



# Wholesale Services Contract

SUBJECT TO CONTRACT

CONFIDENTIAL TO FIBRENEST AND THE CUSTOMER

Issue date:

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## 1. INTERPRETATION

1.1. The following words and expressions shall have the following meanings:

**“Abortive Visit Charge”** means the charge specified in the Price List;

**“Adjustment Interest Rate”** means one per cent above the official Bank Rate from time to time in force of the Bank of England unless an alternative interest rate is stipulated to apply by Ofcom or other regulatory authority or body of competent jurisdiction pursuant to a determination made in accordance with clause 17.7;

**“Annual Revenue”** means the total charges levied exclusive of VAT from the Customer for the Service in any Contract Year;

**“Applicable Law”** means the laws of England and Wales and any laws, statutes and regulations (and any determinations or designations having the force of law imposed by a competent authority), as may be amended from time to time, that apply to the provision or receipt of a Service or to the performance of this Contract or the parties’ rights and obligations arising under or in connection with it, including (without limitation):

- (a) Regulations specific to the communications sector imposed by Ofcom using its statutory powers;
- (b) anti-corruption laws set out in the Bribery Act 2010 and the Foreign Corrupt Practices Act of 1977 of the United States of America; and
- (c) all applicable export laws and regulations, including those of the United States of America;

**“Binding Corporate Rules”** means a set of internal rules adopted by FibreNest and approved by the appropriate data protection regulator(s), allowing the transfer and processing of personal data outside of the European Economic Area (“EEA”) in compliance with Data Protection Legislation and set out in the Privacy Policy.

**“Cancellation charge”** means the charge that the Customer must pay to FibreNest where the Customer cancels an Order after FibreNest has commenced work in respect of that Order, as more particularly described in clause 3.15 and the Price List;

**“Communications Provider”** has the meaning given to it in section 405(1) of the Communications Act 2003;

**“Connection Charge”** is the sum payable by the Customer in accordance with the Price List for provisioning of the Service;

**“Contract”** means these contract terms, the relevant sections of the Price List, the Service Description, the Reseller Application Form, the Order and other any documents that are expressly incorporated by reference into this Contract;

**“Contract Year”** means each consecutive 12 calendar month period commencing from the date of this Contract and then on each anniversary of the date of this Contract.

**“Corporate Marks”** means the registered or unregistered trade marks and service marks, house marks and marks of ownership, trading names, brand names,

distinctive colour schemes, devices, styles, emblems and other manifestations associated with FibreNest and/or the Customer;

**“Customer”** means the person who signs this Contract with FibreNest and is a person who provides a Public Electronic Communications Network or a Public Electronic Communications Service;

**“Customer Service”** means the broadband and/or voice service provided to the End User or reseller by the Customer which is based on or facilitated by the Service;

**“Contact List”** means a document containing details of the contacts of each party in connection with the Contract and/or the Services;

**“Data Protection Legislation”** collectively (i) the UK’s retained version of the GDPR and (ii) the Data Protection Act 2018 and (iii) any Applicable Laws and any binding guidance issued by a Supervisory Authority relating to the Processing of Personal Data and/or the protection of an individual’s privacy;

**“Emergency”** means a serious situation or occurrence that:

- (a) threatens life and limb; or
- (b) may cause or threaten to cause damage to physical property or systems; or
- (c) happens unexpectedly

and demands immediate action;

**“End User(s)”** means a third party customer to whom the Customer Service is supplied and who shall use the Customer Service (as the case may be) for connectivity to the internet and/or making voice calls;

**“End User Data”** means personal data, (including sensitive personal data) of End Users (including prospective End Users) that the Customer provides or makes available to FibreNest for the purposes of this Contract;

**“End User Site”** means the End User’s premises where the Customer Service is supplied;

**“EU-US Privacy Shield”** means a legal framework adopted by the European Commission by its adequacy decision of 12 July 2016 that ensures an adequate level of protection for Personal Data transferred from the European Union to organisations in the United States that have self-certified to the EU-US Privacy Shield;

**“FibreNest”** means Persimmon Homes Limited trading as FibreNest with company number 04108747, whose registered office is at Persimmon House, Fulford, York, YO19 4FE;

**“FibreNest’s Credit Vetting Policy”** means FibreNest’s credit vetting policy for Customers, as more particularly described in clauses 13.10 to 13.15 inclusive.

**“FibreNest Equipment”** means equipment (including any software) placed by FibreNest at a Site to provide the Service;

**“FibreNest Group”** means Persimmon Homes Limited and its Affiliates from time to time;

**“FibreNest’s Intellectual Property Rights”** means the Intellectual Property Rights that belong to, vest in, or inure to the benefit of, the FibreNest Group;

**“FibreNest Network”** means the public electronic communications network belonging to FibreNest and its Affiliates;

**“FibreNest Website”** means the website located at URL <https://www.fibrenest.com/> or such other website or URL as FibreNest may notify the Customer from time to time;

**“Force Majeure”** means a matter beyond a party’s reasonable control and may include, but is not limited to (to the extent such events are beyond the reasonable control of the affected Party):

- (a) an act of God or force of nature (including fire, earthquake, flood, lightning, landslide and weather of exceptional severity);
- (b) serious incident, the cause of which is unconnected to the Party relying on the Force Majeure (including but not limited to explosion and radioactive contamination);
- (c) a change of law that is applicable to the affected party and the change was not reasonably foreseeable;
- (d) epidemic, or national or local emergency (whether in fact or law);
- (e) sabotage, riot, insurrection, terrorism or civil disorder;
- (f) military operations or war (whether declared or not); or
- (g) acts, omissions or delays of third parties (including without limitation local or central government or other competent authorities) for whom the Party relying on the Force Majeure is not responsible (for the avoidance of doubt, the Customer and FibreNest are responsible for all of their respective contractors (including suppliers (except where that supplier itself is affected by a Force Majeure), employees, servants and agents),
- (h) industrial disputes including industrial disputes involving that party’s own employees, providing that such party has used reasonable endeavours to resolve such industrial disputes or prevent them from occurring, or
- (i) acts of animals,

but in all cases of (a) to (i) does not include any event the effects of which the Party relying on the Force Majeure could have avoided or overcome by exercising a standard of reasonable care at a reasonable cost

**“Forecast”** means the forecast to be provided by the Customer to FibreNest as detailed in the Service Description;

**“GDPR”** means the UK’s retained version of the General Data Protection Regulation (EU) 2016/679, and any amendment or replacement to it;

**“Go-Live Date”** means the relevant date or dates when the Service is installed and commissioned by FibreNest and the Customer is notified in writing (which may be by email or similar), and is available and ready to use for the purpose for which it was intended;

**“Group Company”** means any direct or indirect subsidiary or any direct or indirect holding company or any such subsidiary of any such holding company or any such holding company of such subsidiary, “subsidiary” and “holding company” having the meanings defined in Section 1159 of the Companies Act 2006 as amended;

**“Intellectual Property Rights”** means any patent, petty patent, copyright, design right, community design right, database right, semiconductor topography right, registered design, rights in know-how, or any similar right in any part of the world and shall include any application for the registration of any patents or registered designs or similar rights capable of registration in any part of the world;

**“Interest Rate”** means four per cent above the base lending rate from time to time in force at the Bank of England;

**“Invoice Correction”** means to correct the amount charged for a Service and/or Event and Time Related Charge previously raised in an invoice but does not include adding a new charge (i.e. a charge for any additional Service or Event and Time Related Charge) not previously invoiced. Where a correction seeks to amend a charge in respect of an End User’s service then such corrections will only be valid if the correction identifies the services provided, the End User’s identity, location and charges applicable;

**“Invoice Dispute”** means for the purposes of clause 13 a dispute taken in good faith by the Customer in relation to the accuracy of the contents of an invoice and excludes a dispute that is or could be referred to Ofcom under the Communications Act 2003;

**“Minimum Term”** means a period of 12 months from the commencement of the Contract;

**“Minimum Period”** means a period of 12 months starting from the Go-Live Date;

**“Network Plans”** has the meaning given to it in clause 3.4;

**“NTE”** means network terminating equipment;

**“Ofcom”** means the Office of Communications or its competent successor body or authority;

**“Operational Data”** means personal data provided or made available by one party to the other which is operationally required for the performance of the Contract (business contact information such as names, email addresses, telephone numbers and fax numbers) relating to the Party’s employees or representatives;

**“Order(s)”** means an order prepared by the Customer for a Service and submitted by the Customer to FibreNest in accordance with the Contract;

**“Parties”** means (whether capitalised or not) the parties to the Contract, being FibreNest and the Customer, and reference to a ‘party’ shall be construed accordingly.

