Activate Telecoms PTY Ltd Terms & Conditions

GENERAL TERMS AND CONDITIONS

1. DEFINITIONS

1.1 In this Master Agreement –

1.1.1 Clause headings are for convenience only and are not to be used in its interpretation;

1.1.2 An expression which denotes–

1.1.2.1 Any gender includes the other genders;

1.1.2.2 A natural person includes a juristic person and vice versa; and

1.1.2.3 The singular includes the plural and vice versa.

1.2 In this Agreement, unless the context indicates a contrary intention, the following words and expressions bear the meaning assigned to them and cognate expressions bear the following meanings –

1.2.1 Activate means Activate Telecoms (Proprietary) Limited (registration number 2007/025253/07) a company incorporated according to the laws of the Republic of South Africa;

1.2.2 "Activation" means the enabling of a service at Activate' s or a Service Provider contracted to Activate premises to operate on one or more networks;

1.2.3 "Addendum" means a supplementary agreement signed by both Activate and the Customer in respect of additional Equipment and Services;

1.2.4 "Agreement" means the General Terms and Conditions, the Annexures, the Schedules including a Proposal to an Annexure which set out the specific products and/or services and all Addenda, if applicable, concluded by the Activate and the Customer and executed in terms hereof;

1.2.5 "Annexure" means any of the following Annexures as the case may be:

1.2.5.1 The Instalment Sale Annexure annexed hereto which sets out the additional terms and conditions upon which Equipment is sold by Activate to the in terms of this Agreement;

1.2.5.2 The Rental Agreement Annexure annexed hereto which sets out the additional terms and conditions upon which Equipment is rented by Activate to the Customer in terms of this Agreement;

1.2.5.3 The Services Agreement Annexure which sets out the additional terms and conditions upon which Non-Managed Services are provided by Activate to the Customer in terms of this Agreement;

1.2.5.4 The SLA Annexure which sets out the additional terms and conditions upon which the Managed Services are provided by Activate to the Customer in terms of this Agreement;

Annexed to these General terms and Conditions;

1.2.6 "Charges" or "Rates" means the installation charges, monthly services charges, usage charges and any other charges pertaining to the provision of services by Activate to the Customer;

1.2.7 "Commissioned" means the date on which the services are operational;

1.2.8 "CPA" means the Consumer Protection Act, 2008;

1.2.9 "CPA Regulations" means regulations promulgated pursuant to the CPA from time to time;

1.2.10 "Customer "means any person who has entered into an agreement with Activate for:

1.2.10.1 The purchase of any Equipment upon the terms and conditions set out in the Instalment Sale Annexure;

1.2.10.2 The Rental or use of any Equipment upon the terms and conditions set out in the Rental Agreement Annexure;

1.2.10.3 the provision of Managed Services upon the terms and conditions set out in the SLA Annexure; or

1.2.10.4 the provision of Non-Managed Services upon the terms and conditions set out in the Service Agreement Annexure;

1.2.11 "ECA" means the Electronic Communications Act, 2005,

1.2.12 "Equipment" means all Equipment, devices or goods including software provided by the Activate to the Customer as identified in a Schedule, Proposal or Addendum which are sold or rented; or

1.2.12.1 supplied to enable Activate to provide Services; as the case may be;

1.2.13 "General Terms and Conditions" means this document excluding all Annexures, Schedules, Proposals and Addenda executed in terms hereof;

1.2.14 "ICASA" means the Independent Communications Authority of South Africa;

1.2.15 "Initial Period" means:

1.2.15.1 The initial rental period in respect of which Equipment is rented by Activate to the Customer as set out in the relevant Schedule or Schedule to an Addendum of the Rental Agreement Annexure to

1.2.15.2 The initial duration in respect of the Managed Services or Non-Managed Services are supplied as set out in the relevant Schedule or Schedule to an Addendum to the Services Agreement Annexure or the SLA Annexure as the case may be;

which period shall commence on the Commissioned Date;

1.2.16 "Initial Services" means the services provided for an Initial Period by to the Customer referred to in clause 12.14.2;

1.2.17 "Instalment Sale Annexure" means the Instalment Sale terms and conditions annexed hereto which sets out the additional terms and conditions upon which Equipment is sold by Activate to the Customer in terms of this Agreement

1.2.18 "Installation" means the installation of Equipment at the Customer's premises or at such other location as may be specified by the Customer;

1.2.19 "Managed Services" means the on-going management and provision of services by Activate in return for a monthly payment by the Customer as set out in a Schedule or Schedule to an Addendum of the SLA Annexure;

1.2.20 "month" shall mean a calendar month commencing at 0h00 on the relevant day of the relevant calendar month;

