

MAINTENANCE AGREEMENT TERMS AND CONDITIONS (Annual Payments)

1. **INTERPRETATION**
 - 1.1 In these Conditions
Agreed Hours: means between 9am and 5pm, Mondays to Fridays excluding weekends and public holidays or such other hours as the Supplier and Customer agree in writing (which will attract additional charges);
Commencement Date: means the date specified overleaf as the commencement date or if later the date that the Equipment is installed by the Supplier;
Customer: means the person named overleaf;
Equipment: means the equipment detailed overleaf and all internal cabling up to the network test termination point or other demarcation point;
Good Working Order: the Equipment operates in accordance with all operating manuals, specifications and other manufacture documentation relating to the Equipment;
Initial Period: means, subject to extension in accordance with clause 10, the period of 7 years;
Supplier: means Berry Telecom Limited, registered in England and Wales with company number 07681963 whose registered office is at Berry Group House, Old Sarum Park, Salisbury, Wiltshire, SP4 6BU;
Maintenance Services: means the fault rectification service described in clause 4 below;
Renewal Period: each successive 12-month period after the Initial Period for which this Agreement is renewed;
Rental Agreement: means an agreement entered into by the Customer pursuant to which the Customer hires the Equipment from the Supplier or a third party;
Response Time: means 8 working hours if the Equipment has failed completely or 16 working hours if the Equipment has failed partially;
Term: the Initial Period together with all Renewal Periods.
2. **SUPPLIER'S UNDERTAKING**

In consideration of the payment by the Customer of the annual service charge in accordance with the terms of clause 3 the Supplier undertakes to provide the Maintenance Services in respect of the Equipment upon the terms and conditions of this Agreement.
3. **MAINTENANCE CHARGES**
 - 3.1 The annual service charge for the Maintenance Service is payable annually in advance. Payment for services provided to the Customer in addition to the Maintenance Services is due on presentation of an invoice by the Supplier. The Supplier reserves the right to submit invoices to the Customer via e mail.
 - 3.2 Where payment is outstanding for more than 30 days in respect of any invoice due under this Agreement the Supplier may without liability suspend its obligations under this Agreement until payment of the overdue amount is made.
 - 3.3 The Supplier reserves the right to charge interest at an annual rate of 4% above the base rate of National Westminster Bank plc calculated on a daily basis in respect of any sum which is due and unpaid, that interest to run from the date on which that sum is due and payable until receipt by the Supplier of the full amount, whether before or after judgment.
4. **MAINTENANCE SERVICES**
 - 4.1 On the Customer informing the Supplier that the Equipment is malfunctioning or has failed or is otherwise not in Good Working Order, the Supplier shall use reasonable endeavours during the Agreed Hours:
 - 4.1.1 to inspect, test and diagnose the fault (by attendance on site or remotely as the Supplier deems necessary) within the relevant Response Time; and
 - 4.1.2 to carry out such repairs replacement of parts or adjustment as the Supplier shall deem necessary to remedy the said fault.
 - 4.2 Maintenance Services will be carried out by duly qualified engineers.
 - 4.3 The Response Time will commence from the time the Customer informs the Supplier in accordance with clause 4.1 provided that such notification is made to the Supplier during the Agreed Hours.
5. **EXCLUDED MAINTENANCE**
 - 5.1 The Supplier is not obliged to perform any Maintenance Service required to restore any malfunctioning or failed Equipment to Good Working Order or suffer any liability in relation thereto where the malfunction or failure results from or is caused by any of the following ("**Excluded Causes**"):
 - 5.1.1 any defect arising from wilful damage, negligence (including improper storage), abnormal working conditions, failure to follow the Supplier's instructions (whether oral or in writing), misuse or alteration or repair of the Equipment without the Supplier's approval; or
 - 5.1.2 faults in the service provided by the network provider; or
 - 5.1.3 defects in electricity or network supply to the Equipment; or
 - 5.1.4 defects caused by failures or surges of electrical power; or
 - 5.1.5 failure of the Equipment due to changes in the electrical supply service or the public network; or
 - 5.1.6 a defect in the manufacturer's design of the Equipment; or
 - 5.1.7 the Customer's broadband connection or the lack of any broadband connection (save where the broadband connection is provided by the Supplier);
 - 5.1.8 faulty materials or workmanship in the manufacture of the Equipment.
 - 5.2 Where the Supplier is performing or has performed Maintenance Services in circumstances where it is established that the Equipment was not in Good Working Order due to any Excluded Causes, the Supplier may charge, and the Customer shall pay a fee, calculated in accordance with the Supplier's then current rates, in respect of that work.
6. **LIMITATION OF LIABILITY**
 - 6.1 Except as expressly state in this Agreement, all warranties, conditions and terms, whether express or implied by statute, common law or otherwise (including fitness for purpose and suitability) are hereby excluded to the extent permitted by law.
 - 6.2 Subject always to clause 6.4 the Supplier shall not be liable whether in contract, tort (including for negligence and breach of statutory duty), misrepresentation (whether innocent or negligent), restitution or otherwise, for (a) any loss (whether direct or indirect) of profits, business, revenue, or goodwill; (b) any special, indirect or consequential loss, costs, damages, charges or expenses however arising under this Agreement.
 - 6.3 Subject always to clause 6.4 the Supplier's total aggregate liability in contract, tort (including negligence and breach of statutory duty), misrepresentation (whether innocent or negligent), restitution or otherwise, arising in connection with the performance or contemplated performance of this Agreement shall be limited to £200,000.
 - 6.4 The Supplier does not exclude or limit liability for fraud or fraudulent misrepresentation or death or personal injury caused by negligence.
 - 6.5 The Supplier shall not be in breach of this Agreement nor liable for any delay in performing or failure to perform, any of its obligations under this Agreement if that delay or failure results from circumstances beyond the Supplier's reasonable control including (without limitation) flood, fire, lightning, war, sabotage, civil disturbance