**“Price List”** means the document containing a list of FibreNest’s charges and terms that apply to the Service provided to the Customer from time to time);

**“Privacy Policy”** means the policy that FibreNest has implemented and may update from time to time on how it Processes Personal Data and that is set out at: <https://www.fibrenest.com/privacy>

**“Public Electronic Communications Network”** has the meaning given to it in section 151(1) of the Communications Act 2003;

**“Public Electronic Communications Service”** has the meaning given to it in section 151(1) of the Communications Act 2003;

**“Relevant Notice Period”** has the meaning given to it in clause 18.1;

**“Reseller Application Form”** means the form signed by the Customer and FibreNest to enter into this Contract;

**“Service”** means the supply of the fibre optic service by FibreNest on the terms of the Contract to the Customer in order for the Customer to provide the Customer Service to the End User at the End User Site;

**“Service Description”** means the service description document and business process document as may be amended from time to time containing information relating to the Service and its use. The Service Description shall be made available to the Customer and updated from time to time in accordance with the Contract;

**“Service Establishment Date”** means, in relation to Broadcast Access Service or Cablelink Service, the date when the Service is installed and commissioned by FibreNest and is available for use by the Customer;

**“Service Levels”** means the performance standards and other metrics that the Services shall meet in accordance with the Contract, as set out in the Service Description;

**“Site”** means a place (including, as the case may be, an End User Site) at which FibreNest agrees to provide the Service;

**“Sub-Processor”** means a FibreNest Affiliate or a FibreNest supplier or subcontractor that FibreNest engages to Process End User Data for the purposes of the Contract;

**“Territory”** means the specific Persimmon housing developments in Great Britain built by Persimmon Homes Limited or its Affiliates where the Network Plans specify that the Service can be ordered by the Customer;

**“Third Party CP”** means a person who is a Communications Provider who provides a Public Electronic Communications Network or a Public Electronic Communications Service but is not a signatory to this Contract;

**“Working Day”** means any day other than Saturdays, Sundays, public or bank holidays in Great Britain.

- 1.2. Any reference in this Contract to any provision of a statute shall be construed as a reference to that provision as amended re-enacted or extended at the relevant time.
- 1.3. The headings in this Contract are for convenience only and shall not affect its interpretation.
- 1.4. Words importing singular include plural and vice versa.

- 1.5. The terms “party” or “the parties” shall mean FibreNest and/or the Customer.
- 1.6. If there is a conflict between these contract terms, the Service Description or any other document referred to in the Contract, the order of precedence shall be as follows:
  - (a) These contract terms;
  - (b) the relevant sections of the Price List;
  - (c) the Reseller Application Form;
  - (d) the Order;
  - (e) the Service Description.

## 2. COMMENCEMENT AND TERMINATION

- 2.1. This Contract begins on the date that the Reseller Application Form is accepted when signed by duly authorised representatives of FibreNest and the Customer and shall continue for the Minimum term thereafter until terminated in accordance with this Contract.
- 2.2. The Customer may terminate the provisions of this Contract in relation to a Service on:
  - (a) not less than one month’s notice if FibreNest materially changes the terms of this Contract or increases the charges, to the Customer’s material detriment provided that such notice to terminate shall be served on FibreNest no later than two months from the date the change comes into effect; or
  - (b) not less than 3 months’ notice for any other reason provided that any such notice shall not expire before the end of the Minimum Period(s) for the relevant Service(s).
- 2.3. The Customer may terminate any Service to any individual Site on not less than 30 calendar days’ notice provided that such notice extends the termination date in respect of that Service to an individual Site beyond the Minimum Period. If the Customer terminates an individual circuit Order within its Minimum Period then the Customer must pay the rental and other charges (including any Connection Charge) for the remainder of the Minimum Period at the rate in force at termination as provided in the Price List.
- 2.4. FibreNest may terminate the provisions of this Contract in relation to the Service:
  - (a) on not less than one month’s notice if FibreNest does not receive an Order for the Service from the Customer within 12 months of the commencement of this Contract (“Minimum Term”);
  - (b) immediately upon notice if the Customer is suspended or prohibited from providing the Customer Service by Ofcom and/or ceases to be a communications provider as defined by section 405(1) of the Communications Act 2003, and shall immediately reinstate the Service as soon as reasonably practicable upon receipt of notice from the Customer confirming that Ofcom has lifted the suspension;
  - (c) on not less than 3 months’ notice for any other reason provided that such notice shall not expire before the end of the latest Minimum Period as at the date of notice, If FibreNest serves a notice to terminate pursuant to this clause 2.4(c) it willf the Customer requests, discuss suitable alternative services where migration charges may be kept to a minimum.



- (d) immediately, or from an Ofcom specified date, on notice if FibreNest is directed by Ofcom to cease the Service or the provision of the Service or any part of it.
- 2.5. If a party is prevented, hindered or delayed in performing an obligation under this Contract, because of Force Majeure, for a period exceeding three months, either party may terminate this Contract by giving not less than one month's notice and provided the Force Majeure has not ceased prior to expiry of the notice this Contract shall terminate. Where the Force Majeure event is specific to an individual circuit then the right to terminate will apply to the individual circuit only.
- 2.6. If the Customer terminates this Contract during a Minimum Period, other than because FibreNest has materially breached this Contract or increased its charges or has materially changed the terms of this Contract to the Customer's detriment or because the Contract is terminated under Force Majeure, the Customer must pay FibreNest the rental and other charges for the remainder of any Minimum Period at the rate in force at termination or as otherwise provided in the Price List. In this situation the individual circuit termination provisions detailed in clause 2.3 apply.
- 2.7. FibreNest agrees to repay or credit the Customer for the period from which the Customer's liability to pay ceases for any charges or deposits paid in advance other than for any part of the Minimum Period if termination charges are payable. This repayment will be paid on the next applicable invoice where this is practicable, or a separate credit note within a reasonable period where the Contract is terminated.
- 2.8. If a valid breach notice is served on the Customer and the Customer has not remedied the breach after the expiry of the period specified for remedy in the breach notice then FibreNest may immediately upon giving notice in writing at its sole discretion refuse to accept new Orders except for the processing of Orders which relate to cessation of services, maintenance of existing services, or for the monitoring of existing Orders and suspend such other services or facilities available to the Customer as shall be reasonable in the circumstances. The Customer agrees to pay the charges for the Service until this Contract is terminated.
- 2.9. If FibreNest is directed to cease the provision of the Service or any part of it, or if the Customer is suspended or prohibited from providing the Customer Service by Ofcom and/or ceases to be a communications provider as defined by section 405(1) of the Communications Act 2003, FibreNest may at its sole discretion refuse to accept any Orders or that part of it that it is directed to cease immediately for the Service immediately on notice to the Customer. FibreNest shall re-instate the Service as soon as practicable on receipt of notice from the Customer if Ofcom ceases such suspension.
- 2.10. Either party may terminate this Contract or the Service (where the breach relates to that Service) provided under it immediately, on notice in writing, if the other:
- (a) commits a material breach of this Contract, which is capable of remedy, and fails to remedy the breach within the following periods from the date of the notice from the other party:
- (i) save in respect of monies the Customer is entitled to withhold under clause 13.9, 14 calendar days, where there is a failure to pay a sum due under this Contract or at the sole discretion of the party to whom the sum is owed 14 days in the first instance of a failure to pay a sum due and 7 days in the second

instance in separate payment months within 12 months of the first instance providing notices are served on each occasion; or

- (ii) 30 calendar days; or
- (b) commits a material breach of this Contract which cannot be remedied; or
- (c) is repeatedly in material breach of this Contract (including without limitation repeatedly late in paying sums due under this Contract); or
- (d) is the subject of a bankruptcy order, or becomes insolvent, or makes any arrangement or composition with or assignment for the benefit of its creditors, or if any of its assets are the subject of any form of seizure, or goes into liquidation, either voluntary (otherwise than for reconstruction or amalgamation) or compulsory or if a receiver or administrator is appointed over its assets (or the equivalent of any such event in the jurisdiction of such other party); or
- (e) ceases to carry on business.

A breach which relates to one individual Order only will not be considered as material for the purposes of this clause 2.10 (a) to (c) except where it relates to a failure to pay a sum under this Contract.

- 2.11. Termination or expiry of this Contract shall not be deemed a waiver of a breach of any term or condition of this Contract and shall be without prejudice to a party's rights, liabilities or obligations that have accrued prior to such termination or expiry.
- 2.12. Each of the parties' rights to terminate or suspend performance is without prejudice to any other rights or remedies available to either party.
- 2.13. Where FibreNest terminates this Contract on the grounds of insolvency specified above, FibreNest may communicate directly with End Users to inform them of the termination of the Service and how this will affect the communications services they receive from the Customer and/or FibreNest including the options available to End Users in order to avoid disconnection or interruption to End Users' existing communications services. This clause 2.13 will survive termination of the Contract.
- 2.14. FibreNest may suspend the provision of the Service as shall be reasonable under the circumstances on notice in the case of Emergency. FibreNest will provide as much notice as is reasonably practicable and will restore the Service as soon as possible after the Emergency has ceased.