1.2.21 "Monthly Service Charge" means the monthly fees levied by Activate in consideration for the Customer's access to and use of the network services or other services provided by Activate set out in a Schedule or Schedule to an Addendum of the Service Agreement Annexure or the SLA Annexure, as the case may be;

1.2.22 "NCA" means the National Credit Act, 2005;

1.2.23 "Network Provider" means any authorised supplier of telecommunications facilities;

1.2.24 "network services" means any services provided by any of the networks including but not limited to fixed line operators, cellular operators, wireless operators or any other operator that provides access and network services (including value added services);

1.2.25 "prime rate" means the prime overdraft lending rate charged by Activate' s bank as certified, in the event of a dispute, by any manager of such bank whose appointment and authority it shall not be necessary to prove and whose decision shall be final and binding;

1.2.26 "product" means any combination of Equipment and services provided by Activate to the Customer;

1.2.27 "Proposal" means the order form or proposal document submitted by Activate to the Customer and signed by the Customer in respect of sale or renting of Equipment, and/or provision of Services and which may be incorporated into a Schedule;

1.2.28 "Rental Agreement Annexure" means the Rental Agreement terms and conditions annexed hereto which sets out the additional terms and conditions upon which Equipment is rented by Activate to the Customer in terms of this Agreement

1.2.29 "Republic" means the Republic of South Africa;

1.2.30 "RICA" means the Regulation of Interception of Communications and Provision of Communication - related Information Act,2002, as amended;

1.2.31 "Services" means the services, managed or Non-Managed, and/or products provided by Activate to the Customer as set out in the Proposal or Schedule or both;

1.2.32 "Services Agreement Annexure" means the terms and conditions annexed thereto which sets out the additional terms and conditions upon which Non-Managed Services are provided by Activate to the Customer in terms of this Agreement;

1.2.33 "Service Provider" means any Electronic Communications Networks Licensee or Electronics Communications Licensee licensed under the ECA or any service provider of an Electronic Communications Networks Licensee or Electronics Communications Licensee;

1.2.34 "SLA" means a service level agreement entered into upon the terms set out in the SLA Annexure;

1.2.35 "SLA Annexure" means the Service Level Agreement terms and conditions which sets out the terms and conditions upon which the Managed Services are provided by Activate to the Customer in terms of this Agreement;

1.2.36 "software" means any computer programme that is either embedded or provided as a stand-alone application, or accessed via the internet or other web browsing method;

1.2.37 "traffic type" means any specific type of calls carried by Activate over the networks;

1.2.38 "usage charges" means the charges charged by Activate to the Customer for recorded usage of the network services;

1.2.39 "VAT" means Value Added Tax as defined in the Value Added Tax Act, 1991, as amended from time to time;

1.3 Any substantive provision, conferring rights or imposing obligations on a Party and appearing in any of the definitions of this clause 1 or elsewhere in this Agreement, shall be given effect to as if it were a substantive provision in the body of this Agreement.

1.4 Words and expressions defined in any clause shall, unless the application of any such word or expression is specifically limited to that clause, bear the meaning assigned to such word or expression throughout this Agreement.

1.5 Defined terms appearing in this Agreement in title case shall be given their meaning as defined, while the same terms appearing in lower case shall be interpreted in accordance with their plain English meaning.

1.6 The terms "holding company" and "subsidiary" shall bear the meanings assigned thereto in the Companies Act, 2011.

1.7 References to "days" shall be construed as calendar days unless qualified by the word "business", in which instant a "business day" will be any day other than a Saturday, Sunday or public holiday as gazetted by the Government of the Republic of South Africa from time to time. A reference to "business hours" shall be construed as being the hours between 08H30 and 17H00 on any business day. Any reference to time shall be based upon South African Standard Time.

1.8 Unless specifically otherwise provided, any number of days prescribed shall be determined by excluding the first and including the last day or where the last day falls on a day which is not a business day, the next succeeding business day.

1.9 Where figures are referred to in numerals and in words, and there is any conflict between the two, the words shall prevail, unless the context indicates a contrary intention.

1.10 No provision herein shall be construed against or interpreted to the disadvantage of a Party by reason of such Party having or being deemed to have constructed, drafted, structured or introduced such provision.

1.11 The Parties, unless specifically otherwise provided, shall be deemed to be contracting as principals and not as agents.

1.12 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.

1.13 The words "include" and "including" mean "include without limitation" and "including without limitation". The use of the words "include" and "including" followed by a specific example or examples shall not be construed as limiting the meaning of the general wording preceding it.

