

## SELF BUILD FIBRE INTO COLOCATION EXCHANGE AGREEMENT

THIS AGREEMENT is made on

BETWEEN

1.

2.

### RECITAL

- A. The Parties have entered into an agreement which sets out the terms and conditions which each Party will permit the other Party to access its Colocation Exchange Site to install equipment for the purpose of operating local access links.
- B. Each Party wishes to install Self-Build Fibre for connecting to its equipment installed at the other Party's exchange, and this Agreement sets out the terms and conditions which each Party will permit the installation of Self-Build Fibre at its Colocation Exchange Site for an Agreed Use specified in this Agreement.

### OPERATIVE PROVISIONS

#### 1. DEFINITIONS AND INTERPRETATION

- 1.1 The following terms used in this Agreement will have the following meaning, unless a contrary intention is specified:

**Agreed Use** in relation to a Self-Build Fibre means using the Self-Build Fibre:

- (a) only to connect and provide transmission capacity between the Requester Equipment and other equipment which constitutes part of the Requesting Operator's Network and which is located at the Requesting Operator's premises; and
- (b) in respect of a Colocation Exchange Site, only to carry those traffic that originates from or terminates at an end-customer served by the Requesting Operator using a local access link provisioned by the Providing Operator under the Local Access Link Agreement in respect of that Colocation Exchange Site; and
- (c) in a manner that is not in breach of clause 9.1.

**Application** means a written application made by the Requesting Operator in accordance with this Agreement for the Providing Operator to accommodate a Self-Build Fibre in a specified Colocation Exchange Site.

**Business Day** means a day other than a Saturday, Sunday and public holiday.

**Cable Connecting Point** means that end of the Self-Build Fibre which is located in the Requesting Operator's Manhole.

**Cable Work** means any type of work to be performed on any part of the Self-Build Fibre pursuant to clause 10, including inspection, maintenance, realignment, rearrangement, removal and replacement.

**Charges** are the following charges payable by the Requesting Operator to the Providing Operator:

- (a) Feasibility Study Charge;
- (b) Work Plan Charge;
- (c) Preparation Charge;
- (d) Recurrent Charge;
- (e) charges for Cable Work; and
- (f) other charges payable to the Providing Operator under this Agreement.

**Confidentiality Agreement** means the Confidentiality Agreement described in Schedule 3.

**Connecting Facility** means the Providing Operator's ducting facilities (including any access point) between the Connecting Piece and the Colocation Exchange Lead-in Chamber.

**Connecting Piece** means the Providing Operator's duct not exceeding 1 meter in length used to connect the Requesting Operator's duct to the Connecting Facility or the Colocation Exchange Lead-in Chamber as specified in the Work Plan.

**Contract** means the contract formed between the Parties in respect of a Self-Build Fibre when the Requesting Operator accepts a Work Plan.

**Colocation Exchange Lead-in Chamber** means the Providing Operator's lead-in access chamber in respect of a Colocation Exchange Site.

**Colocation Exchange Lead-in Facility** in relation to a Colocation Exchange Site means the Colocation Exchange Lead-in Chamber and the Providing Operator's other facilities between the Colocation Exchange Lead-in Chamber and the Colocation Exchange Trunking Facilities, including lead-in duct and cable chamber in relation to that Colocation Exchange Site.

**Colocation Exchange Site** means the premises of the Providing Operator's exchange to which the Requesting Operator's application for access under the Local Access Link Agreement has been approved by the Providing Operator under that agreement.

**Colocation Exchange Trunking Facility** in relation to a Colocation Exchange Site means the trunking, risers, trays, other suitable fixture and other space in the Colocation Exchange Site for accommodating cables that run from the Colocation Exchange Lead-in Facility to the Requester Equipment Space.

**Duct Jointing Point** means the point at which the Connecting Piece is joined to the Requesting Operator's duct.

**Feasibility Study** means desktop study and physical survey, including but not limited to duct rodding, conducted by the Providing Operator as to whether there is available Connecting Facility, Colocation Exchange Lead-in Facility, and Colocation Exchange Trunking Facility, whether a Connecting Piece can be installed, and to locate suitable facility and cable route for the Self-Build Fibre proposed in an Application.

**Feasibility Study Charge** means the amount payable by the Requesting Operator to the Providing Operator for conducting the Feasibility Study.

**Force Majeure** means anything outside reasonable control of a Party including acts of God, industrial disputes of any kind, war declared or undeclared, blockade, disturbance, lightning, fire, earthquake, storm, flood, explosion or meteor, governmental restraint, expropriation or prohibition, any action or event that infringes property rights, inability or delay in granting or obtaining governmental approvals, consents, permits, licences or authorities including but not limited to, from Government Agencies, or termination or withdrawal of such approvals, consents, permits or licences.

**FTNS Licence** means the Fixed Telecommunication Network Services licence.

**Government Agency** means any Government or Government Department, governmental, semi-governmental or judicial person or a person (whether autonomous or not) charged with the administration of any applicable law, including but not limited to the Telecommunications Authority.

**Installation and Connection Specifications** means the technical specifications which apply to:

- (a) the Self-Build Fibre; and
- (b) the connection and continuing attachment of the Requesting Operator's duct to the Connecting Piece,

which are included in Schedule 2 and as the same may be amended and/or updated from time to time by the Providing Operator after consultation with the Requesting Operator.

**Local Access Link Agreement** means the agreement described in Schedule 3 and which sets out the terms and conditions for each Party to access space in the other Party's exchange for the purpose of operating local access links.

**Loss** means loss, cost, damage, expense and charge.

**Minimum Contract Period** in relation to a Self-Build Fibre means a period of months commencing from the Preparation RFU Date of that Self-Build Fibre.

**Network** means, in respect of each Party, the telecommunication or other fixed network which that Party is entitled to install and operate in Hong Kong pursuant to its Licence granted under the Telecommunications Ordinance.

**Ordinance** means the Telecommunication Ordinance (Cap. 106) of Hong Kong.

**Party** means a Party to this Agreement.

**Preparation RFU Date** means the date of a notice issued by the Providing Operator informing the Requesting Operator that the Preparation Work is completed.

**Preparation Charge** means the charge payable to the Providing Operator by the Requesting Operator for the Preparation Work including the cost and expenses incurred by the Providing Operator in applying for the necessary permits as described in clause 7.4.

**Preparation Work** means the work to be conducted by the Providing Operator, at the Requesting Operator's costs to make ready facilities and to install the Self-Build Fibre including but without limitation:

- (a) installing the Connecting Piece;
- (b) preparing the Connecting Facility, Colocation Exchange Lead-in Facility and the Colocation Exchange Trunking Facility for pulling the Self-Build Fibre through, including clearing blockages, repair and reinforcement work, incidental civil and sealing work;
- (c) modifying, altering, moving or relocating facilities or equipment of the Providing Operator, or any third party located within the Connecting Facility, Colocation Exchange Lead-in Facility and the Colocation Exchange Trunking Facility which could be damaged, interfered with or otherwise adversely impacted by the installation and operation of the Self-Build Fibre;
- (d) supervision of the Requesting Operator's Work;
- (e) pulling the cable to be used as Self-Build Fibre from the Cable Connecting Point to the Requester Equipment Space in relation to the Colocation Exchange Site; and
- (f) any other work to be undertaken by the Providing Operator as agreed between the Parties.

