the Customer the exclusive right to use the Company Fibres on the terms of this Agreement.

**It is agreed as follows:**

## Definitions and interpretation

### In this Agreement, unless the context otherwise requires, the following words have the following meanings:

### "**Acceptance Date**" the date that the Customer gives SURF the certificate referred to in sub-clause 9.4(a);

"**Acceptance Tests**" means the acceptance tests as detailed in Schedule 2 of this Agreement;

### "**Agreement**" this Agreement (including the cover page to this Agreement, any Schedule or annexure to it and any document in agreed form);

### "**Annual Charge**" the amount set out in Schedule 1 of this Agreement;

"**Applicable Law**" means:

#### any statute, directive, order, enactment, regulation, by-law, ordinance or subordinate legislation in force from time to time;

#### the common law and the law of equity;

#### any binding court order, judgment or decree;

#### any applicable industry code, policy or standard enforceable by law; and

#### any applicable direction, statement of practice, policy, rule or order that is given by a regulator;

in any jurisdiction applicable to this Agreement;

### "**Associated Company**" any company that is a subsidiary or a holding company of SURF or the Customer, as the case may be, and "**subsidiary**" and "**holding company**" having the same meaning as they have in section 1159 of the Companies Act 2006;

### "**Breaching Party**" shall have the meaning as set out in clause 13.1 of this Agreement;

### "**Break-out**” a connection to the Company Fibres for the purpose of making telecommunications transmissions through another route;

### "**Business Day**" a day (other than a Saturday or Sunday) on which clearing banks are open for business in the City of London;

### "**Cable(s)**" the fibre optic cable (which contain the Company Fibres) and all ancillary equipment (the routes of which and other details being set out in Schedule 1), which are either installed upon part of the Distribution System or in WPD's and/or SURF's underground ducts including without limitation any alternative or replacement cable which SURF may install in accordance with this Agreement and any alternative or replacement cable which SURF obtains the right to use;

### "**Cable Notice**" the written notice given by SURF when it is to carry out Planned Work in accordance with clause 6;

"**Company Fibres**" the fibres in the Cable as described on Schedule 1;

### "**Commencement Date**" the date as set out on the cover page to this Agreement;

"**Connection Charge**" the charge specified as such in Schedule 1;

### "**Corrective Maintenance**" the works necessary to rectify a Fault as detailed in paragraph 2 of Schedule 3;

"**Data Controller**" has the meaning set out in section 1(1) of the Data Protection Act 1998;

"**Data Subject**" means an individual who is the subject of Personal Data;

### "**Distribution System**" WPD's electricity distribution system within WPD's authorised area;

### "**Event of Force Majeure**" any event which is beyond the reasonable control of either party, including but not limited to:

#### acts, defaults or omissions of sub-contractors;

#### strike or lock out or other form of industrial action;

#### act of God;

#### outbreak of hostilities, riot, civil disturbance or acts of terrorism;

#### fire, explosion, flood, severe weather conditions or accident (including any impairment of the System by third parties);

#### theft and malicious damage;

#### act or omission of any government, other telecommunications operator, or competent authority;

#### delay or failure in manufacture, production or supply by third parties; or

#### circumstances or conditions that render it unsafe for SURF to provide the Services.

### “**Fault**" a Minor Fault or a Major Fault;

### "**Fault Report**" the mechanism by which the Customer reports a Fault to SURF;

### "**Good Industry Practice**" the exercise of that degree of skill and diligence which would reasonably and ordinarily be expected to be exercised by an operator engaged in the same type of undertaking under the same circumstances and conditions;

### "**Major Fault**" any condition resulting in a degradation in the technical performance of the Company Fibres such that they are unable to support telecommunication transmissions or fail to meet the attenuation levels or if the attenuation levels exceed 0.25dB/Km as specified in Schedule 2;

### "**Minor Fault**" any failure in the Company Fibres to meet the attenuation levels set out in Schedule 2 save that if such attenuation levels exceed 0.25dB/Km the Fault shall be classified as a Major Fault;

### "**Necessary Consents**" all wayleaves, licences, consents, approvals and permits, whether of a public or private nature, to enable the Cables to be lawfully installed, retained in situ and repaired;

"**OTDR**" means optical time-domain reflectometer;

"**Personal Data**" has the meaning set out in section 1(1) of the Data Protection Act 1998 and relates only to personal data, or any part of such personal data, in respect of which the Customer is the Data Controller and in relation to which WPD is providing services under this Agreement;

### "**Planned Work**" any Preventative Maintenance engineering or other works that are necessary to renew, refurbish or re-route the Cables and which are planned in accordance with clause 6 and as set out in Schedule 4;

### "**Preventative Maintenance**" any or all of those activities described at paragraph 1 of Schedule 3;

### "**Quarter Days**" 31 March, 30 June, 30 September and 31 December each year and "**Quarter Day**" means any one of them;

"**Route**" has the meaning as set out in Schedule 2;

### "**Service Credits**" the compensation detailed in paragraph 5 of Schedule 3 payable by SURF in accordance with sub-clause 4.5(b) where applicable;

### "**Target Restoration Time**" the timescales detailed in paragraph 4 of Schedule 3 in which SURF will rectify a Minor or Major Fault;

### "**Term**" the term of this Agreement which, subject to being extended or shortened under clause 2, shall run for the term as set out on the cover page to this Agreement;

### "**Unavailability**" any one or more of the Company Fibres being (in the Customer's reasonable opinion) unusable by, or not available to the Customer, due to any Planned Work by SURF (unless the Customer is provided with the use of alternative optical fibres) and "Unavailable" is to be interpreted accordingly; and

### "**WPD**" means Western Power Distribution (South West) plc, Western Power Distribution (South Wales) plc, Western Power Distribution (East Midlands) plc and Western Power Distribution (West Midlands) plc (company numbers 02366894, 02366895, 02366923 and 03600574 respectively) whose registered offices are at Avonbank Feeder Road Bristol BS2 0TB.