### 3. PROVISION OF THE SERVICE

- 3.1. FibreNest agrees to:
  - (a) provide the Customer with the Service on the terms of this Contract and in accordance with the Service Description;
  - (b) exercise the reasonable skill and care of a competent communications provider in providing the Service;
  - (c) grant the Customer a non-exclusive right to use the Service for the sole purpose of enabling the Customer to provide the Customer Service; and

- (d) use reasonable endeavours to provide the Service by the Go-Live Date in accordance with the service levels set out in the Service Levels but all dates are estimates and, except as expressly specified otherwise in the Service Levels, FibreNest shall have no liability for failure to meet any date provided that FibreNest has complied with its obligations to use reasonable endeavours to meet the aforementioned dates.
- 3.2. Both parties acknowledge and agree that it is technically impracticable to provide a fault free Service and FibreNest does not warrant or undertake to do so. FibreNest agrees to repair any faults in accordance with the Service Levels and the Service Description.
- 3.3. FibreNest will provide the Service only in the Territory.

#### **Network Plans and Service Availability**

- 3.4. FibreNest shall provide or otherwise make available to the Customer up-to-date plans of its installed network describing where Services to End Users may be ordered (“Network Plans”). Network Plans shall be updated no less frequently than once every 6 (six) months. For the avoidance of doubt, the Customer may not place Orders for Services in any area or to End User Sites where its infrastructure and network is not sufficiently built out and available at that time.
- 3.5. The Network Plans:
  - (a) May be used by the Customer only in relation to the Service;
  - (b) Shall be Confidential Information as described in clause 11 and may not be passed to a third party;
  - (c) Provided is in relation to a potential Order and should not be retained for further reference or use; and
  - (d) Must not be stored by the Customer in locations outside the UK and Network Plans may only be accessed by the Customer from within the UK.
- 3.6. FibreNest does not give any warranty or assurance as to the accuracy of any information provided to the Customer by FibreNest under clause 3.5 above.

#### **Technical Constraints on Services**

- 3.7. The Service provided by FibreNest to the Customer may be used only for providing broadband services (and voice over IP voice services) to End Users (whether directly or by means of a reseller).
- 3.8. There may be technical or geographical limitations that inhibit the installation of the Service. The Customer acknowledges that the provision of the Service will be subject to a survey and/or feasibility checks to ensure that the Service can be provided. Following the survey and/or feasibility checks, FibreNest will advise the Customer of any limitations affecting the provision of the Service and in such circumstances where the Service cannot be provided FibreNest will (a) use reasonable endeavours to identify if alternative FibreNest products may possibly be used instead, and (b) notify the Customer and close the installation order.

- 3.9. If there is a technical limit relating to the Service, FibreNest will have no liability to the Customer relating to the provision of the Service to the extent that the technical limitation affects the Service (or FibreNest's inability to provide the Service), the performance of the Service, its effect on other services or equipment or the withdrawal of the Service provided that FibreNest notifies the Customer as soon as reasonably practicable.
- 3.10. FibreNest will use reasonable endeavours to identify any technical or geographical limitations prior to proposed Go-Live Date for an individual Order.
- 3.11. The Customer may place Orders for Services in accordance with clause 3.14.
- 3.12. FibreNest shall provide the Customer with:
- (a) access to an appropriate fault reporting system and supporting documentation; and
- 3.13. The Customer is responsible for:
- (a) compliance with any instructions contained in the Service Description and the terms of this Contract; and
  - (b) the acts and omissions of any employee, contractor agent or other person authorised by the Customer to liaise with FibreNest in connection with the fault reporting system and/or any other alternative process set out in the Service Description.

### **Order handling**

- 3.14.** The following provisions shall apply in relation to the handling of Orders:
- (a) The Customer may place Orders by submitting to FibreNest an Order using the relevant order form specified by FibreNest from time to time.
  - (b) An Order may be rejected if any relevant information required to progress the Order is inaccurate, incomplete or incorrect (except where minor or typographical in nature) or if it is a duplicate Order. If an Order is rejected, FibreNest will notify the Customer of the reason for the rejection by the end of the next Working Day.
  - (c) All Orders received by FibreNest will be processed by FibreNest in the order in which they are received.
  - (d) Orders will be processed by FibreNest within the periods specified in and in accordance with the Service Description and the Service Levels.
  - (e) Accepted Orders will be actioned and the relevant circuits delivered within the periods specified in and in accordance with the Service Description and the Service Levels.
  - (f) Where FibreNest determines that it is able to fulfil the Customer's Order by delivering the Service to the relevant End User Site, FibreNest shall promptly update the Customer to that effect and provide a proposed Go-Live Date. FibreNest shall use its reasonable endeavours to provide the Service on the Go-Live Date, but in some circumstances it may be unable to do so, and a revised proposed Go-Live Date shall be provided to the Customer. FibreNest shall use its reasonable endeavours to:
    - (i) keep the Customer updated as to progress of the Order; and
    - (ii) keep all delay to the fulfilment of the Order to a minimum.

### Cessations and cancellations

**3.15.** The following provisions shall apply in relation to the cessation and cancellation of Orders:

- (a) The Customer may place Orders for cessation by following the process set out in clause 3.14 above.
- (b) If the Customer cancels the Service or any part of it before the Go-Live Date, the Customer agrees to pay to FibreNest the Cancellation Charge set out in the Price List.
- (c) If the Customer cancels the Order for the Service involving an external survey before 5 days has elapsed from the date of receiving notification of the charge for civil engineering work, the Cancellation Charge shall apply. If the Customer cancels an Order after 5 days referred to above have elapsed, the Customer shall pay the Cancellation Charge and to reimburse FibreNest to the extent of the costs of any work done and for money spent in preparing to provide the Service which exceed the Cancellation Charge. FibreNest will take reasonable steps to mitigate the amount of such costs and expense.
- (d) If the Customer cancels the Order for the Service where internal work only is required before 5 days has elapsed from the date of FibreNest accepting the order the Cancellation Charge shall apply. If the Customer cancels an Order after the said 5 days has elapsed, the Customer agrees to pay the Cancellation Charge and to reimburse FibreNest to the extent of the costs of any work done and for money spent in preparing to provide the Service which exceed the Cancellation Charge. FibreNest will take reasonable steps to mitigate the amount of such costs and expense.
- (e) If the contract between the Customer and the End User is ceased, the Customer agrees to inform the End User that the CP Service may be disconnected, and the End User needs to make alternative arrangements.

### Engineering visits

**3.16.** The following provisions shall apply in relation to engineering visits:

- (a) Where an engineering visit is required to provide the Service:
  - (i) All appointments and/or notifications by FibreNest will be confirmed by email to the Customer's technical contact as stated on the Order;
  - (ii) Appointments for survey visits will be confirmed by the Customer by e-mail or electronic means to FibreNest's planning representative; and
  - (iii) FibreNest shall (acting reasonably) arrange the appointment for the engineering visit. The Customer agrees to use its best endeavours to ensure that a suitable Customer representative shall be present where requested by FibreNest and/or the End User is available to facilitate the appointment at the End User Site.
- (b) If the Customer does not agree to an appointment request for an engineering visit made by FibreNest (or fails to attend an appointment after agreeing to it), then the Service Levels shall not apply to the Order. If the appointment cannot be rearranged within 20 working days of the original appointment request (both parties acting

reasonably), or the Customer fails to attend the appointment after agreeing to it, then FibreNest may cancel the Order and the Cancellation Charge shall be payable.

- (c) If an installation or repair appointment is agreed with FibreNest for work at the End User Site, and FibreNest is unable to carry out the work at, or gain access to, the End User Site due to an act or omission by the Customer or End User or the appointment is broken by the Customer or End User, FibreNest may charge the Customer an Abortive Visit Charge as set out in the Price List. If the appointment is broken by FibreNest then no Abortive Visit Charge will apply.

### **Upgrades**

**3.17.** The following provisions shall apply in relation to updates to a Service:

- (a) Possible upgrades to a Service will be specified in the Service Description. Where upgrades are possible, the Customer may place Orders for upgrading to a higher bandwidth variant of the Service by following the process set out in clause 3.14 above.
- (b) The Customer shall be charged a Connection Charge for any accepted upgrade, and shall pay such Connection Charge (and rental charges from the Go-Live Date) for the upgraded variant. The charges for this work are as set out in the Price List.
- (c) FibreNest shall waive the termination costs, being the rental charge for the unexpired period of the Minimum Period of service for the variant which has been upgraded.

### **Service assurance and problem management**

**3.18.** The Customer may report to FibreNest faults or other problems affecting a Service in accordance with the process set out in the Service Levels.

**3.19.** FibreNest will only accept fault reports directly from the Customer. If the fault is not attributable to the FibreNest Network or the FibreNest Equipment, FibreNest will charge an Abortive Visit Charge for any Site visit.

**3.20.** If FibreNest fails to keep an appointment with an End User and the Customer incurs a call out charge as a direct consequence of that failure from a third party with whom an appointment had reasonably been arranged to coincide with FibreNest's appointment, the Customer may claim from FibreNest the charge rates which apply for the actual time charge incurred up to a maximum of two hours. The Customer must enclose a copy of the third party's invoice with the claim.