1.14 Any reference in this Agreement to "this Agreement" shall be construed as a reference to this Master Agreement, its Annexures applicable to the contacts concluded in respect of applicable goods and services, any schedule and/or proposal to this Master Agreement or any Annexure hereto, as the case may be, or such other agreement or document, as amended, varied, novated or supplemented from time to time.

1.15 In this Agreement, the words "clause" or "clauses" refer to clauses of this Agreement.

2. MASTER AGREEMENT

2.1 The Customer agrees that this is a Master Agreement.

2.2 These General Terms and Conditions terms shall apply to:

2.2.1 An Annexure which sets out the specific terms and conditions applicable to the type of contract concluded in relation to the Equipment or Services or Product, as the case may be;

2.2.2 All schedules and proposals incorporated, annexed or associated with or to any Annexure;

2.2.3 Any Addendum created in terms of 2.3.

2.3 Should the parties agree that Activate shall provide additional Equipment or Services to the Customer an Addendum shall create a separate agreement relating to the Goods or Services set out in that Addendum. The Addendum shall:

2.3.1 Set out whether the Equipment is sold or rented or whether the Services are Managed Services or Non-Managed Services in terms of the applicable Annexure;

2.3.2 Include a Schedule and/or Proposal identifying the identity of the Equipment and the nature of the Services;

as the case may be.

2.4 These General terms and conditions (and the relevant Annexure to these General Terms and Conditions applicable to the type of the contract concluded) shall apply to the Addendum.

2.5 The Customer agrees that should any separate agreement which has been created in terms of clause 2.4, be terminated by Activate in terms of the Agreement or by any cause whatsoever and howsoever arising, the Customer will continue to fulfil the Customer's obligations to Activate in respect of any separate agreement created under any other Addenda in terms hereof and the terms of this Agreement will remain in force in respect of such separate agreement so created.

3. TERM

3.1 Activate undertakes to supply the services to the Customer subject to the succeeding terms of this agreement, for the duration of the initial period; provided that in the event that the initial services do not become commissioned as a result of the actions or omissions of the Customer, Activate shall have the right to recover from the Customer, the minimum monthly charge stipulated in the proposal (or pro rata portion thereof) payable by the Customer for the period of the delay together with any reasonable wasted costs incurred by Activate and Customer hereby indemnifies Activate accordingly.

3.2 If the Customer is a juristic person, at the expiry of the initial period, unless otherwise notified in writing to the Custom er, the services and the agreement shall continue automatically on the terms contained in this agreement for an unlimited number of renewal periods, unless terminated by the Customer, on expiration of the initial period or a renewal period, as the case may be, by giving Activate a written notice of termination not less than 30 (thirty) and not more than 90 (ninety) days before the expiration of the initial period or renewal period, as the case may be.

3.3 If the Customer is a natural person:

3.3.1 the Customer may terminate the agreement:

3.3.1.1 on the expiry of the initial period, on written notice to Activate;

3.3.1.2 during the initial period, on 20 (twenty) business days' written notice to Activate, subject, however, to the provisions of clause 3.6;

3.3.2 Activate may, during the initial period, terminate the agreement 20 (twenty) business days' after giving the Customer written notice to remedy a material breach and the Customer failing to remedy such breach within such period;

3.3.3 the agreement is not terminated by either party in accordance with the aforegoing during the initial period, unless the Customer agrees to a renewal of the agreement for a further fixed term, the agreement will continue, after the initial period, on a month to month basis (terminable by either Activate or the Customer on 1 (one) month's written notice to the other), subject to any material changes of which Activate has given written notice pursuant to clause 3.3.4;

3.3.4 not more than 80 (eighty) nor less than 40 (forty) business days before the expiry of the initial period, Activate shall notify the Customer in writing of the impending expiry of the agreement, which notice will include any material changes that would apply if the agreement were to be renewed and the Customer's right to terminate or continue with the agreement on the expiry of the initial period.

3.4 Notwithstanding the aforegoing, during any automatic renewal period the discounts applicable to the services provided for in the agreement shall not be available to the Customer until the Customer concludes a new written agreement with Activate in respect of the services provided by Activate for the term of the renewal period.

3.5 Unless the CPA applies to this agreement, Activate shall furthermore be entitled to terminate this agreement at any time by giving 3 (three) months' written notice to this effect to the Customer. Should the provision of any of the products or services by Activate on the basis provided for in this Agreement be finally declared illegal by an Act of Parliament, any regulatory body or court of law, Activate shall be entitled to cancel this agreement on written notice to the Customer.