### In this Agreement, unless the context otherwise requires:

#### words in the singular include the plural and vice versa and words in one gender include any other gender;

#### a reference to a statute or statutory provision includes:

##### any subordinate legislation (as defined in Section 21(1), Interpretation Act 1978) made under it;

##### any repealed statute or statutory provision which it re-enacts (with or without modification); and

##### any statute or statutory provision which modifies, consolidates, re-enacts or supersedes it except to the extent that it would create or increase the liability of SURF party under clause 15;

#### a reference to:

##### any party includes its successors in title and permitted assigns;

##### clauses and schedules is to clauses of and schedules to of this Agreement and references to sub-clauses and paragraphs are references to sub-clauses and paragraphs of the clause or schedule in which they appear; and

#### the table of contents and headings are for convenience only and shall not affect the interpretation of this Agreement.

## Duration

### This Agreement shall take effect on the Commencement Date and will continue until terminated by either party in accordance with clause 13 or clause 16 for 12 months ("**Initial Term**") and will automatically renew for 1 month ("**Extended Term**") after the end of the Initial Term and at the end of each Extended Term. Either party may give written notice to the other party, not later than 30 days before the end of the Initial Term or the relevant Extended Term, to terminate this Agreement at the end of the Initial Term or the relevant Extended Term, as the case may be.

## Use of the Company Fibres

### Subject to the terms and conditions of this Agreement SURF grants the Customer the exclusive right to use the Company Fibres to make telecommunications transmissions starting on the Acceptance Date.

### Subject to sub-clause 7.1 the Customer may resell to its customers the rights to use capacity or circuits in the Company Fibres and provide other services in the normal course of its business.

### Upon written request by the Customer, SURF shall provide the Customer with a written specification of the Company Fibres within a reasonable timeframe of such written request.

## Payments and Review

### SURF will send an invoice for the Connection Charge to the Customer on or as soon as reasonably practicable after the Acceptance Date.

### For each 12 month period during the Term the Customer shall pay SURF the Annual Charge (starting on the Acceptance Date) by equal quarterly instalments in advance on Quarter Days without deduction or set off (the first and last payments being proportionate sums, if appropriate).

### SURF shall send the Customer an invoice for each quarterly instalment of the Annual Charge not less than 30 days before each Quarter Day.

### The Customer shall pay all Charges properly invoiced by SURF within 30 days of the date of the relevant invoice.

### Where Service Credits or a refund of part of the Annual Charge, or both, are payable by SURF for any quarter, SURF will send the Customer within 30 days after each Quarter Day a statement showing details of:

#### any Unavailability following Planned Work and the amount of the Annual Charge to be refunded to the Customer in accordance with clause 6.7; and

#### any Service Credits payable to the Customer,

### together with payment to the Customer for the amount (if any) shown to be due.

### The Customer will be responsible for paying the proportion reasonably and properly attributable to the Company Fibres of any business rates (or similar) which are imposed on the Cables after the Acceptance Date.

### All sums payable to SURF by the Customer shall be payable in cleared funds without deduction or set off.

### SURF reserves the right to charge the Customer interest at the rate of 3% above the base rate of National Westminster Bank plc from time to time on all outstanding sums from the date when such payment was due until the date of actual payment whether before or after judgment. Such interest shall accrue from day to day and be compounded annually.

### Without prejudice to any other right or remedy that it may have, if the Customer fails to pay SURF any sum due under this Agreement on the due date, SURF may suspend the Customer's right of access and/or use of the Company Fibres until payment has been made in full.

### If the Customer disputes a payment in good faith, then it must notify SURF of this within 5 Business Days of receipt of the relevant invoice by the Customer. Where notification of disputed payment is not made within this timeframe, the payment will be considered undisputed. The dispute will be handled in accordance with the dispute resolution procedure as set out in clause 29.

## SURF's obligations

### Without prejudice to the provisions of clauses 6, 10 and 16 and the Customer complying with its obligations under this Agreement, SURF will:

#### allow the Customer to use the Company Fibres to make telecommunications transmissions with peaceful and quiet enjoyment and without unreasonable interference from SURF;

#### use reasonable endeavours not to do anything which is likely to cause damage, interference or disruption to either the Company Fibres or the telecommunications transmissions, or both together.

### SURF warrants that it has obtained all Necessary Consents including (without limitation) those from WPD, for the Cables and will maintain them during the Term.

### SURF warrants that all splicing and connection works carried out by SURF or its agents pursuant to this Agreement will be carried out in accordance with Good Industry Practice using internationally recognised techniques working methods and equipment.

### SURF shall comply with all Applicable Laws in respect of its obligations under this Agreement.

## Planned Work

### Before SURF carries out any Planned Work to the Cables, SURF shall give the Customer notice, by means of the Cable Notice delivered to the Customer of such Planned Work as follows:

#### five (5) Business Days where SURF reasonably anticipates Planned Work will not involve an interruption to telecommunications transmissions;

#### as much notice as it is reasonably able to give (but in any event not less than 25 Business Days) of the commencement of Planned Work where the Planned Work involves the Unavailability of the Company Fibres.

### The Cable Notice shall be in writing and specify:

#### the work SURF will be carrying out;

#### how many of the Company Fibres will be Unavailable, the time when and for how long they will be Unavailable.

### The Customer shall afford all reasonable assistance to SURF in connection with the Planned Work.

### Where Planned Work will cause any of the Company Fibres to be Unavailable, SURF will (at its own cost):

#### use its reasonable endeavours to minimise the period of Unavailability; and

#### where reasonably available will provide the Customer with the use of alternative optical fibres.

### Any optical fibres which replace the Company Fibres, whether temporarily or permanently, will become the Company Fibres on satisfactory completion of Acceptance Tests in accordance with clause 9.4.