**Proposed RFU Date** means the Providing Operator's proposed Preparation RFU Date as set out in the Work Plan.

**Providing Operator** means the Party operating a Colocation Exchange Site to which the Requesting Operator has made an Application in accordance with the terms and conditions of this Agreement.

**Providing Operator's Facility** means the Connecting Piece, the Connecting Facility (if applicable), the Colocation Exchange Lead-in Facility, and the Colocation Exchange Trunking Facility used for accommodating a Self-Build Fibre.

**Recurrent Charge** means the monthly charges payable by the Requesting Operator to the Providing Operator for accommodating the Self-Build Fibre in the Providing Operator's facilities under this Agreement.

**Requester Equipment** means the Requesting Operator's equipment that the Providing Operator has agreed to be installed at the Colocation Exchange Site for the sole purpose of operating local access links in accordance with the Local Access Link Agreement.

**Requester Equipment Space** means the space allocated to the Requesting Operator under the Local Access Link Agreement for installing Requester Equipment .

**Requesting Operator** means the Party proposing to establish a Self-Build Fibre into a Colocation Exchange belonging to the Providing Operator in accordance with the terms and conditions of this Agreement.

**Requesting Operator's Manhole** means the duct access point of the Requesting Operator (as identified in the Work Plan) that is located closest to the Connecting Piece and connected to the Connecting Piece with a duct provided by the Requesting Operator.

**Requesting Operator's Works** means all work necessary to connect the Requesting Operator's Manhole to the Connecting Piece and incidental sealing and civil work, install cable in the Requesting Operator's Manhole for the Providing Operator to pull the same to the Requester Equipment Space, and other work to be performed by the Requesting Operator as agreed between the Parties.

**Review Event** is as defined in clauses 4.1 and 4.3.

**Self-Build Fibre** means that section of an optical fibre (with an external diameter not exceeding 25 millimeters) between the Cable Connecting Point and the Requester Equipment Space, to be installed in the Providing Operator's Facilities in accordance with the terms and conditions of this Agreement, connected to the Requester Equipment and the Cable Connecting Point, and used by the Requesting Operator solely for the Agreed Use.

**Tax** means any present or future tax, levy, impost, deduction, charge, duty, compulsory loan or withholding tax (together with any related interest, penalty, fine and expense in connecting with any of them) levied or imposed by any Government Agency, other than those imposed on overall income.

**Telecommunications Authority** or TA has the meaning given to the term "Authority" in the Ordinance.

**Work Plan** means the plan prepared by the Providing Operator described in clause 5.2.

**Work Plan Charge** means the amount payable by the Requesting Operator to the Providing Operator for preparing the Work Plan.

## 1.2 Interpretation

In this Agreement:

- (a) headings are for convenience only and do not affect the interpretation of this Agreement;
- (b) the singular includes the plural and vice versa;
- (c) the word "person" includes a body corporate, an unincorporated association or an authority;
- (d) a reference to a document includes any amendment, replacement or novation of it;
- (e) a reference to a statute, ordinance or by-law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (f) if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated exclusive of that day;
- (g) derivatives of a defined term have the same meaning ascribed to that defined term with necessary alterations or changes;
- (h) the provisions listed after the word "including" in any clause is to be interpreted as being without limitation to the generality of that clause;
- (i) a reference to "days" means calendar days unless otherwise stated in this Agreement;
- (j) a reference to this Agreement includes all the Schedules and Attachments, and their contents will have the same force and effect as if expressly set out in the body of this Agreement;
- (k) a reference to dollars or "\$" is to Hong Kong dollars.
- (l) a reference to a clause shall, unless the context otherwise required, means a reference to a clause in this Agreement.

1.3 If there is any inconsistency between clauses 1 to 24 of this Agreement and a Schedule or between any Schedule, clauses 1 to 24 of this Agreement shall prevail.

## 2. SELF-BUILD FIBRE APPLICATION

2.1 The Requesting Operator may make an Application from time to time in accordance with this Agreement.

2.2 The Requesting Operator may only make an Application in relation to a Colocation Exchange Site:

- (i) where a RFU Notice (as defined in the Local Access Link Agreement) has been issued by the Providing Operator under that agreement, and
- (ii) provided that no suspension or termination notice has been given

under the Local Access Link Agreement in respect of the same Colocation Exchange Site to which the Application applies.

2.3 Each Application must be in respect of one Self-Build Fibre. Each Application must be in writing, incorporate maps as appropriate, and must contain the following information:

- (a) the name and location of the Colocation Exchange Site at which Requesting Operator seeks to establish a Self-Build Fibre;
- (b) details, including type, size and capacity of the Requesting Operator's Self-Build Fibre;
- (c) the proposed Requesting Operator's Work (including work nature) and the name of the Requesting Operator's contractor proposed to undertake the Requesting Operator's Work;
- (d) the date proposed for installation of the Self-Build Fibre; and
- (e) such other information reasonably requested by the Providing Operator prior to submission of the application to assess the Application.

2.4 Requesting Operator is deemed to have included in each Application a confirmation that:

- (a) the Requesting Operator's Work and the Self-Build Fibre conforms with the Installation and Connection Specifications; and
- (b) it will pay the Feasibility Study Charge and the Work Plan Charge, subject to the Providing Operator notifying the Requesting Operator in writing of the Feasibility Study Charge and Work Plan Charge and the Requesting Operator agreeing in writing to pay the same prior to such work being conducted in each case.

### 3. RECEIPT OF APPLICATION

3.1 After the receipt of an Application in writing from the Requesting Operator, the Providing Operator must within Business Days:

- (a) acknowledge receipt of the Application in writing; or
  - (b) notify the Requesting Operator in writing:
    - (i) if there are any apparent errors or inconsistencies in the Application;
    - (ii) of any further information that is reasonably required by the Providing Operator for the purpose of assessing the Application; and
    - (iii) of any factors that may make it not reasonably practical to fulfill the Application in accordance with its terms.
- 3.2 Within Business Days of the Providing Operator's acknowledgment under clause 3.1, the Requesting Operator must provide the Providing Operator in writing with such further information that the Providing Operator has requested under clause 3.1.
- 3.3 Subject to a Review Event, within Business Days of receipt of information from the Requesting Operator under clause 3.2, the Providing Operator will inform the Requesting Operator in writing the amount payable for the Feasibility Study Charge and the Requesting Operator must agree to the Feasibility Study Charge in accordance with Schedule 1.
- 3.4 In consideration of the payment of the Feasibility Study Charge by the Requesting Operator, the Providing Operator will commence the Feasibility Study and inform the Requesting Operator of the results of the Feasibility Study within Business Days of receiving the Requesting Operator's written acceptance to pay the Feasibility Study Charge.
- 3.5 The Providing Operator may not be able to respond within the time limits stated in this clause 3 if:
- (a) the Providing Operator receives more than 2 Applications in respect of any one of the following areas (Hong Kong Island, Kowloon or New Territories) from the Requesting Operator and third parties within any week period. For the avoidance of doubt, the Providing Operator will process a maximum of 2 applications per area within any four week period;
  - (b) special requirements such as duct rodding are required in conducting the Feasibility Study; or
  - (c) any third party approval is required to carry out any aspect of the Feasibility Study,
- in which case the Providing Operator may, without liability, defer assessment of an Application until such time as the number of pending Applications in respect of any one such area falls to two or less, third party approval is granted or the special requirements are fulfilled.
- 3.6 The Requesting Operator must pay the Feasibility Study Charge in accordance with Schedule 1, irrespective of the results of the Feasibility Study and irrespective of

whether or not the relevant Application is rejected after completion of the Feasibility Study (in accordance with clause 4.1).

