

# PortNET Standard Terms & Conditions

## 1. Definitions and Interpretation

### 1.1 Definitions

In this Agreement the following words have the following meaning, unless a contrary intention appears.

**Access Bandwidth** means the bit rate measure of available or consumed data communication resources expressed in Mbps. It is commonly referred to as a connection's speed, (download/upload).

**Agreement** means this agreement and the schedules and annexures to this agreement (as amended from time to time).

**Associates** means any or all of the officers, employees, consultants, agents and subcontractors (including the subcontractor's employees, consultants, agents and subcontractors) of a party.

**Upload Traffic** means the volume of data that leaves a Customer's site via the Link.

**Business Day** means a weekday that is not a public holiday.

**Charges** means the Telecommunications Service Charges and any other charges payable by the Customer to the Contractor under this Agreement.

**Chargeable Traffic** means Download Traffic except where the Upload Traffic is greater than the Download Traffic, then it will equal to the greater of the two.

**Chargeable Traffic Allowance** means the amount of Chargeable Traffic for which there is no charge. Unused allowance amounts do not carry over to subsequent periods.

**Commencement Date** means the date the service is commenced as stated in the Agreement.

**Confidential Information** means any information of or provided by any party relating to pricing and other financial information, business processes, customer information, intellectual property and any other commercially valuable information in whatever form, including the terms of this Agreement, but excluding the following:

- a) information that is already in the public domain;
- b) information which subsequently becomes part of the public domain other than as a result of an unauthorised disclosure by a party to this Agreement;
- c) information which is or becomes available to the receiving party from a third party who is legally entitled to possess and provide the information to the receiving party; or
- d) information which is independently developed by an employee of the receiving party (as shown by the appropriate records) who has no knowledge of the disclosure by the disclosing party under this Agreement.

**Contractor** means **Port of Brisbane Pty Ltd**, ABN: 78 143 384 749, Port Office, 3 Port Central Avenue, Port of Brisbane, Brisbane Queensland 4178.

**Contractor's Telecommunications Provider** means Uecomm Operations Pty Ltd, TPG Telecom Limited or such other telecommunications provider as may be engaged by the Contractor from time to time.

**Customer Data** means data supplied to the Contractor by the Customer for the purpose of enabling the Contractor to perform the Services, and materials directly derived by the Contractor from such data.

**Customer Resources** means any resources including links, hardware, software and personnel, utilised in this Agreement which are not supplied by the Contractor.

**Customer's Offices** means the addresses of the Customer specified in this Agreement.

**Customer's Site Address** means the address where the Service is installed.

**Download Traffic** means the volume of data that enters a Customer's site from the Link.

**Gb (gigabyte)** means 1048576 kilobytes.

**Government Body** means any Australian government or governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity.

**Hardware** means all devices supplied by the Contractor to establish and enable the Link. The Hardware always remains the property of the Contractor.

**Hardware Charges** means the charges agreed between the parties relating to the supply of Hardware to the Customer by the Contractor.

**Initial Term** means the period of the term as stated in the Agreement starting from the Commencement Date.

**Insolvency Event** means that:

- a) a party is or states that it is insolvent or unable to pay its debts as they fall due;
- b) an order is made that a party be wound up;
- c) a liquidator, provisional liquidator or administrator is appointed to a party, whether or not under an order;
- d) except to reconstruct or amalgamate while solvent, any step is taken (including without limitation, an application made, proceedings commenced, or resolution passed or proposed in a notice of meeting) for:
  - i) the winding up, dissolution, or administration of a party; or
  - ii) a party entering into any arrangement, compromise or composition with or assignment for the benefit of its creditors or any class of them; or
- e) a receiver or receiver and manager is appointed to a party or its assets.

**Installation Charge** means a one time charge for installing the hardware at the Customer's Site address and provisioning the link.

**Intellectual Property Rights** means:

- a) any patent, trade mark (whether registered or common law), trade name, business name, company name, copyright, registered design or other design right, eligible layout right, domain name and any corresponding property or right under the laws of any jurisdiction throughout the world;
- b) any right throughout the world to apply for the grant or registration of a patent, trademark, copyright, design, eligible layout right, domain name or any corresponding property or right; and
- c) any rights throughout the world with respect to an invention, discovery, trade secret, data, algorithm, source code or formula.