### On completion of any Planned Work, SURF will ensure that;

#### any new optical fibres are functionally equivalent to or better than the original the Company Fibres being replaced;

#### satisfactory Acceptance Tests are carried out; and

#### the standard of telecommunications transmissions is maintained.

### In the event of Unavailability due to Planned Work SURF will refund to the Customer 1/365th of the Annual Charge for each day or part of a day on which Unavailability occurs (although a refund will not be payable if the period of Unavailability does not exceed 2 consecutive minutes) to be paid in accordance with clause 4.5(a).

### For the avoidance of doubt, the period of Unavailability is to be calculated from the time that one or more of the Company Fibres becomes Unavailable until the time the Customer is provided with the use of alternative optical fibres and the Customer confirms the Acceptance Tests to be satisfactory in accordance with sub-clause 9.6.

## The Customer's obligations

### The Customer shall not sublet the Company Fibres nor grant rights to any third party in relation to the Company Fibres greater than those granted to the Customer by this Agreement. The Customer warrants that:

#### it has all the consents and regulatory licences necessary for use of the Company Fibres and will not infringe the provisions of any such consent or licence; and

#### any interconnection equipment it uses to interconnect the Company Fibres will comply with current international standards and telecommunications regulations.

### The Customer shall comply with the requirements of any Applicable Law authorising or regulating telecommunications transmissions in so far as they apply to the Customer.

### The Customer shall not do anything which is likely to cause damage, interference or disruption to either or both of the Cables or the Distribution System. SURF will notify the Customer as soon as reasonably practicable after becoming aware that the Customer is by act or omission doing anything which is likely to cause any damage, interference or disruption.

### The Customer shall indemnify SURF and at all times keep it fully indemnified from and against all liability, damages, costs, claims, fines and proceedings that may be brought or awarded against SURF or agreed to be paid by SURF to any third party arising from:

#### any failure by the Customer to comply with the provisions of this clause 7; or

#### any claim by a customer of the Customer arising from any failure by the Customer to comply with the provisions of this clause 7.

### The Customer shall co-operate with all reasonable instructions of SURF and provide SURF, its agents, subcontractors, consultants and employees with all documents, information, items and materials in any form reasonably required by SURF in connection with this Agreement.

## Title

### SURF warrants that it owns the Cable and that it will not do or allow to be done anything in respect of the Cable which might prejudice the rights of the Customer set out in this Agreement without the Customer’s prior written consent, such consent not to be unreasonably withheld or delayed.

### SURF and the Customer confirm that this Agreement:

#### is not intended to and does not grant either party any estate or interest in land;

#### shall not provide the Customer with any ownership, interest or other right of physical access (other than at the Cable end locations specified in Schedule 1 to the Company Fibres other than as expressly provided in this Agreement.

## Acceptance Tests

### SURF shall carry out the Acceptance Tests as soon as reasonably practicable after the date of this Agreement (and in any event no later than 5 Business Days. SURF shall give the Customer as much notice as reasonably practicable of the date and time of such tests.

### The Customer may send an employee or agent to attend the Acceptance Tests and SURF will take account of all reasonable representations made by the Customer employee or agent. The Acceptance Tests are not dependent on the presence of an employee of the Customer.

### SURF will notify the Customer of the results of the Acceptance Tests within 3 Business Days after they have been completed.

### Within 5 Business Days after receipt of the results of the Acceptance Tests, the Customer will verify them and acting reasonably shall either:

#### issue written confirmation to SURF confirming that the Acceptance Tests results as stated are satisfactory, or

#### notify SURF in writing why the Acceptance Tests results as stated are unsatisfactory.

### If the Acceptance Tests results are unsatisfactory:

#### SURF and the Customer will co-operate to identify the cause of the failure;

#### SURF will repeat the Acceptance Tests within 24 hours of the co-operation referred to in sub-clause 9.5(a) and the parties will carry out the procedures set out in sub-clauses 9.2, 9.3 and 9.4 until (subject to sub-clause 13.2(a) and 1.1(a)) the Customer issues a certificate under sub-clause 9.4(a); and

#### where SURF repeats the Acceptance Tests in accordance with clause 9.5(b) two or more times and the Customer notifies SURF in writing that the Acceptance Tests results as stated are still unsatisfactory pursuant to clause 9.4(b), either party may terminate this Agreement with immediate effect without liability by serving written notice on the other party.

### SURF will also carry out Acceptance Tests within 1 Business Day after:

#### providing alternative optical fibres in accordance with sub-clause 6.4;

#### carrying out Corrective Maintenance to rectify a Fault;

#### following Planned Work; or

#### after effecting a Break-out,

#### and the procedures set out in sub-clauses 9.2, 9.3, 9.4 and 9.7 shall apply to Acceptance Testing under this sub-clause 9.6 (except that only written confirmation that the Acceptance Tests are satisfactory shall be required, and not the issuing of an Acceptance certificate).

### In the event that the Customer does not notify with 5 Business Days, SURF in accordance with sub-clause 9.4(a) or 9.4(b) or sub-clause 9.6, the Acceptance Tests shall be deemed to have been satisfactorily passed.

## Maintenance

### SURF will carry out Corrective Maintenance and Preventative Maintenance to the Company Fibres where the cost of this is included in the Annual Charge.

### SURF will carry out all Corrective Maintenance and Preventative Maintenance:-

#### with reasonable skill and care;

#### in accordance with Good Industry Practice;

#### in accordance with the relevant service levels set out in Schedule 3; and

#### in a safe manner and in a manner which, as a minimum, complies with relevant health and safety legislation and regulations applicable from time to time.

### Where Preventative Maintenance, Corrective Maintenance and Planned Works have been performed since the previous Quarter Day, on each Quarter Day, SURF will submit to the Customer a written report. The written report will contain details of any material work performed by SURF relating to the Company Fibres and will include, without limitation, the following:

#### details of any outstanding works on the Company Fibres;

#### details of break-out connections;

#### the status of any outstanding Acceptance Tests; and

#### a log of any and all Faults and associated repair times and periods of unavailability due to a Fault, Service Credits due and Unavailability (due to Planned Works) and any refund payable for that Unavailability.

