

# Digicel

DIGICEL (PNG) LIMITED

Master Services Terms

Version Control

Version	Particulars	Effective from	Approved by
1.1	First draft		CK, MH
1.2	Includes rules on bribery and corruption		MH
1.3	Reformatting		MH
1.3	New clause on Third Party Claims	30 April 2019	MH

**Legend:**

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## MASTER SERVICES TERMS

### INTRODUCTION

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These are Digicel's standard Master Services Terms which apply to Services that Digicel supplies to ICT customers (each a **Customer**) unless the Customer signs a negotiated Master Services Agreement. If a Customer signs a Master Services Agreement with Digicel, the Master Services Agreement apply to Services that Digicel supplies to the Customer. Digicel's standard Service Terms also apply to the Services unless the Customer has signed a Service Order with its own Service Terms which Digicel has accepted.

Digicel may change these Master Services Terms and any Service Terms relevant to services supplied to the Customer from time to time without notifying the Customer provided that if a change has a material adverse effect on the Customer:

- (a) Digicel will notify the Customer of the change; and
- (b) the Customer may terminate the Service without incurring any Early Termination Fee by notifying Digicel within 7 calendar days of receipt of the material adverse change from Digicel.

If the Customer continues to use the Service, the Customer is deemed to accept the change notified by Digicel.

These Master Services Terms and Digicel's standard Service Terms (as varied from time to time) are available from the Digicel Business website at <https://www.digicelpacific.com/business/pg/en.html>. Subject to Digicel notifying the Customer of any material adverse change, the Customer is deemed to have notice of the Master Services Terms and any relevant Service Terms as published on the Digicel Business website and varied from time to time.

These Master Services Terms are incorporated by reference into a Service Agreement that is made up of the Service Details and the Service Terms. The law that governs the Service Agreement is as set out in Clause 17.6 of these Master Services Terms.

### RECITALS

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- A Each Digicel entity ("**Digicel**") operates and maintains a communications network and provides services over the network to end users in a Territory on the terms of these Master Services Terms.
- B The Customer wishes to acquire certain services from Digicel on the terms of an agreement (**Service Agreement**) that are constituted by:
  - (a) these Master Services Terms;
  - (b) the terms of any Service Terms applicable to the relevant category of service; and
  - (c) the Service Order applicable to the relevant service.
- C The Customer acknowledges that a new Service Agreement is created in respect of a service (**Service**) when Digicel accepts a Service Order for that Service. Unless agreed otherwise, each Service is independent of other Services. Expiry or termination of one Service does not affect the continuation of another Service unless the latter depends on the former.
- D Digicel may revise these Master Services Terms from time to time in accordance with its provisions.

### AGREEMENT DETAILS

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#### Item 1 Digicel and Territory

Each row of the following Table sets out the particulars of each Digicel entity and the Territory that the Digicel entity operates in.

Digicel entity	Territory
Digicel (PNG) Limited, incorporated in Papua New Guinea with company number 1-55909 and having its principal place of business at Section 494, Lot 1&2, Kennedy Road, Gordons Industrial Estate, PO Box 1618, Port Moresby, NCD, Papua New Guinea	Papua New Guinea

#### Item 2 Address for Notices (Clause 13)^

Digicel	Contact Person	CEO
	Address	The address specified in Item 1 above.
	Fax No.	+ 675 7222 4447 (PNG)
	Email	digicelpng@digicelgroup.com

^ unless revised

Customer	Contact Person	<i>As specified by the Customer in the Service Order*</i>
	Address	<i>As specified by the Customer in the Service Order*</i>
	Fax No.	<i>As specified by the Customer in the Service Order*</i>

\* if the Customer does not specify notice details in a Service Order, Digicel will use reasonable efforts to serve notice at the Customer's last known address or fax number recorded by Digicel. Notice served using such reasonable efforts shall be deemed sufficient notice to the Customer.

## 1. DEFINED TERMS & INTERPRETATION

### 1.1. Defined terms

In these Master Services Terms:

**Acceptable Use Policy** – see Clause 2.12.

**Agreement** means these Master Services Terms. If this Agreement is incorporated into, or applies to, a Service Agreement, the term **Agreement** also refers to the Service Agreement unless the context indicates otherwise.

**Additional Services** means additional services requested under Clause 2.7 of this Agreement.

**Advisers** means:

- (a) the financial or legal advisers of a party; and
- (b) the respective officers and employees of those financial or legal advisers.

**Affiliate**, in relation to either party ("**first person**"), means a person ("**second person**") who directly or indirectly:

- (a) controls the first person;
- (b) is controlled by the first person; or
- (c) is together with the first person under the common control of a **third person**.

**Arbitration Rules** means:

- (a) the arbitration law of the Territory;
- (b) the arbitration rules of the Australian Centre for International Commercial Arbitration;
- (c) the Arbitration Act 1996 (NZ), including clauses 2, 3 and 6 of its Schedule 2; or
- (d) the International Arbitration Act Chapter 143A (Singapore), including the Model Law in its First Schedule,

as Digicel may select in its sole and absolute discretion. The **jurisdiction** of the Arbitration Rules is the relevant Territory, New South Wales, New Zealand or Singapore (as the case may be).

**Base Interest Rate** is the indicative lending rate for loans to business customers published by a reputable

financial institution in the Territory. If there is more than one such indicative lending rate, the Base Interest Rate is the indicative rate that Digicel considers is that rate that would likely apply to an overdraft facility made available to Digicel.

**Business Day** is a day when banks are open for business in the place where the Services are provided.

**Commencement Date** is the date an Agreement comes into effect. If no Commencement Date is specified, the Agreement commences when both parties sign it and (if signed in counterpart) exchange the documents.

**Confidential Information** means information that:

- (a) is by its nature confidential;
- (b) is treated by each party as confidential; or
- (c) each party knows or ought to know is confidential,

except information that:

- (d) is or becomes public knowledge otherwise than by breach of this Agreement; or
- (e) has been independently acquired or developed by a party to this Agreement.

**Contract Material** means all Material created for the purposes of this Agreement.

**Digicel** means, in relation to Services supplied in a Territory, the Digicel Operator that operates in that Territory.

The **Due Date** for paying a bill is the 7<sup>th</sup> day after the date of the bill.

Unless a Service Order provides otherwise, "**Early Termination Fee**" or "**ETF**" is an amount calculated as follows:

$$\text{ETF} = 90\% \text{ of the Total Contract Value} \times ('A' / 'B')$$

where:

**Total Contract Value** is the sum of all monthly recurring charges or minimum

monthly spend that the Customer agrees to pay over the Minimum Service Period;

'A' is the number of months remaining of the Minimum Service Period when the Service is terminated;

'B' is the total number of months in the Minimum Service Period.

**Emergency** means any crisis that, in Digicel's sole but reasonable discretion, necessitates prompt action by Digicel.

**End Customer** means any person who uses a Service or to whom a Service is resold and who is supplied with or uses or accesses a Service and includes Customer to the extent that it uses the Services for itself but excludes any person who resupplies the Service by itself or with other services.

**End Customer Data** means personal information relating to an End Customer and its operations, facilities, customers, clients, personnel, assets and programs, in whatever form that information may exist and whether entered into, stored in, generated by or processed as part of the Services.

**Equipment Charges** means charges for the supply and/or installation of Equipment. Unless agreed otherwise, Equipment Charges exclude import duty, freight cost and other levies or costs.