3.6 Should the Customer terminate this agreement prior to the expiry of the initial period or any renewal period for any reason other than expressly provided for in this agreement, the Customer shall remain liable for all amounts owing to Activate up until the date of termination and Activate shall be entitled (unless the Customer is entitled to terminate the agreement without penalty in accordance with the provisions of the CPA, if applicable) to levy a cancellation/early settlement fee provided for in the proposal, provided that where the Customer is a natural person, such cancellation fee shall be limited to a reasonable fee determined in accordance with the guidelines set out in the CPA and, if applicable, the CPA Regulations.

3.7 Unless otherwise expressly stated in the agreement, upon expiry of the initial period or any renewal period, Activate, in its sole discretion, but subject to clause 3.3.4, may remove or change any discounts that were applicable during the initial period or renewal period, as the case may be.

3.8 Any new or additional services or expansion of the initial services to be provided by Activate to the Customer from time to time shall be subject to the terms contained in the proposal or required to be agreed upon by the parties in writing in a new agreement (or in an addendum to the existing proposal) and such new services shall commence on the date on which such new services are commissioned.

3.9 Activate may in its sole and absolute discretion alter the routing of any traffic at any time in pursuit of the provision of services, such routing changes having no effect on the validity of the agreement.

3.10 The services provided by Activate are subject to government or relevant authority regulated limitations and transmission limitations, and may be temporarily and/or permanently interrupted or curtailed as necessary or appropriate for the proper operation of the services.

3.11 If the conclusion of the agreement is the result of direct marketing and the provisions of the CPA are applicable hereto, the Customer has the right to cancel the agreement without reason or penalty by written notice to Activate within 5 business days after the later of the date on which the agreement was concluded or the services or Equipment were delivered to the Customer. Should the Customer have opened the original packaging of the products prior to returning same to Activate on cancellation of this agreement, Activate shall be entitled to deduct from any reimbursement or refund which may be payable to the Customer on cancellation, a reasonable amount for the use and/or depletion of the products.

4. SOFTWARE

4.1 The Customer shall use any software provided to it by Activate, only for the purposes for which it is intended and licensed in terms of this Agreement.

4.2 The Customer shall not nor permit anyone else to reverse engineer, decompile, modify, tamper with, vary, enhance, copy, sell, lease, license, sub-license or otherwise deal with the software or any part, variation, modification, release or enhancement thereof or have any software or any program written or developed for it based on the software.

4.3 All rights of whatever nature in and to the software and all upgrades, updates, modifications and variations thereto from time to time, shall vest in Activate. and no rights in and to the software, its upgrades, updates, modifications and variations thereto are granted or assigned to the Customer. The Customer shall not, at any time in any way, question or dispute the ownership of the software and undertakes not to infringe or prejudice any rights of Activate in and to the software.

4.4 Activate shall upgrade any software provided to the Customer at its sole discretion and shall not be obliged to perform such upgrades at any time unless a specific provision has been included in the agreement requiring that Activate performs such upgrade.

4.5 It is the Customer's responsibility to notify Activate of its requirement to renew software licences.

5. PAYMENT

5.1 Unless otherwise agreed to by Activate in writing or provided for in the relevant Schedule or Proposal or in the product specific terms and conditions, the Customer shall effect payment to Activate, in full, free of bank charges, from the date of Activate' s invoice unless specifically otherwise stated on an official Activate tax invoice.

5.2 The following forms of payment may be used:

5.2.1 Electronic Funds Transfer; or

5.2.2 Credit and debit card; or

5.2.3 Cheque subject to a maximum of R…… per individual cheque (and acceptance is subject to cheque acceptance provisos in clause 5.3); or •

5.3 Cheque acceptance provisos:

5.3.1 No third-party cheques will be accepted;

5.3.2 Post-dated cheques will not be accepted as payment unless prior arrangements have been made with the Seller's Credit Manager;

5.3.3 For amounts above R…… must be bank guaranteed, unless prior arrangements have been made with Activate, failing which the cheque will require a 7 (seven) working day clearance period (which excludes Saturdays and Sundays);

5.3.4 The Customer, waives its right to insist on notice of dishonour or protests being given to it in the event that the cheque is dishonoured.

5.4 In all cases where the Customer uses a postal banking, electronic or similar service to effect payment, such services shall be deemed to be the agent of the Customer.

5.5 The Customer agrees to pay the amount reflected on Activate' s invoice and shall not be entitled to claim set off or deduction in respect of any payment due by the Customer to Activate Equipment for supplied or Services rendered.

5.6 Activate may appropriate and/or allocate all payments made by the Customer to such accounts as Activate, in its sole and absolute discretion, decides.

5.7 The Customer shall not be entitled to claim set off or deduction in respect of any payment due by the Customer to Activate for Equipment or Services supplied.

