



## Pen Telecom – Master Service Agreement Terms and Conditions v1.1

### 1. INTERPRETATION

#### 1.1. Definitions:

#### 1.2. The following words shall have the following meanings in these Conditions and the Service Documents:

**Business Day:** a day other than a Saturday, Sunday or public holiday in England when banks in London are open for business.

**Charges:** the charges payable by the Customer for the supply of the Services in accordance with clause 9.

**Commencement Date:** has the meaning set out in clause 2.2.

**Conditions:** these terms and conditions as amended from time to time in accordance with clause 16.4.

**Contract:** the contract between Pen Telecom and the Customer for the supply of Goods and/or Services in accordance with the terms of the Service Documents.

**Control:** shall be as defined in section 1124 of the Corporation Tax Act 2010, and the expression change of Control shall be construed accordingly.

**Customer:** the person or firm who purchases the Goods and/or Services from Pen Telecom as stated on the Service Order Form.

**Customer Default:** has the meaning set out in clause 8.3.

**Delivery Location:** has the meaning given to it in clause 4.2

**Force Majeure Event:** means any circumstance not within a party's reasonable control including, without limitation: acts of God, flood, drought, earthquake or other natural disaster; epidemic or pandemic; terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations; nuclear, chemical or biological contamination

or sonic boom; any law or any action taken by a government or public authority, including without limitation imposing an export or import restriction, quota or prohibition, or failing to grant a necessary licence or consent; collapse of buildings, fire, explosion

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or accident; any labour or trade dispute, strikes, industrial action or lockouts (other than in each case by a party to this Contract or companies in the same group as that party); non-performance by Pen Telecom or subcontractors (other than by companies in the same group as a party to this Contract); interruption or failure of utility service.

**Goods:** the goods (or any part of them) set out in the Order as being supplied and sold to the Customer and shall not include Pen Telecom's Materials.

**Goods Specification:** any specification for the Goods including any relevant plans or drawings, that is agreed in writing by the Customer and Pen Telecom.

**Initial Term:** shall mean the minimum term for which the Services are contracted to be provided by Pen Telecom as set out in the Service Order Form and / or the relevant Service Schedule.

**Intellectual Property Rights:** patents, rights to inventions, copyright and related rights, trade marks, business names and domain names, rights in get-up, goodwill and the right to sue for passing off, rights in designs, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how), and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.

**Order:** The Customer's order for the supply of Goods and /or Services as set out in the Customer's Service Order Form.

**Portal:** [www.pen-telecom.co.uk](http://www.pen-telecom.co.uk) or such other website as Pen Telecom may notify the Customer from time to time at which Pen Telecom publishes procedures, guidelines,

manuals, standard instructions and other information concerning the provision of the Services.

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**Services:** the services supplied by Pen Telecom to the Customer as set out in the Service Order Form and relevant Service Schedule.

**Service Documents:** refers to the following documents:

- (a) These Conditions.
- (b) The relevant Service Schedule as indicated on the Service Order Form.
- (c) The Service Order Form; and
- (d) Pen Telecom's Price Lists and Tariffs

**Service Order Form:** shall mean the document signed by the Customer that provides the required information for the provision of Services or Products or Equipment by Pen Telecom.

**Service Schedules:** the

- (a) SIP Service Schedule.
- (b) Ethernet Service Schedule.
- (c) Wholesale Line Rental Schedule.
- (d) Broadband Service Schedule.
- (e) Hosted Voice Schedule.

as published on Pen Telecom's website at [www.pen-telecom.co.uk](http://www.pen-telecom.co.uk) from time to time.

**Unacceptable use of the Services:** means the use of the Services in such manner that is, or causes Pen Telecom to reasonably suspect that the Services are being used in, an unreasonable, abusive or improper manner to include, without limiting the generality of the foregoing, the use of the Services:

- (a) in a fraudulent and / or criminal manner.
- (b) in any illegal manner.
- (c) for conduct which constitutes harassment of any party.
- (d) for the transmission of material, which is defamatory, offensive or of an obscene

or menacing nature.

- (e) in a manner which constitutes a violation or infringement of the rights of any person.
- (f) for the purpose of mis-selling including but not limited to the practices commonly referred to as "slamming" and "spamming".

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- (g) in a manner which causes or is likely to cause unreasonable network congestion including, without limiting the generality of the foregoing, the use of automated dialling equipment, dialling sequential numbers and / or the dialling of telephone numbers that do not exist.
- (h) any activity on the Customer's account which is reasonably perceived as Artificially Inflated Traffic.
- (i) comprises more than one call exceeding four hours in duration in any twenty-four-hour period.
- (j) Exceeding 2 x E1s allocation per customer when purchasing any "Unlimited" product.
- (d) including, include, in particular or any similar expression, shall be construed as illustrative and shall not limit the sense of the words preceding those terms.
- (d) A reference to writing or written includes fax and email.

**Pen Telecom:** Pen Telecom registered in England and Wales with company number 8201447

**Pen Telecom Materials:** all materials, equipment, documents and other property of Pen Telecom lent by Pen Telecom to the Customer for the purpose of using the Services.