### In the event of unavailability due to a Fault, SURF will pay Service Credits in accordance with Schedule 3 and clause 4.5(b).

### For the avoidance of doubt Service Credits or a refund for Unavailability may be due (but not both Service Credits and a refund) where Cable is unavailable both due to a Fault or Planned Works. In such circumstances, SURF may in its absolute discretion elect to choose the applicable remedy.

### For the avoidance of doubt, the period of unavailability due to a Fault is to be calculated from the time that one or more of the Company Fibres is reported to be unavailable pursuant to clause 3 of Schedule 3, until the Fault is rectified.

## Break-outs

### The Customer may during the Term request Break-outs from the Company Fibres.

### The Customer may not Break-out without the prior written consent of SURF (such consent not to be unreasonably withheld or delayed).

### Within 5 Business Days of a Break-out request from the Customer, SURF will either:

#### confirm its consent to the relevant Break-out; or

#### notify the Customer in writing that is has not consented to the relevant Break-out with reasons why it has refused to give its consent.

### SURF will effect all Break-outs confirmed in accordance with sub-clause 11.3(a) within 10 days of confirmation to the Customer.

### Where a Break-out is requested by the Customer, the Customer must bear all SURF's reasonable costs of providing the Break-out. These include all reasonable expenses incurred by SURF, whether by way of payments to third parties, the obtaining of wayleaves or other necessary third party consents, provision of apparatus, plant or machinery, internal administration and engineering costs, payments to professional advisers or otherwise, provided that all such costs shall be notified to the Customer in advance.

### When a Break-out is effected, SURF will carry out the following works as necessary at times to be agreed with the Customer (but the Customer may not unreasonably withhold or delay its agreement):

#### any works that have to be undertaken on WPD's property in order to provide the Break-out;

#### all works directly on the Cables; and

#### the final jointing connection to the Company Fibres.

### Both parties will co-operate with the other and take all actions reasonably necessary in order to obtain any wayleaves or other third party consents necessary for a Break-out.

### The Customer acknowledges that Break-outs may affect the level of service provided by SURF, the optical performance and attenuation of the Company Fibres. Where this occurs after a Break-out, Schedule 3 shall be agreed in writing between the parties.

### SURF shall not be liable to the Customer under this Agreement) where the breach arises directly as a result of the effect of the Break-out as requested by the Customer.

## Data Protection

### The Customer and SURF acknowledge that for the purposes of the Data Protection Act 1998, the Customer is the Data Controller and SURF is the data processor in respect of any Personal Data.

### SURF shall process the Personal Data only in accordance with the Customer's instructions from time to time and shall not process the Personal Data for any purpose other than those expressly authorised by the Customer.

### SURF shall take reasonable steps to ensure the reliability of all its employees who have access to the Personal Data.

### Each party warrants to the other that it will process the Personal Data in compliance with all applicable laws, enactments, regulations, orders, standards and other similar instruments.

### SURF warrants that, having regard to the state of technological development and the cost of implementing any measures, it will:

#### take appropriate technical and organisational measures against the unauthorised or unlawful processing of Personal Data and against the accidental loss or destruction of, or damage to, Personal Data to ensure a level of security appropriate to:

##### the harm that might result from such unauthorised or unlawful processing or accidental loss, destruction or damage; and

##### the nature of the data to be protected.

#### take reasonable steps to ensure compliance with those measures.

### The Customer acknowledges that SURF is reliant on the Customer for direction as to the extent to which SURF is entitled to use and process the Personal Data. Consequently, SURF will not be liable for any claim brought by a Data Subject arising from any action or omission by SURF, to the extent that such action or omission resulted directly from the Customer's instructions.

## Termination

### Either party may terminate this Agreement immediately by written notice to the other ("**Breaching Party**") if:

#### the Breaching Party commits a breach of any of its material obligations under this Agreement, and the breach is not capable of being remedied;

#### the Breaching Party commits a breach of any of its material obligations under this Agreement, and the breach, if capable of being remedied, remains unremedied for 30 days after by written notice by the party not in default;

#### the Breaching Party fails to pay any amount due under this Agreement on the due date for payment and remains in default not less than 14 days after being notified to make such payment; and/or

#### if other than for the purposes of amalgamation or reconstruction:

##### the Breaching Party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts or (s deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;

##### the Breaching Party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with any of its creditors;

##### a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of the Breaching Party;

##### an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over the Breaching Party;

##### the holder of a qualifying floating charge over the assets of the Breaching party has become entitled to appoint or has appointed an administrative receiver;

##### a person becomes entitled to appoint a receiver over all or any of the assets of the Breaching Party or a receiver is appointed over all or any of the assets of the Breaching Party;

##### a creditor or encumbrancer of the Breaching Party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the Breaching Party's assets and such attachment or process is not discharged within 14 days;

##### any event occurs, or proceeding is taken, with respect to the Breaching Party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in Clause 13.1(d)(i) to Clause 13.1(d)(vii) (inclusive); or

##### the Breaching Party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.

### The Customer may terminate this Agreement immediately by written notice to SURF if:

#### any alternative optical fibres provided to the Customer in accordance with sub-clause 6.4 fail to pass the Acceptance Tests within 10 Business Days of the provision of such fibres to the Customer;

#### SURF fails on three or more occasions within any calendar month to remedy a Major Fault within the Target Restoration Times; and/or

#### the limitation set out in clause 5.2 of Schedule 3 operates to prevent Service Credits being payable to the Customer where SURF fails to meet the Target Restoration Times.

### The termination or expiry of this Agreement shall not affect any rights which have already accrued to either party.

### If this Agreement is terminated pursuant to clause 13.1 (save where the termination is due to a default by the Customer) or 13.2, without prejudice to the terminating party’s other rights and remedies, the Customer shall be refunded on a pro-rata basis any part of the Annual Charge which it has paid in advance and which relates to the period after this Agreement has been terminated.