#### 4. FEASIBILITY AND PROCESSING OF APPLICATIONS

4.1 Notwithstanding anything else contained in this Agreement, the Providing Operator may reject an Application in writing including the reason for rejection for any of the following reasons (**Review Event**):

- (a) the Application does not meet all the requirements set out in clause 2;
- (b) accommodating the Self-Build Fibre could not be achieved without resulting in, or unreasonably risking, an infringement of the right of a third party, or a breach of the Providing Operator's obligation towards another party with in situ cable or equipment; or
- (c) approving an Application is in the reasonable opinion of the Providing Operator a breach of any law, licence, permit or approval issued by any Government Agency, or an infringement of the right of the owner of the land in which the facilities in which the Self-Build Fibre is proposed to be contained, or a breach of any arrangement with a third party having a property interest therein; or
- (d) there is any technical reason including site constraints, engineering, technical feasibility, operating or safety issues which renders it not practicable to install a suitable Connecting Piece or to accommodate the Self-Build Fibre in the Providing Operator's Facility under the circumstances; or
- (e) no space is available to accommodate the Self-Build Fibre in any part of the Providing Operator's Facility; or
- (f) the Requesting Operator is in arrears to the Providing Operator for any payments due under this Agreement or the Local Access Link Agreement; or
- (g) a suspension or termination notice has been issued under the Local Access Link Agreement or this Agreement.

4.2 For the purpose of clause 4.1(e) space or facilities is considered as available if all the conditions set out in the following paragraphs of this clause 4.2 are satisfied:

- (a) there is sufficient currently unused space in the Providing Operator's Facility after taking into consideration space and facilities that are required for the normal operational requirements of the Providing Operator, and such space and facilities are :
  - (i) not needed for the Providing Operator's reasonable maintenance requirements and are not reasonably required by the Providing Operator during the period of years after the installation date proposed in the Application, on the basis of the Providing Operator's current network and business plans as at the date of receipt of that Application; and

(ii) not the subject of an Application from a third party on or before the date of receipt of the Application by the Providing Operator; and

(b) the Providing Operator considers that accommodating the Requesting Operator's Self-Build Fibre would leave sufficient space or facilities for the requirements of Applications from third parties.

**4.3** The Providing Operator must notify the Requesting Operator if any of the following matters affect an Application (**Review Event**):

(a) the Application does not contain sufficient information for the Providing Operator to consider the Application;

(b) if the Requesting Operator's Self-Build Fibre does not comply with the Installation and Connection Specifications or will otherwise be unsafe or is interfering with any in situ cable or equipment;

(c) the Providing Operator requires more time to complete the Feasibility Study because of the number of Applications received by the Providing Operator; or

(d) any of the matter set out in clause 4.1.

**4.4** If the Review Event set out in clause 4.3(c) applies to an Application, the Parties will discuss in good faith on extending the time available to the Providing Operator to conduct the Feasibility Study.

## **5. DESIGN PHASE AND WORK PLAN**

**5.1** Should the Feasibility Study indicate that the Application is feasible, then the Providing Operator must within Business Days of notifying the Requesting Operator of the results of the Feasibility Study, arrange a meeting with the Requesting Operator to discuss the Application and the Requesting Operator's Work and the Work Plan Charge.

**5.2** When written agreement is reached in respect of the Work Plan Charge in accordance with Schedule 1 and all technical matters relevant to the planning and design for accommodating the Self-Build Fibre, the Providing Operator will prepare and send to the Requesting Operator within Business Days of such written agreement a Work Plan setting out information on:

(a) whether the Connecting Piece will be attached to the Colocation Exchange Lead-in Chamber or the Connecting Facility;

(b) the location of the Duct Jointing Point;

(c) the location of the Requesting Operator's Manhole;

(d) the Requesting Operator's Work;

(e) the Preparation Work.

- (f) the proposed Charges; and
- (g) the Proposed RFU Date.

## 6. FORMATION OF A CONTRACT

- 6.1 The Requesting Operator may accept a Work Plan in writing within Business Days of receipt. Upon the Requesting Operator's written acceptance of the Work Plan, a Contract in relation to the subject Self-Build Fibre is deemed to be formed between the Parties incorporating the Work Plan and clauses 6 to 24 (both inclusive) of this Agreement.
- 6.2 If the Requesting Operator does not accept a Work Plan in its entirety within Business Days of receipt, it is deemed to have rejected the Work Plan. If a Work Plan is rejected or deemed to be rejected, the Requesting Operator must upon demand pay the Providing Operator the Work Plan Charge in accordance with Schedule 1.
- 6.3 The Providing Operator is under no obligation to commence any Preparation Work until a Contract is formed.
- 6.4 If the Requesting Operator wishes to vary any part of a Contract the Providing Operator will consider whether the requested variation can reasonably be implemented and whether there should be any associated changes in the Charges. If the Parties cannot agree to the variation and the associated charges within Business Days of the request for a variation, the Requesting Operator may within a further Business Days by notice in writing to the Providing Operator either cancel the Contract or withdraw its request for a variation. If the Requesting Operator withdraws its request for variation it must in its notice of withdrawal to the Providing Operator specify the non-agreement which lead to the withdrawal. If the Requesting Operator fails to notify the Providing Operator within the Business Days the variation request is deemed to have been withdrawn. If the Requesting Operator cancels a Contract, the Requesting Operator must upon demand pay the Providing Operator the Work Plan Charge and for any Preparation Work done up to the date of cancellation and for any work required to reinstate roads and facilities necessitated by the Preparation Work, and must pay all other charges payable under the Contract up to and including the date of cancellation. All payments must be made by the Requesting Operator within days from the date of the invoice.
- 6.5 The Requesting Operator must agree and pay the Preparation Charge in accordance with Schedule 1.
- 6.6 In consideration for the Preparation Charge the Providing Operator will undertake the Preparation Work and use its reasonable endeavours to complete the same by the Proposed RFU Date. The Providing Operator will not be liable for any delays or failure in undertaking the Preparation Work where such delay is a result of the issuance or non-issuance of any approval or permit by Government Agency or the relevant third party, or a failure or delay of any part of the Requesting Operator's Work.