**Equipment** means, depending on the context, equipment belonging to Digicel (**Digicel Equipment**) or to the Customer (**Customer Equipment**) or both.

**Harmful Code** means any program code, programming, instruction or set of instructions constructed for the purpose of damaging, interfering with, or otherwise adversely affecting infrastructure, data, people or services including viruses, trojans, worms, phishing emails, backdoors, botspyware, adware, dialers, rootkits, keyloggers, hijackers, web bug, exploits, cracking tools and hacking tools.

**Helpdesk** means the helpdesk at the Digicel Business Call Centre which is responsible for receiving and responding to customer calls, fault report, and queries about the Service, logging such calls, pursuing them to resolution, and reporting back to the Customer.

**Insolvency Event** means conduct by any party whereby that party:

- (a) stops or suspends, or threatens to stop or suspend payment of all or a class of its debts;
- (b) is insolvent within the meaning of the relevant legislation on corporations;
- (c) is presumed by a court to be insolvent;
- (d) fails to comply with a statutory demand;
- (e) has an administrator appointed over it or any step preliminary to the appointment of an administrator is taken; other than for the purpose of reconstruction;
- (f) resolves to reduce its shareholder capital or gives notice to so resolve; or
- (g) has an application or order made, proceedings commenced, a resolution passed or proposed in a notice of meeting, an application to a court made or other steps taken against or in respect of it (other than frivolous or vexatious applications, proceedings, notices or steps) for its winding

up, deregistration or dissolution or for it to enter an arrangement, compromise or composition with or assignment for the benefit of its creditors, a class of them or any of them.

**Intellectual Property** means all intellectual property rights, including:

- (a) patents, copyright, rights in circuit layouts, registered designs, trade marks, know how, trade secrets, domain names, website contents, and any right to have confidential information kept confidential; and
- (b) any application or right to apply for registration of any of the rights referred to in paragraph (a).

**Law or Laws** means rules of common law, principles of equity, statutes, regulations, proclamations, ordinances, by-laws, rules, regulatory principles and requirements, statutory rules of an industry body, statutory mandatory codes of conduct, writs, orders, injunctions and judgments, whether in the Territory or any other country in which the Services are provided to or from.

**Material** includes property, information and the subject matter of any category of Intellectual Property.

**Minimum Service Period** is 24 months unless specified otherwise in a Service Order.

**Network** means the telecommunications system owned and/or operated by Digicel.

**Other Network** means any telecommunications system network other than the Network.

**People** of a party mean the officers, employees, contractors (including subcontractors and their employees), and the agents of that party, but exclude the other party.

**Personal Information** means information or an opinion (including information or an opinion forming part of a database) whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion.

**Premises** of a Customer mean a building, area or location at which the Customer has exclusive control or possession.

**Privacy Rules** means any Law of the Territory that deals with the collection, use, processing, protection and disclosure of Personal Information.

**Security** means any security, in a form acceptable to Digicel, for the payment of the charges or the meeting of Customer's other obligations under a Service Agreement. The form of a Security may include a bank guarantee, a letter of credit, security over a bank deposit, a deposit with Digicel, a parent company guarantee, a deed of cross guarantee, a related company guarantee, a fixed charge or a floating charge security.

**Service** means, depending on the context:

- (a) the service described in a Service Agreement; or
- (b) a service provisioned by Digicel pursuant to a Service Order.

**Service Agreement** means an agreement between Digicel and the Customer in respect of a Service, being an agreement that is constituted by:

- (a) this Master Services Agreement,
- (b) any terms and conditions applicable to the Service (**Service Terms**); and
- (c) the **Service Details** set out in any order accepted by Digicel in relation to the Service (**Service Order**) or otherwise.

**Service Charges** means the charges paid or payable to Digicel by the Customer for a Service, being:

- (a) the non-recurring and recurring charges specified in a Service Order; and
- (b) the charges advised by Digicel for any variation to the Service Order.

Depending on the context, a reference to Service Charges may include Equipment Charges.

**Service Details** are the details applicable to a Service and may be set out in a Service Order.

**Service Order** means a Customer's order for a Service that Digicel has accepted. A Service Order must be made in a form specified by Digicel and contain the details (**Service Details**) applicable to the Service.

**Service Terms** are the terms and conditions that apply only to a specific set of Services. The Service Terms are Digicel's standard Service Terms unless the parties have signed a negotiated Service Agreement.

**Site** of a Customer means the location at which a Service is provisioned or installed. A Site may be at the Customer's Premises or somewhere else.

**Site Regulations** means such health and safety and security rules and procedures applicable to a Customer's Premises as may be notified in writing by the Client to Digicel from time to time during the Term of this Agreement.

**Start Date** means the date a Service is provisioned or the date Equipment is installed. The Start Date can be the Commencement Date of an agreement or later.

**Subcontractor** means a Digicel subcontractor appointed in accordance with Clause 4.

**Subcontracting arrangement** refers to the use of a third party to provide the whole or part of a Service specifically for the Customer but excludes any arrangement that Digicel would enter into independently of whether the Service is provided to the Customer.

**Term** is the term in Clause 3.1 of this Agreement.

**Territory** – see Item 1 of the Agreement Details.

**Third Party Material** means Material owned by a third party that is included, embodied in or attached to the Contract Material.

## 1.2. Interpretation

In this Agreement:

- (a) A reference to the Customer includes the Customer's People but does not make them a

party to this Agreement or confer any rights or obligations on them;

- (b) A reference to Digicel includes Digicel's People but does not make them a party to this Agreement or confer any rights or obligations on them;
- (c) The singular includes the plural and vice versa;
- (d) A reference to one gender includes a reference to all other genders;
- (e) Headings to clauses are included for the sake of convenience only and shall not affect the interpretation of the clauses to which they relate;
- (f) References to any statute or statutory provision include that statute or statutory provision as amended, extended, consolidated or replaced by subsequent legislation and any orders, regulations, instruments or other subordinate legislation made under the relevant statute;
- (g) References to this Master Services Agreement includes the schedules and attachments hereto, references to a Service Agreement includes the schedules and attachments thereto, and references to a Service Order includes the schedules and attachments thereto;
- (h) When a party comprises two or more persons the rights and obligations of such persons pursuant to this Agreement shall enure for the benefit of and bind all of them jointly and each of them severally;
- (i) The word '**person**' means and includes a natural person, a company, a firm or any other legal entity whether acting as a trustee or not;
- (j) This Agreement shall bind each party's legal personal representatives, successors and assigns;
- (k) "**may**" implies a corresponding obligation: If this Agreement gives Digicel the right to do something (which is implied when words such as "may" is used), the other party is obliged to give effect to Digicel's exercise of that right. The converse is not necessarily true. Depending on the context, a party's right to do something may be subject to Digicel's consent provided the consent is not unreasonably withheld, delayed or conditioned;
- (l) **Communication to be in writing:** If this Agreement requires a notice, permission, authorisation or other communication, that notice, permission, authority or communication must be in writing;
- (m) **Approvals, consents, etc:** Unless this Agreement expressly says so otherwise, where this Agreement requires Digicel's consent or approval or allows Digicel to determine or direct anything, Digicel may give conditionally or withhold its consent or approval, or make the direction or determination, in its sole and absolute discretion;
- (n) **Neutral reading:** Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in the construction or interpretation of this Agreement.

## 1.3. Precedence

Any inconsistency between these Master Services Terms, a Service Terms, any Service Order and Service Details shall be resolved according to the following order of precedence (from the highest precedence to the lowest precedence):

- (a) Service Details and Service Order;
- (b) Service Terms;
- (c) these Master Services Terms.