### **FibreNest liaison with End Users**

- 3.21. All communications between FibreNest and End Users will be arranged via the Customer, save that where the Service is to be delivered to an End User Site, FibreNest may contact End Users directly in the following circumstances:
- (a) in relation to operational or emergency reasons incidental to or arising from FibreNest's service management of the FibreNest Network, provided that, where reasonably practicable, FibreNest shall notify the Customer of any such operational or emergency reasons; or
  - (b) where the Customer has requested FibreNest to contact the End User directly; or
  - (c) in relation to all appointments, changes to appointments and access arrangements with the End User for engineering visits; or
  - (d) to assist with fault diagnostics.
- 3.22. FibreNest may contact End Users with the Customer's permission in writing (which shall include email or electronic means), not to be unreasonably withheld or delayed, for the purposes of carrying out quality checks for management and training purposes concerning the visit of FibreNest personnel to an End User's Site.
- 3.23. FibreNest may explain to End Users the respective roles and obligations of FibreNest and the Customer in relation to the provision of the Service and the CP Service. In these circumstances, FibreNest will comply with any regulatory obligation or agreed code relating to its conduct in communications with End Users.
- 3.24. Without FibreNest's prior written consent, the Customer must not publish or give to End Users contact details for FibreNest's nominated contacts or other personnel.

### **Maintenance**

- 3.25. In the event that it becomes necessary to perform maintenance on the Service, FibreNest will use its reasonable endeavours to:
- (a) provide the Customer with as much notice as reasonably practicable of the maintenance to be performed; and
  - (b) conduct the maintenance in such a way so as to minimise the adverse impact the maintenance might have on the Customer and its End User(s).

## **4. SERVICE MANAGEMENT**

- 4.1. FibreNest may:
- (a) occasionally, for operational reasons, introduce or withdraw Service features, introduce process changes to improve the quality of the Service, change the technical specification of the Service including, without limitation, Service upgrades upon giving not less than 28 calendar days notice from the date of the notification, provided that any such changes do not have a materially adverse effect on the performance or provision of the Service; or

- (b) give the Customer instructions which it reasonably believes are necessary for reasons of health, safety or the quality of the Service and it is the Customer's responsibility to ensure these are adhered to; or
  - (c) interrupt the Service for operational reasons (such as planned maintenance or Service upgrades) or because of an Emergency. FibreNest agrees to restore the interrupted Service as quickly as possible. FibreNest will give the Customer as much notice as possible and shall give the Customer at least 15 calendar days' notice of any interruption to the Service for planned maintenance and upgrade work. Where practicable, FibreNest will agree with the Customer when the Service will be interrupted. If there has been an interruption to the Service for Emergency reasons, FibreNest will inform the Customer that there has been an interruption as soon as reasonably practicable, but in all cases of (a), (b) and (c), FibreNest agrees to use reasonable endeavours to provide an uninterrupted Service to the Customer so far as is reasonably practicable.
- 4.2. FibreNest shall give the Customer notice of scheduled outages affecting the Services in accordance with the Service Description.
- 4.3. If the Customer reports a fault in the Service, FibreNest agrees to respond in accordance with the Service Levels.
- 4.4. The Customer agrees to provide a Forecast to FibreNest as detailed in with the Service Description.
- 4.5. The Customer and FibreNest agree to complete a Contact List if one does not already exist and both parties agree to use their reasonable endeavours to keep the Contact List up to date.
- 4.6. The parties may from time to time meet or arrange a video or telephone call to discuss the Contract, the performance of the Services and potential improvements to the Service. Each party shall participate in such discussions in good faith using their reasonable endeavours. Any change to the Contract or to a Service that is agreed in principle as part of those discussions shall be implemented in accordance with clause 18.2.

## 5. FIBRENEST EQUIPMENT

- 5.1. FibreNest Equipment remains the property of FibreNest at all times.
- 5.2. The Customer agrees to liaise with the End User as appropriate in connection with any engineering appointment and Go-Live Date.
- 5.3. The Customer is responsible for FibreNest Equipment installed at an End User Site and agrees to take reasonable steps to ensure that nobody (other than someone authorised by FibreNest) adds to, modifies or in any way interferes with it. The Customer will be liable to FibreNest for any loss of or damage to FibreNest Equipment, except where such loss or damage is due to fair wear and tear or is caused by FibreNest, or anyone acting on FibreNest's behalf. The Customer's liability under this clause 5.3 is limited to the replacement value of the FibreNest Equipment together with any associated reasonable costs of replacement.



## 6. CONNECTION OF EQUIPMENT TO THE SERVICE

- 6.1. Any equipment connected to the Service must not harm the FibreNest Network, the Service or FibreNest Equipment or another customer's network or equipment and must be:
  - (a) connected and used in line with any relevant instructions provided by the manufacturer or FibreNest (as the case may be) from time to time; and
  - (b) connected and used in line with any relevant laws or regulatory requirements; and
  - (c) technically compatible with the Service and connected and used in line with any relevant standards including any standards set out in the Service Description.
- 6.2. The Customer agrees to connect equipment to the Service only by using the NTE (where applicable) provided by FibreNest with the Service.
- 6.3. If upon becoming aware that the equipment does not meet the relevant instructions, standards or laws, the Customer must immediately disconnect it or FibreNest will do so, at the Customer's expense. If the Customer asks FibreNest to test the equipment to make sure that it meets the relevant instructions, standards or laws, the Customer agrees to pay FibreNest any time related charges set out in the Price List.
- 6.4. FibreNest will not be liable for failure to meet the Service Levels or other obligations under this Contract to the extent that the failure is caused by equipment found to be connected otherwise than in accordance with this clause.

## 7. ACCESS AND SITE REGULATIONS

- 7.1. The Customer agrees to take reasonable steps to ensure that the End User provides FibreNest with access to the End User Site.
- 7.2. FibreNest agrees to comply with (and shall procure that its employees, agents, subcontractors and officers shall comply) the End User's reasonable Site safety and security requirements made known and brought to the attention of the FibreNest personnel at the Site.
- 7.3. The Customer agrees to take reasonable steps to procure that the End User provides a suitable and safe working environment for FibreNest at the End User's Site.
- 7.4. FibreNest shall not tamper or interfere with any Customer Equipment save to the extent it is necessary to provide, repair or maintain the Service. FibreNest shall have no liability to the Customer in respect of decorator's work or any making good whatsoever, except to the extent that property damage is caused by FibreNest's negligence.

## 8. USE OF THE SERVICE

- 8.1. The Customer must take reasonable steps to procure that the Customer Service is not used:
  - (a) unlawfully or fraudulently or in breach of any legislation; or
  - (b) to send, knowingly receive, upload, download, use or re-use material which is grossly offensive, indecent, defamatory, obscene or menacing; or
  - (c) contrary to any reasonable instructions given by FibreNest pursuant to clause 4.1(d) in relation to health and safety.

- 8.2. If FibreNest notifies the Customer or if the Customer is aware that the End User has used the Service for any of the purposes listed in (a) to (c) of clause 8.1 then the Customer will co-operate with FibreNest and take reasonable steps to address the breach within a time limit which is reasonable under the circumstances including, at FibreNest's request, asking the End User to cease using the service in breach of clause 8.1 and notifying the End User that the Service will be disconnected if the End User continues to use the Service for any of the purposes listed in (a) to (c) of clause 8.1. If the End User continues to use the Customer Service in breach, the Customer will disconnect the End User's service and if the Customer does not disconnect the End User's service then it will be disconnected by FibreNest. The Customer agrees to indemnify FibreNest against all loss, damages, reasonable costs and expenses arising or incurred in respect of any actions, claims or legal proceedings which are brought or threatened against FibreNest by a third party if there is a breach of this clause 8.2. The Customer's liability under this indemnity is limited to £2 million for any one event or series of connected events and £5 million for all events (connected or unconnected) in the 12 calendar months immediately preceding either the relevant event (single or unconnected) or in the case of a series of connected events, the first event. FibreNest shall have a duty to mitigate its loss in the circumstances covered by this indemnity
- 8.3. If a Customer uses the Service in breach of clauses 8.1 or 8.2 or supplies the Customer Service to an End User (or reseller) who is in breach of clauses 8.1 or 8.2, FibreNest may on notice immediately suspend the Service to the extent necessary to bring the breach to an end, without prejudice to FibreNest's rights of termination under this Contract, provided that where reasonably practicable, FibreNest shall warn the Customer that it is in breach of clauses 8.1 or 8.2. If the Service is suspended in accordance with this clause 8.3, the Service (or relevant part thereof) will be reinstated on provision of evidence by the Customer that the breach has been remedied. Evidence that a breach has been remedied may include:
- (a) if the breach is by an End User (or reseller), that the Customer has taken such actions as are necessary to notify the End User (or reseller) of the breach and received assurances from the End User (or reseller) that the breach had been brought to an end; or
  - (b) if the breach is by the Customer, that the Customer has taken such actions as are necessary to bring the breach to an end.
- 8.4. The Customer agrees to include and maintain in its contracts with all resellers of the Customer Service, conditions equivalent to those contained in clauses 8.1 or 8.2 above, and undertakes to enforce such conditions, including if appropriate suspending or terminating the provision of the services under such reseller agreement.
- 8.5. The Customer must comply with all reasonable, lawful instructions and requests concerning the Services issued by FibreNest from time to time.
- 8.6. The Customer must at all times comply with all Applicable Law in connection with the Contract, the Services and the Customer Service, and FibreNest shall not be responsible for compliance with any Applicable Law that naturally and properly falls on the Customer as a Communications Provider supplying the Customer Service to an End User.
- 8.7. The Customer shall indemnify and keep FibreNest fully indemnified from and against any and all actions, demands, costs (on a full indemnity basis), losses, penalties, charges, damages, liability, claims and expenses (including but not limited to legal fees) whatsoever incurred by it and resulting from any breach of any Applicable Law by the Customer, its Resellers or End Users. The Customer's liability under this indemnity is limited to £2 million for any one event

or series of connected events and £5 million for all events (connected or unconnected) in the 12 calendar months immediately preceding either the relevant event (single or unconnected) or in the case of a series of connected events, the first event. FibreNest shall have a duty to mitigate its loss in the circumstances covered by this indemnity

- 8.8. Without prejudice to any other provision in this Contract, where FibreNest reasonably suspects that the Customer's use of a Service (or its End User's use of the Customer Service) is in breach of any Applicable Law, or constitutes any other reasonably suspected abuse or bad practice, then FibreNest reserves the right to suspend the relevant Service with immediate effect. Any resumption of Service shall only occur when the Customer demonstrates to FibreNest's reasonable satisfaction that the circumstances giving rise to the suspension have ceased and are not likely to reoccur.