6.7 The Providing Operator will upon completion of the Preparation Work issue a notice to the Requesting Operator stating that the installation of the Self-Build Fibre is completed, and the issuing date of that notice is the Preparation RFU Date.

## 7. THE REQUESTING OPERATOR'S WORK

7.1 The Requesting Operator must, at its own cost:

- (a) undertake the Requesting Operator's Work in accordance with the Work Plan;
- (b) provide sufficient length of cable to be used as Self-Build Fibre for the Providing Operator to pull the cable from the Requesting Operator's Manhole to the Requester Equipment Space;
- (c) mark clearly the cable it provides for use as a Self-Build Fibre to distinguish it from the cables and equipment of the Providing Operator and any third party. The exact details of the markings to be used by the Requesting Operator in respect of its Cables shall be agreed with the Providing Operator. The Requesting Operator authorises the Providing Operator, at its election, to incorporate any information provided by the Requesting Operator into the Providing Operator's record in relation to the relevant Providing Operator's Facility and to disclose the same to any Government Agency, the owner or management of the relevant Building, and any third party with cable in the same Providing Operator's Facility.

7.2 The Requesting Operator must:

- (a) comply with any reasonable procedures and instructions of the Providing Operator relating to the Requesting Operator's Work; and
- (b) co-operate with the Providing Operator in co-ordinating the Requesting Operator's Work and the Preparation Work.

7.3 It is the responsibility of the Requesting Operator to perform any work for connecting and maintaining:

- (a) the connection of both ends of the cable constituting a Self-Build Fibre to the Requesting Operator's Network, and
- (b) the Duct Jointing Point.

7.4 Subject to paragraphs (a) and (b) of this clause 7.4, each Party is responsible for obtaining any necessary approval, licences or permits from the relevant Government Agency or land owner that may be required to conduct their respective work.

- (a) The Requesting Operator is responsible for all charges, fees and expenses for obtaining the necessary approvals, traffic impact assessments, licences and permits required for implementation of the Work Plan regardless of whether the application is made by the Providing Operator or the Requesting Operator and only if directly relating to a Requesting Operator's fibre.

- (b) The Requesting Operator must reimburse the Providing Operator for any costs or expenses incurred under this clause 7.4.

## **8. PROVIDING OPERATOR'S FACILITIES & MAINTENANCE**

- 8.1 The Requesting Operator must agree and pay the Recurrent Charges in accordance with Schedule 1.
- 8.2 In consideration of the payment of the Recurrent Charge by the Requesting Operator, the Providing Operator will clear blockages in and perform normal remedial work to the Connecting Piece, the Connecting Facility (if applicable), the Colocation Exchange Lead-in Facility, and the Colocation Exchange Trunking Facility.
- 8.3 The Recurrent Charge does not cover planned work or unplanned remedial work that may become necessary including :
  - (a) major damage to the Providing Operator's Facility caused by third party, traffic, landslide or any other disaster or accident, or
  - (b) complete renewal of the Providing Operator's Facility; or
  - (c) the removal of hazardous materials and substance (except gas) from the Providing Operator's Facilities; or
  - (d) work on the Providing Operator's Facility required to be undertaken at the lawful request of a Governmental Agency or utility.
- 8.4 If unplanned or planned remedial work is necessary, the Parties will discuss and share the cost for unplanned or planned remedial work. The Providing Operator is not obliged to conduct any remedial work if no written agreement is reached with the Requesting Operator. If any part of the Providing Operator's Facility is beyond repair and the Providing Operator does not intend to renew that facility for use in respect of its own or a third party's cable, the Parties will negotiate in good faith in relation to the cost and undertaking of the complete renewal of such facility.
- 8.5 The maintenance of the Duct Jointing Point, the Requesting Operator's duct, the Cable Connecting Point, the connection or termination of the Self-Build Fibre in the Requesting Operator's Manhole and in the Requester Equipment Space is the responsibility of the Requesting Operator and does not in any way form part of the maintenance responsibility of the Providing Operator.
- 8.6 Without limiting the Providing Operator's rights under this Agreement, the Providing Operator will be relieved of its maintenance obligations if the Requesting Operator is in breach of its payment obligation under this Agreement (including the obligation to pay interest on overdue amounts) which remains unremedied for a period of    days, and in the case of any other material breach by a Requesting Operator of this Agreement which remains unremedied for a period of    days after receipt of a notice to remedy the same.

**9. AGREED USE AND WARRANTIES**

**9.1** The Requesting Operator must not use or permit any other person to use the Self-Build Fibre for any purpose other than an Agreed Use, and must:

- (a) not directly or indirectly connect a Self-Build Fibre to any facility at an Colocation Exchange Site other than the Requester Equipment;
- (b) not use or permit the use of the Self-Build Fibre in any way which threatens or is likely to threaten the safety or security of:
  - (i) any employee or customer of the Providing Operator; or
  - (ii) any third party; or
- (c) not use or permit the use of the Self-Build Fibre in any way which causes damage or is likely to cause damage to:
  - (i) the property or facilities of the Providing Operator; or
  - (ii) the property or facilities of any third party; or
- (d) not use or permit the use of the Self-Build Fibre in any way which interferes with or is likely to interfere with the supply or potential supply of telecommunication services by the Providing Operator or any third party; or
- (e) not use or permit the use of the Self-Build Fibre in any way which may jeopardise the integrity of and/or the confidentiality of communications within the other Providing Operator's Network or any third party's network.

**9.2** The Requesting Operator must comply with the requirements of all Government Agencies and the Providing Operator in relation to safety of the Duct Jointing Point and the Requesting Operator must pay to the Providing Operator the cost for any alterations or work done to the Providing Operator's Facility which become necessary because of the Requesting Operator's duct connected to the Connecting Piece or the Requesting Operator's non-compliance with these requirements.

**9.3** This Agreement does not confer on the Requesting Operator the right to and the Requesting Operator (including its employees, agents and contractors) must not access or attempt to gain access to any part of the Providing Operator's Facility. If the Requesting Operator wishes to perform any work to the Self-Build Fibre, it must comply with clause 10.

**10. REQUESTER CABLE WORK**

**10.1** The Requesting Operator hereby irrevocably authorises the Providing Operator to conduct all Cable Work.

**10.2** When the Requesting Operator wishes to conduct any Cable Work, it must comply with the following:

- (a) Subject to paragraph (b), the Requesting Operator must give at least Business Days advance written notice to the Providing Operator.
- (b) In the event of an emergency (which means any matter which either threatens personal safety or which has resulted or will result in interruption of the provision of telecommunications service within any affected party's network in a material respect), the Providing Operator will, within hours following receipt of a written request from the Requesting Operator, notify the Requesting Operator of the time when the Providing Operator can perform the Cable Work set out in the Requesting Operator's request.

10.3 The Requesting Operator must pay the Providing Operator for the (i) expenses incurred by the Providing Operator in conducting the Cable Work and (ii) the performance of the Cable Work by the Providing Operator in accordance with the rates set out in Schedule 1.