**Pen Telecom's Price Lists and Tariffs:** Pen Telecom's Price List per Service Type and Call Tariffs as published on the Portal as at the date of the Service Order Form.

### 1.3. Interpretation:

- (a) A person includes a natural person, corporate or unincorporated body (whether or not having a separate legal personality).
- (b) A reference to a statute or statutory provision is a reference to it as amended or re-enacted. A reference to a statute or statutory provision includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted.
- (c) Any phrase introduced by the terms

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(e) A reference to the relevant Service Schedule shall be to the Service Schedule applicable to this Contract as indicated on the Service Order Form.

## 2. BASIS OF CONTRACT

2.1. The Order constitutes an offer by the Customer to purchase Goods and/or Services in accordance with the terms of the Service Documents.

2.2. The Order shall only be deemed to be accepted when Pen Telecom issues written acceptance of the Order at which point, and on which date the Contract shall come into existence (Commencement Date).

2.3. Any samples, drawings, descriptive matter or advertising issued by Pen Telecom, and any descriptions of the Goods or illustrations or description of the Services contained in Pen Telecom's catalogues or brochures, are issued or published for the sole purpose of giving an approximate idea of the Services and/or Goods described in them. They shall not form part of the Contract or have any contractual force.

2.4. These Conditions apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.

2.5. Any quotation given by Pen Telecom shall not constitute an offer and is only valid for a period of twenty Business Days from its date of issue.

2.6. All of these Conditions shall apply to the supply

of both Goods and Services except where application to one or the other is specified.

2.7. When the Customer offers to purchase Goods and/or Services in accordance with the terms of the Service Documents, the person signing the order form is confirming that they are an authorised person to enter into contracts for services on behalf of the Customer.

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### **3. GOODS**

- 3.1.** The Goods are described in the Goods Specification.
- 3.2.** Pen Telecom reserves the right to amend the Goods Specification if required by any applicable statutory or regulatory requirements.
- 3.3.** The Goods do not include the Pen Telecom Materials which shall remain the property of Pen Telecom at all times.

### **4. DELIVERY OF GOODS**

- 4.1.** Pen Telecom shall ensure that:
  - (a) each delivery of the Goods is accompanied by a delivery note which shows the date of the Order, all relevant Customer and Pen Telecom reference numbers, the type and quantity of the Goods (including the code number of the Goods, where applicable), special storage instructions (if any) and, if the Order is being delivered by instalments, the outstanding balance of Goods remaining to be delivered; and
  - (b) if Pen Telecom requires the Customer to return any packaging material to Pen Telecom, that fact is clearly stated on the delivery note. The Customer shall make any such packaging materials available for collection at such times as Pen Telecom shall reasonably request. Returns of packaging materials shall be at Pen Telecom's expense.
- 4.2.** Pen Telecom shall deliver the Goods to the location set out in the Order or such other location as the parties may agree (Delivery Location) at any time after Pen Telecom notifies the Customer that the Goods are ready.

- 4.3.** Delivery of the Goods shall be completed on the Goods' arrival at the Delivery Location.

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- 4.4.** Any dates quoted for delivery of the Goods are approximate only, and the time of delivery is not of the essence. Pen Telecom shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event or the Customer's failure to provide Pen Telecom with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.
- 4.5.** If Pen Telecom fails to deliver the Goods, its liability shall be limited to the costs and expenses incurred by the Customer in obtaining replacement goods of similar description and quality in the cheapest market available, less the price of the Goods. Pen Telecom shall have no liability for any failure to deliver the Goods to the extent that such failure is caused by a Force Majeure Event or the Customer's failure to provide Pen Telecom with adequate delivery instructions for the Goods or any relevant instruction related to the supply of the Goods.
- 4.6.** If the Customer fails to accept or take delivery of the Goods within ten Business Days of Pen Telecom notifying the Customer that the Goods are ready, then except where such failure or delay is caused by a Force Majeure Event or by Pen Telecom's failure to comply with its obligations under the Contract in respect of the Goods:
- (a) delivery of the Goods shall be deemed to have been completed at 9.00 am on the eleventh Business Day following the day on which Pen Telecom notified the Customer that the Goods were ready; and
  - (b) Pen Telecom shall store the Goods until delivery takes place and charge the Customer for all related costs and expenses (including insurance).
- 4.7.** If thirty Business Days after Pen Telecom notified the Customer that the Goods were ready for delivery the Customer has not accepted delivery of them, Pen Telecom may resell or otherwise dispose of part or all of the Goods and, after deducting reasonable storage and selling costs, account

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to the Customer for any excess over the price of the Goods or charge the Customer for any shortfall below the price of the Goods.

- (b) accordance with clause 5.2.  
the defect arises because the Customer failed to follow Pen Telecom's oral or written instructions as to the storage, installation, commissioning, use or maintenance of the Goods or (if there are none) good trade practice.

