

BY ACCEPTING THIS AGREEMENT THROUGH THE SUBMISSION OF AN SERVICE APPLICATION, THE CUSTOMER AGREES TO FOLLOW AND BE BOUND BY THE TERMS AND CONDITIONS OF THIS AGREEMENT. IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY TO THE TERMS AND CONDITIONS OF THIS AGREEMENT AND, IN SUCH EVENT, "YOU" AND "THE CUSTOMER" AS USED IN THIS AGREEMENT SHALL REFER TO SUCH ENTITY. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF THE CUSTOMER OR SUCH ENTITY DO NOT AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT, YOU AND/OR THE CUSTOMER MAY NOT USE THE SERVICES.

1. DEFINITIONS

In this Agreement the following terms shall have the meanings set out below:

- 1.1 **"Activation Fees"** means the fees related to the initial setup of the Products and/or Services, as specified in the Service Application;
- 1.2 **"Agreement"** means this agreement and all annexures and addendums;
- 1.3 **"Business Day"** means any day other than a Saturday, Sunday or public holiday within the meaning of the Public Holidays Act, 1994, in the Republic of South Africa;
- 1.4 **"Business Hours"** means from 08h00 to 17h00 on a Business Day;
- 1.5 **"Consumer"** means a consumer as defined under the Consumer Protection Act 68 of 2008;
- 1.6 **"Customer Data"** means all data furnished to Cybersmart by the Customer, or generated in the course of the provision of the Services, but excludes any derivative data which is created by Cybersmart for its own internal purposes or which is proprietary or confidential to Cybersmart or its suppliers;
- 1.7 **"Customer Input"** means the inputs reasonably required of the Customer in order to enable Cybersmart to provide the Services to the Customer, as set out in clause 5 and expanded upon in the Service Application where necessary;
- 1.8 **"Confidential Information"** means information or data, whether disclosed orally or in writing, that is identified as being confidential or proprietary at the time of disclosure or which by its nature would generally be deemed in the information technology or telecommunications industry to be of a confidential nature and includes, without limitation the terms and conditions of this Agreement and any information relating to a Party's:
 - 1.8.1 business, business policies, business plans, pricing models, rate cards, Service Application and other business and commercial information; and
 - 1.8.2 know-how, trade secrets, specifications, drawings, sketches, models, samples, data, diagrams and flow charts, and
 - 1.8.3 potential customers, customer lists, sales, sales figures and products; and
 - 1.8.4 technical information, including use of technology, systems, hardware, software (and the incidence of any faults therein) and related material and documentation; and
 - 1.8.5 past, present and future research and development;
- 1.9 **"Cybersmart Technology"** means the various concepts, ideas, methods, methodologies, procedures, processes, know-how, and techniques; models (including, without limitation, function, process, system and data models); templates; general purpose consulting and software tools, utilities and routines; and logic, coherence and methods of operation of systems which Cybersmart has created, acquired or otherwise has rights in and is extended to its business partners;
- 1.10 **"Destructive Element"** means any "back door", "time bomb", "time lock", "trojan horse", "worm", "drop dead device", "virus" or other computer software routine or code intended or designed to:

- 1.10.1 permit access to or the use of a computer system by an unauthorised person, or
- 1.10.2 disable, damage, erase, disrupt or impair the normal operation of a computer system;
- 1.10.3 damage, erase or corrupt data, storage media, programmes, equipment or communications, or otherwise interfere with operations of a computer system;
- 1.11 "**Dispute Resolution Procedure**" means the procedure set out in clause 19;
- 1.12 "**Effective Date**" means the date on which Services or availability of the Services to the Customer commence in terms of this Agreement,
- 1.13 "**Excusing Cause**" means:
 - 1.13.1 a force majeure event as contemplated in clause 21 hereof; or
 - 1.13.2 a failure by the Customer, or its Staff, to provide Customer Input to Cybersmart:
 - 1.13.2.1 within the timeframes contemplated in this Agreement, or failing such contemplation within a reasonable period stipulated by Cybersmart in any written request for such Customer Input or within any period agreed by the Parties in writing; or
 - 1.13.2.2 which is not of the required accuracy, standard or quality, including, without limitation, where such Customer Input is defective, corrupted (in the case of data) or inaccurate;
 - 1.13.3 where the Customer breaches any term of this Agreement; or
 - 1.13.4 where any bona fide dispute arises between the Parties;
- 1.14 "**Fees**" means the fees and charges to be paid by the Customer to Cybersmart from time to time in terms of this Agreement, being Service Fees, Activation Fees and any other fees as may be chargeable under this Agreement from time to time as detailed in the applicable Service Application;
- 1.15 "**Independent Expert**" means an independent expert appointed by written agreement between the Parties to resolve a dispute between them in terms of this Agreement;
- 1.16 "**Initial Term**" means the period over which particular Services will be provided, commencing on the Service Commencement Date and enduring for the period set out in the Service Application;
- 1.17 "**Intellectual Property Rights**" means any and all rights in the nature of intellectual property rights anywhere in the world (whether registered or unregistered) owned, possessed or controlled by a Party, directly or indirectly, including, without limitation, patents, trademarks, service marks, design rights, copyright (including all copyright in any designs and computer software), source codes, moral rights, databases, trade or business names, whether capable of registration or not, but including any right to register same;
- 1.18 "**Line-item Service**" means each line item of the discrete Services to be provided by Cybersmart pursuant to this Agreement, as set out in the relevant Service Application and which together comprise the Services;
- 1.19 "**Network**" means all the equipment and/or network infrastructure used by Cybersmart to provide the Services to the Customer;
- 1.20 "**Network Maintenance**" means planned repairs and improvements carried out from time to time to the Network by Cybersmart;
- 1.21 "**Parties**" means, collectively, Cybersmart and the Customer, and "**Party**" refers to either one of the Parties, as the context may require;