10.4 The Providing Operator may not be able to access the Self-Build Fibre to perform the Cable Work unless the Providing Operator or a third party moves its cable. Under such circumstances, the Providing Operator may call a meeting between the Requesting Operator and the relevant third party to discuss movement of the cable which shall be moved at the expense of the Requesting Operator.

## 11. MOVEMENT OF CABLE

11.1 If the Providing Operator reasonably determines that the Self-Build Fibre located in the Providing Operator's Facility must be moved to perform installation, operational or maintenance work to any part of the Providing Operator Facility, or to enable the Providing Operator or a third party to install or access its property in the Providing Operator's Facility, or to comply with a lawful direction of any Government Agency (such as a requirement to move any duct or access point), or the Providing Operator's Facility may be damaged by work contemplated in Section 16 of the Ordinance, road works, development, redevelopment or other works in the vicinity of the Providing Operator Facility, and that no other reasonably practicable alternative is available, the Providing Operator may inform the Requesting Operator by not less than Business Days notice in writing and by oral notice in the case of emergency, that the Self-Build Fibre will be moved at the Requesting Operator's expense.

11.2 The Requesting Operator acknowledges that if, pursuant to the terms of this Agreement, the Providing Operator requires space in any part of the Providing Operator's Facility for its own purposes including to allocate space to any third party, the Requesting Operator must co-operate with the Providing Operator in co-ordinating the reasonable use of space by all persons with access to the Providing Operator's Facility, and the Requesting Operator agrees to pay the Providing Operator for the Cable Work involved under this clause.

11.3 The Providing Operator will have the right to rearrange or realign the cable within the Providing Operator's Facility, if, within its reasonable opinion, such realignment is required. The Providing Operator must give the Requesting Operator months written notice of such realignment (except in emergencies). The Requesting Operator agrees to pay the Providing Operator' for the Cable Work involved under this clause in accordance with Schedule 1.

11.4 The Providing Operator will have no liability for any accompanying service interruption that is incidental to any part of clause 11.

## 12. NO LIMITATION OF INTEREST

12.1 The Requesting Operator acknowledges that the Providing Operator gives no warranties or representations in relation to any part of the Providing Operator's Facility or its use.

12.2 The Requesting Operator acknowledges that the Providing Operator retains all rights, title and interests in the Providing Operator's Facility, and nothing in this Agreement is to be construed as vesting in the Requesting Operator :

(a) any right, title or property interest in any part of the Providing Operator's Facility; or

(b) any right (including access or use) in respect of any part of the Providing Operator's Facility the grant or enjoyment of which would contravene any law, or breach any licence, permit or approval issued by any Government Agency, or breach any arrangement with a third person in respect of that part of the Providing Operator's Facility made prior to the Contract, or infringe any right of or breach any arrangement with a third person (including the building owner or a third party with property interest).

12.3 Nothing in this Agreement is to be construed as affecting or limiting the right of the Providing Operator to enter into arrangements with third parties relating to any part of the Providing Operator's Facility.

12.4 The Requesting Operator acknowledges that this Agreement :

(a) does not in any way grant it a right to access or use any of the Providing Operator's ducts, access points or other facilities that are connected to the Providing Operator's Facilities in any manner not provided for in this Agreement ; and

(b) shall not in any way prejudice any current or future negotiations between the Parties in relation to access and use of any facilities belonging to the Providing Operator.

12.5 The Requesting Operator acknowledges that the Providing Operator is under no obligation to receive fault reports from customer or other persons or to conduct any fault detection and rectification of the Self-Build Fibre.

## 13. CHARGES AND PAYMENT

13.1 The Requesting Operator must pay the Feasibility Study Charge, the Work Plan Charge, the Preparation Charge, the Recurrent Charges and the Cable Work Charges in accordance with Schedule 1. The Requesting Operator must pay any other costs and charges payable under a Contract at the time and in the manner indicated on the invoice issued by the Providing Operator subject to the provisions of this Agreement.

- 13.2 The Recurrent Charges are payable each month in advance. Recurrent Charge becomes chargeable commencing from the Preparation RFU Date for the relevant Contract. However, if the actual Preparation RFU Date is delayed due to delay or failure by the Requesting Operator in carrying out its obligations, under this Agreement, the Recurrent Charges will be calculated and first become payable from the Proposed RFU Date.
- 13.3 The Parties agree that the Recurrent Charges represent an amortization of the Providing Operator's costs and revenues for use of the Providing Operator's Facilities. Therefore, the Providing Operator may charge, and the Requesting Operator must pay, the Recurrent Charges for the Minimum Contract Period of a Contract irrespective of whether the Requesting Operator actually uses the Self-Build Fibre.
- 13.4 Subject to the provisions of this Agreement, the Requesting Operator must pay all Charges by the due date specified in the invoice issued by the Providing Operator. The Providing Operator is entitled to charge interest on all outstanding amounts under this Agreement or under any Contract from the due date at the rate of 2% above the prime lending rate of The Hongkong & Shanghai Banking Corporation Limited as current from time to time. Notwithstanding expiration or termination of a Contract or this Agreement, interest will continue to accrue daily on all outstanding amounts including accrued default interest from the due date until payment in full is received by the Providing Operator.
- 13.5 Notwithstanding the other clauses of this Agreement, the Providing Operator is not obliged to entertain any Application or perform any of its obligations under any Contract if there is any outstanding payment from the Requesting Operator under this Agreement or any Contract
- 13.6 Each Party acknowledges and agrees that the Charges will be reviewed and adjusted in accordance with Schedule 1.
- 13.7 The Parties acknowledge and agree that the Recurrent Charges will be increased annually in accordance with Schedule 1.

#### 14. TERMINATION OF CONTRACT

- 14.1 Any Party may terminate a Contract by giving the other Party months written notice any time after the expiry of the Minimum Contract Period in relation to that Contract.
- 14.2 The Providing Operator may terminate a Contract with immediate effect if:
- (a) after receiving written notice from the Providing Operator the Requesting Operator continues to use or permits any other person to use the Self-Build Fibre which is the subject matter of the Contract for any use other than an Agreed Use or in any manner which is in breach of clause 9.
  - (b) the Requesting Operator's Self-Build Fibre causes operational interference to any other cable or equipment located in the Providing Operator's Facility and the Requesting Operator fails to eliminate that interference within Business Day of receipt of written notice by the Providing Operator specifying the problem and requiring its remedy;