## **5. QUALITY OF GOODS**

**5.1.** Pen Telecom warrants that on delivery the Goods shall:

- (a) conform in all material respects with the Goods Specification.
- (b) be free from material defects in design, material and workmanship.
- (c) be of satisfactory quality (within the meaning of the Sale of Goods Act 1979); and
- (d) be fit for any purpose held out by Pen Telecom.

**5.2.** Subject to clause 5.3, if:

- (a) the Customer gives notice in writing within a reasonable time of discovery that some or all of the Goods do not comply with the warranty set out in clause 5.1.
- (b) Pen Telecom is given a reasonable opportunity of examining such Goods; and
- (c) the Customer (if asked to do so by Pen Telecom) returns such Goods to Pen Telecom's place of business at Pen Telecom's cost,

Pen Telecom shall, at its option, repair or replace the defective Goods, or refund the price of the defective Goods in full.

**5.3.** Pen Telecom shall not be liable for the Goods' failure to comply with the warranty in clause 5.1 if:

- (a) the Customer makes any further use of such Goods after giving a notice in

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- (c) the defect arises as a result of Pen Telecom following any drawing, design or Goods Specification supplied by the Customer.
  - (d) the Customer alters or repairs such Goods without the written consent of Pen Telecom.
  - (e) the defect arises as a result of fair wear and tear, wilful damage, negligence, or abnormal working conditions.
  - (f) the Goods differ from the Goods Specification as a result of changes made to ensure they comply with applicable statutory or regulatory standards.
- 5.4.** Except as provided in this clause 5, Pen Telecom shall have no liability to the Customer in respect of the Goods' failure to comply with the warranty set out in clause 5.1.
- 5.5.** The terms of these Conditions shall apply to any repaired or replacement Goods supplied by Pen Telecom under clause 5.2.
- 6. TITLE AND RISK**
- 6.1.** The risk in the Goods shall pass to the Customer on completion of delivery.
- 6.2.** Title to the Goods shall not pass to the Customer until Pen Telecom receives payment in full (in cash or cleared funds) for the Goods and any other goods Pen Telecom has supplied to the Customer in respect of which payment has become due, in which case title to the Goods shall pass at the time of payment of all such sums.
- 6.3.** Until title to the Goods has passed to the Customer, the Customer shall:
- (a) store the Goods separately from all other goods held by the Customer so that they remain readily identifiable as Pen Telecom's property.
  - (b) not remove, deface or obscure any identifying mark or packaging on or relating to the Goods.

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- (c) maintain the Goods in satisfactory condition and keep them insured against all risks for their full price on Pen Telecom's behalf from the date of delivery. specified in the Service Documents, but any such dates shall be estimates only and time shall not be of the essence for performance of the Services.
- (d) notify Pen Telecom immediately if it becomes subject to any of the events listed in clause 13.4; and
- (e) give Pen Telecom such information relating to the Goods as Pen Telecom may require from time to time.

**6.4.** If before title to the Goods passes to the Customer the Customer becomes subject to any of the events listed in clause 13.4, then, without limiting any other right or remedy Pen Telecom may have:

- (a) the Customer's right to resell Goods or use them in the ordinary course of its business ceases immediately; and
- (b) Pen Telecom may at any time:
  - (i) require the Customer to deliver up all Goods in its possession which have not been resold, or irrevocably incorporated into another product; and
  - (ii) if the Customer fails to do so promptly, enter any premises of the Customer or of any third party where the Goods are stored in order to recover them.

## **7. SUPPLY OF SERVICES**

**7.1.** Pen Telecom shall supply the Services to the Customer in accordance with the specification set out in the Service Order Form in all material respects and on the terms of the Service Documents.

**7.2.** Pen Telecom shall use all reasonable endeavours to meet any lead times

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- 7.3.** Pen Telecom shall have the right to make any changes to the Services which are necessary to comply with any applicable law or safety requirement, or which do not materially affect the nature or quality of the Services, and Pen Telecom shall notify the Customer in any such event.
- 7.4.** Pen Telecom warrants to the Customer that the Services will be provided using reasonable care and skill.
- 7.5.** The Customer acknowledges and agrees that:
- (a) the provision of the Services, including without limitation, the commencement date of provision of the Services is dependent on the actions of **third-party service providers** that are not controlled by Pen Telecom. Pen Telecom accepts no liability for delay in provision caused by third parties; and
  - (b) provision of the Services is dependent on the Customer providing complete and correct information, as identified in the Order; and
  - (c) it shall maintain all third party equipment and / or services not provided by Pen Telecom but required for the provision of the Services and such third party items and / or services are to be the responsibility of the Customer and are not supported by Pen Telecom.
- 7.6.** Should the Customer require equipment to be shipped outside of the UK after ordering, the ~~Customer~~ is responsible for all charges associated with such shipment and the equipment shall be at the customer's risk during shipment.
- 7.7.** The Customer shall indemnify and keep indemnified Pen Telecom against any claims, losses, damages, costs and other liabilities which Pen Telecom may incur or may be established against it by reason of any claim against Pen Telecom by any third party arising out of or in connection with:
- (a) the use of Services by the Customer; and/ or
  - (b) any breach by the Customer of the terms of this Contract.