## 2. SERVICES

### 2.1. Scope of Services

- (a) Upon Digicel accepting a Service Order issued by the Customer, Digicel shall provide the Service to the Customer in accordance with the Service Order.
- (b) If the Service Order specifies a Start Date for the Service, Digicel will endeavour to provision the Service by the Start Date, but does not guarantee it will do so.
- (c) Digicel is only responsible to ensure connectivity up to the defined Points of Demarcation.
- (d) Digicel shall not be responsible for calls, data, information, or otherwise routed over Other Networks once such calls, data, or information have been handed over to the Other Networks.

### 2.2. Performance of Services

- (a) Without limiting specific provisions of this Agreement, Digicel will:
  - (i) comply with all legal, regulatory or contractual requirements applicable to the Services including licensing obligations;
  - (ii) exercise reasonable skill, care and diligence in providing the Services;
  - (iii) keep reasonable records on the performance of the Services; and
  - (iv) use reasonable endeavours to perform the Services at least consistent with levels of performance achieved by well managed operations performing services similar to the Services.
- (b) The Customer must not take or allow any action or make or allow to be made a decision that may adversely affect the function or performance of, or decrease the efficiency of, Digicel's ability to perform the Services without Digicel's prior written approval.
- (c) Digicel may from time to time change the technical specifications of a Service if:
  - (i) the change does not materially and adversely affect the Customer; or
  - (ii) there is an Emergency.

### 2.3. Warranties

- (a) Digicel warrants that it has sufficient expertise to perform the Services and all necessary licences, consents, approvals, permits and authorisations that may be required to provide the Services.
- (b) The Customer acknowledges and agrees that except as expressly set out in this Agreement, neither Digicel nor any person acting on behalf of or associated with Digicel has made any representation, given any advice or given any warranty or undertaking, promise or forecast of any kind in relation to the Services, Digicel or this Agreement except as set out in this Agreement.
- (c) Digicel will do its best to provide a reasonable quality of service but does not warrant that the Service will be continuously available or fault free.

### 2.4. Access to Customer premises

- (a) **(Preparing premises)** The Customer must, at its own expense, prepare relevant Premises according to any reasonable instructions provided by Digicel (including, but not limited to, obtaining all such consents and authorisations as may be necessary to provide Digicel with access to those Premises and installing all

Customer Premises Equipment) and must provide Digicel with reasonable access to selected parts of the Premises for the purpose of line testing, surveys, installation and maintenance of Digicel Equipment.

- (b) **(Access)** The Customer will, where necessary, and at all reasonable times, permit access or secure access to the Premises to Digicel and anyone acting on Digicel's behalf, on production of a valid identity card, to enable Digicel to carry out its obligations under this Agreement. Digicel will normally only require such access during the Customer's usual working hours, however, Digicel may, on reasonable notice, require the Customer to provide it with access at other times. Such request shall not be unreasonably denied. The Customer will provide a suitable and safe working environment for Digicel at the Premises throughout the Term of this Agreement.
- (c) **(Digicel to observe site regulations)** Digicel will observe all reasonable Site Regulations of the Customer, which have been advised in writing to Digicel prior to the date of access to the Premises by Digicel. In the event of any conflict between the Site Regulations and the terms of this Agreement, Digicel shall proceed with the installation only upon receipt of the Customer's written authorization to do the installation in accordance with the terms of this Agreement and may waive adherence to the Site Regulations
- (d) **(Repair)** The Customer will also be responsible for making good any damages reasonably arising from Digicel's modifications and/or alterations unless such damages are caused by the negligence of Digicel or otherwise agreed in writing by the parties.
- (e) **(OH&S)** The Customer must, when permitting Digicel to use the Customer's premises or facilities for the purposes of Digicel providing the Services, make all Digicel People present aware of, and promulgate all procedures relating to occupational health and safety and security in operation at those premises or facilities (including a smoke-free policy)
- (f) **(Stakeholder approvals)** Where it is necessary for Digicel to lay cables, lines, equipment at, in, on or to, or to otherwise acquire access, leave, or permission to traverse, Premises not owned or in the possession or under the control of, or accessible under consent granted to, the Customer, the Customer must secure all necessary approvals from the relevant persons, including, as applicable, the owner, landlord, or their agents so as to enable Digicel to lawfully carry out its installation, maintenance and provision of the Services, including Digicel Equipment, to the Customer.
- (g) **(Planning consents)** The Customer will, at its own expense, obtain all necessary building or planning consents, permissions and approvals for any modifications required to any Premises.

### 2.5. Digicel equipment

- (a) **(No interference)** The Customer must not, without Digicel's prior written consent, add to, modify or in any way interfere with the Digicel Equipment and will be liable to Digicel for any loss of, or damage to, the Digicel Equipment, except where such loss or damage is due to fair wear and tear, acts of God, or is caused by the negligent or wilful act or omission of Digicel.

- (b) **(Safety and security)** The Customer must comply with all Digicel's reasonable safety and security requirements in relation to the use of Digicel Equipment and the Services of which, from time to time, it is notified in writing by Digicel.
- (c) **(Legal title)** All legal title, right to and interest in the Digicel Equipment will remain with Digicel and nothing in this Agreement is to be construed or interpreted as passing any such right or interest to the Customer. The Customer acknowledges that equipment that is affixed to the Premises is not a fixture if the equipment can be removed without causing irreparable material damage to the Premises.
- (d) **(Ongoing support)** The Customer agrees to provide, at its expense, a suitable place, conditions and support for Digicel Equipment and Services, including all necessary trunking, conduits and cable trays in accordance with relevant installation and use standards and, where required, a continuous mains electricity supply and connection point.
- (e) **(Demarcation point)** Digicel will not be responsible nor liable for any fitting, cable, ducting, equipment (including Customer Premises Equipment) on the Customer's side of the Point of Demarcation and all risk, responsibility and liability for such, or arising from or related to such, will remain at all times with the Customer.

#### 2.6. Digicel relieved of its obligations

- (a) Digicel is relieved of any of its obligations under this Agreement to the extent of the Customer's involvement in the performance or alteration of the Services without Digicel's consent during the Term.
- (b) Digicel will not be liable for any delays in meeting its obligations under this Agreement where the delay is due to acts outside its reasonable control or to any act or default of the Customer.

#### 2.7. Additional Services and variation to Service Order

- (a) The Customer may request Digicel to supply Additional Services from time to time by issuing a Service Order in a form specified by or acceptable to Digicel.
- (b) Service Charges for Additional Services will be based on Digicel's standard rates applicable at that time.
- (c) The Customer may vary an existing Service Order with Digicel's approval subject to changes to Service Charges specified by Digicel.

#### 2.8. Termination of Services

- (a) The Customer may terminate a Service before the Minimum Service Period (if any) expires by giving Digicel a decommissioning notice in the form specified by Digicel and paying Digicel the Early Termination Fee calculated by Digicel. The Service terminates in accordance with the decommissioning notice.
- (b) The Customer may terminate a Service on or after expiry of the Minimum Service Period by giving Digicel one month's notice.
- (c) The Customer agrees that the Early Termination Fee is a genuine pre-estimate of any loss that Digicel will suffer, including in the recovery of any upfront subsidy provided by Digicel, any reliance loss and the loss of expectations.