- 1.22 "**Prime Rate**" means the publicly quoted prime rate of interest (percent, per annum) from time to time charged by Firstrand 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;
- 1.23 "**Products**" means hardware and software, provided by Cybersmart to the Customer in terms of this Agreement from time to time;
- 1.24 "**Pro rata Service Fees**" means the initial Service Fee payable by the Customer in respect of the first month of a Line Item Service, in respect of after the period between the Service Commencement Date and the end of the first calendar month;
- 1.25 "**Renewal Period**" means a minimum period of 12 (twelve) months as per Service Order form;
- 1.26 "**Service Application**" means the document stipulating the specific Services and Products to be provided by Cybersmart to the Customer in terms of this Agreement, together with the applicable Fees, Initial Term and other information relevant to the Services, as such Service Application may be amended or supplemented to from time to time by the Parties should the need for further and/so additional services arise;
- 1.27 "**Service Commencement Date**" means the date on which specific Line-item Services will commence, being the date on which the Ready for Service Certificate in respect of a Line-item Service is signed off, or deemed to have been signed off, by the Customer in terms of clause 4.2;
- 1.28 "**Service Fee**" means the monthly fee payable by the Customer in respect of the Line-Item Services provided in terms of this Agreement, as set out in the Service Application;
- 1.29 "**Service Level Agreement**" means the document set out in the Annexures and Addendums describing the service levels to be provided by Cybersmart to the Customer and the service level credits due in respect of performance failure if and where applicable, as same may be amended or supplemented from time to time by the parties in terms of the Variation Procedure;
- 1.30 "**Services**" means the Services and other services to be provided by Cybersmart to the Customer in terms of this Agreement, as set out in the relevant Service Application and additions from time to time;
- 1.31 "**Service Levels**" mean the qualitative and quantitative standards according to which the Services are to be provided, as set out in the Service Level Agreement;
- 1.32 "**Site**" means the sites to or at which the Services will be provided as set out in the Service Application;
- 1.33 "**Staff**" means any director, employee, agent, consultant, contractor or other representative of a Party involved in the provision or acquisition of the Services;
- 1.34 "**Time and Material Basis**" means the method of billing based on actual time spent and materials used, based on Cybersmart standard rates from time to time; and
- 1.35 "**Variation Procedure**" means the Agreement variation procedure set out in clause 9.

2. ORDERING

- 2.1 To order any Services, Customer must complete and deliver to Cybersmart an Service Application . A Service Application submitted by Customer shall be deemed an offer capable of acceptance by Cybersmart to acquire the Services on the terms of this Agreement.
- 2.2 Cybersmart shall not be bound by an Service Application until accepted by it and may accept or reject Service Applications in its sole discretion. A Service Application shall be accepted by Cybersmart and become an Order binding on both Parties on the earlier of: (i) its counter-signature by Cybersmart; and (ii) when Cybersmart issues a welcome letter (which may be by email) confirming that the Order is being processed and will be delivered.
- 2.3 Cybersmart shall have the right to cancel or alternatively, subject to Clause 2.4, amend the details for that Service, if:

- 2.3.1 the cost of any third party services required for that Service or a related Service change from those used in Cybersmart's calculation of the Charges in a Service
 - 2.3.2 a change in the delivery time of any third party services required for that Service or a related Service requires a change to the agreed Ready for Go Live date;
 - 2.3.3 that Service or a related Service is supplied subject to survey and such survey reveals information that was unknown to Cybersmart at the time of quoting and which could affect the availability, performance, delivery timeframes and/or Charges offered; or
 - 2.3.4 other changes are made to the terms upon which a third party element of a Service is supplied or a third party is unable or unwilling to provide such element.
- 2.4 If Cybersmart amends the details of a Service as set out in an Order in accordance with Clause 2.3, Cybersmart will notify Customer and provide Customer with a new Service Application (a "New Order") for the affected Service(s).
- 2.4.1 If accepted by Customer, the New Order will replace the old Order and will be treated as an Order for the purposes of this Agreement.
 - 2.4.2 Customer shall have five (5) Working Days to accept the changes or to cancel the affected Service by signing and returning the New Order.
 - 2.4.3 If Customer does not accept the revised Service Application within five (5) Working Days of notification, Cybersmart reserves the right to cancel the affected Service as described in the original Service Order by notice in writing to Customer and without Cybersmart incurring any Liability.
 - 2.4.4 If there are any Services on the Service Order other than those described in the New Order, these shall remain unaffected.
- 2.5 Any terms and conditions contained in a Customer Service Application, purchase order, letter or other document generated or managed by the Customer or terms added by Customer to a Service Application prepared by Cybersmart shall notwithstanding Clause 2.2 (ii) be invalid with respect to the Services provided hereunder unless agreed to in writing by Cybersmart. However, should this Agreement be held by a court of competent jurisdiction to include Customer's terms and conditions then in the event of any conflict or apparent conflict this Agreement shall always prevail over Customer's terms and conditions.
- 2.6 If there is any inconsistency between the provisions of this Agreement, the Service Level Agreement, or a Service Order, the conflict shall be resolved by interpreting the documents in the following descending order of priority:
- 2.6.1 the Order;
 - 2.6.2 the Service Schedules;
 - 2.6.3 this Agreement; and

3. DURATION

- 3.1 This Agreement shall commence on the Effective Date and, subject to the rights of termination stipulated herein, continue for the Initial Period and then automatically renew for successive Renewal Periods.
- 3.2 Each Line-item Service contemplated in an Service Application shall commence on the relevant Service Commencement Date and shall endure for the relevant Initial Term, where after it shall be automatically renewed for further Renewal Periods.
- 3.3 The Customer may terminate a specific Line-item Service at the end of its relevant Initial Term or any Renewal Period on no less than three calendar month's written notice to Cybersmart. In the event that the Customer is a Consumer, the Customer shall provide no less than one calendar month's written notice to Cybersmart.