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## 8. CUSTOMER'S OBLIGATIONS

### 8.1. The Customer shall:

- (a) ensure that the terms of the Order and any information it provides in the Service Order Form and Goods Specification are complete and accurate.
- (b) co-operate with Pen Telecom in all matters relating to the Services.
- (c) provide Pen Telecom, its employees, agents, consultants and subcontractors, with access to the Customer's premises, office accommodation and other facilities as reasonably required by Pen Telecom.
- (d) provide Pen Telecom with such information and materials as Pen Telecom may reasonably require in order to supply the Services, and ensure that such information is accurate in all material respects.
- (e) prepare the Customer's premises for the supply of the Services (if applicable).
- (f) obtain and maintain all necessary licences, permissions and consents which may be required before the date on which the Services are to start.
- (g) keep and maintain all of Pen Telecom's Materials at the Customer's premises in safe custody at its own risk, maintain Pen Telecom Materials in good condition until returned to Pen Telecom, and not dispose of or use Pen Telecom Materials other than in accordance with Pen Telecom's written instructions or authorisation;
- (h) comply with any additional obligations as set out in the Service Documents; and
- (i) promptly report any faults in the Services in accordance with Pen Telecom's fault reporting procedures as published on the Portal from time to time and available on request.
- (j) Comply with any reasonable instructions or regulations issued by Pen Telecom to the Customer concerning the Customer's use of the Services.

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- (k) Maintain or procure the maintenance of all third-party equipment required for the provision of the Services by Pen Telecom.
- (l) Promptly on request provide to Pen Telecom (free of charge) any information which Pen Telecom may require to enable it to proceed with the performance of its obligations under this Contract including any information which Pen Telecom may reasonably request for the purposes of credit verification and debt collection. The Customer permits Pen Telecom to use such information and to provide it to third parties acting on behalf of Pen Telecom for such purposes; and
- (m) Comply at all times with all laws and obligations applicable to it and the use of the Services by it
- (n) Not use or permit the use of the Services in any manner which would constitute an Unacceptable use of the Services.
- (o) Take all steps necessary to ensure that the Services are not used in any manner which would constitute an Unacceptable use of the Services.
- (p) Inform Pen Telecom as soon as the Customer becomes aware of or suspects any fraudulent or Unacceptable use of the Services.
- (q) Comply with the terms of the relevant Service Schedule and any obligations on the Customer contained therein.
- (r) The Customer will take all reasonable steps to ensure that their systems are secure and in good working order, including but not limited to ensuring.
  - (i) Its networks are adequately protected from being accessed by unauthorised third parties, whether by the installation of an appropriate firewall or otherwise.
  - (ii) Any hardware installed by or on behalf of the Customer is installed in such a manner that it was secure from access by unauthorised third parties.

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- (s) The Customer shall ensure that it possesses any licences or other authorisations required to play any "hold music" provided to its own customers in connection with its use of the Services.
- 8.2.** The Customer will promptly provide to Pen (free of charge) any information which Pen Telecom may require to enable it to proceed with the performance of its obligations under this Contract including, without limitation:
- (a) Any information requested by an order, instruction or request of Government, an emergency services organisation or other competent administrative or regulatory authority; and
- (b) Any information which Pen Telecom may reasonably request for the purpose of credit verification and debt collection.
- 8.3.** If Pen Telecom's performance of any of its obligations under the Contract is prevented or delayed by any act or omission by the Customer or failure by the Customer to perform any relevant obligation (Customer Default):
- (a) Pen Telecom shall without limiting its other rights or remedies have the right to suspend performance of the Services until the Customer remedies the Customer Default, and to rely on the Customer Default to relieve it from the performance of any of its obligations to the extent the Customer Default prevents or delays Pen Telecom's performance of any of its obligations.
- (b) Pen Telecom shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from Pen Telecom's failure or delay to perform any of its obligations as set out in this clause 8.3; and
- (c) The Customer shall reimburse Pen Telecom on written demand for any costs or losses sustained or incurred by Pen Telecom arising directly or indirectly from the Customer Default.



## 9. CREDIT CHECKS

Service Schedule and any obligations on the Customer contained therein.