### The Customer may upon at least thirty (30) days’ prior written notice to SURF, terminate its use of the Company Fibres during the Initial Term, without the payment of any applicable termination liability if:

#### the Customer contemporaneously (or within thirty (30) days before or after the effective date of termination) places and SURF accepts an order for a new, replacement use of Company Fibres of the same type with equal or greater capacity with a term of not less than the greater of: (a) the remaining Term under this Agreement; or (b) one (1) year; and

#### the Customer pays all non-recurring charges applicable to the replacement Company Fibres; and

#### the monthly recurring charges applicable to the replacement Company Fibres are not less than the monthly recurring charges payable by the Customer under this Agreement.

## Consequences of Termination

### On termination or expiry of this Agreement, the Customer shall immediately pay to SURF all of SURF's outstanding undisputed and unpaid invoices and interest and, in respect of the services supplied but for which no invoice has been submitted, SURF may submit an invoice, which shall be payable within 30 days of receipt by the Customer.

### On termination or expiry of this agreement, the customer shall grant SURF reasonable access to the Customer’s premises and the Customer shall provide all reasonable assistance to SURF in relation to the same.

### Clauses 7.4, 11.9, 13.3, 13.4, 14, 15, 17, 24, 29, 30 and 32, will continue to operate and have effect after this Agreement terminates regardless of the reason for its termination.

## Limitation of liability

### Nothing in this Agreement will limit a party's liability to the other for death or personal injury resulting from its own or its employees' or agents' negligence.

### Subject to clause 15.1, neither party shall be liable whether in contract, tort (including negligence and breach of statutory duty), arising under or in connection with this Agreement for:

#### loss of profits;

#### loss of sales or business;

#### loss of agreements or contracts;

#### loss of anticipated savings;

#### loss of or damage to goodwill;

#### loss of use or corruption of software, data or information;

#### damage to computer hardware/software;

#### loss of electricity supply; or

#### any indirect or consequential loss.

### Subject to clause 15.1, the Customer shall indemnify SURF and keep SURF indemnified fully at all times against all demands, damages, losses, costs (including reasonable legal costs), expenses and charges arising from damage to SURF's property caused by or attributable to the Customer.

### Subject to clauses 15.1 and 15.3, each party's liability in contract, tort (including negligence or breach of statutory duty) or otherwise arising out of this Agreement will be limited to £500,000 in aggregate.

### The terms implied by sections 3, 4 and 5 of the Supply of Goods and Services Act 1982 are, to the fullest extent permitted by law, excluded from this Agreement.

## Force majeure

### Neither party shall be deemed to be in breach of this Agreement, or otherwise liable to the other, by reason of any delay in performance or non-performance of any of its obligations under this Agreement to the extent that such delay or non-performance is due to an Event of Force Majeure. No Service Credits shall be due or refunds for Unavailability shall be due from SURF if the Unavailability or Fault arises as a result of an Event of Force Majeure.

### The party affected by the Event of Force Majeure shall immediately give the other party written notification of the nature and extent of the Event of Force Majeure and the parties shall enter into bona fide discussions with a view to alleviating its effects or to agreeing on such alternative arrangements as may be fair and reasonable.

### Without prejudice to sub-clause 16.4, if the parties cannot agree alternative arrangements in accordance with sub-clause 16.2 within 3 weeks of receiving the written notification of the Event of Force Majeure, either party may treat the matter as a dispute and refer the dispute in accordance with clause 29.

### If any single Force Majeure event continues for a period of thirty (30) days without Service being restored to pre-event conditions; or any multiple Force Majeure events occur for an aggregate of 45 days in any rolling 12 month period, Customer may terminate the affected Service(s) without liability

## Confidentiality

### Each party agrees, both during the Term and for 2 years after termination to treat as strictly confidential and not (except as authorised or required for the purposes of this Agreement) to use or disclose or attempt to use or disclose to any person any unpublished technical information deriving from the other party or any other confidential information in relation to the other's affairs or business or method of carrying on business.

### The restrictions in this clause do not apply to confidential information which a party discloses with the prior written consent of the other or which a party can prove:

#### is known to it at the date of disclosure as evidenced from its written records;

#### is, after the date of disclosure, acquired by it in good faith from an independent third party;

#### has in its entirety become public knowledge otherwise than in breach of these restrictions;

#### is required to be disclosed either by law or by the rules of a relevant stock exchange; or

#### is disclosed to its professional advisers under an obligation of confidentiality.

## Publicity

### Except as referred to in sub-clause 18.2, no announcement concerning the terms of this Agreement shall be made by or on behalf of any of the parties without the prior written consent of the others, such consent not to be unreasonably withheld or delayed.

### Any announcement or circular required to be made or issued by any party by law or under the regulations of the London Stock Exchange or the City Code on Takeovers and Mergers issued by the Panel on Takeovers and Mergers may be made or issued by that party without consent if it has first sought consent and given the other parties a reasonable opportunity to comment on the subject matter and form of the announcement or circular (given the time scale within which it is required to be released or despatched).

## Assignment

### Either party may assign its rights or sub-contract its obligations under this Agreement to an Associated Company.

### Except as permitted in sub-clause 19.1, a Party may not assign or dispose of its rights or obligations under this Agreement without the prior written consent of the other party (such consent not to be unreasonably withheld or delayed).

## Sub-contracting

### SURF may sub-contract the performance of this Agreement in whole or in part. For the avoidance of doubt, SURF shall at all times remain responsible for the proper performance of this Agreement.

### The Customer shall not assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with any of its rights and obligations under this Agreement without the prior written consent of SURF.

## No Partnership

### Nothing in this Agreement shall:

#### create a partnership or joint venture between the parties;

#### render a party the agent of the other nor shall a party hold itself out as such (whether by an oral or written representation or by any other conduct);

### and save as expressly provided in this Agreement neither party shall enter into or have authority to enter into any engagement or make any representation or warranty on behalf of or pledge the credit of or otherwise.