4. PRODUCTS AND SERVICES

- 4.1 **Provision of Products and Services.** Cybersmart shall during the term of this Agreement provide the Products and Services to the Customer in accordance with the terms of this Agreement, as read with the relevant Service Application.
- 4.2 **Setup of Services.**
- 4.2.1 Cybersmart shall commence setup of the Services upon acceptance of the relevant Service Application by the Customer.
- 4.3 **Support Channels** The support services rendered in terms of this agreement and the procedures to activate support services, are detailed in the Support Channels Document located at <https://www.cybersmart.co.za/SupportChannels.pdf>.

5. CUSTOMER INPUT

In order to enable Cybersmart to provide the Services in terms of this Agreement, the Customer shall, to the extent required by Cybersmart and at the Customer's cost: -

- 5.1 allow Cybersmart, its Partners and its Staff reasonable access to the Site, which access is required to enable Cybersmart to fulfil its obligations in terms of this Agreement;
- 5.2 provide electricity services, telephone services and other connectivity (including access to networks, information, documentation and data) at the Site;
- 5.3 Where applicable and in relation to a Customer that is a company, make available sufficiently competent and authorised resources, with appropriate access rights and permissions, to assist Cybersmart and consider all requests by Cybersmart for consent or authorisation without any delay, having regard to the nature of the request and the impact which any delay in such consent or authorisation may have on the provision of Services pursuant to this Agreement;
- 5.4 comply with all reasonable policies, procedures and instructions of Cybersmart in respect of the provision of Services pursuant to this Agreement;
- 5.5 use best efforts to ensure that no Destructive Element is introduced into the Customer's or Cybersmart systems by the Customer's Staff or any third party; and
- 5.6 provide all such other assistance and support as may be contemplated in this Agreement.

6. CUSTOMER OBLIGATIONS

- 6.1 **Regulatory compliance.** The Customer has sole responsibility to ensure that the information it and its users transmit and receive over the network complies with all applicable laws and regulations. The Customer hereby indemnifies Cybersmart and holds it harmless against any claims by third parties in respect of prohibited activities conducted by the Customer or its users.
- 6.2 **Acceptable Use.** The Customer hereby agrees that in using the Services it shall at all times comply and where applicable, shall procure that its Staff at all times comply, with Cybersmart Acceptable User Policy (AUP) from time to time, located on its website at www.cybersmart.co.za, which are incorporated herein by reference.
- 6.3 **Security.** The Customer shall at all times adhere to all Cybersmart policies located at www.cybersmart.co.za as well as to security and safety measures applicable to its networks from time to time. In particular, the Customer shall not engage in any of the following:
- 6.3.1 misuse, unauthorised use, abuse of or interference with any of Cybersmart or any third party's equipment or other property loaned by or under the supervision of Cybersmart;
- 6.3.2 the harassment of any person including Cybersmart personnel or authorised representatives, or personnel or representatives of any of Cybersmart other Customers;

6.3.3 any unlawful activity or assisting therein, while using the Cybersmart Services.

6.4 **General Customer obligations.** The Customer shall not take any steps or fail to take any steps which directly or indirectly:

6.4.1 damage the network or any part thereof;

6.4.2 impair or preclude Cybersmart from being able to provide Products and/or Services in a professional manner;

6.4.3 constitutes an abuse or malicious misuse of the Products and/or Services provided by Cybersmart (including but not limited to spamming etc); or

6.4.4 is calculated to have one or more of the above-mentioned effects.

6.5 **Effect of non-compliance.** To the extent that the Customer is in breach of any provision of clauses 5 and 6, Cybersmart reserves the right to suspend all Services to the Customer until such time as the Customer remedies the situation and if Cybersmart incurs any expense in remedying the effects of any of the acts or omissions referred to above, the Customer shall reimburse Cybersmart on demand in the amount necessary to cover such expense.

7. DATA

7.1 **Ownership.** Ownership in all Customer Data, whether under its control or not, shall continue to vest in the Customer and Cybersmart shall not obtain any proprietary rights in such data. For the avoidance of doubt, the Parties agree that the Customer Data will at all times be the sole property of the Customer.

7.2 **Restricted use.** In performing the Services, Cybersmart will comply with the Cybersmart Privacy Policy, which is available at www.cybersmart.co.za and incorporated herein by reference. The Cybersmart Privacy Policy is subject to change at Cybersmart's discretion; however, Cybersmart policy changes will not result in a material reduction in the level of protection provided for Customer Personal Data provided as part of the Customer Content during the Services Period of its Order.

8. EXCUSING CAUSES

In the event of an Excusing Cause arising:

8.1 Cybersmart will notify the Customer, in writing, of the Excusing Cause within a reasonable period of becoming aware of such Excusing Cause;

8.2 the time/service levels for Cybersmart performance shall be extended on a reasonable basis in proportion to the prejudice caused by the Excusing Cause and Cybersmart may charge for any additional hours required to execute the Services or remedy the Excusing Cause on a Time and Materials Basis; and

8.3 Cybersmart shall not be liable for any failure to provide any Services in terms of this Agreement where such failure is a result of any Excusing Cause.

9. VARIATION PROCEDURES

9.1 **No Variation.** Subject to the provisions of this clause 9, no variation, addition or consensual cancellation of this Agreement or any component thereof shall be of any force or effect unless reduced to writing and signed by the Parties or their duly authorised representatives.

9.2 **No Aggregation.** There shall be no aggregation allowed on Cybersmart's FTTH/FTTB/FTTE services. In the event of a breach of this clause all Services will be suspended immediately until the line is repaired. In the event that the Customer then fails to comply with the request to stop aggregating, All Services will be terminated immediately and the Customer will be liable for the costs of termination and the costs of the Services for the remainder of the contracted Term in accordance with clause 17.3.2.1.