### 9.1. The Customer agrees that:

- (a) When the Customer applies to Pen Telecom to open an account, Pen Telecom may check the following records about the Customer and its business partners:
  - (i) Pen Telecom's own.
  - (ii) Personal and business records at credit reference agencies (CRAs). When CRAs receive a search from Pen Telecom they will place a search footprint on the Customer's business credit file that may be seen by other parties including lenders. They supply to Pen Telecom both public (including the electoral register) and shared credit and fraud prevention information; and
  - (iii) those at fraud prevention agencies (FPAs).
- (b) For directors, Pen Telecom may seek confirmation, from credit reference agencies, that the residential address provided is the same as that shown on the restricted register of directors' usual addresses at Companies House.
- (c) Pen Telecom may make checks such as assessing the Customer's application and verifying identities to prevent and detect crime and money laundering. Pen Telecom may also make periodic searches at CRAs and FPAs to manage the Customer's account with it.
- (d) Information on applications will be sent to CRAs and will be recorded by them. Including information on the Customer's business and its proprietors and CRAs may create a record of the name and address of.
- (e) Comply with the terms of the relevant

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- (f) The Customer will take all reasonable steps to ensure that their systems are secure and in good working order, including but not limited to ensuring.
- (i) its networks are adequately protected from being accessed by unauthorised third parties, whether by the installation of an appropriate firewall or otherwise.
  - (ii) any hardware installed by or on behalf of the Customer is installed in such a manner that it was secure from access by unauthorised third parties.
  - (iii) The Customer shall ensure that it possess any licences or other authorisations required to play any "hold music" provided to its own customers in connection with its use of the Services.
- (a) Default): Pen Telecom shall without limiting its other rights or remedies have the right to suspend performance of the Services until the Customer remedies the Customer Default, and to rely on the Customer Default to relieve it from the performance of any of its obligations to the extent the Customer Default prevents or delays Pen Telecom's performance of any of its obligations.

**9.2.** The Customer will promptly provide to Pen Telecom (free of charge) any information which Pen Telecom may require to enable it to proceed with the performance of its obligations under this Contract including, without limitation:

- (a) any information requested by an order, instruction or request of Government, an emergency services organisation or other competent administrative or regulatory authority; and
- (b) Any information which Pen Telecom may reasonably request for the purpose of credit verification and debt collection.

**9.3.** If Pen Telecom's performance of any of its obligations under the Contract is prevented or delayed by any act or omission by the Customer or failure by the Customer to perform any relevant obligation (Customer

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- (b) Pen Telecom shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from Pen Telecom's failure or delay performing any of its obligations as set out in this clause 8.3; and the Customer's whereabouts and recover debts.
- (c) the Customer shall reimburse Pen Telecom on written demand for any costs or losses sustained or incurred by Pen Telecom arising directly or indirectly from the Customer Default.
- (d) Information on applications will be sent to CRAs and will be recorded by them. Including information on the Customer's business and its proprietors and CRAs may create a record of the name and address of the Customer's business and its proprietors if there is not one already. Where the Customer borrows from us, we will give details of the Customer's accounts and how the Customer manages it/them to CRAs.
- (e) If the Customer borrows and does not repay in full and on time, CRAs will record the outstanding debt. This information may be supplied to other organisations by CRAs and FPAs to perform similar checks and to trace the Customer's whereabouts and recover debts that the Customer owes. Records remain on file for 6 years after they are closed, whether settled by the Customer or defaulted.
- (f) If the Customer gives Pen Telecom false or inaccurate information and Pen Telecom suspect or identifies fraud Pen Telecom will record this and may also pass this information to FPAs and other organisations involved in crime and fraud prevention.
- (g) If the Customer has borrowed from Pen Telecom and does not make payments that it owes Pen Telecom, Pen Telecom may trace

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- (h) Pen Telecom and other organisations may access and use from other countries the information recorded by fraud prevention agencies; and
- (i) The Customer's data may also be used for other purposes for which the Customer gives specific permission or, in very limited circumstances, when required by law or where permitted under the terms of the Data Protection Act 1998.
- 10.4. If the Customer does not notify Pen Telecom in accordance with clause 10.3 hereof it shall be deemed to have accepted the increase in charges and shall not be entitled to object to the same.

## 10. CHARGES AND PAYMENT

- 10.1. The price for the Goods shall be the price set out in the Service Order Form. The price of the Goods is exclusive of all costs and charges of packaging, insurance, transport of the Goods, which shall be paid by the Customer when it pays for the Goods.
- 10.2. The Charges for the Services shall be as set out on the Service Order Form and the Service Documents.
- 10.3. Save in respect of Call Tariffs in respect of which see clauses 10.6 and 10.7 hereof, Pen Telecom reserves the right to increase its charges set out on Pen Telecom's Price Lists and Tariffs, provided that such charges cannot be increased more than once in any six-month period. Pen Telecom will give the Customer written notice of any such increase at least two months before the proposed date of the increase. If such increase is not acceptable to the Customer, it shall notify Pen Telecom in writing within one month of the date of Pen Telecom's notice and Pen Telecom shall have the right without limiting its other rights or remedies to

terminate the Contract by giving six months' written notice to the Customer.