or governmental action, import regulations, embargoes or where the Customer has failed to comply with its obligations hereunder.

8. **THE CUSTOMER'S OBLIGATIONS**

The Customer agrees that it will:-

 - 8.1 pay the Supplier all amounts due under this Agreement at the due times;
 - 8.2 ensure that the Equipment is not moved at any time from the address at which it was originally installed, altered, adjusted or interfered with in any way except by the Supplier's servants or agents. Alterations include the reprogramming of the Equipment to change network providers for the purpose of least cost routing;
 - 8.3 provide the Supplier with full access to the Equipment during the Agreed Hours to enable maintenance of the Equipment to be carried out;
 - 8.4 notify the Supplier promptly if Equipment is discovered to be operating incorrectly;
 - 8.5 pay the Supplier's charges for reprogramming the Equipment required as a result of an error by any person other than the Supplier's servants or agents;
 - 8.6 take any steps reasonably necessary to ensure the safety of the Supplier's personnel when attending the Equipment;
 - 8.5 not alter or extend the Equipment without prior notification to the Supplier (an additional charge may, at the Supplier's sole discretion be made for the maintenance of altered Equipment);
 - 8.6 provide the Supplier with details of the installer of the Equipment, a copy of its Pre-Connection Inspection Certificate and access to all relevant site records.
9. **ADDITIONAL EQUIPMENT**
 - 9.1 If at any time throughout the Term the Supplier provides the Customer with any additional equipment ("Additional Equipment") then to the extent that the Customer requires the Additional Equipment to be maintained by the Supplier and a separate maintenance agreement has not been entered into in respect of the Additional Equipment:
 - 9.1.1 such Additional Equipment will form part of the Equipment for the purposes of this Agreement and the Initial Term shall be extended to a period of 7 years from the date on which the Additional Equipment was provided to the Customer; and
 - 9.1.2 the annual service charge for the Maintenance Service of the Equipment shall be increased by an amount equal to the agreed service charge for the Maintenance Service as specified on the Additional Equipment purchase order in respect of the Additional Equipment such increase to be effective from the date on which the additional equipment is provided to the Customer.
10. **TERM & TERMINATION**
 - 10.1 This Agreement shall commence on the Commencement Date and unless terminated earlier in accordance with clause 10.2 shall remain in force for the Initial Term. The Term of the Agreement shall automatically be extended for a Renewal Period at the end of the Initial Period and at the end of each Renewal Period, unless a party gives written notice to the other party, not later than 90 days before the end of the Initial Term or the relevant Renewal Period, to terminate this Agreement.
 - 10.2 This Agreement may be terminated:
 - 10.2.1 by the Customer during the Initial Term by giving at least 90 days written notice to the Supplier expiring on an anniversary of the Commencement Date; or
 - 10.2.2 by the Supplier if the Customer is in breach of any provision of this Agreement and does not rectify the breach within 14 days of the Supplier's notice of such breach; or
 - 10.2.3 by the Supplier if the Customer becomes unable to pay its debts in within the meaning of the Insolvency Act 1986, enters into liquidation or administration is subject to any other analogous insolvency proceeding.
 - 10.3 On termination the Customer shall immediately pay any outstanding amounts owed to the Supplier pursuant to this Agreement.