#### 2.9. Suspension

Without prejudice to its rights to terminate this Agreement, Digicel may suspend or interrupt the provision of one or more Services under this Agreement:

- (a) in the event of an Emergency;
- (b) due to reasonable technical expediency;
- (c) in the event that the Customer fails to comply with any of the provisions of this Agreement;
- (d) if in Digicel's reasonable discretion the Customer's use of the Service would result in a substantial risk that Digicel or its suppliers become:
  - (i) indicted as a criminal defendant in any country; or
  - (ii) subject to any government proceedings that could result in fines, sanctions or non-monetary remedies including loss of any license or consents;
- (e) should the Service be used in any way that will cause interference with Digicel's Equipment;
- (f) should payment of any bills not be made within 10 days of the Due Date for payment;
- (g) should the Customer not comply with reasonable instructions or directions given to it by Digicel which are, in Digicel's sole but reasonable opinion, necessary to maintain the safety or the quality of the Services;
- (h) in order to prevent damage to, or degradation of, the Network which may be caused by the Customer or anyone using the Customer's access;
- (i) to comply with any law, regulation, court order or other lawful governmental requirement or order;
- (j) to comply with any request of an emergency service organization; or
- (k) to prevent use of the Services which, in the reasonable opinion of Digicel is fraudulent, illegal or improper.

Except where to do so would require the Customer to engage in unethical, misleading or deceptive conduct, the Customer must not attribute Digicel blame for any fault or other circumstances or the suspension or partial suspension of a Service.

#### 2.10. Change to technical specifications

Digicel reserves the right, from time to time, to:

- (a) change the technical specification or any other aspect of the Services provided that the change does not materially and adversely affect the Services;
- (b) in the case of an Emergency, change the technical specification or other aspect of the Service which may materially or adversely affect the Services; or
- (c) give the Customer such instructions as may, in Digicel's sole opinion, be necessary to maintain the safety and/or quality of the Service.

#### 2.11. Customer's obligations

The Customer shall:

- (a) use the Service in accordance with reasonable instructions or directions given by Digicel which, in Digicel's sole opinion, are necessary to maintain the safety or the quality of the Service;
- (b) not use the Service in a manner that would jeopardize the operation of the Network, the

- network of any Digicel customer, or other third party;
- (c) permit Digicel to examine, test or repair the Digicel Equipment on the Premises at all reasonable times;
  - (d) be responsible for the maintenance of all Customer Equipment;
  - (e) be responsible for the security of Customer and Digicel Equipment at the Customer's premises;
  - (f) promptly report faults in the Service to the Helpdesk facility provided by Digicel;
  - (g) bear all costs relating to the provision of commercial power to the Customer's premises, Customer Equipment and the Equipment and the provision of additional infrastructure such as pole mounts, bases, grounding equipment required to facilitate the installation of the Equipment;
  - (h) not, nor permit any other person to:
    - (i) attach anything directly or indirectly to any Digicel Equipment;
    - (ii) interfere with any labels on Digicel Equipment;
    - (iii) place anything in electrical connection with any Digicel Equipment; and
    - (iv) connect or attach any equipment to the Digicel Equipment and/or the Customer Premises Equipment which may adversely affect the operation of such equipment and/or the provision of the Services by Digicel;
  - (i) not connect nor allow a third party to connect equipment or Other Networks to the Network without Digicel's prior approval; and
  - (j) The Customer must exercise best efforts to ensure that its People do not introduce or incorporate any Harmful Code into the network infrastructure, systems, software and tools deployed in the use of the Services.

## 2.12. Acceptable Use Policy

- (a) In the event of activity which Digicel considers to be deliberately or otherwise abusive or in violation of this Clause 2 by the Customer or a user of the Customer, Digicel may immediately suspend a Service or, by giving 24 hours notice to the Customer, terminate a Service if Digicel in its sole discretion considers this necessary to address the abuse or violation. Digicel reserves the right, at its sole discretion, to determine what constitutes an abuse or violation and the Customer agrees that Digicel's determination is final and binding on it.
- (b) The Customer agrees not to use the Service for any purpose or in any manner that:
  - (i) does not comply with the terms of any legislation, regulation, policy or any license or authorization applicable to the Customer or Digicel;
  - (ii) does not comply with any instructions given to Digicel by any other telecommunications operator or any competent regulatory authority and which has been notified in writing by Digicel to the Customer;
  - (iii) would or could result in Digicel being in breach of any agreement between Digicel and any public telecommunications operator which has been notified in writing by Digicel to the Customer;
  - (iv) in the reasonable opinion of Digicel is or could be improper.
- (c) The Customer shall not and hereby undertakes to procure that any of its users do not engage in

activity that is abusive or violates any system or network including but not limited to:

- (i) gaining or seeking to gain unauthorized access to or use of data, systems or networks, including any attempt to probe, scan or test the vulnerability of a system and/or network or to breach security or authentication measures without express authorization of the owner of that system or that network;
- (ii) using or seeking to use or distribute tools designed for compromising security including, but not limited to, password guessing programs, cracking tools, packet sniffers or network probing tools;
- (iii) interfering with service to any internet user, host or network including, but not limited to:
  - (A) mail-bombing;
  - (B) packet flooding;
  - (C) deliberate attempts to overload a system; or
  - (D) broadcast attacks;
- (iv) forging of any TCP-IP packet header or any part of the header information in an email or a newsgroup posting;
- (v) sending data, or causing data to be sent, to or through Digicel's network that hides or obscures the source of the data, that contains invalid or forged headers or domain names or deceptive addressing;
- (vi) relaying data from a third party's mail server without permission or which employs similar techniques to hide or obscure the source of the data;
- (vii) collecting or harvesting screen names or e-mail addresses of others for the purpose of sending unsolicited e-mails or for exchange;
- (viii) monitoring of data and/or traffic on any network or system without the express authorisation of the owner of the system or network;
- (ix) transmitting, distributing or storing any material in violation of any applicable law, regulation, policy, licence or authorisation;
- (x) sending unsolicited mail messages ("SPAM"), including, without limitation, commercial advertising, charity requests, petitions for signatures, chain letters, informational announcements and political or religious messages, unless requested by the specific recipient;
- (xi) collecting or redirecting responses from SPAM sent from other Internet hosts which would violate this Agreement or being directed by SPAM sent from other internet hosts or messaging services to any web site or resource that uses the Digicel Network;
- (xii) sending large or numerous amounts of data for the purpose of, or likely to have the effect of, disrupting another's computer or account;
- (xiii) knowingly transmitting or disseminating any information or software, which contains a virus or other harmful feature.
- (d) The Customer shall notify Digicel immediately of any unauthorised or attempted unauthorised use of a Service, and any breach or attempted breach of system or network security, and any breach or attempted breach of this Clause 2.12.
- (e) The Customer shall not make or allow unreasonable or excessive demands on the

Network nor make or allow improper or abusive use of the Network.

(f) The Customer authorises Digicel to cooperate with:

- (i) law enforcement authorities in the investigation of suspected criminal violations; and
- (ii) system administrators at other Internet service providers, as well as other network or computing facilities.

Such cooperation may include providing, for example, the username, IP address or other identifying information about a Customer.

### 2.13. Monitoring

- (a) Digicel is under no obligation, but has the right to monitor transmissions made or received using a Service (including content posted, disseminated or accessed by using the Service) to ensure that the Customer is complying with the terms of this Agreement, and to disclose that content as required under this Agreement or by law.
- (b) Digicel does not monitor content transmitted or posted over its network but reserves the right to do so and to block or remove any content in Digicel's sole discretion, to the extent this is permitted by an applicable law. Digicel takes no responsibility for any material, input or content transmitted or posted by any user. Digicel is not responsible for the content of any web sites linked to the Digicel network.