5.8 Should any amount not be paid by the Customer on due date, then the whole amount in respect of all purchases by the Customer shall immediately become due, owing and payable irrespective of the date when the goods were purchased and the Customer shall be liable to pay interest in respect of the amount unpaid at the due date at a compound rate of 2% (two per cent) above the prime rate;

5.9 In the event that any agreement between the Customer and Activate is governed by the NCA, then the interest payable by the Customer shall be the interest rate provided for in the NCA.

5.10 Unless the Customer notifies Activate in writing within 3 days of receipt of an invoice to the contrary, the contents of such invoice shall be deemed to be correct.

5.11 All amounts payable by the Customer to Activate in terms of this agreement are exclusive of VAT and any other statutory levies, taxes and imposts as may be levied thereon from time to time. The Customer shall accordingly be liable for VAT and all rates, taxes, government or statutory levies as may be imposed from time to time.

5.12 Notwithstanding the provisions of clause 5.2,Activateshall be entitled to insist that all amounts payable by the Customer are made through a debit order on the terms and conditions stated in the relevant Schedule or Proposal and the Customer shall be obliged to execute and deliver such further instruments, contracts, forms and other documents ("additional documentation") or perform such further acts as may be required by Activate for the purposes of securing such debit order/s in favour of Activate, copies of which additional documentation shall have been made available to the Customer by Activate in order to give effect to the debit order.

5.13 In terms of the debit order, the Customer is aware of non-refundable setup fee, outright purchases and pro-rata amounts applicable to the services applied for, and accepts that these amounts will be debited from their account immediately when the service is activated.

5.14 Any cancellation of such a debit order without the prior written consent of Activate shall constitute a breach by the Customer of this agreement.

5.15 A certificate by a director of Activate as to the amount owing by the Customer to Activate at any time shall be sufficient proof thereof for provisional sentence or summary judgment.

6. DEFAULT AND TERMINATION

6.1 Save where otherwise provided for in the proposal or elsewhere herein, should either party ("the defaulting party") –

6.1.1 fail to pay any amount payable under this agreement within 7 (seven) days after receipt of written demand requiring such payment;

6.1.2 commit a breach of any provision (other than a payment obligation) of this agreement and, if such breach is capable of remedy, fail to remedy such breach within 14 (fourteen) days after receipt of written demand from the other party requiring it to do so;

6.1.3 becomes the subject of business rescue proceedings, is placed under liquidation, judicial management or any similar disability, whether provisionally or finally and whether voluntarily or compulsorily;

6.1.4 commit any act which if committed by a natural person would constitute an act of insolvency or become insolvent;

6.1.5 compromise or attempt to compromise generally with any of its creditors;

6.1.6 have a final judgment taken against it which is not satisfied within 30 days after the granting of such judgment,

then the other party ("the aggrieved party") shall be entitled, without prejudice to any of its other rights under this agreement and/or in law and by giving written notice, to immediately cancel this agreement or to claim immediate specific performance of all of the defaulting party's obligations whether or not due for performance, in either event without prejudice to the aggrieved party's right to claim damages.

7. TERMS APPLICABLE TO THE EQUIPMENT

For as long as the Equipment is subject to any Instalment Sale Agreement, Rental Agreement, Service Agreement or SLA and the ownership of the Equipment still vests in Activate:

7.1 The Customer undertakes to use the Equipment only for the purpose for which it is intended and to ensure that its employees, agents and/or sub-contractors comply with the instructions and recommendations of Activate.

7.2 Upon delivery or collection of the Equipment as the case may be, risk in the Equipment shall pass to the Customer who shall then be responsible for:

7.2.1. keeping the Equipment in its possession and control, protected against loss and damage from whatsoever cause; free from any judicial attachment, hypothec or any other legal charge or process and shall not encumber the Equipment;

7.2.2. providing clean power to the Equipment;

7.2.3. exercising due care and diligence in respect of the Equipment;

7.2.4. protecting all Equipment against any form of lightning by means of installing a lightning protection, unless expressly provided by Activate to the Customer, and

7.2.5. obtaining adequate insurance for the Equipment for the full replacement value thereof.

7.3 The Customer furthermore agrees to ensure that the Equipment is maintained in clean, serviceable and good working order. Upon the expiry of this agreement, where required the Customer shall return all Equipment in good working order and in the same condition as at the date of installation, fair wear and tear excepted.