9.3 **Amendments to Services.** Further, during the currency of this Agreement, events may occur which require an amendment to the nature or scope of Services provided by Cybersmart to the Customer. Such amendments shall be implemented on the following basis:

9.3.1 Party desiring amendment. Should either Party wish to propose any amendment to the nature or scope of Services, such amendment shall be requested as follows:

9.3.1.1 By the Customer – by entering into a new Service Application for acceptance by Cybersmart;

9.3.1.2 By Cybersmart – written proposal of the suggested amendment, for acceptance by the Customer.

9.3.1.3 All amendments to the Services will result in a new Service Application being provided to the Customer for signature (New Order). The new order will set out the existing Services as well as any amendments and the term for all the Services contained in the New Order will automatically renew for the Renewal Term.

10. CONSIDERATION

10.1 **Consideration.** As consideration for the provision of the Products and the Services pursuant to this Agreement, the Customer shall pay Cybersmart the Activation Fee, any Pro rata Services Fees and Service Fees set out in the relevant Service Application.

10.2 **VAT.** All amounts stipulated in this Agreement are, unless otherwise indicated, stipulated exclusive of Value-Added Tax, which shall be payable by the Customer at the applicable rate.

10.3 **Activation Fees.** Activation Fees and Pro rata Service Fees are due by the Customer on the relevant Service Commencement Date and are payable in advance, within 7 (seven) days of Cybersmart invoice in respect thereof, or as may otherwise be provided on the applicable Service Application .

10.4 **Service Fees.** Service Fees are due by the Customer monthly and payable on or before the 1st day of the month following the relevant Services delivery by way of debit order, or as may otherwise be provided on the applicable Service Application.

10.5 **Invoices.** Service fees will be invoiced in advance in the form of a detailed VAT invoice in respect of all Fees payable pursuant to this Agreement. Such invoice may be in electronic or hardcopy format.

10.6 **Payments.** All payments by the Customer must be made in South African Rand, free of set-off and bank charges, by debit order, unless otherwise agreed in writing.

10.7 **Overdue amounts.** If the Customer fails to make any payment on the due date, Cybersmart may, without prejudice to any of its rights, charge the Customer interest on the overdue amounts at the Prime Rate, plus any additional costs incurred by Cybersmart related to collections as a result of Customer's failure to make any payment on the due date, including, *inter alia*, collection commission and attorney's fees on the attorney own client scale. All such default interest shall automatically accrue from the day following the date the relevant amount was due until it is paid in full and shall accrue both before and after judgment. Such interest shall be payable on demand and collected with the succeeding debit order.

10.8 **Amounts Disputed in Good Faith.** Customer may avoid the incurrence of extended payment charges in the case of a bona fide dispute by notifying Cybersmart in writing of the amount that is disputed within the seven (7) day invoicing period and providing full details of the grounds on which the amount is disputed, together with documents and calculations in support of its claim. Cybersmart shall investigate and resolve any dispute notified to it under this Clause 10.8 and shall notify the Customer of the outcome of same. In the event it is ascertained that no incorrect amounts were billed Cybersmart shall be entitled to interest on any amounts determined to be owed to it. All undisputed amounts shall be paid in accordance with the terms of this Agreement.

10.9 **Suspension of Services.** In addition, Cybersmart shall be entitled, without liability, to suspend the Services for any period during which any Fees (including all interest thereon) are outstanding or in arrears, provided that Cybersmart shall give the

Customer no less than five Business Days written notice (which shall include by way of e-mail) of its intention to suspend the Services.

- 10.10 **Escalations.** Cybersmart may, on 30 (thirty) days written notice to the Customer, increase the Service Fees in respect of any Line-Item Services. Cybersmart shall provide Customer with reasonable explanations and justifications for such proposed increases in order to enable the Customer to analyse same.
- 10.11 **No set-off.** The Customer will not be entitled to withhold payment of any amount payable in terms of this Agreement to satisfy any claim against Cybersmart arising from this or any other agreement with Cybersmart, nor will the Customer be entitled to set off any such amount payable in terms of this Agreement against any amount owing to it by Cybersmart in terms of this or any other agreement.
- 10.12 **Credit Checks.** Cybersmart reserves the right to conduct credit checks on the Customer from time to time and the Customer consents to such credit checks.

11. MAINTENANCE AND INFORMATION EXCHANGE

- 11.1 Cybersmart shall use reasonable endeavours to maintain each Service and/or procure that it is maintained in accordance with the applicable Service Level Agreement. Customer shall be entitled to rebates in respect of failure by Cybersmart to meet the Service Levels calculated in the manner set out in the Service Level Agreement.
- 11.2 When a Fault is reported, Cybersmart shall use reasonable endeavours to take such steps and give such advice as may be appropriate to restore normal operation of the Services.
- 11.3 Customer shall allow Cybersmart, its authorised nominee or the cable system operator or administrator, as applicable, to have access to and to use and test the Services as reasonably required for the purpose of ensuring that the Services are operated and maintained in efficient working order.
- 11.4 Customer undertakes to promptly provide Cybersmart (free of charge) with all information and co-operation that Cybersmart may reasonably require and which Customer is able to provide from time to time to enable Cybersmart to perform uninterrupted its obligations and exercise its rights hereunder and to verify and/or monitor Customer's compliance with this Agreement.
- 11.5 Cybersmart shall promptly supply Customer (free of charge) with all relevant information necessary to enable Customer suitably to prepare the Sites for the delivery, installation and commissioning of the Services and for the ongoing provision of the Services.

12. SAFETY AND SECURITY

- 12.1 Each Party agrees to comply with safety and security procedures notified to them by the other Party and with the requirements of any applicable health and safety legislation or any other Applicable Law.
- 12.2 The Parties shall each at their own cost and expense take whatever steps as are necessary to procure and discharge their respective obligations under this agreement and applicable law to ensure the health and safety of the each party and/or their employees, agents, directors, sub-contractors and members of the public.