- 10.5.** For the avoidance of doubt the Customer acknowledges that it has sole responsibility for all charges relating to the use of the Services regardless of whether such use is authorised, unauthorised, fraudulent or otherwise.
- 10.6.** The Customer accepts that the Call Tariffs set out in Pen Telecom's Price Lists and Tariffs are set by Pen Telecom by reference to the telecommunication tariffs of third parties which Pen Telecom pays to provide the Services to the Customer (insofar as the applicable Services are being provided to the Customer by Pen Telecom). Those third-party tariffs are not controlled by Pen Telecom and are subject to increase or decrease at any time.
- 10.7.** Due to the circumstances set out at clause 10.6 hereof the Customer agrees that, at any time during the term of this Contract, Pen Telecom may increase or decrease its Call Tariff charges as set out on the Call Tariffs within Pen Telecom's Price Lists and Tariffs and the Customer shall pay such increased or decreased rate in the Call Tariff charges.
- 10.8.** Pen Telecom shall endeavour to notify the Customer of any change in the Call Tariff charges within a reasonable time of any change but failure by Pen Telecom to notify the Customer shall not affect the Customer's liability to pay the Charges or entitle the Customer to any remedy from Pen Telecom.
- 10.9.** Pen Telecom shall invoice for any usage charges monthly in arrears and any fixed charges monthly or quarterly or yearly in advance as specified on the Services Order Form. Invoices and detailed information on any applicable usage may be sent by email at

Pen Telecom's discretion.

- 10.10.** In respect of the Goods, Pen Telecom shall invoice the Customer on or at any time after the date of the Order.



**10.11.** Usage charges for a given billing period will be calculated by reference to the appropriate band of Pen Telecom's tariff structure which is available for inspection upon request.

**10.12.** The Customer shall pay each invoice submitted by Pen Telecom:

- (a) within twenty-one days of the date of the invoice; and
- (b) in full and in cleared funds to a bank account nominated in writing by Pen Telecom; and
- (c) through a direct debit arrangement on or about the 17<sup>th</sup> day of the month of invoice, any deviation to this must first be agreed in writing to Pen Telecom and said deviation will be subject to a monthly charge of £5; and
- (d) time for payment shall be of the essence of the Contract.

**10.13.** In the event that a legitimate direct debit charge cannot be collected a £30 administration fee will be charged to the Customer's account. In addition, at Pen Telecom's discretion and without prejudice to any other rights it may have under this Contract or otherwise, the supply of the Services may be suspended. If the provision of the Supply of Services is suspended for any breach of this Contract by the Customer and subsequently re-instated at the absolute discretion of Pen Telecom, a £30 Reinstatement fee will be paid by the Customer.

**10.14.** All amounts payable by the Customer under the Contract are exclusive of amounts in respect of value added tax chargeable for the time being (VAT).

Where any taxable supply for VAT purposes is made under the Contract by Pen Telecom to the Customer, the Customer shall, on receipt of a valid VAT invoice from Pen Telecom, pay to Pen Telecom such additional amounts in respect of VAT as are chargeable on the supply of the Services or Goods at the same time as payment is due for the supply of the Services or Goods.

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**10.15.** If the Customer fails to make any payment due to Pen Telecom under the Contract by the due date for payment, then the Customer shall pay interest on the overdue amount at the rate of 4% per cent per annum above HSBC Bank plc's base rate from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. The Customer shall pay the interest together with the overdue amount.

**10.16.** The Customer shall pay all amounts due under the Contract in full without any set-off, counterclaim, deduction or withholding (except for any deduction or withholding required by law). Pen Telecom may at any time, without limiting its other rights or remedies, set off any amount owing to it by the Customer against any amount payable by Pen Telecom to the Customer.

**10.17.** Usage charges shall be calculated by reference to data recording or logged by Pen Telecom.

**10.18.** For the avoidance of doubt, the Customer shall be liable for all and any telecommunication charges payable to any third party arising out of the Customer's use of the Services.

## **11. INTELLECTUAL PROPERTY RIGHTS**

**11.1.** All Intellectual Property Rights in or arising out of or in connection with the Services shall be owned by Pen Telecom.

**11.2.** The Customer acknowledges that, in respect of any third-party Intellectual Property Rights, the Customer's use of any such

Intellectual Property Rights is conditional on Pen Telecom obtaining a written licence from the relevant licensor on such terms as will entitle Pen Telecom to license such rights to the Customer.

**11.3.** All Pen Telecom Materials are the exclusive property of Pen Telecom.

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## **12. LIMITATION OF LIABILITY:**

**12.1.** Nothing in the Contract shall limit or exclude Pen Telecom's liability for:

- (a) death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors.
- (b) fraud or fraudulent misrepresentation; or
- (c) breach of the terms implied by section 2 of the Supply of Goods and Services Act 1982 (title and quiet possession).
- (d) breach of the terms implied by section 12 of the Sale of Goods Act 1979 (title and quiet possession); or
- (e) defective products under the Consumer Protection Act 1987; or
- (f) or any other liability which cannot be limited or excluded by applicable law.

**12.2.** Subject to clause 12.1, Pen Telecom shall not be liable to the Customer, whether in contract, tort (including negligence), for breach of statutory duty, or otherwise, arising under or in connection with the Contract for:

- (a) loss of profits.
- (b) loss of sales or business.
- (c) loss of agreements or contracts.
- (d) loss of anticipated savings.
- (e) loss of use or corruption of software, data or information.
- (f) loss of damage to goodwill; and
- (g) any indirect or consequential loss.