**Internet Service Charge** means the monthly charge for supply and delivery of Internet access to the Customer's Site address.

**Kbps (kilobits per second)** means 1024 bits per second

**Link** means the telecommunications link between the Customer's Offices or between the Customer's Site Address and the Contractor's Offices or between the Customer's Site Address and the Internet.

**Mb (megabyte)** means 1024 kilobytes.

**Mbps** (*megabits per second*) means 1048576 bits per second

**Network Termination Point** means the point, designated by the Contractor, at which the Link connects to:

- a) the Customer's equipment or cabling; or
- b) the cabling of the Contractor's Telecommunications Provider or another third party.

**New Contract Material** means any material created, written or otherwise brought into existence by the Contractor and its Associates in the performance of this Agreement.

**Service Support Levels** means service to the levels specified in the Agreement

**Services** means the Telecommunications Services and any other services provided under this Agreement.

**Services Commencement Date** means the date the services commenced as per the Agreement.

**Service Charges** mean the charges relating to the supply of services to the Customer by the Contractor.

**Specifications** means the specifications in the Agreement.

**Subsequent Term** means a period of 12 months that commences on the expiry of the Initial Term or the preceding Subsequent Term, as the case may be.

**Telecommunication Charges** means the charges specified in the Agreement.

**Telecommunication Services** means the type of services described in the agreement.

**Term** means the period from the Commencement Date to the date of termination or expiration of this Agreement.

**Traffic Charge** means the charge per megabyte levied for Chargeable Traffic

**Upgrade** means all modifications, upgrades or improvements on or to the Link.

**Upload Traffic** means the volume of data that leaves a Customer's site via the Link.

**VPN** means a virtual private network.

## 1.2 Interpretation

The following rules apply unless the context requires otherwise.

- a) *headings* are for convenience only and do not affect the interpretation of this Agreement;
- b) words importing the *singular* includes the plural and vice versa;
- c) the word *including* and similar words are not and must not be treated as words of limitation;
- d) an expression importing a natural *person* includes any company, partnership, joint venture, association, corporation or other body corporate or any governmental agency;
- e) a reference to any *thing* (including, but not limited to, any right) includes a part of that thing;
- f) a reference to a *party* to this Agreement or another agreement or document includes that party's successors amended permitted assigns; and
- g) monetary references are references to Australian currency.

## 2. Term of Agreement

### 2.1 Initial Term

This Agreement will commence on the Commencement Date and will continue for the Initial Term unless earlier terminated in accordance with this Agreement.

### 2.2 Subsequent Term

- a) The Customer may renew this Agreement for a Subsequent Term by serving written notice of such renewal on the Contractor not less than 3 months prior to the expiry of the Initial Term or the then current Subsequent Term, as the case may be.
- b) If the Customer serves written notice of renewal in accordance with clause 2.2(a), then this Agreement continues for the relevant Subsequent Term at the price to be agreed between the parties, but otherwise on the same terms and conditions, unless otherwise agreed by the parties. The Contractor may, but need not, accept the Customer's renewal of this Agreement.

### 2.3 Extended Agreement

If the Customer fails to serve written notice of renewal in accordance with clause 2.2(a), then this Agreement is automatically extended on a month-by-month basis until terminated, on the same plan, with the same charges, terms and conditions. The Contractor may, but need not, accept the Customer's extension of this Agreement.

## 3. Supply and Installation

The Contractor will:

- a) Supply suitable telecommunications equipment to the Customer to enable the service; and
- b) install and configure the equipment as required to provide the service.

## 4. Service Upgrade

The Service may be upgraded to a higher speed service, a greater download allowance or both on application in writing to the Contractor.

## 5. Customer's Obligations

The Customer will:

- a) provide reasonable assistance to enable the Contractor to install and configure the Telecommunications Service; and
- b) provide the Customer Resources for the purpose of configuring, testing and commissioning the Hardware and the Link.

## 6. Link

The Contractor shall:

- a) use reasonable endeavours to establish the Link in accordance with the Specifications;
- b) undertake the transition from the Customer's current telecommunication network to the Link in accordance with the Specifications; and
- c) maintain the Link during the Term in accordance with this Agreement.