 - 10.4 Notwithstanding 10.3 in the event of termination:
 - 10.4.1 pursuant to clause 10.2.1 the Customer shall immediately pay the annual service charges in respect of the remainder of the Initial Term after the date of termination;
 - 10.4.2 pursuant to clause 10.2.2 and/or 10.2.3 the Customer shall immediately pay such proportion of the annual services charges in respect of the remainder of the Initial Term after the date of termination as the Supplier calculates (acting reasonably) represents a genuine estimate of the loss suffered as a result of the breach. Such amount shall never exceed an amount equal to the services charges for the remainder of the Initial Term.
11. **GENERAL**
 - 11.1 The terms of this Agreement including the details overleaf, represent the entire agreement between the parties in relation to the maintenance of the Equipment during the Agreed Hours and no variation shall be binding unless signed by the director of the Supplier.
 - 11.2 The terms of this Agreement may be varied by the Supplier if the Supplier deems such variation to be necessary to comply with any statute, regulation or British Standards Institute requirement.
 - 11.3 The Supplier reserves the right to change any term of the Contract at any time. This includes the ability to separately charge for Services which may be currently included in the Service as free. The Supplier will publish details on line on the Supplier's Website at least 2 weeks before the change is to take effect and will give the Customer reasonable notice of any variation before it takes place.
 - 11.4 The annual charge payable under this Agreement shall be reviewed annually and may be increased by the Supplier by not more than the rate of inflation determined in accordance with the Retail Prices Index.
 - 11.5 The Supplier reserves the right to make a charge in accordance with its current rates if it is erroneously notified of an Equipment fault on more than two occasions in any calendar month.
 - 11.6 Any notice shall be in writing addressed to the addressee at its registered office or principal place of business or such other address as may at the relevant time have been notified pursuant to this provision to the party giving the notice and in respect of a notice given under clause 10 shall be sent by recorded delivery.
 - 11.7 No delay or failure by the Supplier in enforcing any provision of this Agreement shall constitute a waiver of that provision or any other provision. No waiver by the Supplier of any breach of the Maintenance Agreement by the Customer shall be considered as a waiver of any subsequent breach of the same or any other provision. No waiver by the Supplier shall be effective unless in writing.
 - 11.8 If any provision of this Agreement is held by any competent authority to be invalid or unenforceable in whole or in part the validity of the other provisions of this Maintenance Agreement and the remainder of the provision in question shall not be affected.
 - 11.9 The Supplier may assign its rights and obligations. The Customer may not assign its rights and obligations. In the event the Customer wishes to transfer all or a material part of its business and assets it shall give the Supplier at least 30 days prior notice of such intention.
 - 11.10 The Supplier may change the terms of this Agreement (including the charges) at any time. The Supplier will publish details of such changes on line on the Supplier's website www.berrytelecom.co.uk at least two weeks before the change is to take effect.
 - 11.11 This Agreement shall be governed by the laws of England and the parties submit to the exclusive jurisdiction of the English courts.