13. SUSPENSION OF SERVICES

- 13.1 Cybersmart may lawfully suspend and withdraw all or part of the Services at any time until further notice to Customer if:
- 13.1.1 Cybersmart reasonably considers that the continued provision of the Service may cause Cybersmart to breach an Applicable Law or be in contravention of any operating licence or other authorisation;
- 13.1.2 Customer is in breach of or otherwise is not complying with any of the provisions of this Agreement, Cybersmart having given the Customer five (5) days written notice to remedy the breach; or

13.1.3 Any payment or invoice delivered by Cybersmart to Customer is not paid by the due date.

13.2 The exercise of Cybersmart's right to suspend the Services under Clause 13 at its sole discretion is without prejudice to any other remedy available to Cybersmart under the Agreement and does not constitute a waiver of Cybersmart's right to subsequently terminate the Agreement. Suspension of the Services under clause 13 shall be without prejudice to and shall not affect Customer's obligation to pay the charges related to the suspended Service which shall continue during the period of suspension.

13.3 This clause 13.3 shall operate without prejudice to Clause 13.2 where:

13.3.1 in Cybersmart's sole discretion the circumstances giving rise to a suspension under Clause 13.1 are lifted; and/or

13.3.2 Customer makes payment of any overdue invoice triggering suspension under Clause 13.1.3 together with applicable interest thereon; and/or

13.3.3 Customer otherwise remedies a breach triggering suspension under Clause 13.1.2 to Cybersmart's reasonable satisfaction and provides acceptable assurances as to future performance,

13.4 Cybersmart shall reinstate the Service and shall require the Customer to pay a reasonable reconnection fee minimum of R1500 in advance as a pre-condition to making the Services available again and to cover any third party costs that may be directly related to the reconnection of the Services.

14. INTELLECTUAL PROPERTY

Each Party has created, acquired or otherwise obtained Intellectual Property Rights in various products, technology or methodology which it may employ, provide, modify, create, acquire or otherwise use during the currency of this Agreement. Each Party shall retain all right, title and interest in same and the other Party shall not have nor acquire any right, title or interest therein.

15. CYBERSMART WARRANTIES

15.1 **Intellectual Property Warranties:**

15.1.1 Cybersmart warrants that no aspect of the provision of the Services or any Cybersmart Technology will infringe any Intellectual Property Rights of any third party, and Cybersmart shall, at its cost, defend the Customer against any such claim, provided that in respect of all such claims, the Customer:-

15.1.1.1 gives prompt notice to Cybersmart of such claim and Cybersmart has the election to control the defence thereof;

15.1.1.2 takes all reasonable steps to mitigate any loss or liability in respect of the claim; and

15.1.1.3 does not compromise or settle the claim in any way without Cybersmart prior written consent.

15.2 **Service warranties.** Cybersmart warrants that in relation to each Service provided in terms of this Agreement it will provide same in accordance with all applicable laws and regulations.

15.3 **Disclaimer of warranties.** CYBERSMART DOES NOT GUARANTEE THAT (A) THE SERVICES WILL BE PERFORMED ERROR-FREE OR UNINTERRUPTED, OR THAT CYBERSMART WILL CORRECT ALL SERVICES ERRORS, (B) THE SERVICES WILL OPERATE IN COMBINATION WITH CUSTOMER CONTENT OR APPLICATIONS, OR WITH ANY OTHER HARDWARE, SOFTWARE, SYSTEMS, SERVICES OR DATA NOT PROVIDED BY CYBERSMART, AND (C) THE SERVICES WILL MEET CUSTOMER REQUIREMENTS, SPECIFICATIONS OR EXPECTATIONS. THE CUSTOMER ACKNOWLEDGES THAT CYBERSMART DOES NOT CONTROL THE TRANSFER OF DATA OVER COMMUNICATIONS FACILITIES, INCLUDING THE INTERNET, AND THAT THE SERVICES MAY BE SUBJECT TO LIMITATIONS, DELAYS, AND OTHER PROBLEMS INHERENT IN THE USE OF SUCH COMMUNICATIONS FACILITIES. CYBERSMART IS NOT RESPONSIBLE FOR ANY DELAYS, DELIVERY FAILURES, OR OTHER DAMAGE RESULTING FROM SUCH PROBLEMS. CYBERSMART IS NOT RESPONSIBLE FOR ANY ISSUES RELATED TO THE PERFORMANCE, OPERATION OR SECURITY OF THE SERVICES THAT ARISE FROM THE

CUSTOMER CONTENT, APPLICATIONS OR THIRD PARTY CONTENT. CYBERSMART DOES NOT MAKE ANY REPRESENTATION OR WARRANTY REGARDING THE RELIABILITY, ACCURACY, COMPLETENESS, CORRECTNESS, OR USEFULNESS OF THIRD PARTY CONTENT OR SERVICES, AND DISCLAIMS ALL LIABILITIES ARISING FROM OR RELATED TO THIRD PARTY CONTENT OR SERVICES.

- 15.4 FOR ANY BREACH OF THE SERVICES WARRANTY, THE CUSTOMER'S EXCLUSIVE REMEDY AND CYBERSMART'S ENTIRE LIABILITY SHALL BE THE CORRECTION OF THE DEFICIENT SERVICES THAT CAUSED THE BREACH OF WARRANTY, OR, IF CYBERSMART CANNOT SUBSTANTIALLY CORRECT THE DEFICIENCY IN A COMMERCIALY REASONABLE MANNER, THE CUSTOMER MAY TERMINATE THE DEFICIENT SERVICES AND CYBERSMART WILL REFUND TO THE CUSTOMER THE FEES FOR THE TERMINATED SERVICES THAT IT PRE-PAID TO CYBERSMART FOR THE PERIOD FOLLOWING THE EFFECTIVE DATE OF TERMINATION.
- 15.5 TO THE EXTENT NOT PROHIBITED BY LAW, THESE WARRANTIES ARE EXCLUSIVE AND THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS INCLUDING FOR SOFTWARE, HARDWARE, SYSTEMS, NETWORKS OR ENVIRONMENTS OR FOR MERCHANTABILITY, SATISFACTORY QUALITY AND FITNESS FOR A PARTICULAR PURPOSE.
- 15.6 **No representations.** The Customer warrants that it has not been induced to enter into this Agreement by any prior representations, warranties or guarantees, whether oral or in writing, except as expressly contained in this clause 15.
- 15.7 **Survival.** This clause 15 shall survive termination of this Agreement.