## 9. INTELLECTUAL PROPERTY RIGHTS AND FIBRENEST CORPORATE MARKS

- 9.1. The Customer acknowledges that all Intellectual Property Rights in or relating to the Service vest in or are licensed to FibreNest and nothing in this Contract is to be construed as and it shall not have the effect of assigning or otherwise giving the Customer any rights in FibreNest's Intellectual Property Rights except as provided in this clause 9.
- 9.2. The Customer only has the right to use the Service and any documentation and manuals relating to the Service (including those on the FibreNest Website) and to make copies of those documents and manuals, to the extent necessary to provide the Customer Service and for its own internal use in connection with its obligations under this Contract.
- 9.3. All rights in any developments, improvements or variations to FibreNest's Intellectual Property Rights will vest in FibreNest.
- 9.4. Without the prior written consent of the other party, neither party shall:
- (a) use any of the Corporate Marks of the other party; or
  - (b) authorise any third party to use any of the Corporate Marks of the other party.
- 9.5. Except where FibreNest has provided its prior written consent, the Customers shall not use any photographs or representations of any FibreNest building including in any promotional literature.
- 9.6. The parties agree not to use or register or attempt to register as a trade mark, company name or domain name, anything that is identical to, similar to, or likely to be confused with any of the Corporate Marks of the other party
- 9.7. If authorised to use the name "FibreNest", the Customer will ensure that the name "FibreNest" will be no more prominent than the immediately surrounding letters and in no case greater than the surrounding typeface.
- 9.8. The Customer agrees to include and maintain in its contracts with any resellers of the Customer Service, conditions equivalent to those contained in clauses 9.4, 9.5 and 9.6 above, and undertakes to diligently and properly enforce such conditions including if appropriate by suspending or terminating the provision of the services under such reseller agreement.
- 9.9. This clause 9 does not prevent any legitimate use of a party's name or any other trade mark in any comparison of services and tariffs, in accordance with the Trade Marks Act 1994 or in any

other way which does not constitute an infringement of a third party's registered trade mark or common law rights.

- 9.10. FibreNest agrees to indemnify the Customer against all claims and proceedings arising from infringement of any third party Intellectual Property Rights by reason of FibreNest's provision of the Service to the Customer.
- 9.11. The indemnity in clause 9.10 above does not apply to actions claims or legal proceedings to the extent that they are:
- (a) caused by the use of the Service in conjunction with other equipment or software or any other service not supplied or approved by FibreNest; or
  - (b) caused by reason of any alteration or modification which was not made by FibreNest or with FibreNest's prior written consent; or
  - (c) caused by designs or specifications made by, or on behalf of, the Customer, other than where such designs or specifications are made as part of the Service on behalf of the Customer by FibreNest; or
  - (d) which arise as a result of the use of the Service otherwise than in accordance with the terms of this Contract.
- 9.12. The limitations and exclusions of liability contained in clause 14 do not apply to clauses 9.10 and 9.11 above, except for clause 14.1.

## 10. DATA PROTECTION

- 10.1. In this Contract, the following terms each have the meaning given to it in the GDPR: "Binding Corporate Rules", "Controller", "Data Subject", "Personal Data", "Personal Data Breach", "Processing", "Processor", "Special Categories of Personal Data" and "Supervisory Authority".
- 10.2. Save where otherwise prohibited under this Contract, FibreNest may Process Personal Data for the purposes of providing the Service, by:
- (a) using, managing, accessing, transferring or holding Personal Data on a variety of systems, networks and facilities (including databases); and / or
  - (b) transferring Personal Data worldwide to the extent necessary to allow FibreNest to fulfil its obligations under this Contract, and the Customer appoints FibreNest to perform each transfer in order to provide the Services provided that FibreNest shall not transfer Personal Data outside of the United Kingdom unless it has implemented appropriate transfer mechanisms permitted by Data Protection Legislation, including:
    - (i) FibreNest Group's Binding Corporate Rules (for transfers among FibreNest's Affiliates);
    - (ii) agreements incorporating the relevant standard data protection clauses adopted or approved by the European Commission; and
    - (iii) where applicable, the EU-US Privacy Shield or any equivalent safeguard mechanism that replaces it.
- 10.3. Where each party acts as a Controller in relation to the Processing of Personal Data under the Contract, the Parties will not act as joint Controllers for the purposes of Article 26 of the GDPR in relation to such Processing.

- 10.4. The Parties acknowledge that, in respect of all End User Data provided by the Customer, the Customer is the data controller and FibreNest is the data processor.
- 10.5. Without limiting clause 10.4, the Parties acknowledge and agree that the Parties will need to share Operational Data between them. Operational Data will be shared on the basis of a transfer from data controller to data controller, and each Party will assume responsibility for its own compliance with the Data Protection Legislation.
- 10.6. FibreNest shall Process Personal Data in accordance with applicable Data Protection Legislation and as set out in the FibreNest Privacy Policy and, where applicable, FibreNest Group's Binding Corporate Rules.
- 10.7. Where FibreNest acts as a Processor:
- (a) the subject-matter, duration, nature and purpose of the Processing, the type of End User Data and categories of Data Subjects will be set out in the Data Processing Annex (in respect of which both parties shall liaise in good faith to agree and complete);
  - (b) In performing its obligations under the Contract, FibreNest shall:
    - (i) Process the End User Data on behalf of the Customer in accordance with the Customer's documented instructions as set out in this clause 10, except where:
    - (ii) Applicable Law requires FibreNest to Process the End User Data otherwise, in which case, FibreNest shall notify the Customer of that requirement as soon as reasonably practicable before Processing unless to do so would be contrary to that Applicable Law on important grounds of public interest; and / or
      - 1. in FibreNest's reasonable opinion, an additional instruction or a change to the instructions provided by the Customer infringes the Data Protection Legislation and in which case FibreNest shall inform the Customer of its opinion without undue delay and, if agreed between the Parties, FibreNest will not be required to comply with that instruction;
      - 2. to protect the End User Data against a Personal Data Breach implement technical and organisational security measures as required by Article 32 of the GDPR.
      - 3. provide notice to the Customer without undue delay (and, in any event, no later than 24 hours) of becoming aware of a Personal Data Breach affecting the End User Data;
      - 4. only use the Sub-Processors approved by the Customer or in accordance with clause 10.7(j); and
      - 5. In relation to any Data Security Incident, FibreNest shall:
        - A. take all reasonable steps to identify and correct the underlying cause of the Personal Data Breach so as to eliminate or minimise the risk of its repetition and the occurrence of similar Personal Data Breach;
        - B. take such steps as the Customer may reasonably request and FibreNest may reasonably be able to take to assist the Customer in addressing the adverse consequences for the Customer and

- its affiliates of, and complying with the Customer and its affiliates' obligations under Data Protection Legislation in relation to, the Personal Data Breach; and
- C. report to the Customer affected by the Personal Data Breach, and/or at its direction to it and another person, promptly and at regular intervals, on the steps taken to identify and correct a Personal Data Breach and their results; and
- 6. assist the Customer in its compliance with the Data Protection Legislation, taking into account the nature of the Processing of the End User Data and the information available to FibreNest, relating to:
  - A. the Customer's obligation to respond to lawful requests from a Data Subject for access to, or rectification, erasure or portability or restriction of, or objection to any Processing of their Personal Data, to the extent practicable (including by having appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the Customer's obligation to respond to requests from a Data Subject to exercise his or her right under the Data Protection Legislation) but FibreNest shall not respond to any such request except with the Customer's prior written consent.
  - B. the security of the Processing of the End User Data;
  - C. notification of a Personal Data Breach affecting the End User Data to the Supervisory Authority or the Data Subjects; and
  - D. a data protection impact assessment as may be required by Article 35 of the GDPR and prior consultation with the Supervisory Authority;
- (c) unless Applicable Law requires FibreNest to store a copy of the End User Data, upon expiry or termination of the Contract and at the Customer's option, FibreNest shall delete or return the End User Data within a reasonable time period.
- (d) FibreNest shall make available to the Customer the information demonstrating FibreNest's compliance with its obligations set out in clauses 10.2(b), 10.6 and 10.7.
- (e) The Customer may, subject to 30 days' notice (or if an audit needs to be conducted on an Emergency basis, then as much prior notice as is reasonably practicable), audit FibreNest's compliance with clauses 10.2(b), 10.6 and 10.7. FibreNest shall allow for and reasonably cooperate with the Customer (or a third party auditor appointed by the Customer) to audit FibreNest's compliance, so long as:
  - (i) the Customer
  - (ii) uses its reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt FibreNest's business;
  - (iii) conducts the audit during business hours, unless the audit needs to be conducted on an Emergency basis and the Customer has given notice to FibreNest that an Emergency audit is required;