### 2.14. Harmful Code

Each Party must exercise best efforts to ensure that its People do not introduce or incorporate any Harmful Code into the network infrastructure, systems, software and tools deployed in the use or delivery of the Services. .

## 3. TERM

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3.1. If not otherwise specified, each Service Agreement commences on the date Digicel provides a Service pursuant to the Service Order and shall continue:

- (a) for the Minimum Service Period; unless
- (b) terminated earlier under Clause 2.8(a) or Clause 10.

3.2. Upon the expiry of the Minimum Service Period, the Service Agreement shall continue on a monthly basis unless terminated under Clause 2.8(b).

3.3. This Master Services Agreement:

- (a) comes into force upon its execution;
- (b) continues for so long as Digicel is providing a Service to the Customer; and
- (c) expires upon the disconnection of the last Service provided to the Customer.

3.4. Either party may seek a review of the terms of this Master Services Agreement at any time by notifying the other party. This Master Services Agreement will continue to apply until a new agreement replaces it or until the parties agree to vary the Master Services Agreement.

## 4. SUBCONTRACTORS

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4.1. Digicel:

- (a) may subcontract any part of the Services and shall promptly notify the Customer of any subcontracting arrangement;
- (b) must ensure that each Subcontractor complies with the terms of this Agreement; and
- (c) will despite any Subcontractor appointment, be the Customer's sole point of contact regarding the Services including with respect to payment.

4.2. Digicel may at its election change any Subcontractor, in which case, the new Subcontractor will perform the Services.

## 5. CUSTOMER INFORMATION

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5.1. General

- (a) Digicel will use reasonable endeavours to protect the security of information it collects from the Customer ("**Customer Information**").
- (b) The Customer acknowledges that Digicel may use or disclose Customer Information to for the purpose of providing the Services and for ancillary purposes including:
  - (i) to improve the Services that Digicel provides to its customers; and
  - (ii) to inform the Customer about other services or products that the Customer may be interested in.
- (c) Digicel may transfer the Customer Information to another party (including an Affiliate of Digicel) as part of a corporate restructure or a sale of business.
- (d) Digicel may use or disclose Customer Information for the purpose of a credit assessment.

5.2. End Customer Data

Each party must comply with Privacy Rules in relation to its collection, use, protection and disclosure of End Customer Data.

5.3. Numbers or codes

- (a) The Customer shall, at no time, acquire any rights or title in the numbers and/or codes allocated to it by Digicel. Digicel reserves the right to withdraw or replace any numbers or codes allocated to the Customer:
  - (i) for operational or technical reasons; or
  - (ii) where any such withdrawal is required by the telecommunications regulatory authority but will use its best endeavours to provide the Customer with the maximum notice practicable having regard to the circumstances of the withdrawal or replacement.
- (b) Digicel shall not be liable to the Customer for any losses, claims, damages, costs and attorneys costs arising from such withdrawals or replacements.

## 6. SERVICE CHARGES

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6.1. General

- (a) In consideration of the performance of the Services by Digicel, the Customer must pay the Service Charges specified in the Service Order.
- (b) Unless Digicel has accepted a Service Order at agreed Service Charges for a Minimum Service Period, Digicel may revise the Service Charges from time to time upon 28 days notice to the Customer, in writing and/or via national newspaper.
- (c) Where the Services under this Agreement include voice or SMS services, the Customer is liable for all calls made or SMS sent via the Service. This provision shall apply irrespective of whether the Customer knows or consents to such use.
- (d) Where Digicel investigates faults reported by the Customer, and no faults are identified, or if identified, are attributed to the Customer's acts or omission, Digicel may charge the Customer its reasonable costs of investigation and any repair.
- (e) Where Digicel investigates faults reported by the Customer and such faults are attributed to Digicel's acts or omissions, Digicel shall be responsible for costs of investigations and any repairs.

#### 6.2. Taxes, duties, levies and miscellaneous costs

- (a) Unless otherwise specified, Service Charges are exclusive of any consumption or value added tax.
- (b) A party making a **taxable supply** (being a supply of goods or services that is subject to consumption or value added tax) under this Agreement shall be entitled to bill the recipient of the taxable supply for any consumption or value added tax correctly chargeable in respect of the taxable supply. The supplier will provide a valid tax invoice to support any consumption tax or value added tax chargeable.
- (c) All sums to be paid under this Agreement shall be paid after deducting applicable withholding tax, if any, as required by any applicable legislation or regulation. To the extent withholding tax is deducted by the Customer, a receipt from the tax authority to whom the tax was paid confirming the amount and date of payment of the withholding tax must be provided at the earliest opportunity.
- (d) Unless otherwise specified, Digicel may pass on to the Customer any import duty, freight costs and other levies or costs in connection with the supply of Equipment to the Customer.
- (e) Digicel may bill the Customer for taxes with respect to a Service as a separate line item in addition to Service Charges. As between Digicel and the Customer, the Customer is liable for the taxes (including any penalties or interest charges) even if the taxes are levied on Digicel. "**Tax**" means any excise, gross receipts, value added, sales, use or other similar taxes, fees, tax-like fees, or surcharges of whatever nature and however designated, imposed or sought to be imposed on or with respect to the supply of the Service by Digicel or use of the Service by the Customer but excludes taxes on Digicel's income, payroll, property, corporate existence or status.

#### 6.3. Payment

- (a) All charges shall be payable to Digicel by the Due Date.

- (b) The Customer shall pay Service Charges in full without set-off or counter claim.

#### 6.4. Billing Dispute

- (a) Unless the Customer disputes a bill ("**Billing Dispute**"), the Customer shall not defer or suspend payment of the Service Charges once that part of the Services to which the payment relates has been completed.
- (b) The Customer may dispute a bill only on grounds that there is a manifest error in the bill. The Customer acknowledges that Service Charges are based on Digicel's billing records.
- (c) The Customer may not dispute a bill on grounds that the Service is below agreed service levels.
- (d) If there is a Billing Dispute, the Customer must pay the amount of a bill that is not in dispute and may withhold the amount in dispute until it is resolved.
- (e) If a Billing Dispute is resolved in Digicel's favour, the Customer must pay the amount withheld within 7 days notice from Digicel plus interest at the Base Interest Rate. Interest will accrue daily from the Due Date to the time of payment and shall be compounded monthly.
- (f) If the Customer withholds payment on amounts that are not in dispute, interest will accrue daily on the amount withheld at the Base Interest Rate plus 5% pa from the Due Date to the time of payment and shall be compounded monthly.

#### 6.5. Finality

The Customer may dispute a bill only if this is done within 6 months of the date of the bill.

### 7. MANAGING FINANCIAL EXPOSURE

#### 7.1. Digicel may require the Customer to provide Security or vary the form or value of the existing Security if:

- (a) the Customer acquires Services on a post-paid basis;
- (b) the Customer fails to make payment in full by the due date (which for the avoidance of doubt, excludes disputed charges);
- (c) there is a heightened risk the Customer will be subject to an Insolvency Event; or
- (d) a material adverse change to Customer's creditworthiness occurs.

#### 7.2. Digicel may draw against any Security in respect of any amounts payable by the Customer to Digicel under a Service Agreement which are overdue or to compensate Digicel for any loss, liability or expense Digicel suffers or incurs as a result of any breach of a Service Agreement by the Customer including if the Customer fails to pay any charges when due and the Customer must immediately restore or procure the restoration of the Security to the value determined under Clause 7.1 ("**Managing Financial Exposure**").