16. CONFIDENTIAL INFORMATION

- 16.1 **Confidentiality obligation.** Each Party ("**the Receiving Party**") must treat and hold as confidential all Confidential Information of the other Party ("**the Disclosing Party**") to which they have access, or which otherwise becomes known to them during the currency of this Agreement.
- 16.2 **Exceptions.** The obligations of confidentiality contained herein shall not apply to any confidential information which the Receiving Party thereof can show (and it shall be for the Receiving Party to prove this by documentary evidence) -
- 16.2.1 is, at the time of disclosure to the Receiving Party by the Disclosing Party, within the public domain and could be obtained by any person with no more than reasonable diligence; or
- 16.2.2 comes into the public domain and could be obtained after such disclosure, otherwise than by reason of a breach of any of the undertakings contained in this Agreement; or
- 16.2.3 is, at the time of such disclosure, already within the possession of the Receiving Party, or it has been independently developed by the Receiving Party; or
- 16.2.4 is subsequently provided to the Receiving Party by a person who has not obtained such information from the Disclosing Party, provided that, in any such case, such information was not obtained illegally or disclosed by any person in breach of any undertaking or duty as to confidentiality, whether express or implied; or
- 16.2.5 is disclosed with the written approval of the Disclosing Party; or
- 16.2.6 is or becomes available to a third party from the Disclosing Party on an unrestricted basis; or
- 16.2.7 is obliged to be reproduced under order of a court or government agency of competent jurisdiction or in satisfaction of the requirements of any stock exchange or other regulatory authority.
- 16.3 **Duties of Parties.** The Receiving Party therefore agrees to hold such Confidential Information in the strictest confidence, not to make use thereof other than for the performance of the obligations under this Agreement, to release it only to Staff and professional advisors requiring such information on a need-to-know basis and not to release or disclose it to any other person.
- 16.4 **Survival.** The Parties agree that the provisions of this clause will survive the termination of this Agreement.

- 16.5 **Obligation prior to disclosure.** Cybersmart shall procure that any party to whom it validly discloses the confidential information of the Customer, as contemplated in clause, 16.2 undertakes to respect the secret, confidential and proprietary nature thereof.

17. TERMINATION

17.1 **Termination for cause**

17.1.1 Without prejudice to any rights and remedies that may have accrued to a Party, either Party may terminate this Agreement or any Order with immediate effect by providing the other Party written notice of its intention to do so if the other Party:

17.1.1.1 ceases to trade (either in whole or as to any part involved in the performance of this Agreement or any Order);

17.1.1.2 becomes insolvent, is sequestered, or placed under provisional liquidation, or finally liquidated, or placed into business rescue;

17.1.1.3 makes any composition or arrangement with its creditors, takes or suffers any similar action in consequence of debt, is unable to pay its debts under any Applicable Law relating to insolvency or bankruptcy or the relief of debtors;

17.1.1.4 Excluding planned maintenance, should the Customer experience an outage of an individual port (because of an outage in either the circuit/port) or the relevant Cybersmart provided local access circuit experiences either:

17.1.1.5 a single period of Service Unavailability in excess of seventy two hours in any calendar month,

17.1.1.6 three or more periods of Service Unavailability of seventy two hours or longer over the course of a rolling six-month period, or

17.1.1.7 fifteen separate periods of Service Unavailability (of any duration) within a calendar month, Customer may terminate the affected circuit without penalty provided that written notice of termination is provided to Cybersmart within fifteen days of the event giving rise to the termination right under this Section.

17.2 **Termination for Convenience**

17.2.1 Subject to Clause 17.4.1, either Party shall be entitled to terminate this Agreement by providing the other Party with ninety (90) days' prior written notice to that effect.

17.2.2 Termination in accordance with Clause 17.2.1 above shall not affect any Service provided or tendered under an Order accepted prior to the date of the notice issued under Clause 17.2.1 ("Pre-Termination Order"). Each Pre-Termination Order shall continue, in full force and effect, in accordance with its terms and the terms and conditions of this Agreement. The Customer acknowledges and agrees that this Clause is reasonable in all respects and it is necessarily required by Cybersmart to protect its interests.

17.2.3 The Customer shall accept full responsibility for all reasonable abortive costs and expenses incurred by Cybersmart in terms of this Agreement and undertakes to pay the costs to Cybersmart, should the Customer cancel the order for the provision of the Service(s), as set out in the "Service Application", after the Effective Date of this Agreement or effect any changes regarding the installation of the Service(s). In any event any incurred costs and charges shall not exceed the contractual value of the minimum term for the service."

17.2.4 Cybersmart may terminate this Agreement and suspend services in accordance with clause 13 should the Customer fail to pay in full the fees set out in the Service Application.

17.3 **Breach**

17.3.1 Either Party shall be entitled to terminate any relevant Service Order, or the Agreement if the breach directly impacts to all active Service Orders, where the other Party:

17.3.1.1 commits a material breach of such Service Order or this Agreement which is incapable of remedy; or

17.3.1.2 fails to remedy or persists in a remedial material breach of such Service Order or this Agreement following the expiry of a period of seven (7) days following service of a notice detailing the breach and requiring its remedy, and for the purposes of this Clause such material breach shall include but not be limited to a failure to make payment of an overdue invoice which is not the subject of an unresolved good faith dispute under Clause 10.8 irrespective of the reason for such non-payment including in any case where Customer claims Force Majeure in respect of the same.