## 7. Use of the Link

The Customer shall use the Link in a manner consistent with this Agreement for the sole purpose of maintaining communications between the Customer's Offices and to the Internet.

The Customer shall not:

- a) allow any other party to access or use the Link, transfer data on the Link or create traffic on the Link without the written permission of the Contractor; or
- b) knowingly use the Link, or allow the Link to be used, to transmit or receive any unlawful, illegal, obscene or pornographic information

of any kind, including without limitation, any transmissions constituting or encouraging conduct that would support terrorist activities, constitute a criminal offence, give rise to civil liability or otherwise violate any local, state, national or international law; or

- c) resell, rent, lease, assign or give all or part of the provided Services, data or Link to any other party without the written permission of the Contractor.

## **8. Services**

### **8.1 Services**

The Contractor shall provide to the Customer:

Telecommunications Services from the Services Commencement Date to the termination or expiration of this Agreement.

### **8.2 Service Levels**

The Contractor shall use all reasonable endeavours to ensure that the Telecommunications services meet the Service Levels.

## **9. Charges**

### **9.1 Charges**

The Customer must pay to the Contractor all applicable Charges at the times and in the manner specified in the Reference Schedule. The Contractor reserves the right to vary the pricing from that outlined in this Agreement as a result of altered capacity, modified specification, unavailability of specified devices, replacement suppliers, changes in A\$ exchange rate, consumer price index and the passage of time.

### **9.2 Payment Terms**

The Customer will pay the Contractor, via electronic funds transfer, all Telecommunications Charges and any other Charges specified in a monthly invoice, within 14 days of receipt of that invoice.

### **9.3 Withholding Payments**

The Customer agrees that it is liable to the Contractor for all Charges incurred by the Contractor under this Agreement (whether by the Contractor directly or on the Contractor's behalf). The Customer agrees that it has no right to set off or withhold payment of any Charges invoiced by the Contractor in accordance with clause 9.2. For the avoidance of doubt and without limiting the foregoing, the Customer agrees not to set off or withhold any Charges included in an invoice from the Contractor based on a Chargeable Traffic or billing dispute or the Customer's dissatisfaction with the Hardware or performance of any Services.

### **9.4 Interest on overdue amounts**

If the Customer does not pay the Contractor an amount when due, the Contractor may charge the Customer interest on it from when it was due until it is paid, at the rate of 15% per annum. Interest will be calculated on a daily basis, on the basis of a year of 365 days, and capitalised monthly.

## **10. GST**

All Prices and Charges quoted on the service agreement are inclusive of GST.

## **11. Charges Review**

### **11.1 Review**

On each anniversary of the Commencement Date, the Charges for the following 12 month period will be increased in accordance with the increase, if any, in the Consumer Price Index over the preceding 12 month period, unless the parties otherwise agree.

## **12. Upgrades**

### **12.1 Right to Upgrade**

Nothing in this Agreement limits the Contractor's right to Upgrade the Link or any equipment used in connection with the Link.

## **12.2 Additional Services**

The Contractor will notify the Customer of any additional services, increase in the level of existing services or other benefits that it can offer the Customer, resulting from an Upgrade to the Link.

## **13. Cooperation**

The Customer shall provide the Contractor and the Contractor's Telecommunications Provider with access to all of the Customer's offices and the Customer Resources, and all cooperation and assistance reasonably requested by the Contractor for the purpose of:

- a) meeting the Contractor's obligations under this Agreement; and
- b) enabling the Contractor and the Contractor's Telecommunications Provider to comply with their obligations under any applicable law or industry code of conduct.

## **14. Warranties**

### **14.1 Customer Warranties**

The Customer represents and warrants on a continuing basis that:

- a) its obligations under this Agreement are valid and binding and enforceable against it;
- b) the Contractor's use of the Customer Data in carrying out its obligations under this Agreement will not breach any privacy law; and
- c) it has not relied on any representation made by the Contractor which has not been stated expressly in this Agreement and, to the extent that the Contractor has made any representation which is not otherwise expressly stated in this Agreement, the Customer has been provided with an opportunity to independently verify the accuracy of that representation.