#### 7.3. The Security is refundable without interest.

#### 7.4. The Customer must:

- (a) maintain any Security provided to Digicel until the expiry of a six month period after termination or expiration of the applicable Service Agreement; and
- (b) ensure the terms of any Security provided to Digicel are complied with fully.

7.5. The Customer's usage of a Service may be subject to a credit limit determined by Digicel. If so, the Service may be suspended if the Customer exceeds the credit limit.

## 8. INTELLECTUAL PROPERTY

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### 8.1. Vests in Digicel

Intellectual Property in all Contract Material vests in Digicel immediately upon its creation.

### 8.2. Ownership of pre-existing Material

- (a) Clause 8.1 does not affect the ownership of Intellectual Property in any of the Customer's or Digicel's pre-existing Material.
- (b) If Digicel requires any of the Customer's pre-existing Material to provide the Services then the Customer grants to Digicel an irrevocable, royalty free, worldwide, non-exclusive (including the right to sublicense) license to use, reproduce, adapt, communicate and exploit the Customer's pre-existing Material to provide the Services for the Term of the Agreement.

### 8.3. Third Party Material

If the Customer requires Digicel to use a third party's Material for the Services then the Customer must procure:

- (a) from that party all necessary copyright and Intellectual Property rights permission in Digicel's favour; and
- (b) licenses in the manner contemplated under Clause 8.28.2(b) of this Agreement in relation to any third party Intellectual Property which the Customer requires Digicel to include or use for the Services.

## 9. NEGATION OF EMPLOYMENT, PARTNERSHIP OR AGENCY

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This Agreement does not create a relationship of employment, agency or partnership between the parties.

## 10. CONFIDENTIAL INFORMATION

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The obligations under this Clause 10 continue indefinitely.

### 10.1. Prohibition on Disclosure

- (a) A party must not disclose the other party's Confidential Information to any person except:
  - (i) to its employees, legal and financial advisers, and subcontractors who have a genuine need to receive such Confidential Information, and provided those persons first agree to observe the confidentiality of the information;
  - (ii) with the other party's prior written consent;
  - (iii) to the extent required by Law, any stock exchange or any regulatory authority; or
  - (iv) if the information is in the public domain.
- (b) Each recipient of Confidential Information (**Recipient**) must:
  - (i) (ensure at all times that each employee, legal and financial adviser, and subcontractor to whom the Confidential

Information has been disclosed under this clause keeps that Confidential Information secure;

- (ii) establish and maintain rigorous security measures to safeguard the Confidential Information disclosed to it;
- (iii) promptly notify the other party of a suspected or actual unauthorized use, copying or disclosure of the Confidential Information.

## 11. TERMINATION

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### 11.1. The Customer's right to terminate

- (a) Without prejudice to any other accrued rights or remedies, the Customer may terminate a Service Agreement without liability for an Early Termination Fee by written notice if Digicel:
  - (i) commits a material breach of the Service Agreement and fails to remedy that breach within six (6) weeks of receipt of written notice of the breach;
  - (ii) commits a material breach of the Service Agreement which is incapable of being remedied;
  - (iii) persistently fails to perform or comply with any one or more of its obligations under the Service Agreement in any 3 month period and Digicel has been given notice of such failure in that period by the Customer; or
  - (iv) is subject to an Insolvency Event.
- (b) The Customer may not terminate a Service Agreement as a result of a material change in the ownership or control of Digicel.

### 11.2. Digicel's right to terminate

Digicel may, at anytime terminate a Service Agreement:

- (a) for convenience by giving the Customer 20 business days notice provided the termination takes effect after any Minimum Service Period expires;
- (b) if the Customer commits a material breach of this Agreement or fails to pay Service Charges and fails to remedy that breach or failure within 20 business days of receipt of a notice from Digicel of that breach or failure;
- (c) if the Customer fails to provide or maintain any Security required under Clause 7 ("**Managing Financial Security**") or comply with that clause; or
- (d) if the Customer is subject to an Insolvency Event or in Digicel's reasonable opinion is unable to pay its debts when they fall due.

11.3. If Digicel terminates a Service Agreement under Clause 11.211.2(b), Digicel shall be entitled to declare immediately due and payable the Early Termination Fee in addition to all of Digicel's other remedies at law or in equity.

## 12. GUARANTEE, INDEMNITY, LIABILITY AND INSURANCE

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### 12.1. Guarantee

The Customer guarantees to Digicel the due and faithful performance by the Customer of each and every part contained in this Agreement.

## 12.2. Indemnity

The Customer indemnifies and agrees to keep Digicel indemnified against all claims, losses, expenses, damages and costs (on a solicitor and own client basis and whether incurred by or awarded against Digicel) that Digicel may sustain or incur as a result, whether directly or indirectly of:

- (a) any breach of the Acceptable Use Policy by the Customer or its People;
- (b) any breach of this Agreement including, but not limited to, a breach in respect of which Digicel exercises an express right to terminate this Agreement;
- (c) any negligent act or omission or willful misconduct of the Customer or its People; or
- (d) any infringement by the Customer or its People of the Intellectual Property rights of a third party.

## 12.3. Third party claims

If a claim ("**Third Party Claim**") to which any indemnity given under this Agreement arises, the following provisions apply:

- (a) The party indemnified ("**Indemnified Party**") must immediately or as soon as the Indemnified Party is aware of the Third Party Claim give the party giving the indemnity ("**Indemnifying Party**") notice of the Third Party Claim.
- (b) If the Indemnifying Party admits its obligations to indemnify the Indemnified Party in respect of the Third Party Claim:
  - (i) the Indemnified Party must give the Indemnifying Party full control over any proceedings and negotiations and full authority to reach any settlement and shall provide any assistance reasonably requested by the Indemnifying Party;
  - (ii) the Indemnifying Party may use the lawyer of its choice;
  - (iii) the Indemnifying Party must at its cost and discretion ensure that the Third Party Claim is promptly and fully defended;
  - (iv) in defending the Third Party Claim, the Indemnifying Party must not unreasonably or unnecessarily take or fail to take into account any action if to do so would damage the Indemnified Party's name and reputation; and
  - (v) the Indemnifying Party must obtain the Indemnified Party's written approval to any proposed settlement of the Third Party Claim, such approval not to be unreasonably withheld, delayed or conditioned.
- (c) If:
  - (i) the Indemnifying Party does not admit its obligations to indemnify the Indemnified Party of the Third Party Claim; or
  - (ii) in the Indemnified Party's reasonable view, the Indemnifying Party is not acting in accordance with the requirements in clauses 12.3(b)(iii), 12.3(b)(iv) or 12.3(b)(v),the Indemnified Party may after so notifying the Indemnifying Party:

- (iii) defend the Third Party Claim and keep the Indemnifying Party informed of the progress; and
- (iv) settle the Third Party Claim for a commercially reasonable result and consult with the Indemnifying Party before agreeing to the settlement.