7.4 The Customer agrees that any Equipment supplied by Activate and/ or its service providers pursuant to this agreement is movable property and that notwithstanding any installation thereof at the Customer's premises, unless the Customer has purchased the Equipment under the instalment Sale provisions and has paid in full for such Equipment, the Equipment shall at all times remain the property of Activate and/ or its service providers, as the case may be, who shall have the right to inspect the Equipment at all reasonable times during the currency of this agreement and to remove the Equipment on termination of the agreement for any reason. Accordingly, the Customer undertakes forthwith upon the installation of the Equipment, to notify the landlord of the premises where the Equipment is to be installed of Activate' s and/or its service provider's ownership of the Equipment.

7.5 The Customer shall provide:

7.5.1 Activate with access to its premises, the Equipment, software, telephone ports and/or network for the purposes of monitoring and correcting the Equipment and/or software and monitoring the performance of the Customer's obligations hereunder;

7.5.2 Activate with plans, organograms, structural, architectural and block diagrams, user lists, company procedures and any other form of information that Activate deems necessary for the proper installation of the Equipment or provision of the services;

7.5.3 its security procedures so as to ensure the integrity of its systems, it being specifically recorded that, notwithstanding the provisions of clauses 7.6 and 7.7, that Activate shall not be liable for any loss suffered by the Customer attributable to loss of integrity of its systems unless such loss is directly attributable to the gross negligence or fraud of Activate.

7.6 In respect of any Equipment provided to the Customer by Activate under an SLA and in respect of Equipment provided by Activate at Activate' s cost to the Customer, where such Equipment is covered by Activate' s insurance:

7.6.1 the Customer undertakes to comply fully with the terms and conditions of the insurance cover procured by Activate, for all the Equipment supplied to it by Activate;

7.6.2 if the Equipment or any part thereof is lost, stolen or damaged for any reason whatsoever and howsoever arising, the Customer shall immediately notify Activate in writing of such loss, theft or damage;

7.6.3 In the case of Equipment that is damaged, and until such notification has been received by Activate, the Customer shall remain fully liable for all costs and charges pertaining to such Equipment and to the services.

7.7 Activate shall, as soon as reasonably possible after receipt of written notification of such theft, loss or damage of Equipment supplied under an SLA:

7.7.1 repair or replace Equipment (other than Equipment that has not been supplied by Activate, the repair and/or replacement of which shall be for the Customer's entire responsibility);

7.7.2 bear the costs of such repair or replacement except where such repair or replacement is necessary as a result of an accident or force majeure event or through improper, malicious or negligent use by the Customer of the Equipment or use in breach of the terms and conditions hereof. Activate shall in its sole discretion, using reasonable testing methods, determine whether such Equipment has been subjected to improper, malicious or negligent use.

7.8 The Customer shall be obliged to ensure that the Equipment and all components thereof at all times remain at the site of installation thereof. Should the Customer wish to relocate any fixed or movable component(s) of the Equipment to alternative premises, the Customer shall be precluded from doing so unless it has made written application on 2 (two) months' notice to Activate to such effect and Activate has approved such relocation in writing. The Customer will be charged for any site relocation requirement (whether within the Customer's existing premises or to alternative premises) at the relevant rates stipulated by Activate and/or its service providers at the time of such site re-location.

7.9 Activate may at any time re-configure upgrade, and/or exchange any Equipment at its sole and absolute discretion, to meet its obligations required to provide the services. Activate shall not be obliged to effect any other upgrades or improvements unless it determines to do so in its sole and absolute discretion.

7.10 The Customer shall not itself be entitled to nor permit any other party to repair, maintain, modify, alter or add to the Equipment in any manner whatsoever without Activate' s prior written consent.

7.11 Unless the prior written approval of Activate is obtained, the Customer shall ensure that only Equipment and services marketed and sold by Activate may be installed on or connected to the Equipment. Any component or accessory affixed or addition made to the Equipment during the currency of this agreement shall become the property of Activate without reimbursement or compensation to the Customer.

8. FORCE MAJEURE

8.1 Delay or failure to comply with or breach of any of the terms and conditions of this Agreement if occasioned by or resulting from an act of God or public enemy, fire, explosion, earthquake, perils of the sea, flood, storm or other adverse weather conditions, war declared or undeclared, civil war, revolution, civil commotion or other civil strife, riot, strikes, blockade, embargo, sanctions, epidemics, act of any Government or other Authority, compliance with Government orders, demands or regulations, or any circumstances of like or different nature beyond the reasonable control of the Party so failing, will not be deemed to be a breach of this Agreement nor will it subject either Party to any liability to the other.

8.2 Should either Party be prevented from carrying out its contractual obligations by force majeure lasting continuously for a period of 30 (thirty) days the Parties will consult with each other regarding the future implementation of this Agreement. If no mutually acceptable arrangement is arrived at within a period of 7 (seven) days thereafter, either Party will be entitled to terminate this Agreement forthwith on written notice.