- (iv) uses its reasonable endeavours to ensure that the conduct of each audit does not cause FibreNest to breach its confidentiality obligations with its other customers, suppliers or any other organisation; and
- (v) FibreNest shall provide the Customer with the necessary instructions and copies of FibreNest's security policies which apply to the Customer (or its third party auditor) undertaking the audit and the Customer or its third party auditors shall comply with FibreNest's security policies and appropriate confidentiality obligations provided to the Customer by FibreNest.
- (f) Without prejudice to the Customer's rights of audit under clause 10.7(e) and FibreNest's obligation to rectify issues identified by any such audit adherence by FibreNest to an approved code of conduct or an approved certification mechanism may be used by FibreNest as an element by which to demonstrate compliance with its obligations set out in clauses 10.2(b), 10.6 and 10.7;
- (g) the Customer may conduct an audit of FibreNest's compliance with its obligations set out in clause 10 only once per Contract Year, except for any additional audits which:
  - (i) the Customer reasonably considers necessary because of genuine and evidentially supported concerns as to FibreNest's compliance with clauses 10.2(b), 10.6 and 10.7 that cannot be resolved without an audit; or
  - (ii) the Customer is required to conduct an audit by Applicable Law or a competent data privacy or other regulatory authority.
- (h) without limiting FibreNest's other obligations under this clause 10, FibreNest shall not disclose End User Data to a third party unless required for the performance of the Service, permitted under the Contract or otherwise required by Applicable Law. If required by Applicable Law FibreNest shall provide as much prior notice as reasonably practicable; and
- (i) FibreNest shall ensure that persons authorised by, or on behalf of, FibreNest to Process the End User Data will be bound by a duty of confidentiality.
- (j) FibreNest shall notify the Customer of proposed changes to its Sub-Processors from time to time, provided that:
  - (i) The Customer shall have 90 days from the date of this notice to object to the use of the new Sub-Processor. FibreNest may use the Sub-Processor during the notification period.
  - (ii) b) if the Customer does not give notice of an objection to the proposed Sub-Processors or changes to those Sub-Processors change within 90 days of the date of this notice, the Customer will be deemed to have authorised the use of those Sub-Processors or changes;
  - (iii) if the Customer does object to the use of a new Sub-Processor, the Customer shall give notice in accordance with clause 21 documenting reasonable concerns why the Sub-Processor will not be able to comply with the Data Protection Legislation; and
  - (iv) if such notice is received within the 90 days set out in clause 10.7(j)(i), the parties will address the Customer's objection in accordance with the dispute resolution set out in clause 17 and FibreNest may use the relevant Sub-

Processor to provide the Service until the objection is resolved in accordance with clause 17;

- (k) FibreNest may use Sub-Processors in accordance with clause 10.7(b)(ii) and will remain responsible to the Customer for the compliance by any Sub-Processor with the terms of this clause 10.7 and the Data Protection Legislation (including by ensuring that data protection obligations in respect of Processing End User Data equivalent to those set out in clause 10.7 of the Contract will be imposed on any Sub-Processors);
- (l) This Contract contains the Customer's complete instructions to FibreNest for the Processing of End User Data. If the Customer wishes to add or amend the instructions for the Processing of End User Data, the Customer will bring the issue to FibreNest's attention in accordance with clause 4.6. If the amended or additional instructions are accepted by FibreNest, the change(s) will be incorporated into this Contract in accordance with clause 18.2.
- (m) the Customer and FibreNest shall comply with applicable Data Protection Legislation; and
- (n) the Customer shall not disclose to FibreNest any Personal Data other than the Personal Data required by FibreNest to perform the Service.

10.8. To the extent permitted by Applicable Law and subject to clause 14,

- (a) a party in breach of the Data Protection Legislation or this clause 10 will be liable to the other for any losses, costs and liabilities (including those arising from claims) incurred or suffered by the other party where those losses, costs and liabilities are caused by, or in connection with, that breach including where the Parties are jointly and severally liable; and
- (b) where the Parties are jointly and severally liable for a claim caused by Processing, neither party will make any payment or any offer of payment to any Data Subject (including third parties acting on behalf of any Data Subject) in response to any complaint or claim for compensation caused by or relating to the Processing of Personal Data, without the prior written agreement of the other party, such agreement not being unreasonably withheld.

## 11. CONFIDENTIALITY

11.1. The parties agree to keep in confidence any information (whether written or oral) of a confidential nature obtained under or in connection with this Contract or the Service. The parties agree not, without the written consent of the other party, to disclose that information to any person other than:

- (a) their employees or professional advisers;
- (b) in the case of FibreNest, the employees of a FibreNest Group Company or its or their suppliers; and
- (c) in the case of the Customer, the employees of a Customer Group Company or its or their sub-contractors or End Users or resellers.

Any disclosure in (a) to (c) above can only be made in order for the party to fulfil its obligations under or in relation to this Contract.



- 11.2. The parties agree not to, without the written consent of the other party, use information of a confidential nature referred to in clause 11.1 above, for the commercial advantage of their businesses.
- 11.3. Clause 11.1 will not apply to:
- (a) any information which is in the public domain other than through a breach of this Contract;
  - (b) information lawfully in the possession of the recipient before the disclosure under this Contract took place;
  - (c) information obtained from a third party who is free to disclose it; and
  - (d) information which a party is required by law to disclose or by any order authority or court of competent jurisdiction provided that prior to such disclosure the party required to disclose the information shall consult with the other as to the proposed form, nature and purpose of the disclosure.
- 11.4. This clause 11 will remain in effect for 5 years after the termination of this Contract.

## 12. MARKETING AND MISREPRESENTATION

- 12.1. The parties undertake (in the case of the Customer, the Customer undertakes for itself and any reseller of the Customer Service) that in relation to their dealings with Third Party CPs, End Users and/or potential End Users they will not:
- (a) represent themselves as each other; or
  - (b) misrepresent their relationship with each other; or
  - (c) misrepresent the nature and/or effect of their contracts with Third Party CPs or End Users; or
  - (d) assert that they have any authority to provide or promote any products or services on behalf of each other.
- 12.2. The Customer also agrees not to represent that:
- (a) the Customer Service is a service provided by FibreNest, except where authorisation has been obtained in accordance with clause 9.7; or
  - (b) the Third Party CP or End User has access to a dedicated FibreNest customer service.
- 12.3. The Customer agrees to use reasonable endeavours to include and maintain in its contracts with any reseller of the Customer Service, conditions equivalent to those contained in clauses 12.1 and 12.2 above, and to enforce such conditions including if appropriate by suspending or terminating the provision of the services under such reseller agreement.

## 13. CHARGES, PAYMENT AND BILLING

- 13.1. The Customer agrees to pay all charges for the Service as shown in the Price List (or as otherwise agreed in writing) and calculated using the details recorded by FibreNest.
- 13.2. The Customer agrees to pay the charges within 30 calendar days of the date of FibreNest's invoice.