## 12.4. Liability

- (a) In no event shall Digicel be liable to the Customer in contract, in tort (including but not limited to negligence and or economic torts), in equity, under statute, under an indemnity, under a warranty breach or otherwise for any direct, indirect or consequential cost, injury, damage, expense (including legal and other professional fees and expenses), loss (including deterioration in or loss of profits, anticipated savings, revenue, data, business opportunity, bargain, or goodwill), liability or claim incurred by the Customer or a third party (including the Customer's People or users) in connection with any act or omission by Digicel in connection with a Service Agreement, whether foreseeable or not.
- (b) As far as the law permits, Digicel excludes all warranties, rights and remedies that the Customer would otherwise be entitled to at law.
- (c) As far as the law permits, Digicel may, at its option discharge any of its liability under any statutory warranty by:
  - (i) repairing or replacing any defective goods;
  - (ii) re-supplying any defective service; or
  - (iii) paying for the cost of repairing, replacing or resupplying the goods or services.
- (d) Each party is liable to the other for death or personal injury or damage to property to the extent caused by that party and foreseeable by that party provided that a party liable for property damage may in its sole discretion discharge that liability by repairing the damage or replacing the property.
- (e) Subject to paragraph (g) below, each party's liability to the other in connection with a Service is limited to:
  - (i) the total Service Charges paid under the Service Agreement in respect of the 12 months immediately preceding the date of the cause of action giving rise to the liability ("**Liability Date**"); less
  - (ii) any amount that the party liable has agreed to pay in respect of any other liability with a Liability Date falling within that 12 month period.
- (f) To avoid doubt, the Customer's liability to pay charges or fees for Services is not limited under any provision limiting liability in connection with a Service.
- (g) The limitation of liability in paragraph 12.4(e) above does not apply to liability in connection with:
  - (i) Clause 8 (**Intellectual Property**),
  - (ii) Clause 10 (**Confidentiality**),
  - (iii) paragraph 12.2(a) (**Acceptable Use Policy**),
  - (iv) paragraph 12.2(d) (**third party Intellectual Property**), and
  - (v) paragraph 12.4(d) (**property damage and personal injury**).

## 12.5. Insurance

The Customer will have and maintain during the Term valid and enforceable insurance policies of sufficient

cover to enable the Customer to meet all its obligations under this Agreement, including but not limited to:

- (a) public liability insurance for an insured amount of not less than US\$ 10 million per occurrence and in aggregate for each calendar year;
- (b) property insurance that covers the Customer for any loss or damage to the Customer's property;
- (c) insurances required by law including any relevant workers or accident compensation legislation,

which insurance shall be issued by companies with a Best's Key Rating of at least A.

### **13. NOTICES**

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**13.1.** Any notice, demand, consent or other communication (Notice) given under this Agreement:

- (a) must be in writing and signed by a person duly authorised by the sender;
- (b) must be delivered to the intended recipient by prepaid post (if posted to an address in another country, by registered airmail) or by hand or fax to the address or fax number in Item 2 of the Agreement Details or the address or fax number last notified by the intended recipient to the sender;
- (c) if given to Digicel, must be sent to [PNG Legal & Regulatory@digicelgroup.com](mailto:PNG_Legal_&_Regulatory@digicelgroup.com) by email along with a duplicate copy delivered in the manner specified in paragraph (b) above; and
- (d) will be taken to be duly given or made in the case of:
  - (i) delivery in person, when delivered;
  - (ii) fax, on receipt by the sender of a transmission control report from the despatching machine showing the relevant number of pages and the correct destination fax number or name of recipient and indicating that the transmission has been made without error; and
  - (iii) email, on confirmation by telephone that the email has been received by its intended recipient.

**13.2.** If the result is that a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent or is later than 4.00pm (local time) it will be taken to have been duly given or made at the start of business on the next Business Day in that place.

### **14. STRUCTURED NEGOTIATIONS**

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**14.1.** The parties desire to resolve disputes arising out of or relating to this Agreement without litigation. Therefore, except for an action seeking a temporary restraining order or an injunction relating to the subject matter of this Agreement, or suit to compel compliance with this dispute resolution process, the parties agree to use these Structured Negotiations with respect to any controversy or claim arising out of or relating to this Agreement or its breach ("**Dispute**").

**14.2.** The party invoking these dispute resolution procedures ("**disputing party**") shall send written notice of the Dispute to the other party ("**receiving party**"). The notice shall contain all relevant details including the nature and extent of the Dispute. Upon receipt of the

notice, the parties must appoint at least one senior representative, who must, within five (5) Business Days from the date the receiving party received the notice of the dispute, meet with each other, and attempt to resolve the Dispute.

**14.3.** Following notice under Clause 14.2, the parties shall consult in good faith to try to resolve the Dispute. If agreement is not reached within ten (10) Business Days from the date of the meeting, the Dispute will be escalated to each of the parties' respective Chief Executive Officers or the Chief Executive Officer's nominee, who must then meet and attempt to resolve the Dispute within five (5) Business Days.

**14.4.** If a dispute or difference under this Agreement cannot be resolved amicably, either party may propose to the other in writing that structured negotiations be entered into with the assistance of a neutral adviser or mediator ("**Neutral Adviser**") before resorting to litigation.

**14.5.** If the parties are unable to agree on a Neutral Adviser or if the Neutral Adviser agreed upon is unable or unwilling to act, the president of the Law Society of the Territory may appoint the Neutral Adviser at a party's request. To the extent practicable, the Neutral Adviser must have expertise relevant to the subject matter of the Dispute.

**14.6.** The parties will within 14 days of the appointment of the Neutral Adviser meet with the Neutral Adviser to agree a program for the exchange of any relevant information and the structure to be adopted for the negotiation to be held at the capital city of the Territory.

**14.7.** All negotiations will be conducted in complete confidence, and the parties undertake not to divulge details of such negotiations except to their professional advisers who will also be subject to such confidentiality, and will be without prejudice to the rights of the parties in any future proceedings.

**14.8.** If the parties accept the Neutral Adviser's recommendations or otherwise reach agreement on the resolution of the dispute, such agreement shall be reduced to writing and once, it is signed by their duly authorised representatives, shall be final and binding on the parties.

**14.9.** Failing agreement, any of the parties may invite the Neutral Adviser to provide a non-binding but informative opinion in writing as to the merits of the dispute and the rights and obligations of the parties. Such opinion will be provided on a without prejudice basis and will be private and confidential to the parties and may not be used in evidence in any proceedings commenced pursuant to the terms of this Agreement without the prior written consent of all the parties.

**14.10.** If the parties fail to reach agreement in the structured negotiations within 30 days of the Neutral Adviser being appointed, such a failure shall be without prejudice to the right of any party subsequently to refer any dispute or difference to litigation but the parties agree that before resorting to litigation structured negotiations in accordance with this Clause 14 shall have taken place.

**14.11.** Nothing contained in this Clause 14 shall restrict either party's freedom to commence legal proceedings to preserve any legal right or remedy or protect any proprietary or trade secret right.