9. WARRANTIES, EXCLUSION AND LIMITATION OF LIABILITY

9.1 Activate shall use all reasonable endeavours to ensure that the Equipment supplied by it and/or its service providers is in accordance with the agreement and is otherwise correct in terms of the Customer's requirements. Subject to any warranties that may be implied by the CPA to the extent that the CPA is applicable to the agreement, Activate does not, however, make any representations nor, unless expressly given in writing, give any warranty or guarantee of any nature whatsoever, whether express or implied, in respect of the services or the Equipment including but not limited to implied warranties of merchantability and fitness or suitability for any intended purpose.

9.2 Subject to the provisions of the CPA to the extent that the CPA is applicable to the agreement, Activate shall not be liable to the Customer or any third party for any loss or damage which the Customer or such third party may suffer or incur as a consequence of utilising the services and/or software and/or Equipment, irrespective of whether such loss or damage is direct, special, incidental, consequential or otherwise unless such loss or damage was directly attributable to the gross negligence or fraud of Activate.

9.3 Without limiting the generality of the aforegoing, Activate shall not (other than in circumstances of Activate' s gross negligence or fraud) be liable for any damage or loss suffered by the Customer caused by and/or attributable to –

9.3.1 the services being interrupted, suspended or terminated, for whatsoever reason; and/or

9.3.2 Activate or its supplier's failure to suspend the provision of the services to the Customer in terms of an arrangement between Activate and the Customer or after the Customer has specifically requested Activate to do so in order to limit the applicable charges; and/or

9.3.3 communications not being sent and/or received and/or transmitted timeously or at all for any reason whatsoever; and/or

9.3.4 circumstances that constitute a force majeure event; and/or

9.3.5 the customer's failure to perform its obligations under this agreement; and/or

9.3.6 changes made to the Customer's operating environment which were not communicated to Activate; and/or

9.3.7 a power failure or power interruptions at any site from where any Equipment or the services or any component of the services are rendered; and/or

9.3.8 any failure or delay by the Customer to report problems or queries to Activate' s call centre; and/or

9.3.9 the server and/or Equipment of any recipient party being non-functioning for any reason whatsoever; and/or

9.3.10 the failure of any Equipment, hardware, software programme, operating system, application/s, networks, telecommunication lines and/or any other computer system (or any component thereof) of any third party on whom Activate and/or the Customer relies (whether directly or indirectly) to supply and/or receive, as the case may be the services; and/or

9.3.11 the unavailability of Activate 's website or the website of any of Activate 's for any reason whatever; and/or

9.3.12 the Customer using the service for any unlawful, improper or immoral purpose; and/or

9.3.13 the unlawful or fraudulent accessing by a third party of the Customer's telecommunication lines, PBX or other telecommunication Equipment. In such circumstances, the Customer shall remain liable for all charges incurred pursuant to such unlawful or fraudulent access and hereby indemnifies Activate against all loss, liability, damage or expense which Activate may suffer as a result thereof.

9.4 Notwithstanding any other provisions of this agreement, Activate' s liability to the Customer and/or any third party for any damages or loss of whatsoever nature, including without limitation any damages or loss caused by the negligence (but excluding gross negligence) of Activate or the Customer, as the case may be, or that of its servants, agents and subcontractors, shall in any event and under all circumstances be limited to an amount equal to:

9.4.1 The total purchase price of the Equipment; or

9.4.2 The total rental charges for the initial period;

9.4.3 the fixed monthly charges payable by the Customer during the initial period

whichever is the applicable contract for the provision of Equipment or Services l in terms of this Agreement.

10. ASSIGNMENT AND SUB-CONTRACTING

10.1 The Customer may not assign any of its rights or obligations in terms of this agreement, nor pass any Equipment to any third party, nor allow any third party to use the Equipment, without Activate 's prior written consent.

10.2 Activate shall be entitled at any time during the currency of the agreement to cede and/or assign and/or sub-contract any or all of its rights and obligations in terms of the agreement to any other party provided that if the Customer is a consumer as contemplated in the CPA Regulations such assignment of obligations is not to the Customer's detriment.

10.3 Subject to the restriction in clause 10.1 this Agreement shall be binding on the successors-in-title of the respective parties.

11. REPRESENTATIONS

11.1 Each Party represents and warrants that it has the authority necessary to enter into this Agreement and to do all things necessary to procure the fulfilment of its obligations in terms of this Agreement.