- (c) the Providing Operator is of the reasonable opinion that the relevant Self-Build Fibre is unsafe, dangerous or will cause damage to property or equipment of the Providing Operator;
  - (d) the Requester Equipment Space under the Local Access Link Agreement that relates to equipment in the Providing Operator's Exchange is decommissioned, relocated out of its Colocation Exchange Site, or is otherwise terminated or concluded in accordance with the Local Access Link Agreement;
  - (e) the Requesting Operator is in material breach of the terms and conditions of the Contract and that breach is not remedied within Business Days to the Providing Operator's satisfaction after notice to do so has been served on it by the Providing Operator; or
  - (f) after receiving written notice from the Providing Operator any Charges remain overdue and outstanding under such Contract.
- 14.3 If a contract is terminated under clause 14.2(c), the Providing Operator and the Requesting Operator will endeavour to re-provision the relevant Self-Build Fibre as soon as practicable.
- 14.4 If at any time the Providing Operator is of the reasonable opinion that granting any Contract constitutes a contravention of any law, or a breach of any licence, permit or approval granted or deemed to have been granted by any Government Agency, the Providing Operator may by giving days written notice to the Requesting Operator terminate the affected Contract. The Requesting Operator agrees to bear the cost for applying for any necessary licence, permit or approval from any Government Agency in respect to such contract.
- 14.5 If a terminating event for this Agreement also constitutes a terminating event for any Contract then that Contract may be terminated in accordance with its own terms and the notice of termination of this Agreement will be deemed as a notice for termination of each Contract affected by the same terminating event.
- 14.6 If a notice of termination of this Agreement (as opposed to a Contract) has been served, the Providing Operator is not obliged to (a) approve any new Application from the Requesting Operator, (b) fulfill any existing Application which has not been approved, nor to commence or continue with any Preparation Work.

**15. GENERAL TERMINATION**

- 15.1 Any Party may terminate this Agreement immediately upon:
- (a) giving the other Party months written notice any time after the third anniversary of the date of execution of this Agreement; or
  - (b) the Local Access Link Agreement expiring, concluding or being otherwise terminated.

15.2 A Party may terminate this Agreement or a Contract with immediate effect by serving the other Party notice in writing to that effect where:

- (a) any step is taken to enter into any scheme of arrangement between that other Party and its creditors;
- (b) any step is taken to appoint a receiver, a receiver and manager, a liquidator, a provisional liquidator, an administrator or other like person of the whole or any part of that other Party's assets or business where such appointment is for the amalgamation and reconstruction of that other Party, provided that other Party obtains the prior consent of the first mentioned Party thereto which consent shall not be unreasonably withheld;
- (c) the other Party becomes subject to any form of insolvency administration or winding-up, unless there is a bona fide dispute between that Party and the person(s) seeking to subject that Party to insolvency administration or winding-up;
- (d) a Force Majeure, substantially and adversely affecting the ability of either Party to perform its obligations under this Agreement, continues for a period of days or more; or
- (e) the TA revokes the other Party's FTNS Licence and does not immediately grant a similar licence; or
- (f) the authorisation or licence granted by Government to the Requesting Operator in respect of laying cables is revoked, terminates or expires.

15.3 Each party may terminate this Agreement by:

- (a) month's notice to the other Party given after any date that the other Party has requested the TA to make; or
- (b) months notice to the other Party given after the date the TA informs a Party that the TA has made;

a determination or direction under the Ordinance regarding the FTNS Licence of either Party or otherwise in relation to part or all of this Agreement or the Local Access Link Agreement, the subject matter of this Agreement or the Local Access Link Agreement or any copper wire line of that Party that connects a user site to an Colocation Exchange Site or other network facility.

15.4 "The Parties acknowledge and agree that clause 15.3 does not in any way constrain or restrict the powers of the TA to make a determination or direction under the Ordinance.

15.5 If a Party gives notice to terminate this Agreement, the Providing Operator may give notice to terminate a Contract with effect on the date which is the earlier or the later of (a) the expiration of the Minimum Contract Period, or (b) termination date of the Agreement at the discretion of the Providing Operator. If no such notice is given, this

Agreement shall continue to apply to any Contract existing at the time of termination of the Agreement until termination of that Contract in accordance with other provisions of this Agreement.

- 15.6 Termination of this Agreement or a Contract does not extinguish or otherwise affect any rights of any Party against the other which:
- (a) accrued before the date of termination of the Contract or this Agreement (as applicable); or
  - (b) otherwise relate to or may arise at any future time from any breach or non-observance of obligations under the Contract or this Agreement (as applicable) which arose before the date of termination of the Contract or this Agreement.

## 16. SUSPENSION

- 16.1 The Providing Operator may suspend (until further notice to the Requesting Operator) all or part of the rights of the Requesting Operator and all of the Providing Operator's obligations under the relevant Contract:
- (a) of which the Requesting Operator is in breach of clause 14.2(b), (c), (d) or (e), or clause 14.4; or
  - (b) of which in the reasonable opinion of the Providing Operator, it is necessary to suspend the Contract in order for the Providing Operator to:
    - (i) carry out planned maintenance, repair or upgrading of any equipment or facility forming part of its Network and the Providing Operator has given the Requesting Operator as much notice as is reasonably practicable in the circumstances (which notice may be oral if subsequently confirmed in writing); or
    - (ii) protect the integrity of its Network, or to carry out unplanned maintenance, repair or upgrading of any equipment or facility forming part of the Providing Operator's Network.

Notwithstanding the above, if the Providing Operator is notified in advance of any of the circumstances referred to in clause 16.1(b)(ii) the Providing Operator will endeavour to give as much notice to the Requesting Operator as may be reasonably practicable.

- 16.2 The Providing Operator may suspend all or part of the rights of the Requesting Operator and all of the Providing Operator's obligations under this Agreement until further notice to the Requesting Operator:
- (a) if the Requesting Operator is in breach of clause 14.2(a) or (f) but only for the period of the breach, or
  - (b) if a Party exercises its right of termination under clause 15.

- 16.3** In addition to and without prejudice to clause 16, if the Providing Operator exercises its right of suspension pursuant to clause 16.2(a) or (b), the Requesting Operator must upon suspension immediately cease to use the Self-Build Fibre.
- 16.4** Notwithstanding the other clauses of this Agreement, the Providing Operator will not be obliged to entertain any Application :
- (a) if the Providing Operator exercises its right of suspension or termination pursuant to the Requesting Operator's breach of clause 14.2(a);
  - (b) if there is outstanding payment of any Charges from the Requesting Operator; or
  - (c) if a Party exercises its right of termination under clause 15.
- 16.5** Without limiting the exclusions or limitations of liability in clause 18, the Providing Operator is not liable to the Requesting Operator nor any third person for any Loss resulting from or in connection with a suspension under this clause 16.
- 16.6** The exercise of the Providing Operator's right to suspend under this clause 16 is without prejudice to any other remedy available to the Providing Operator under this Agreement and does not constitute a waiver of the Providing Operator's right to subsequently terminate this Agreement.

## **17. CONSEQUENCES OF TERMINATION**

- 17.1** Without prejudice to other parts of this Agreement upon termination of any Contract, the Requesting Operator must within Business Days of termination:
- (a) cease to use the Self-Build Fibre;
  - (b) pay the reasonable expenses incurred by the Providing Operator in removing the Self-Build Fibre from the Providing Operator's Facility and reinstating and making good the Providing Operator's Facility to its state and condition on the Preparation RFU Date and also pay the Providing Operator for the time and labour in planning and supervision of such removal and reinstatement at the charging rates set out in Schedule 1;
  - (c) disconnect the Requesting Operator's duct from the Connecting Piece; and
  - (d) pay to the Providing Operator immediately all Charges (whether or not due) which have accrued up to the date of termination and remain unpaid.
- 17.2** In addition to clause 17.1, the Requesting Operator hereby irrevocably authorises the Providing Operator to remove the Self-Build Fibre from the Providing Operator's Facility upon termination of a Contract, and agree to pay for the reasonable cost of removal including expenses of the Providing Operator in conducting the necessary Cable Work, and the planning and supervision of the Cable Work by the Providing Operator calculated at the rates set out in Schedule 1.