17.3.2 **Upon any termination under this Clause 17.3:**

17.3.2.1 in which Customer is the Party in breach, Customer shall be liable for and shall pay on demand all Charges incurred up to the termination date as well as for the balance of all Charges that would have been paid until the end of the Term of any terminated Service Orders. The Customer acknowledges and agrees that this Clause is reasonable in all respects and it is necessarily required by Cybersmart to protect its interests.

17.3.2.2 in which Cybersmart is the Party in breach, Customer shall be liable for all Charges incurred up to the termination date as and shall not be liable for any further Charges after the termination date of the terminated Service Orders.

17.4 **Effects of Termination**

17.4.1 Upon termination of any Service Order and/or this Agreement in accordance with clause 17.2.1, the Customer shall be liable for an early termination fee equal to the sum due under such Service Order for the remainder of the Term. The Parties record that the early termination charges are not a penalty, but a genuine estimate of the actual damages that Cybersmart will suffer as a result of the early termination.

17.4.2 Upon termination of any Service Order and/or this Agreement all Charges incurred (whether or not invoiced) shall be immediately due and payable, Customer shall immediately cease to have any right in the relevant Services and neither Party shall have any further obligation to the other in respect of the same save that such termination: (i) shall not operate as a waiver of any breach hereof nor affect a Party's accrued rights, liabilities and obligations as at the date of termination; or (ii) affect any provision which is expressly or by implication intended to come into force on, or continue in force after, termination, including without limitation Clauses 2.6, 17.3.1, this Clause 17.4; and (iii) shall in no case give rise to an obligation on the part of Cybersmart to refund any Charges. The Customer acknowledges and agrees that this Clause is reasonable in all respects and it is necessarily required by Cybersmart to protect its interests

18. LIMITATION OF LIABILITY

18.1 **Direct damages limited.** Notwithstanding the form (whether in contract, delict, or otherwise) in which any legal action may be brought, Cybersmart maximum liability for general and/or direct damages for any breach of this Agreement or any wilful or gross negligent misconduct or omission arising during the course and scope of fulfilling its obligations in terms of this Agreement, shall, in respect of the Services, be equal to the lesser amount of either an aggregate amount of the Service Fees paid by the Customer over the previous 12 (twelve) months pursuant hereto. Such maximum amount shall be an aggregate amount for all claims arising out of this Agreement.

18.2 **Consequential damages excluded.** Neither Party shall be liable for any loss of profits, goodwill, business, Customers, contracts, revenue, the use of money, contractual penalties imposed by third parties, anticipated savings or data; or any special, indirect or consequential loss and such liability is excluded whether it is foreseen, foreseeable, known or otherwise. For the purposes of clarity it is recorded that the provisions of this clause 18.2 apply whether such loss is direct, indirect,

consequential or otherwise, but shall not apply to any claim by Cybersmart in respect of any fees payable by the Customer for services rendered, or in respect direct contractual damages as a result of a breach by the Customer of any provision of this Agreement.

19. DISPUTE RESOLUTION

- 19.1 **Committee.** Any dispute which arises between the Parties shall first be referred to Cybersmart in writing and Cybersmart will use its best endeavours to resolve the dispute within 14 (fourteen) days of the dispute having been referred to it.
- 19.2 **Severability.** clause 19.1 is severable from the rest of this Agreement and shall remain valid and binding on the Parties notwithstanding any termination of this Agreement.

20. DOMICILIA AND NOTICES

- 20.1 **Addresses.** The Parties select as their respective *domicilia citandi et executandi* the physical addresses set out on the cover sheet. Likewise, the Parties choose all the addresses set out on the cover sheet for the purposes of giving or sending any other notice provided for or required hereunder, or such other address or fax number as may be substituted by notice given as herein required.
- 20.2 **Change of Address.** Either Party may give written notice to the other, change its domicilium to any other physical address in the Republic of South Africa and its fax number to any other South African number, provided that such change shall take effect fourteen 14 (fourteen) days after delivery of such written notice.
- 20.3 **Deemed Receipt.** Any notice to be given by either Party to the other shall be deemed to have been duly received by the other Party -
- 20.3.1 if addressed to the addressee at its domicilium and posted by pre-paid registered post on the 10th day after the date of posting thereof, or
- 20.3.2 if delivered to the addressee's domicilium by hand to a responsible person apparently in charge of the addressee's premises, during Business Hours on a Business Day, on the date of delivery thereof, or
- 20.4 **Use of email.** The Parties record that whilst they may correspond via email during the currency of this Agreement for operational reasons, no formal notice required in terms of this Agreement, may be given via email.

21. FORCE MAJEURE

- 21.1 Performance of the obligations of Cybersmart in terms of this Agreement shall be excused for as long as and to the extent that such Party is unable to deliver performance because of any cause beyond its control and for which it is not responsible which, if qualifying as such shall include, without limitation, an act of God or State or war (whether declared or not) or sabotage, fire, flood, riot, strike, lock-out, pandemic downtime of any third party communication (including telecommunication) infrastructure, governmental restriction, affecting the performance of such obligations, Cybersmart shall –
- 21.1.1 As soon as it becomes aware of any such force majeure event, immediately give notice to the Customer (which shall be confirmed in writing as soon as possible thereafter as is possible) detailing the circumstances on which it relies and an estimate of the likely duration of such inability, where possible; and
- 21.1.2 Notify the Customer as soon as the event terminates, by giving notice thereof to Customer, which shall be confirmed in writing as soon thereafter as is possible;
- 21.2 the Parties shall co-operate together and use all reasonable efforts to overcome, or failing which, to minimise the effect of such inability;

- 21.3 Cybersmart shall be excused and subsequently not obliged perform any obligation hereunder not performed as a consequence of and during any such inability, and the duration of this Agreement shall not be extended as a consequence of any such inability.