### **15. ARBITRATION**

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- 15.1. If the Dispute is not resolved under structured negotiations in Clause 14, Digicel may at its sole and absolute discretion require the Customer to submit to and settle the Dispute by arbitration proceedings conducted in accordance with the Arbitration Rules by a single arbitrator with the appropriate qualifications and experience to arbitrate the dispute (including knowledge of the telecommunications industry and legal qualifications) agreed on by the parties or, in the absence of such agreement, appointed by the President for the time being of the Law Society of the jurisdiction of the Arbitration Rules.
- 15.2. If either party initiates proceedings relating to a dispute in any forum other than in what is permitted in this Clause 15 (an Inconvenient Forum), the party initiating the proceedings shall indemnify the other party against all costs and expenses incurred in any action in the Inconvenient Forum even if the party initiating the proceeding is successful in the Inconvenient Forum.
- 15.3. In determining the Dispute, the parties must instruct the Arbitrator to:
- decide within the shortest practicable time and as informally and as inexpensively as possible;
  - consult with each of the parties and give each a reasonable opportunity to make submissions and to put any material before the Arbitrator which the party considers relevant; and
  - deliver an Award stating its opinion with respect to the matters in the dispute and the reasons for its decision.
- 15.4. The decision of the Arbitrator, in the absence of manifest error, will be conclusive and binding.
- 15.5. Each party shall bear the cost of preparing and presenting its case. The cost of arbitration, including the arbitrator's fees, will be shared equally by the parties unless the resolution otherwise provides. The language of the arbitration will be English.
- 15.6. Any information or documents disclosed by a party under this Clause 15:
- must be kept confidential;
  - may only be used to attempt to resolve the Dispute; and
  - must not be used as evidence in court proceedings arising out of this Agreement.
- 15.7. In any Dispute, both parties must:
- save as otherwise provided herein or as otherwise agreed between them, continue to perform their respective obligations under this Agreement; and
  - not, whether by act or omission impede or otherwise interfere with a party's endeavours to remedy any event which gave rise to the Dispute.
- 15.8. The above procedures are without prejudice to any other rights and remedies that may be available in respect of any breach of any provisions of this Agreement. Each party is free to apply to the court for urgent interlocutory relief.

## 16. ETHICAL CONDUCT

- Each party will comply with all applicable commercial and public anti-bribery laws, including the U.S. Foreign Corrupt Practices Act

of 1977 and the UK Bribery Act of 2010, which prohibit corrupt offers of anything of value, either directly or indirectly to anyone, including government officials, to obtain or keep business or to secure any other improper commercial advantage. "Government officials" include any government employee; candidate for public office; and employee of government-owned or government-controlled companies, public international organizations, and political parties.

- Neither party will make any facilitation payments, which are payments to induce officials to perform routine functions they are otherwise obligated to perform.
- The Customer will use commercially reasonable and good faith efforts to comply with Digicel's due diligence process, including providing requested information.

## 17. MISCELLANEOUS

### 17.1. Counterpart

This Agreement may be executed in any number of counterparts (including facsimile copies or image) and any/all such counterparts shall constitute the one and same binding and enforceable Agreement between the parties provided that this Agreement will be of no force and effect until the counterparts are exchanged. A counterpart signed by a party and sent by facsimile or transmitted electronically in either Tagged Image Format Files (TIFF) or Portable Document Format (PDF) shall be treated as originals, fully binding and with full legal force and effect, and the parties hereto waive any rights they may have to object to such treatment.

### 17.2. Further action

Each party must use reasonable efforts to do all things necessary or desirable to give full effect to this Agreement and its subject matter.

### 17.3. Alteration

This Agreement may only be altered in writing signed by the authorised signatories of each party.

### 17.4. Severability

Part or all of any provisions of this Agreement that is illegal or unenforceable may be severed from this Agreement and the remaining provisions of this Agreement remain in force.

### 17.5. Waiver

Waiver of any provision of or right under this Agreement must be in writing signed by the party entitled to the benefit of that provision or right and is effective only to the extent set out in any written waiver. A failure to enforce a right under this Agreement is not a waiver of that right.

### 17.6. Governing law

This Agreement is governed by the law applicable in the Territory excluding its conflict provisions and the parties submit to the non-exclusive jurisdiction of the courts of the Territory.

### 17.7. Force Majeure

- (a) No party to this Agreement their agents, contractors, employees or assigns shall be deemed to be in breach of this Agreement or otherwise liable to the other as a result of any delay or failure in the performance of its obligations under this Agreement if and to the extent that such delay or failure is caused by force majeure and the time for performance of the relevant obligation(s) shall be extended accordingly.
- (b) For the purpose of this Clause “**force majeure**” means any circumstances not foreseeable at the date of this Agreement and not within the reasonable control of the party in question including without limitation any strike lockout or other industrial action or any shortage of or difficulty in obtaining labour or raw materials; any destruction temporary or permanent, breakdown malfunction or damage of or to any premises, plant, equipment (including computer systems or the Network) or materials which is not attributed to the gross negligence or fraudulent acts or omissions of either party, their agents, employee’s or assigns; any action taken by a governmental or public authority of any kind including not granting a consent, exemption, approval or clearance; any civil commotion or disorder, riot, invasion, war, threat of or preparation for war; and any fire or explosion which is not attributed to the gross negligence or fraudulent acts or omissions of either party, their agents, employee’s or assigns; any storm, flood, earthquake, epidemic or other natural physical disaster.
- (c) A party whose performance of its obligations under this Agreement is delayed or prevented by force majeure shall forthwith:
  - (i) notify the other party of the nature, extent, effect and likely duration of the circumstances constituting the force majeure;
  - (ii) use all reasonable endeavours to minimise the effect of the force majeure on its performance of its obligations under this Agreement; and
  - (iii) after the cessation of the force majeure, notify the other party thereof and resume full performance of its obligations under this Agreement.
- (d) If any force majeure delays or prevents the performance of the obligations of either party for a continuous period in excess of thirty (30) days, the party not so affected may give notice to terminate this Agreement to the affected party specifying the date (which shall not be less than 7 days after the date on which the notice is given) on which termination will take effect.

#### 17.8. Survival

The following Clauses survive termination of any individual Service Agreement:

- (a) Clause 8 (“**Intellectual Property**”);
- (b) Clause 10 (“**Confidential Information**”);
- (b) Clause 12 (“**Guarantee, Indemnity, Liability and Insurance**”).

#### 17.9. Warranties

If a party is a corporate entity, the party warrants that it:

- (a) is duly incorporated and validly exists under the Law of its place of incorporation;
- (b) has full corporate power and lawful authority to execute and deliver this Agreement and to consummate and perform or cause to be performed its obligations under this Agreement and each transaction contemplated by this Agreement to be performed by that party;
- (c) is not insolvent and no receiver has been appointed over any part of its assets and no such appointment has been threatened; and
- (d) is not in liquidation and no proceedings have been brought or threatened for the purpose of winding up that party.

#### 17.10. Indemnity

Any indemnities given by a party under this Agreement:

- (a) constitutes a liability of that party separate and independent from any other liability of that party under this document or any other agreement; and
- (b) survives and continues after performance of this Agreement.

#### 17.11. Assignment

- (a) Neither party shall transfer, assign (including via any direct or indirect change of control), or dispose of a part or the whole of this Agreement without the prior written consent of the other party, which must not be unreasonably withheld.
- (b) Notwithstanding the foregoing, either party (“**assignor**”) may assign the entirety of this Agreement to an Affiliate as part of a restructure (including merger, acquisition, amalgamation or reorganization) of a group of entities comprising of that person and its Affiliates (“**Group**”) including by adding new entities to the Group provided:
  - (i) the assignee is at least as creditworthy as the assignor; and
  - (ii) the assignee or its Common Parent is not a competitor of the other party.
- (c) Digicel may perform its obligations under this Agreement through an Affiliate. Performance by the Affiliate is deemed to be performance by Digicel.
- (d) Subject to this clause 17.11, each party undertakes to only deal directly (and not through an agent) with the other party in connection with this Agreement and any Services which this Agreement applies to unless:
  - (i) the agent is an employee or officer of that party; or
  - (ii) with the other party’s prior approval.  
Nothing in this Agreement requires the other party to recognise, acknowledge or otherwise deal with an agent of a party appointed in breach of this undertaking.