17.3 Subject to and without limiting clause 17, the Requesting Operator indemnifies the Providing Operator for any direct Loss suffered by the Providing Operator or any claim against Providing Operator by a third party which arises from damage to property directly caused by the Requesting Operator (any of its employees, agents or contractors) in disconnecting the Self-Build Fibre.

17.4 Termination of this Agreement or any Contract will:

- (a) not operate as a waiver of any breach; or
- (b) not extinguish or otherwise affect any rights of any Party against the other which:
  - (i) accrued before the date of termination of this Agreement or that Contract; or
  - (ii) otherwise relate to or may arise at any future time from any breach or non-observance of obligations under this Agreement or that Contract which arose before the date of termination of this Agreement or that Contract.

17.5 This clause 17 survives termination of any Contract and this Agreement

## 18. LIMITATION OF LIABILITY AND INDEMNITY

18.1 Each Party acknowledges that this clause:

- (a) provides for certain exclusions and limitations by each Party of liability to the other Party for the other Party's Losses;
- (b) does not exclude or limit the application of any provision of any law where to do so would:
  - (i) contravene that law; or
  - (ii) cause any part of this clause to be void; and
- (c) does not exclude or limit a Party's right to seek or obtain any remedy that may be available at law or in equity when damages are not an adequate remedy, including but not limited to an injunction or specific performance.

18.2 Notwithstanding clauses 18.4 and 18.5 or any other provision of this Agreement, each Party excludes all liability to the other Party (whether under contract, tort, statute or otherwise) for the following in relation to all Contracts and this Agreement:

- (a) consequential or indirect Loss (including loss of revenue or profits) of the other Party;
- (b) liability of the other Party to any third party for any:

- (i) consequential or indirect Loss (including loss of revenue or profits) of that third party (other than consequential or indirect Loss of a natural person for personal injury or death under a claim by a natural person referred to in clauses 18.4(a) and 18.5(a));
- (ii) direct Loss of that third party other than direct Loss of a type referred to in clause 18.4(a) or (b) ; and
- (c) liability of the other Party to a Government Agency under or in relation to the other Party's Licence (including under any performance bond relating to that Party's Licence);

suffered or incurred by the other Party during or after the term of this Agreement arising under or in any way out of or in connection with this Agreement, the performance of this Agreement or the termination of this Agreement.

**18.3** Other than Loss of a type referred to in clause 18.4, the liability of one Party to the other in contract, tort or otherwise (including any liability for negligence) arising by reason of or in connection with this Agreement is limited to \_\_\_\_\_ for any one incident or series of events arising from a single incident or common cause and in no case will a Party be liable for aggregate amount of \_\_\_\_\_ in excess of \_\_\_\_\_ for all liability arising by reason of or in connection with this Agreement.

**18.4** Subject to clause 18.2, nothing in this Agreement in any way excludes or restricts a Party's ("Indemnifying Party") liability to the other Party ("Innocent Party") for:

- (a) Losses of the Innocent Party arising from any claim against the Innocent Party by any natural person for any injury to or death of:
  - (i) any of the Indemnifying Party's personnel;
  - (ii) any of the Innocent Party's personnel; and
  - (iii) any other person;

caused by negligence of the Indemnifying Party or its employees, agents or contractors arising out of or in connection with this Agreement;

- (b) direct Losses arising from damage to or loss of any equipment, facility or other tangible property of the Innocent Party or any other person caused by the negligence of the Indemnifying Party or its employees, agents or contractors arising out of or in connection with this Agreement; and
- (c) direct Losses arising from an intentional breach of this Agreement by the Indemnifying Party or its employees, agents or contractors or any fraud.

**18.5** Subject to clause 18.2 each Party ("Indemnifying Party") indemnifies the other Party ("Innocent Party") against all:

(a) Losses of the Innocent Party arising from any claim against the Innocent Party in relation to any injury to or death of:

(i) any of the Indemnifying Party's personnel; and

(ii) any of the Innocent Party's personnel; and

(iii) any other person;

caused by negligence of the Indemnifying Party or its employees, agents or contractors arising out of or in connection with this Agreement;

(b) direct Losses arising from damage to or loss of any equipment, facility or other tangible property of the Innocent Party or any other person caused by the negligence of the Indemnifying Party or its employees, agents or contractors arising out of or in connection with this Agreement; and

(c) direct Losses arising from an intentional breach of this Agreement by the Indemnifying Party or its employees, agents or contractors or any fraud.

**18.6** The Requesting Operator must ensure that each of its agreement with a Customer ("Customer Contract") includes a provision that, in so far as it is legally able, seeks to:

(a) exclude and limit the liability of the Providing Operator (or one or more of the Requesting Operator's subcontractors or suppliers of transmission capacity which include the Providing Operator ) to no lesser extent than the Customer Contract excludes and limits the Requesting Operator's liability to that Customer for Loss suffered or incurred by the Customer during or after the term of this Agreement arising under or in any way out of or in connection with this Agreement, the performance of this Agreement or the termination of this Agreement; and

(b) exclude the Providing Operator's liability for all consequential and indirect Loss of the Customer (including loss of revenue or profits); and

(c) limit the Providing Operator's liability for all Loss other than Loss referred to in paragraph (i) to a maximum amount which is no different to the limit to the Requesting Operator's liability for activities undertaken by it under that Customer Contract;

provided that this clause does not require the Requesting Operator to include a provision in any Customer Contract that would exclude or limit the application of any provision of any law in a manner that would contravene that law or cause any part of that provision to be void.

**18.7** By virtue of and subject to this clause, the Requesting Operator confers on the Providing Operator the benefit of the provision in the Customer Contract referred to in clause 18.6. The Requesting Operator must act as the Providing Operator's bare trustee and agent for the sole purpose of conferring the benefit of such a provision on the Providing Operator as beneficiary. The Requesting Operator must hold the benefit of that provision which is conferred on the Providing Operator as a bare trustee for Providing Operator. The

Requesting Operator will not have any obligation or responsibility to the Providing Operator in any capacity as agent, trustee or otherwise except to the extent expressly set out in this clause. The Requesting Operator will not have any right to act on behalf of the Providing Operator as agent, trustee or otherwise except as expressly set out in this clause.

18.8 The limitations of liability under this clause do not apply to any liability to pay Charges under this Agreement.

18.9 This clause 18 survives termination and suspension of any Contract and this Agreement.

## 19. DISPUTE RESOLUTION

### Working group

19.1 A Party may give written notice to the other setting out any dispute that Party has in relation to the subject matter of this Agreement. On receipt of that notice each Party will appoint representatives to a working group. The Parties shall procure that their representatives use their best efforts to resolve the dispute.