22. ASSIGNMENT AND SUB-CONTRACTING

- 22.1 **No Assignment.** 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 without the prior written consent of Cybersmart, which consent shall not be unreasonably withheld or delayed.
- 22.2 **Sub-contractors.** Cybersmart may sub-contract its obligations under this Agreement to third parties, provided that in such event Cybersmart shall remain liable for the performance by such subcontractor of Cybersmart obligations in terms of this Agreement.

23. RELATIONSHIP AND DUTY OF GOOD FAITH

- 23.1 **Good Faith.** The Parties shall at all times owe each other a duty of good faith and shall, in all dealings with each other and in respect of the Services act according to such standard.
- 23.2 **No authority.** Nothing in this Agreement shall be construed as creating a legal partnership between the Parties and neither Party shall have any authority to incur any liability or obligation on behalf of the other or to pledge or bind the credit of the other Party.

24. INTERPRETATION

This Agreement shall be subject to the following rules of interpretation.

- 24.1 **Headings.** Headings and sub-headings are inserted for information purposes only and shall not be used in the interpretation of this Agreement.
- 24.2 **Parts of the Agreement.** Unless otherwise stated:
- 24.2.1 references to clauses, sub-clauses, schedules or paragraphs are to be construed as references to clauses, sub-clauses, schedules or paragraphs of this Agreement;
- 24.2.2 references in Schedules to clauses shall, unless expressly provided otherwise, be deemed to be a reference to clauses in such Schedule.
- 24.3 **Enactments.** References to any enactment shall be deemed to include references to such enactment as re-enacted, amended or extended from time to time.
- 24.4 **References to persons.** References to: -
- 24.4.1 persons shall include companies, corporations and partnerships;
- 24.4.2 any Party shall, where relevant, be deemed to be references to, or to include, as appropriate, their respective successors or permitted assigns;
- 24.4.3 the singular shall include the plural and vice versa;
- 24.4.4 any one gender shall include a reference to all other genders.
- 24.4.5 days shall be deemed to be to calendar days, unless specifically stipulated as being business days.
- 24.5 **Survival of terms.** The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

- 24.6 **Substantive provisions.** If any provision in a definition is a substantive provision conferring rights or imposing duties on any Party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in this Agreement.
- 24.7 **Calculation of days.** When any number of days is prescribed in this Agreement, same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day falls on a day which is not a business day, in which case the last day shall be the next business day.
- 24.8 **Approvals and consents.** Where the approval or consent of any Party is required in terms of this Agreement, the Parties hereby agree that such approval or consent shall not, unless expressly provided to the contrary, be unreasonably withheld or delayed by the Party who is required to give same.
- 24.9 **Neutral construction.** The rule of construction that the Agreement shall be interpreted against the Party responsible for the drafting or preparation of the Agreement, shall not apply.
- 24.10 **The term "including".** The words "include", "includes", and "including" means "include without limitation", "includes without limitation", and "including without limitation". The use of the word "including" followed by a specific example shall not be construed as limiting the meaning of the general wording preceding it.
- 24.11 **Common meaning.** Terms other than those defined within the Agreement will be given their plain English meaning, and those terms, acronyms, and phrases known in general commercial or industry-specific practice, will be interpreted in accordance with their generally accepted meanings.

25. GENERAL

- 25.1 **Non-exclusivity.** Nothing in this Agreement shall be construed as precluding or limiting in any way the right of Cybersmart from supplying services of whatsoever nature to other Customers.
- 25.2 **Entire Agreement.** This Agreement and the documents, records or attachments referred to herein or therein, constitute the entire agreement between the Customer and Cybersmart in respect of the subject matter hereof, and supersedes all previous Agreements in respect thereof.
- 25.3 **Waiver.** No granting of time or forbearance shall be or be deemed to be a waiver of any term or condition of this Agreement and no waiver of any breach shall operate a waiver of any continuing or subsequent breach.
- 25.4 **Applicable Law.** This Agreement shall be governed and construed according to the laws of the Republic of South Africa.
- 25.5 **Jurisdiction.** Subject to clause 19, the Parties hereto hereby consent and submit to the jurisdiction of Western Cape Division of the High Court of South Africa.
- 25.6 **Certificate of indebtedness.** A certificate of indebtedness signed by any director or manager of Cybersmart, whose authority or appointment it shall not be necessary to prove, in respect of any indebtedness of the Customer in terms of this Agreement, shall be *prima facie* evidence of the Customer's indebtedness to Cybersmart.
- 25.7 **Publicity.** Neither Party shall make or issue any formal or informal announcement, advertisement or statement to the press in connection with this Agreement or otherwise disclose the existence of this Agreement or the subject matter thereof to any other person, other than a professional advisor or its Staff involved in the provision of the Services, without the prior written consent of the other Party, provided that:-
- 25.7.1 Cybersmart may cite the Customer as one of its Customers in its accounting, marketing and associated material,
and
- 25.7.2 the Customer may cite Cybersmart as one of its service providers in its accounting, marketing and associated material.

25.8 **Costs.** Each Party shall bear and pay its own fees and costs of and incidental to the negotiation, drafting, preparation and execution of this Agreement.

25.9 ***direct marketing: consumer's rights to withdraw from the agreement***

25.9.1 If this Agreement is concluded as a result of direct marketing, a Consumer has the right to terminate this Agreement by written notice to be delivered to Cybersmart, within five (5) days after the conclusion of the Agreement.

25.9.2 the five (5) day period mentioned in clause 25.9.1 is calculated with the exclusion of the date of conclusion of this Agreement and of any Saturday, Sunday or public holiday. This notice will have no effect unless it:

25.9.2.1 Is signed by the Consumer or his representative on his written authority;

25.9.2.2 Refers to this Agreement as the agreement that is being revoked or terminated, as the case may be; and

25.9.2.3 Is unconditional.