## Exclusion of Third Party Rights

### Other than an Associated Company of SURF’s, a person who is not a party to this Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement but this does not affect any right or remedy of a third party which exists or is available apart from that Act. The parties may vary this Agreement in accordance with clause 26 without reference to, or the consent of, any Associated Company of SURF.

## Value Added Tax

### Where under this Agreement any party agrees to pay to any other party any sum or to furnish to any other party consideration which (in either case) is consideration for a taxable supply such sum or consideration shall be exclusive of Value Added Tax payable thereon and the recipient of the said supply shall pay Value Added Tax in addition to any sum or consideration on receipt of a valid Value Added Tax invoice from the relevant party.

## Entire agreement

### This Agreement sets out the entire Agreement and understanding between the parties in respect of the subject matter of this Agreement.

### The Customer acknowledges that it has entered into this Agreement in reliance only on the representations, warranties and promises specifically contained or incorporated in this Agreement and, save as expressly set out in this Agreement, SURF shall have no liability in respect of any other representation, warranty or promise made prior to the date of this Agreement unless it was made fraudulently.

## Invalidity and Severability

### To the extent that any provision of this Agreement is found by any court or competent authority to be invalid, unlawful or unenforceable in any jurisdiction, that provision shall be deemed not to be a part of this Agreement, it shall not affect the enforceability of the remainder of this Agreement nor shall it affect the validity, lawfulness or enforceability of that provision in any other jurisdiction.

## Variations

### No purported variation of this Agreement shall be effective unless it is in writing and signed by or on behalf of each of the parties.

## Counterparts

### This Agreement may be executed in any number of counterparts and by the parties on separate counterparts, but shall not be effective until each party has executed at least one counterpart.

### Each counterpart, when executed, shall be an original of this Agreement and all counterparts shall together constitute one instrument.

## Releases and Waivers

### The rights, powers and remedies conferred on any party by this Agreement and remedies available to any party are cumulative and are additional to any right, power or remedy which it may have under general law or otherwise.

### Any party may, in whole or in part, release, compound, compromise, waive or postpone, in its absolute discretion, any liability owed to it or right granted to it in this Agreement by any other party or parties without in any way prejudicing or affecting its rights in respect of that or any other liability or right not so released, compounded, compromised, waived or postponed.

### No single or partial exercise, or failure or delay in exercising any right, power or remedy by any party shall constitute a waiver by that party of, or impair or preclude any further exercise of, that or any right, power or remedy arising under this Agreement or otherwise.

## Dispute Resolution

### The parties shall use the escalation procedures set out in Schedule 3. If a dispute arises out of or in connection with this Agreement and cannot be resolved using such procedures the parties agree the following:

#### to try in good faith to resolve the dispute through negotiations between the parties' senior representatives who have authority to settle it;

#### except where there is a total loss of service due to a Fault, not to pursue any other remedies available to them for at least 2 months after the first written notification of the dispute.

### The appointed representatives must use all reasonable endeavours to meet within 21 days of written notification of the dispute and must use all reasonable endeavours to resolve it.

### If the dispute is not resolved at that meeting, either party may propose to the other in writing that the matter be referred to a non-binding mediation. If the parties are unable to agree on a mediator either party may apply to the Centre for Dispute Resolution (CEDR) to appoint one.

### The provisions of this clause 29 in no way limit either party's right to immediately bring legal proceedings in respect of late payment of sums due under this Agreement.

## Notices

### Any notice to a party under this Agreement shall be in writing signed by or on behalf of the party giving it and shall, unless delivered to a party personally be left at, or sent by prepaid first class post or email to, the receiving party's address for notices as set out on page 1 of this Agreement or as otherwise notified in writing from time to time.

### A notice shall be deemed to have been served:

#### at the time of delivery if delivered personally;

#### 48 hours after posting;

#### if sent by email, at 9.00 am on the next Business Day after transmission.

### A party shall not attempt to prevent or delay the service on it of a notice connected with this Agreement.

## Costs and Expenses

### Each party shall bear its own costs and expenses incurred in the preparation, execution and implementation of this Agreement.

## Governing Law and Jurisdiction

### This Agreement shall be governed by and construed in accordance with the law of England and Wales.

### Subject to clause 29 each of the parties irrevocably submits for all purposes in connection with this Agreement to the exclusive jurisdiction of the courts of England.

This Agreement has been signed on the date of signature shown on page 1.

Schedule 1

**Cable Details**

**Dark Fibre Route**: SURF shall provide [xx] dark fibres (1 fibre pair) over the following route and distances:

Total [xx] fibres over [xx] km of Cable

|  |  |
| --- | --- |
| **Route** | **Distance** |
| 1. [Enter Route Details here]
 | **Km** |
| 1. [Delete this row if not applicable]
 | **Km**  |

1. The Company Fibres at each optical node end shall be terminated and presented at the equipment locations as specified by the Customer. (SURF standard connection being SCAPC).

2. Charges: (exclusive of VAT)

|  |  |  |
| --- | --- | --- |
| **Route** | **Connection Charges** | **Annual Charges** |
| 1. [Enter Route Details here]
 | £ 0.00 | £ 0.00 |
| 1. [Delete this row if not applicable]
 | £ 0.00 | £ 0.00 |

**Route Distance**:

The estimated optical distance of the dark fibre route, subject to final OTDR acceptance results, is [xx] km.

The route of the Company Fibres is shown below:

[insert route of Company Fibres]

The fibre specification requirements as defined in ITU-T G.652

Schedule 2

**Acceptance Testing – Optical Fibre Testing**

## Acceptance Testing

### Prior to handover of the Company Fibres and as part of the Fault rectification and Planned Works process, SURF will provide the Customer or the Customer’s representative with the optical fibre test results of the Company Fibres over the Route in question.

### A "**Route**" is defined in this schedule as being from the optical connector (**OC**) on the optical distribution frame (**ODF**) of one accommodation module (**AM**) to the OC on the ODF of the next AM, there being no other AM in between.