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**12.3.** Subject to clause 8.1, Pen Telecom's total liability to the Customer, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, arising under or in connection with the Contract shall be limited to:

- (a) 100% of the fixed charges payable under the Contract during the Initial Term as set out in the Service Documents; or
- (b) if that sum is not calculable for any reason, the sum of £10,000 (ten thousand pounds).

**12.4.** The terms implied by sections 13 to 15 of the Sale of Goods Act 1979 and the terms implied by sections 3 to 5 of the Supply of Goods and Services Act 1982 are, to the fullest extent permitted by law, excluded from the Contract.

**12.5.** This clause 12 shall survive termination of the Contract.

### **13. TERMINATION AND SUSPENSION**

**13.1.** Upon expiry of the Initial Term Pen Telecom shall continue to supply the Services to the Customer on the terms of this Contract subject to the rights of either party to terminate or suspend the Contract as set out in this clause 13.

**13.2.** Without limiting its other rights or remedies, Pen Telecom may terminate the Contract by giving the Customer at least three months' written notice provided that such notice will only be effective if it expires after expiry of the Initial Term.

**13.3.** Without limiting its other rights or remedies, the Customer may at any time after commencement of the Initial Term terminate all or some only of the Services provided under the Contract by giving Pen Telecom written notice of a length at least equal to the:

- (a) the length of notice set out in the relevant Service Schedule in respect of the Service(s) being terminated; or
- (b) if no length of notice is specified, three months' notice; provided that any such notice will only be effective if it expires after expiry of the Initial Term.

**13.4.** Without limiting its other rights or remedies, either party may terminate the Contract with immediate effect by giving written notice to the other party if:

- (a) the other party takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing to carry on business or, if the step or action is taken in another jurisdiction, in connection with any analogous procedure in the relevant jurisdiction;
- (b) the other party suspends, or threatens to suspend, or ceases or threatens to cease to carry on all or a substantial part of its business; or
- (c) the other party's financial position deteriorates to such an extent that in the terminating party's opinion the other party's capability to adequately fulfil its obligations under the

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Contract has been placed in jeopardy.

- (d) the other party (being an individual) dies or, because of illness or incapacity (whether mental or physical), is incapable of managing his own affairs or becomes a patient under any mental health legislation.

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- 13.5.** Without limiting its other rights or remedies, Pen Telecom may terminate the Contract with immediate effect by giving written notice to the Customer if:
- (a) the Customer fails to pay any amount due under the Contract on the due date for payment and remains in default not less than seven days after being notified in writing to make such payment: or
  - (b) there is a change of Control of the Customer.
  - (c) Pen Telecom reasonably suspects Unacceptable use of the Services.
  - (d) Pen Telecom reasonably suspects that the Services are being used in a way prohibited by the terms of the Service Documents; or
  - (e) If any licence or other agreement required for Pen Telecom to supply the Services expires or is revoked through no fault of Pen Telecom.
  - (f) the results of any survey of the Customer's site by Pen Telecom shows the Customer's site to be unsuitable for the Services in Pen Telecom's opinion acting reasonably.
- 13.6.** Without limiting its other rights or remedies, Pen Telecom may suspend provision of the Services or all further deliveries of Goods under the Contract or any other contract between the Customer and Pen Telecom if:
- (a) the Customer becomes subject to any of the events listed in clause 13.3 13.4(a) to clause 13.4(c) or Pen Telecom reasonably believes that the Customer is about to become subject to any of them; or
  - (b) or if the Customer fails to pay any amount due under this Contract on the due date for payment; or
  - (c) or if Pen Telecom reasonably suspects Unacceptable Use of the Services; or
  - (d) required for Pen Telecom's operational reasons or in the case of emergency.

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## 14. CONSEQUENCES OF TERMINATION AND SUSPENSION

### 14.1. On termination of the Contract for any reason:

- (a) the Customer shall immediately pay to Pen Telecom all of Pen Telecom's outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has been submitted, Pen Telecom shall submit an invoice, which shall be payable by the Customer immediately on receipt.
- (b) the Customer shall return all of Pen Telecom Materials which have not been fully paid for. If the Customer fails to do so, then Pen Telecom may enter the Customer's premises and take possession of them. Until they have been returned, the Customer shall be solely responsible for their safe keeping and will not use them for any purpose not connected with this Contract.
- (c) If Pen Telecom's Materials are damaged or not in good condition the Customer shall immediately pay the remedial or replacement costs of the same.
- (d) the Customer shall immediately cease using the Services.
- (e) the accrued rights, remedies, obligations and liabilities of the parties as at expiry or termination shall be unaffected, including the right to claim damages in respect of any breach of the Contract which existed at or before the date of termination or expiry; and
- (f) clauses which expressly or by implication survive termination shall

continue in full force and effect.

- 14.2. If a suspension is implemented by Pen Telecom as a consequence of the breach, fault or omission of the Customer, the Customer shall reimburse Pen Telecom on a full indemnity basis for all costs, expenses, management time calculated at a reasonable hourly rate and any other losses incurred as a result of the suspension and/or the recommencement of the provision of the Services as appropriate.