11.2 The signatory of the Customer warrants that he/she is authorised to sign on behalf of the Customer.

11.3 The Customer confirms that:

11.3.1 it has been given an adequate opportunity to read and has read and understood the agreement together with all Annexures hereto an

11.4 Where the physical installation of Equipment is required, the Customer warrants that it has obtained all the necessary consents from the landlord or landowner.

12. SUPPORT

The Parties undertake to act in good faith towards each other and at all times to do all such things, perform all such actions and take all such steps and to procure the doing of all such steps as may be open to them and reasonably necessary for or incidental to the putting into effect or maintenance of the terms, conditions and/or import of this Agreement.

13. NOTICES AND DOMICILIUM

13.1 The Parties choose as their domicilia citandi et executandi for all purposes under this Agreement, whether in respect of court process, notices or other documents or communications of whatsoever nature (including the exercise of any option), at addresses and contact details set out in _____.

13.2 Any notice or communication required or permitted to be given in terms of this Agreement shall be valid and effective only if in writing but it shall be competent to give notice by email or telefax.

13.3 Notwithstanding anything to the contrary herein contained a written notice or communication actually received by a Party shall be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen domicilium citandi et executandi.

14. APPLICABLE LAW AND JURISDICTION.

14.1 This agreement shall be governed by and interpreted according to the Laws of the Republic.

14.2 The Customer, by its signature hereto consents to the jurisdiction of the Magistrate's Courts in relation to any actions or proceedings instituted against the Customer in terms of, or arising out of the provisions of this agreement, provided that either party in its sole and absolute discretion shall be entitled to institute any such actions or proceedings, in any division of the High Court of South Africa possessed of the requisite jurisdiction.

14.3 In the event of either party instituting legal proceedings against the other ("defaulting party") to recover amounts due to or take any other legal steps arising out of this agreement, the defaulting party shall be liable for legal costs on the scale as between attorney and own client.

15. ABUSE OF SERVICES

15.1 The Customer hereby warrants and undertakes in favour of Activate that the Customer –

15.1.1 shall not use or allow the services to be used for any improper, immoral or unlawful purpose, including, without limitation, attempting to utilise the services to route (or assist another party to route) transit traffic from other networks to Activate, nor in any way which may cause injury or damage to persons or property or an impairment or interruption of the services;

15.1.2 shall comply with all relevant legislation and regulations imposed by any competent authority and all directives issued by Activate relating to the services including its Acceptable Use Policy available on Activate' s website, and hereby indemnifies Activate for any losses, expenses, damages, harm or amount for which Activate may become liable arising from or relating to the use of the services in any manner whatsoever which violates the terms of this agreement, Activate' s Acceptable Use Policy or any law, legislation or regulations; and/or any claims made by any third party arising from the Customer's use of the services unless such losses, expenses, damages, harm or liability were directly attributable to the gross negligence or fraudulent intent of Activate.

16. DISCLOSURE

16.1 Activate undertakes not to disclose to any third-party details of the Customer's name, address or any third party ("Customer details") except as set out in this clause.

16.2 The Customer hereby authorises Activate to disclose Customer's details to a third party wherever Activate deems this reasonably necessary to enable it to properly perform its functions or protect its interests (including, without limitation, for the purposes of credit vetting the Customer), for the purpose of enabling the provision of emergency services or directory or repair services to the Customer.

16.3 In addition, Activate may disclose the Customer's details if required to do so to any regulatory authorities or any court of law.

17. GENERAL

17.1 This Agreement constitutes the whole of the Agreement between the Parties relating to the matters dealt with herein and, save to the extent otherwise provided herein, no undertaking, representation, term or condition relating to the subject matter of this Agreement not incorporated in this Agreement shall be binding on any of the Parties.

17.2 No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties.

17.3 No waiver of any of the terms and conditions of this Agreement will be binding and effectual for any purpose unless in writing and signed by the Party giving the same. Any such waiver will be effective only in the specific instance and for the purpose given. Failure or delay on the part of any Party in exercising any right, power or privilege hereunder will not constitute or be deemed to be a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

17.4 All provisions and the various clauses of this Agreement are, notwithstanding the manner in which they have been grouped together or linked grammatically, severable from each other. Any provision or clause of this Agreement which is or becomes unenforceable in any jurisdiction, whether due to voidness, invalidity, illegality, unlawfulness or for any other reason whatsoever, shall, in such jurisdiction only and only to the extent that it is so unenforceable, be treated as pro non-scripto and the remaining provisions and clauses of this Agreement shall remain of full force and effect. The Parties declare that it is their intention that this Agreement would be executed without such unenforceable provision if they were aware of such unenforceability at the time of execution hereof.