### The test results must demonstrate that the maximum overall optical loss at a wavelength of both 1310mm and 1550 nm (and 1625nm if requested by the Customer) is no greater than the calculated optical loss of the Route. The optical loss of the Route will be calculated as follows:

|  |  |
| --- | --- |
| Optical Loss: | (Attenuation Factor X Length) +(Mean Splice Loss xN + (Repair Loss Factor) |
| Where: |
| Optical Loss | End to End Optical Loss of the route expressed in DB |
| Attenuation Factor  | 0.23 dB/KM @1550nm or 0.37dB/KM @1310nm |
| Length | Route Length expressed in KM |
| Repair Loss Factor | 0.5dB |
| N | The number of splices in the link |

### Please note that:

#### the above figures are quoted for a reference wavelength of 1550nm;

#### individual splice loss must be less than or equal to 0.15db; and

#### the mean splice loss must be equal to or less than 0.1db.

### The Route length is the end to end Route distance as given in Schedule 1 for Routes.

### These tests will include:

#### an OTDR measurement on each fibre of each Route in both directions from the OC on the ODF, to characterise the attenuation of the fibres and splices. A suitable length of buffer fibre will be connected between the OTDR and the fibre under test. The OTDR trace should be archived on suitable electronic media. At least one back-up copy of each disk must be made;

#### an optical power loss test on each fibre of each Route using an optical power source on the OC at one end of the Route and an optical power metre on the OC at the distant end; and

#### as (b) but with optical power source and meter reversed.

### These tests will be carried out at 1310nm and 550nm, (and 1625nm on request from the Customer).

### These tests will be carried out by SURF in accordance with clause 9 and will be available to be witnessed by a Customer representative. The testing will not be dependent on the Customer being in attendance.

### SURF will provide the Customer with a permanent record of the test results in a form that these results can be kept in and retrieved from an electronic filing system in a format approved in advance by the Customer.

### SURF will use its reasonable endeavours to ensure that the maximum overall optical losses of the Company Fibres on a Route will not at any time exceed 9% of the maximum loss in dB measured as part of the Acceptance Tests before the Acceptance Date.

### Maximum Loss Measured at acceptance (dB) x 1.1.

### Polarisation mode dispersion tests: If required, to be agreed with the customer and set out in the order.

### Chromatic dispersion tests: If required, to be agreed with the customer and set out in the order.

Schedule 3

**Maintenance**

## Preventative Maintenance

### SURF shall at its own cost and expense plan and carry out all Preventative Maintenance of the Cables (including, for the avoidance of doubt, the Company Fibres) in accordance with clause 10 of the Agreement.

### SURF will ensure that the Company Fibres and any and all associated joint boxes, jointing chambers and enclosures and splicing (collectively, the "**Customer Facilities**") are maintained such that they are capable of being used for telecommunications transmissions. To this end, SURF will carry out Preventative Maintenance which will include but not be limited to:

#### inspections on an as required basis (but in any event not less than annually of the Customer Facilities);

#### any and all work on the Customer Facilities to ensure that they are capable of being used for telecommunications transmissions; and

#### reporting on any and all inspections and work performed pursuant to the above in accordance with reporting procedures set out in sub-clause 10.3 of the Agreement.

### If the Preventative Maintenance performed by SURF results in any Unavailability of or degradation to the Company Fibres, such Unavailability or degradation shall be treated as a Fault and SURF shall carry out the necessary Corrective Maintenance in accordance with paragraph 2 below.

## Corrective Maintenance

### The Cable (and the Company Fibres) will be maintained by SURF in accordance with clause 10 of the Agreement, this Schedule 3 and the procedure attached at Schedule 4.

## Fault Notification

### The following provisions in relation to the detection of a Fault:

#### upon detection of a Fault by the Customer, the Customer will issue a Fault Report informing SURF of the occurrence of any Fault, its location relative to the nearest Cable end locations as specified in Schedule 1 by telephone contact with SURF’s Operations Centre on 0845 6040115. The SURF operations centre will operate 24 hours a day, 7days a week, each week throughout each year; and

#### upon detection of a Fault by SURF, SURF will promptly inform the Customer who will issue a Fault Report if appropriate.

### Upon the detection of a Fault, SURF shall:

#### log each Fault Report under the Fault Report reporting procedure to be agreed from time to time between the parties;

#### acknowledge to the Customer receipt of every Fault Report issued under paragraph 0 by assigning a Fault reference number to each Fault Notice and giving the Customer written confirmation of the assigned Fault reference number;

#### notify the Customer promptly upon becoming aware of a Fault where it has not received a Fault Report from the Customer;

#### conduct investigative work to confirm the nature and location of the Fault; and

#### as soon as reasonably possible provide the Customer with a written estimate of the time to rectify the Fault, the notification to be sent by email.

## Fault Restoration

### SURF will:

#### respond to a Minor Fault within 4 hours after the earlier of receipt of a Fault Report or SURF becoming aware of the Minor Fault; and

#### rectify a Minor Fault within the Target Restoration Time of 12 hours after the earlier of receipt of a Fault Report or SURF becoming aware of the Minor Fault.

### SURF will:

#### in relation to the Company Fibres on the Distribution System:

##### respond to a Major Fault within 4 hours after the earlier of receipt of a Fault Report or SURF becoming aware of the Fault; and

##### rectify a Major Fault within the Target Restoration Time of 18 hours after the earlier of receipt by SURF of a Fault Report or upon SURF becoming aware of the Major Fault.

#### in relation to the Company Fibres which are underground:

##### attend on site to a Major Fault within 2 hours after the earlier of receipt of a Fault Report or upon SURF becoming aware of the Fault; and

##### rectify a Major Fault within the Target Restoration Time of 12 hours after the earlier of receipt by SURF of a Fault Report or upon SURF becoming aware of the Major Fault.

### For the avoidance of doubt, rectification of a Fault may include making a temporary repair even where this will require additional works to effect a permanent repair.