**14.3.** For the avoidance of doubt and without prejudice to clause 12 of these Conditions Pen Telecom shall not be liable for any loss, damage or inconvenience suffered by the Customer as a result of any suspension or termination of the Contract.

its obligations for a continuous period of more than twelve weeks, the party not affected by the Force Majeure Event may terminate this Contract by giving eight weeks' written notice to the Affected Party.

## **15. FORCE MAJEURE**

**15.1.** Provided it has complied with clause 15.3, if a party is prevented, hindered or delayed in or from performing any of its obligations under this Contract by a Force Majeure Event (Affected Party), the Affected Party shall not be in breach of this Contract or otherwise liable for any such failure or delay in the performance of such obligations. The time for performance of such obligations shall be extended accordingly.

**15.2.** The corresponding obligations of the other party (if any) will be suspended, and its time for performance of such obligations extended, to the same extent as those of the Affected Party.

**15.3.** The Affected Party shall:

- (a) as soon as reasonably practicable after the start of the Force Majeure Event, notify the other party in writing of the Force Majeure Event, the date on which it started, its likely or potential duration, and the effect of the Force Majeure Event on its ability to perform any of its obligations under this Contract; and
- (b) use all reasonable endeavours to mitigate the effect of the Force Majeure Event on the performance of its obligations.

**15.4.** If the Force Majeure Event prevents, hinders or delays the Affected Party's performance of

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- 15.5.** Nothing in this clause 15 shall permit the Customer to terminate this Contract due to delays in the service commencement date in relation to Ethernet Services provided by Pen Telecom if that delay is due to the delay of third parties outside Pen Telecom's control and the Customer hereby expressly acknowledges and agrees that the service commencement date for Ethernet Services may be many months or, in exceptional circumstances, years after the date of the Service Order Form.

## **16. GENERAL**

### **16.1.** Assignment and other dealings.

- (a) Pen Telecom may at any time assign, transfer, mortgage, charge, subcontract or deal in any other manner with all or any of its rights under the Contract and may subcontract or delegate in any manner any or all of its obligations under the Contract to any third party or agent.
- (b) The Customer shall not, without the prior written consent of Pen Telecom, assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with any or all of its rights or obligations under the Contract.

### **16.2.** Confidentiality.

- (a) The Customer undertakes that it shall not at any time any time disclose to any person any confidential information concerning the business, affairs, customers, clients or suppliers of Pen Telecom or Pen Telecom except as permitted by clause 16.2(b).

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- (b) The Customer may disclose Pen Telecom's confidential information: shall be effective unless it is in writing and signed by the parties (or their authorised representatives).
- (i) to its employees, officers, representatives, subcontractors or advisers who need to know such information for the purposes of carrying out the Customer's obligations under the Contract. Each party shall ensure that its employees, officers, representatives, subcontractors or advisers to whom it discloses Pen Telecom's confidential information comply with this clause 16.2; and
  - (ii) as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.
- (c) The Customer shall not use Pen Telecom's confidential information for any purpose other than to perform its obligations under the Contract.

### 16.3. Entire Agreement.

- (a) The Service Documents constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to their subject matter.
- (b) Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in the Service Documents.
- (c) Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in the Service Documents.

### 16.4. Variation. No variation of the Contract

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**16.5.** Waiver. A waiver of any right or remedy is only effective if given in writing and shall not be deemed a waiver of any subsequent breach or default. A delay or failure to exercise, or the single or partial exercise of, any right or remedy shall not:

- (a) waive that or any other right or remedy; or
- (b) prevent or restrict the further exercise of that or any other right or remedy.

**16.6.** Severance. If any provision or part-provision of the Contract is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable.

If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of the Contract.

**16.7.** Notices.

- (a) Any notice or other communication given to a party under or in connection with the Contract shall be in writing, addressed to that party at its registered office or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally or sent by pre-paid first class post or other next working day delivery service, commercial courier, fax or email.
- (b) A notice or other communication shall be deemed to have been received: if

delivered personally, when left at the address referred to in clause 16.7(a); if sent by pre-paid first class post or other next working day delivery service, at 9.00 am on the second Business Day after posting; if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed; or, if sent by fax or email, one Business Day after transmission.

- (c) The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.



- 16.8.** Third parties. No one other than a party to the Contract shall have any right to enforce any of its terms.
- 16.9.** Governing law. The Contract, and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales.
- 16.10.** Jurisdiction. Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with the Contract or its subject matter or formation.
- 16.11.** Non-Solicitation.
- (a) The Customer agrees that during this agreement and for twelve (12) months after the termination or expiry of this agreement not to induce or entice any persons (whether directly or indirectly) who were employed by Pen Telecom Unlimited during the previous twelve (12) months.
- (b) In the event that the Customer breaches Clause 16.11 (a), it will pay Pen Telecom by way of liquidated damages one hundred percent (100%) of the first years' salary of such person with thirty (30) days of that persons commencement of employment with the Customer.

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