### **14.2 No other warranties**

To the extent permitted by law, the Contractor makes no warranties, express or implied, as to the performance of its obligations under, or as to the subject matter of, this Agreement, including, without limitation, as to:

- a) the expected level of usage of the Link by the Customer;
- b) whether the Customer Resources are sufficient to enable the Customer to use the Link;
- c) the suitability of the Services, Software, Hardware, Link, Customer Resources or any other equipment or product supplied under this Agreement, for the Customer's needs;
- d) the performance of the Software, Hardware or Link;
- e) whether the capacity provided to the Customer through the Link is sufficient for the Customer's needs; and
- f) the uninterrupted or fault free use of the Link.

## **15. Intellectual Property Rights**

### **15.1 New Contract Material**

Unless otherwise agreed, title to, and all Intellectual Property Rights in, New Contract Material shall vest in the Contractor.

### **15.2 Customer Data**

Title to, and all Intellectual Property Rights in, the Customer Data, including all copies and extracts, is the exclusive property of the Customer.

## **16. Indemnity**

The Customer shall fully indemnify the Contractor and its Associates from any direct and indirect damage, liability, loss, costs and expenses (including but not limited to reasonable legal fees) incurred by any of them arising out of or in connection with:

- a) the Contractor providing the Services, or performing any obligation required to be performed under this Agreement;
- b) the Contractor's possession of the Customer Data or related data, documentation or records in accordance with this Agreement; and
- c) a breach of any provision of this Agreement by the Customer or its Associates.

## 17. Confidentiality

Subject to the provisions of clause 14, each party must keep all Confidential Information provided to it by the other party confidential. This clause survives termination of this Agreement.

## 18. Liability

### 18.1 No liability

To the maximum extent permitted by law, neither the Contractor nor its Associates will be liable to the Customer, or any other person in any way whatsoever (including because of negligence) because of breach of the Agreement by the Contractor, the Customer's use of, or inability to use, the Hardware, Software or the Link, or otherwise in relation to this Agreement.

### 18.2 Limitation on damages recoverable

If, despite clause 18.1, the Contractor is held liable for loss or damage suffered by the Customer in relation to this Agreement, the parties agree that that liability will be limited to the total amount of the Charges paid by the Customer to the Contractor during the 12 month period preceding the date on which the cause of action arose.

### 18.3 Third parties

The Contractor shall not be liable for anything beyond the reasonable control of the Contractor, including:

- a) any Services or Hardware or other equipment supplied to the Customer by third parties;
- b) the nature or enforceability of any rights obtained by the Customer (with or without the assistance of the Contractor) in respect of third parties or the adequacy of such rights for the purposes of the Customer; and
- c) the interruption to, or failure to provide, the Telecommunications Services, resulting from:
  - i. a fault in or damage to the Link where such fault or damage occurs or is located beyond the Network Termination Point;
  - ii. an act or omission of the Contractor's Telecommunication Provider; or
  - iii. any other cause beyond the reasonable control of the Contractor.

The Contractor shall not be liable for:

- d) any loss or damage resulting from malicious software, spam or a computer virus.
- e) any loss or damage resulting from denial of service attacks, security breaches or intrusions by third parties.

The Customer acknowledges that the Contractor can not protect the Customer's information technology system from any damaging infections or assaults via the Link.

### 18.4 Survival

This clause 18 applies despite termination or expiry of the Agreement.

## 19. Suspension of Telecommunications Services

### 19.1 Suspension of Telecommunications Services

The Contractor reserves the right to suspend the Telecommunications Services, without liability to the Customer, if any of the following occurs:

- a) the Customer is in default of any payment under this Agreement; or
- b) the Contractor or the Contractor's Telecommunications Provider is required to perform maintenance or other service work in connection with the Link or any network or system affecting the Link, or is required to comply with a request from a Government Body or emergency service organisation.

### 19.2 Notice

Wherever possible, the Contractor will endeavour to schedule all maintenance services in periods of low usage of the Link and give the Customer 2 Business Day's notice of such maintenance.

## 20. Termination

### 20.1 Termination by either party

Either party may terminate this Agreement with immediate effect by giving written notice to the other party if:

- a) the other party commits a material breach of this Agreement and fails to remedy that breach within 28 days after receiving written notice requiring it to do so;
- b) the other party ceases to carry on business;
- c) any step is taken by a mortgagee to enter into possession or dispose of the whole or any material part of the other party's assets or business; or
- d) an Insolvency Event occurs in relation to the other party.