## Service Credits

### If SURF fails to meet the Target Restoration Time for a Fault SURF must pay the appropriate amount of Service Credits for the Faults at a rate of 1/365th of the Annual Charge for each hour in excess of the Target Restoration Time for each of the Company Fibres.

### SURF's total liability to pay Service Credits under paragraph 5.1 is limited to a total of 25% of the maximum of the Annual Charge in any 12 month period.

## Escalation Procedures

### The table below sets out the escalation levels for communications between SURF and the Customer in respect of both Planned Work and Fault restoration:

|  |  |
| --- | --- |
| **Management Level** | **SURF** |
| Level 1 | Surf NMC |
| Level 2 | Operations Manager |
| Level 3 | Surf Telecoms Manager |
| Level 4  | Director |

### The following table sets out the times by which a Fault must be escalated. Faults may be escalated at any time in advance of the times set out below where either party feels that there is an undue delay on behalf of one party:

|  |  |
| --- | --- |
| **Level** | **Maximum Time by which escalation must take place** |
| Level 1 | Immediate |
| Level 2 | 4 Hours |
| Level 3 | 8 Hours |
| Level 4 | 24 Hours |

### Escalation for Planned Works may take place during the planning stages and hence the times cannot be specified. However during the carrying out of Planned Works any problem will be escalated as per Fault restoration.

Schedule 4

**Planned Works Procedure**

## Purpose and responsibilities

### To ensure a controlled and consistent approach to Planned Works, Planned Works are defined as work that may have a disruptive effect on Customer services, and are distinct from Fault works.

### The operations manager is responsible for the Planned Works process.

### Operations team managers are responsible for resource management and liaising with the Network Management Centre ("**NMC**") to arrange Planned Works.

### SURF NMC are responsible for Customer contact, and the planning of individual works. Responsibility also includes cross checking all Planned Works to assess impact on services and feedback of the actual duration to the operations manager.

|  |  |
| --- | --- |
| Associated Documents | Link |
| Notice of Planned Works  | [S-P03-F01](file:///C%3A%5CNRPortbl%5COC_UK%5CAppData%5CLocal%5CMicrosoft%5CWindows%5CTemporary%20Internet%20Files%5CContent.Outlook%5CN8TK22D7%5CPlanned%20Works%20Notice%20S-P03-F01.doc) |
| Planned Works Summary | [S-P03-F02](file:///C%3A%5CNRPortbl%5COC_UK%5CAppData%5CLocal%5CMicrosoft%5CWindows%5CTemporary%20Internet%20Files%5CContent.Outlook%5CN8TK22D7%5CPlanned%20Works%20Summary%20S-P03-F02.doc) |
| Notice of Multiple Planned Works | [S-P03-F03](file:///C%3A%5CNRPortbl%5COC_UK%5CAppData%5CLocal%5CMicrosoft%5CWindows%5CTemporary%20Internet%20Files%5CContent.Outlook%5CN8TK22D7%5CMultiple%20Planned%20Works%20Notice%20S-P03-F03.doc) |

## Classifications

### The following classifications are used on notifications to define the type of work:

#### **Protected Services**:

##### Possible loss of protection, primary route secure, - there is no planned outage, but there is physical work on or in the vicinity of the network.

##### Loss of protection, primary route secure, – an outage is planned on a protected ring network, but any traffic on the outage route will automatically be rerouted onto the other route.

##### Loss of protection, reduced bandwidth, – an outage is planned on a protected ring network. As traffic is split across the two routes around the ring, any bandwidth on the outage route will not be available.

##### Planned loss of service – the outage will affect all traffic.

#### **Unprotected Services**:

##### Unprotected service at risk - there is no planned outage, but there is physical work on or in the vicinity of the network.

##### Planned loss of service – the outage will affect all traffic.

## Process

### The operations team managers assess the impact of any Planned Works, with SURF NMC, as necessary, to evaluate the level of risk to the networks and their customers, and the level of resource required. Consideration is given to alternative works that could reduce any disruption.

### Where Planned Works have an impact on customer traffic, notice is given to all customers affected.

## Notification

### Notification of the Planned Works is given by fax, e-mail or pro forma, giving details of:

#### classification;

#### the reason for the Planned Works;

#### circuits/ service affected;

#### date and time and duration of the Planned Works; and

#### contingency date in case of postponement.

### The notification is peer vetted before sending to the Customer.

### Confirmation of receipt of the notification and agreement of the planned works are actively obtained.

### If a change is requested by a Customer, and accepted, new notifications are issued and old notices cancelled.

### The NMC communicate actual planned details to the operations team managers so the Planned Works can be programmed.

### The Planned Works summary is completed to aid notification planning, outage management and review.

## Notice periods

### SURF support gives a minimum of 30 (calendar) days’ notice for dark fibre customers subject to discussion with customers, as to the best day and time for the outage.

### In high risk situations in SURF's absolute discretion, this notice period may be shortened in consultation with the operations management team and its customers.

## Preparation

### During the Business Day prior to the Planned Works date, SURF NMC check to see if it is still okay to continue with the Planned Works. A minimum of one hour before the commencement of the Planned Works, a further check is made with the customers to obtain final clearance and any reference numbers.

## Planned Works

### Depending on the type and impact of the Planned Works, the NMC is occupied, as necessary.

### During extended works, the customers are contacted and updated at regular intervals.

### If the Planned Works look like exceeding the declared duration, then customers are notified, where possible, as soon as this becomes apparent. If necessary, the escalation procedure in Schedule 3 can be implemented.

## Post works

### Following the Planned Works, customers are contacted to confirm that their services are reinstated and available for reuse, within 60 minutes of the completion of the Planned Works. Where customers do not have 24/7 support services, a voicemail/ email message is left. Phone contact is made the next Business Day.

## Records

### Actual times and duration of the Planned Works are reported to the operations manager on completion.

## Contact

### Regular checks are made to ensure contact details are correct and still valid.