- 13.3. All charges exclude Value Added Tax (VAT) which is charged at the applicable rate and is payable by the Customer. FibreNest will provide a valid tax invoice in accordance with the applicable invoicing requirements. Charges that are compensatory are not subject to VAT.
- 13.4. Rental for the Service will be chargeable from, and shall accrue from, the Go-Live Date, and shall be payable in accordance with FibreNest's invoice and clause 13.2 above.
- 13.5. The Connection Charge will be chargeable from, and be accrue from, the Go-Live Date and shall be payable in accordance with FibreNest's invoice and clause 13.2 above, which will be the first invoice raised following the Go-Live Date.
- 13.6. The Customer agrees to pay rental in accordance with FibreNest's billing cycle. If FibreNest begins, or ceases, the Service on a day which is not the first or last day of the period by reference to which FibreNest charges rental, FibreNest will apportion rental on a daily basis for the incomplete period. Rental will be payable in quarterly or monthly (depending upon the option chosen by the Customer) instalments in advance but FibreNest may on occasion bill the Customer in arrears.
- 13.7. FibreNest:
- (a) may charge daily interest on late payments not the subject of an Invoice Dispute or dispute at the Interest Rate both before and after any judgment for the period beginning on the date on which payment is due and ending on the date payment is actually made.
  - (b) must issue an invoice within twelve (12) months of the date the charge for a Service was incurred (in the case of a recurring charge) or the Service was supplied (in other cases). A charge shall only be valid, and the Customer shall only be obliged to make payment, if the charge is raised within the periods specified above.
- 13.8. If the Customer disputes any invoice, it will notify FibreNest in writing within fourteen (14) days of the date of the invoice giving its reasons. Notification of an Invoice Dispute under this clause 13.8 is without prejudice to either party's right to refer the subject matter of that Invoice Dispute to Ofcom.
- The amount in dispute may be withheld by the Customer until the Invoice Dispute is resolved and the balance shall be due and payable on the due date. The Customer is not entitled to withhold payment of any amount not in Invoice Dispute. The Customer is not entitled to withhold any payments to FibreNest on the grounds that the Customer has a dispute with the End User(s) or reseller(s).
- Payment of the invoice in whole, or in part, by the Customer does not affect the right of the Customer to dispute all or some of the charges of an invoice at a later date in accordance with this clause 13.8.
- 13.9. FibreNest may make an Invoice Correction to an invoice sent to the Customer providing it notifies the Customer within twelve (12) months of the date of the invoice giving its reasons.

### **Credit Vetting**

- 13.10. During the term of this Contract, the Customer acknowledges that it may become subject to FibreNest's Credit Vetting Policy if the following circumstances apply:

- (a) there is material adverse change in the Customer's financial position which results in a reduction in the Customer's issued credit rating or (in the absence of such a credit rating) a financial score provided by an accredited ratings agency; and
- (b) there has been a recent or subsequent non-payment or partial non-payment (by five days or more) of an invoice (where the non-payment or partial non-payment is not the subject of a bona fide dispute) for the Services under this Contract.

13.11. FibreNest may acting reasonably and subject to the requirements of clause 13.12 below, require that the Customer provides a deposit or guarantee or payment for the Service in advance. If the Customer refuses to provide such deposit or guarantee or payment for the Service in advance, FibreNest may refuse to accept any orders for the Service until such deposit or guarantee or payment for the Service in advance is provided or the outstanding non-disputed charges are fully paid, whichever is earlier.

13.12. Any deposit or guarantee or payment for the Service in advance required to be provided by the Customer under clause 13.11 above, shall be no greater than the reasonably estimated value of charges under this Contract for three months and the amount or requirement for the deposit or guarantee or payment for the Service in advance shall be reviewed by the parties at regular intervals (and at least annually).

13.13. Where the Customer provides a deposit it will be held until 12 consecutive months of payments have been paid on or by the due date after which the Customer will have the value of their deposit credited against FibreNest invoices from that date. Interest on deposits held by FibreNest will be paid at the Adjustment Interest Rate.

13.14. FibreNest shall advise of any proposed update to the FibreNest Credit Vetting Policy by issuing a notification at least 28 calendar days prior to such update taking effect. Where the Customer has nominated a finance contact, FibreNest shall also issue the update via email to the nominated finance contact.

13.15. This clause 13 shall continue in force after the termination or expiry of this Contract.

## 14. LIMITATION OF LIABILITY

14.1. Neither party excludes or restricts its liability for:

- (a) death or personal injury caused by its negligence or that of its employees, subcontractors or agents acting in the course of their employment or agency;
- (b) any fraudulent act or omission;
- (c) fraudulent misrepresentation or misstatement; or
- (d) any liability that may not otherwise be limited or excluded by law.

14.2. Except as set out in clause 14.1 and subject to express terms of this Contract to the contrary, neither party shall be liable whether based on a claim in contract, tort (including negligence) breach of statutory duty, misrepresentation or otherwise arising out of, or in relation to this Agreement, for:

- (a) loss of time (whether direct or indirect);
- (b) wasted expenditure (whether direct or indirect);

- (c) loss of anticipated savings (whether direct or indirect);
  - (d) loss of opportunity (whether direct or indirect);
  - (e) loss and/or corruption of data (whether direct or indirect);
  - (f) loss of revenue (whether direct or indirect); or
  - (g) any indirect or consequential loss whatsoever (even if the liable party has been advised of the possibility of such loss).
- 14.3. Notwithstanding clause 14.2 and subject to clause 14.4 a party may claim for the following direct losses:
- (a) loss of profit;
  - (b) increased costs of customer handling;
  - (c) damage to, loss or destruction of real property or tangible property; and/or
  - (d) costs incurred in procuring services substantially similar to the Services provided under this Agreement.
- 14.4. Subject to any express terms of this Agreement to the contrary, in relation to any liability arising out of or in relation to this Contract either party's liability to the other party in contract, tort (including negligence), breach of statutory duty or otherwise for direct loss or damage howsoever arising (other than loss or damage of the type referred to in clause 14.5) for all events of liability connected or unconnected in each Contract Year is limited to the liability cap. In each Contract Year, other than the first Contract Year, the liability cap will be £5 million in total or an amount equal to the Annual Revenue, whichever is the lesser but not less than £250 000 and in the first Contract Year the liability cap will be £5 million in total.
- 14.5. If a party is liable to the other party in relation to any claim by the other party for damage to, loss or destruction of real property or tangible property, the first party's liability shall be limited to £1 million for all such claims connected or unconnected in any Contract Year.
- 14.6. If the Customer is entitled to an allowance or payment under the Service Levels, the parties agree that, subject to clause 14.1 and the Service Levels, FibreNest's liability in relation to each entitlement to an allowance or payment shall be limited to the compensation for that particular entitlement and that an allowance or payment is made in full and final settlement in relation to all matters relating to such entitlement.
- 14.7. Any amounts paid out by FibreNest pursuant to the Service Levels shall never exceed the value of the Charges attributable to the relevant Service.
- 14.8. Subject to the exclusions in clause 14.2, each party's liability to the other in contract, tort (including negligence), breach of statutory duty, or otherwise for any loss or damage in connection with a breach of clause 10 and/or a claim under clauses 14.10 or 14.11 below (a "Relevant Event") for all Relevant Events connected or unconnected in each Contract Year is limited, in the aggregate in each Contract Year, to £10 million.
- 14.9. Notwithstanding clause 14.8, a party's liability under or in connection with this Contract for a Fine shall not exceed £5 million in each Contract Year.
- 14.10. Subject to clause 14.9 above and clause 14.11 below, if either Party (the "Fined Party") incurs a fine or other monetary penalties or compensatory awards issued by a court or regulatory body (a "Competent Authority") as a result (in whole or in part) of the other party's

("Breaching Party") act or omission in connection with its obligations under Data Protection Legislation ("Fine"), and the Competent Authority elects not to issue that Fine to the Breaching Party directly then subject to: (i) the exclusions in clause 14.2; and (ii) the liability caps set out in clauses 14.8 and 14.9 above, the Breaching Party shall, to the extent that its act or omission can be evidenced to be the cause of the Fine, indemnify the Fined Party for that proportion of the Fine that the Breaching Party would have been responsible for if the Competent Authority had issued a Fine to the Breaching Party in respect of its act or omission directly and for any incidental costs necessarily incurred by the Fined Party directly relating to the same.

14.11. The Fined Party may claim the benefits of the indemnity in clause 14.10 only if, where requested to do so by the Breaching Party promptly following notification by the Fined Party of the Fine:

- (a) the Fined Party has used reasonable endeavours to ensure that the Breaching Party has been given the opportunity to make representations to the Competent Authority either directly or through the Fined Party (or its third party) concerning the circumstances of any breach; and
- (b) the Fined Party initiates (either itself or through a third party) judicial review of the Fine and, where possible, gives the Breaching Party either sole conduct of the proceedings or, if the Fined Party wishes to be involved in the judicial review or also wishes to challenge the determination, joint control,

provided that :

- (i) the Breaching Party: shall indemnify the Fined Party for any costs reasonably and properly incurred by the Fined Party in acting pursuant to this clause 14.11; and
- (ii) the obligation in clause 14.11(b) shall not apply unless the Breaching Party produces evidence to the Fined Party's reasonable satisfaction that judicial review of the Fine would not be considered vexatious.

14.12. Notwithstanding clauses 14.8, 14.9, 14.10 and 14.11, to the extent that there is a loss or corruption of Personal Data arising out of or in connection with a breach of clause 10, the exclusion in clause 14.2(e) shall not apply.

14.13. For the avoidance of doubt a Fine shall be deemed to be a direct loss or damage in respect of this Agreement.

14.14. Each provision excluding or limiting liability operates separately. If any provision (or part thereof) is held by a court to be unreasonable or inapplicable, the other parts shall continue to apply.

14.15. This clause 14 shall continue in force after the termination or expiry of this Contract.

## 15. FORCE MAJEURE

15.1. To the extent a party is delayed in meeting or fails to perform an obligation under this Contract directly caused by Force Majeure, the party affected shall have no liability to the other for such delay or failure to perform provided that:

- (a) the affected party shall continue performing those obligations under this Contract that are not affected by Force Majeure and in performing those obligations shall deploy its

resources so that (when taken with obligations to third parties) there is no undue discrimination.