Termination of this Agreement will be without prejudice to any rights or obligations or causes of action which have accrued or arisen in favour of any party before the date of termination.

### 20.2 Termination by the Contractor

The Contractor may, at any time, terminate this Agreement, in whole or in part:

- a) without cause, by 30 days' prior written notice to the Customer; or
- b) immediately, by written notice to the Customer, if the Contractor's Telecommunications Provider ceases to provide telecommunications services to the Contractor, or reduces the level of telecommunications services provided to the Contractor, so that the Contractor is unable to provide the Telecommunications Services to the Customer, and, after reasonable efforts, the Contractor is unable to obtain those services from an alternative supplier at a similar cost and on similar terms.

### 20.3 Termination by the Customer

- a) The customer may terminate this agreement without cause by giving 30 days prior written notice to the contractor and payment of 50% of the contract balance of the Service Charge specified in the Agreement.
- b) During an Extended Agreement period the customer may terminate the Extended Agreement without cause by giving 30 days prior written notice to the contractor.

### 20.4 Disengagement

Except where the Agreement was terminated by the Contractor under clause 20.1 (a), the Contractor shall, if the Customer requests, continue

to provide the Services and provide reasonable assistance to any supplier engaged by the Customer, for a period up to 30 days following termination or expiration of this Agreement (the **Disengagement Period**), to enable the transition of the Services to that supplier.

## **20.5 Charges for Services During Disengagement Period**

The provision of Services and assistance during the Disengagement Period will be subject to the Customer paying the Contractor charges agreed upon by the parties.

## **20.6 Consequences of Termination**

Following termination of this Agreement, the Contractor may:

- a) repossess any of its property in the Customer's possession or control;
- b) retain any moneys paid;
- c) charge a reasonable sum for work performed in respect of which no sum has previously been charged;
- d) be regarded as discharged from any further obligations under this Agreement; and
- e) pursue any additional or alternative remedies provided by law.

## **21. Notices**

### **21.1 Notices**

Any communication under this Agreement must be in writing and sent by prepaid post to the mailing address of the addressee.

### **21.2 Receipt**

A communication is deemed to be received 3 days after posting (7 days, if posted to or from a place outside Australia).

## **22. Force Majeure**

No failure by a party to perform any of its obligations under this Agreement (other than an obligation to pay money) will be a breach of this Agreement or create any liability to the extent and during the time that such failure arises from an event or circumstance beyond that party's control (a **Force Majeure Event**). A party affected by a Force Majeure Event must notify the other party of it and use its reasonable endeavours to mitigate the effect of the Force Majeure Event.

## **23. Miscellaneous**

### **23.1 Entire Agreement**

This Agreement supersedes all prior conduct between the parties and constitutes the entire agreement between the parties. Any change to this Agreement must be in writing and signed by the parties.

### **23.2 Assignment and Novation**

The rights of the Customer under this Agreement are incapable of assignment without the prior written consent of the Contractor. The Contractor may assign or subcontract any of its rights or obligations under this Agreement by providing written notice to the Customer.

### **23.3 Severability**

The invalidity or unenforceability of any one or more of the provisions of this Agreement will not invalidate, or render unenforceable, the remaining provisions of this Agreement. Any illegal or invalid provision of this Agreement is severable and all other provisions will remain in full force and effect.

### **23.4 Relationship between Parties**

Each party enters this Agreement as an independent contractor. The parties are not partners, agents, employees or representatives of one another. Neither party has the power to incur any obligations on behalf of, or pledge the credit of, the other.

## **23.5 Waiver**

Waivers under this Agreement must be in writing. Waiver does not affect any other right except to the extent specified in writing.

## **23.6 Survival of Obligations**

All provisions of this Agreement that are by their nature intended to be continuing and/or which are capable of having effect after the termination of this Agreement are not merged or extinguished by the termination of this Agreement and continue in full force and effect after the termination of this Agreement, as the case may be.

## **23.7 Costs**

Each Party shall bear their own costs incurred in the preparation, negotiation and execution of this Agreement.

## **23.8 Governing Law**

This Agreement is governed by the laws of Queensland. The parties submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

## **23.9 Counterparts**

This Agreement may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one agreement.