- (b) the affected party shall promptly notify the other party of the Force Majeure, its geographic scope together with, if practicable, an estimate of the impact on the Service and the extent and duration of its inability to perform or delay in performing its obligations and any mitigating actions it has or is intending to take. The format and detail of notice shall be consistent with any industry-agreed arrangements governing such notifications. The scope of any Force Majeure notice must be no more than necessary to particularise the impact of the event that is beyond that parties' control.
- 15.2. If the affected party is prevented from or delayed in performing its obligations under this Contract as a result of Force Majeure, the other party shall be released to the equivalent extent from its obligation (including to pay any charge for a Service that is not provided) in relation thereto.
  - 15.3. Upon cessation of the effects of Force Majeure any party relying on it must forthwith give notice to the other party of such cessation.
  - 15.4. Force Majeure does not discharge any party relying on it from any obligation accrued beforehand. Any party relying on Force Majeure must continue to perform those of its obligations not affected by Force Majeure.
  - 15.5. Any party affected by Force Majeure shall use reasonable endeavours to mitigate as soon as practicable those consequences of that Force Majeure event which have affected its obligations under the Contract. The affected party shall provide an estimated time of clearance for any Force Majeure event. If those times are missed information shall be provided detailing the reasons. The affected party shall at regular intervals keep the other party fully informed about the status of the Force Majeure event and the extent to which it is preventing the first party from performing those obligations.
  - 15.6. At the time of notification by FibreNest of Force Majeure, the Customer immediately has the right to challenge FibreNest's notice of Force Majeure. Where a Customer challenges a Force Majeure notice at the time of notification, FibreNest must provide the Customer with all the evidence FibreNest has relied on to support the notice. If, following this, the Customer still disputes the Force Majeure notice the Customer shall be entitled to escalate the disputed Force Majeure notice in accordance with the process set out at clause 17.

## 16. CONDUCT OF INDEMNIFIED EVENTS

- 16.1. The indemnified party must notify the indemnifying party of any related claims or legal proceedings and use reasonable endeavours to do so within 14 days of receipt and if it fails to do so, any additional cost reasonably incurred as a consequence of that failure may be deducted from the indemnified sum.
- 16.2. The indemnifying party may assume conduct of the claim providing it notifies the indemnified party of such intention within 5 days of receipt of the notification in clause 16.1. The indemnified party may re-assume conduct of the claim at any time if it reasonably believes a failure to do so would be prejudicial to its interests.
- 16.3. The party assuming conduct of the claim must:

- (a) actively consult with the other party regarding the conduct of any action and take their views into account; and
- (b) make no admissions relating to any claims or legal proceeding without the prior written consent of the other party which shall not be unreasonably withheld; and
- (c) not agree any settlement of such claims or legal proceedings nor make any payment on account of them without the prior written consent of the other party, which shall not be unreasonably withheld.

## 17. ESCALATION AND DISPUTE RESOLUTION

- 17.1. Each party shall use reasonable endeavours to resolve disputes with the other. A dispute will first be escalated to the nominated contacts for disputes set out in the Contact List.
- 17.2. If the dispute is not resolved within 30 calendar days of the matter being raised and it relates to the accuracy of an invoice delivered under this Contract then the parties shall refer the dispute for investigation and resolution by such chartered accountants as the parties may agree, or in default of agreement, as may be nominated by the President of the Institute of Chartered Accountants in England and Wales. Such chartered accountants shall act as an expert and not as an arbitrator and their decision, in the absence of evidence of manifest error, shall be final and binding.
- 17.3. For any dispute not covered by clause 17.2, if the dispute is not resolved within 30 calendar days of the matter being raised then the parties (if they agree) shall have the option of:
  - (a) referral of the dispute to a mediator in accordance with clause 17.4; or
  - (b) referral of the dispute for early neutral evaluation; or
  - (c) pursuing any other dispute resolution option which the parties agree is appropriate.
- 17.4. If the dispute is referred to a mediator:
  - (a) the mediator will be appointed by agreement of the parties. If the parties fail to agree within 3 calendar days of a proposal by one party, the mediator will be appointed by the Centre for Dispute Resolution (CEDR);
  - (b) all negotiations connected with the dispute will be conducted in confidence and without prejudice to the rights of the parties in any further proceedings; and
  - (c) if the parties reach agreement on the resolution of the dispute, the agreement will be put in writing and once signed by the parties will be binding on them. Any such agreement will constitute confidential information for the purposes of the confidentiality provisions in this Contract.
- 17.5. If the parties are not prepared to agree to the dispute being referred to a mediator or fail to reach agreement within 2 months of the mediator being appointed, then either party may exercise any remedy that it has under this Contract.
- 17.6. The third party costs of alternative dispute resolution shall be shared equally between the parties unless determined otherwise by competent or authorised bodies. Nothing in this clause 17 shall prevent the parties from agreeing that any mediator, adjudicator, arbitrator, court or other competent person or body selected by the parties for the purposes of

alternative dispute resolution may require the costs of the alternative dispute resolution to be paid by one of the parties on the resolution of the dispute.

- 17.7. Nothing in this clause 17 shall prevent either party from referring the dispute to Ofcom in accordance with any right either party may have to request a determination or from taking any other appropriate steps for its resolution.

## 18. CHANGES TO THIS CONTRACT

- 18.1. FibreNest may change this Contract at any time by giving not less than the 28 days' notice (the "Relevant Notice Period") before the change takes effect in order to:

- (a) comply with any legal or regulatory obligation; or
  - (b) change the charges payable under this Contract; or
  - (c) maintain the integrity or security of the Service or FibreNest Network; or
  - (d) introduce or withdraw Service features (subject to such notice as is required under the applicable regulatory requirements); or
  - (e) introduce improved service levels; or
  - (f) introduce process changes to improve the quality of the Service; or
  - (g) make corrections to typographical errors;
- providing that the changes in clauses 18.1 (c) to (g) inclusive shall not materially adversely affect the Service.

- 18.2. FibreNest may also introduce changes to this Contract at any time which are proposed by FibreNest or the Customer and which are agreed by the Parties.

- 18.3. FibreNest may amend, change, remove or replace the Service Description on reasonable notice.

- 18.4. Nothing in this clause 18 shall prevent either party from referring a dispute to Ofcom in accordance with any right either party may have to request a determination or from taking any other appropriate steps for its resolution.

## 19. TRANSFER OF RIGHTS AND OBLIGATIONS

- 19.1. Neither party may transfer any of their rights or obligations under this Contract, without the written consent of the other, such consent not to be unreasonably withheld or delayed, except that:

- (a) the Customer may transfer its rights and obligations by way of novation to an eligible Customer Group Company subject to FibreNest's credit vetting policy and the signing of a novation agreement in such form as FibreNest shall reasonably require; and
- (b) FibreNest may transfer its rights or obligations (or both) to a FibreNest Group Company without consent provided that it notifies the Customer in writing in advance that it intends to do so.



## 20. ENTIRE AGREEMENT

- 20.1. This Contract contains the whole agreement between the parties and supersedes all previous written or oral agreements relating to its subject matter.
- 20.2. The parties acknowledge and agree that:
- (a) the parties have not been induced to enter into this Contract by, nor have relied on any statement, representation, warranty or other assurance not expressly incorporated into it; and
  - (b) in connection with this Contract the only rights and remedies of the parties in relation to any statement, representation, warranty or other assurance are for breach of this Contract and that all other rights and remedies are excluded.
- 20.3. Nothing contained in clauses 20.1 and 20.2 above shall affect the rights or remedies of the parties in respect of any fraudulent misrepresentation.
- 20.4. A person who is not a party to this Contract has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Contract.

## 21. NOTICES

- 21.1. All notices given under this Contract must be in writing and may be delivered by hand, email or first class post to the following:
- (a) to the appropriate person for that matter indicated on the Contact List;
  - (b) for all other matters, in the case of notices from the Customer, to the Customer's FibreNest Account Manager;
  - (c) for all other matters, in the case of notices from FibreNest, to the Customer's registered office address or any alternative address or e-mail address which the Customer notifies to FibreNest,
- provided that in all cases of (a), (b) and (c), any notice relating to contract termination, suspension or breach must be delivered by hand or first class post.
- 21.2. Subject to clause 21.1 above, a notice is duly served:
- (a) if delivered by hand, at the time of delivery;
  - (b) if sent by first class post, three Working Days after the date of posting; and
  - (c) if sent by email, at the time of transmission.

## 22. SEVERABILITY

If any Court of competent jurisdiction holds any provision of this Contract invalid, illegal or unenforceable for any reason, such provision shall be severed and the remainder of its provisions will continue in full force and effect as if this Contract had been executed with the invalid, illegal or unenforceable provision omitted.

## 23. NO WAIVER

No failure to exercise nor any delay in exercising any right, power or remedy precludes any other or further exercise of that right, power or remedy. A waiver is not valid or binding on the party granting that waiver unless made in writing.

## 24. LAW

The law of England and Wales governs this Contract and both parties submit to the exclusive jurisdiction of the English Courts.