### Technical matters

19.2 Notwithstanding clause 19.1 the Parties will refer disputes of a technical nature to a technical working committee established under the Operations Manual. The Parties will procure that its representatives on the technical working committee use their best efforts to resolve the dispute in the manner set out in the Operations Manual.

### Senior Management

19.3 If the working group or the technical working committee is not able to resolve the dispute within 14 days of that dispute being referred to it, the Parties will refer to dispute to the senior management of both Parties for resolution.

### Settlement offers

19.4 Each Party acknowledges that any offer made by a representative of the other Party in an attempt to settle a dispute is made on a without prejudice basis unless specifically indicated otherwise in writing.

## 20. NOTICES

20.1 A notice, consent, request or any other communication under this Agreement (**communication**) must be in writing and must be left at the address of the addressee, or sent by prepaid post (airmail if posted to or from a place outside Hong Kong) to the address of the addressee or sent by facsimile to the facsimile number of the addressee specified in Schedule 3 or any other address or facsimile number the addressee requests.

20.2 A communication is deemed to be received:

(a) if by hand delivery, when it is delivered;

- (b) if a letter, three days after posting (seven, if posted to or from a place outside Hong Kong); and
- (c) if a facsimile, at the time of dispatch if the sender receives a transmission report which confirms that the facsimile was sent in its entirety to the facsimile number of the recipient.

20.3 If a Party intends that communications on operational issues be sent to another addressee and facsimile number within its company, it may notify the other Party of the same by issuing a notice in the manner stated above in clause 20.1.

20.4 Communications received by a Party outside of normal working hours (being 9:00am to 5:00pm on any Business Day) will be regarded as being received on the immediately following Business Day.

## 21. FORCE MAJEURE

21.1 A Party (**Claiming Party**) is not in breach this Agreement or otherwise liable to any other Party (**Non-Claiming Party**) for any delay in performance or any non-performance of any obligations under this Agreement (except an obligation to pay money) and the time for performance will be extended accordingly, if and to the extent that the delay or non-performance is due to Force Majeure, provided that:

- (a) the Claiming Party could not have avoided the effect of the Force Majeure by taking precautions which, having regard to all matters known to it before the occurrence of the Force Majeure and all relevant factors, it ought reasonably to have taken but did not take; and
- (b) the Claiming Party has used reasonable endeavours to mitigate the effect of the Force Majeure and to carry out its obligations under this Agreement in any other way practicable.

21.2 The Claiming Party will notify the Non-Claiming Party promptly of the nature and extent of the circumstances giving rise to the Force Majeure and an estimate of the extent and duration of its inability to perform.

21.3 If a delay or failure to perform the Claiming Party's obligation due to a Force Majeure exceeds days, the Non-Claiming Party may immediately terminate this Agreement on notice to the Claiming Party, but only if that Non-claiming Party has otherwise complied with the terms of this Agreement.

## 22. CONFIDENTIALITY

The Parties to this Agreement agree to incorporate the terms and conditions of the Confidentiality Agreement, and such terms and conditions will apply to all confidential information disclosed by one Party to the other Party in relation to this Agreement.

## 23. IMPACT ON CUSTOMER ACCESS AGREEMENT

Unless expressly stated otherwise, this Agreement and any Contract is without prejudice to the Local Access Link Agreement. To the extent there is an inconsistency between the terms and conditions of the Local Access Link Agreement and this Agreement or any Contract then:

- (a) if the conflict relates to the provision of a Self-Build Fibre, then the provisions of this Agreement or the relevant Contract prevail to the extent of the inconsistency; or
- (b) if the conflict is related to the provision of services other than Self-Build Fibre, then the provisions of the Local Access Link Agreement prevail to the extent of the inconsistency.

## **24. GENERAL**

### **Acknowledgment**

- 24.1** The Parties acknowledge that the existence of this Agreement or the inclusion of any specific right or obligation in this Agreement is entirely without prejudice to whether the grant of that right or the acceptance of that obligation falls within or outside the terms of section 36A of the Ordinance or any obligation under its Licence.

### **Cumulative rights**

- 24.2** The rights, powers and remedies of a Party under this Agreement are cumulative with the rights, powers or remedies provided by law independently of this Agreement.

### **Exercise of rights**

- 24.3** A Party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a Party does not prevent a further exercise of that or of any other right, power or remedy.

### **Waiver and variation**

- 24.4** A provision or a right under this Agreement may not be waived except in writing signed by the Party granting the waiver, or varied except in writing signed by the parties.
- 24.5** Failure or delay of any Party at any time to take action against the other Party as provided in this Agreement will not affect such first-mentioned Party's right to require full performance of this Agreement at any time thereafter. Waiver by any Party of a breach of any provision of this Agreement will not constitute a waiver of any subsequent breach nor in any way affect any right, power or remedy of that Party under this Agreement.

### **Approvals and consents**

- 24.6** A Party may give or withhold its approval or consent conditionally or unconditionally in its discretion unless this Agreement states otherwise.

**Further assurances**

- 24.7 Each Party must, at its own expense, do everything reasonably necessary to give full effect to this Agreement. Each Party must bear its own costs in negotiating, preparing and signing of this Agreement.

**Entire agreement**

- 24.8 This Agreement contains the entire agreement and understanding between the Parties relating to its subject matter, and supersedes and cancels in all respects all previous letters of intent, agreements or arrangements between the Parties on this subject matter.

**No other relationships**

- 24.9 Nothing in this Agreement shall constitute or be construed to constitute any Party as the partner, agent, or employee or representative of the other Party and no Party shall have power to incur any obligations on behalf of or pledge the credit of the other Party in any manner. This Agreement shall not constitute a joint venture or any other similar arrangement between the Parties.

**Severability**

- 24.10 If any provision of this Agreement is construed to be illegal or invalid, it will not affect the legality, validity and enforceability of the other provisions of this Agreement. The illegal or invalid provisions will be treated as being deleted from this Agreement and no longer incorporated, but all other provisions of this Agreement will continue to be binding on the parties.

**Taxes**

- 24.11 The Requesting Operator must pay all Taxes payable in relation to this Agreement and the transactions evidenced by this Agreement.

**Assignment**

- 24.12 Neither Party may assign its rights, powers or remedies under this Agreement without the prior written consent of the other Party.

**Governing Law and Jurisdiction**

- 24.13 This Agreement is governed by the laws of Hong Kong.
- 24.14 Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of Hong Kong.
- 24.15 This Agreement may be executed in a number of counterparts. All counterparts together will be taken to constitute one instrument.

**EXECUTED** as an Agreement.

Signed by

)

)

in the presence of:

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

## SCHEDULE 1

### CHARGES SCHEDULE

Terms defined in the Self-Build Fibre Into Colocation Exchange Agreement apply in the Schedule 1 unless the context requires otherwise.

#### 1. Feasibility Study Charge

- 1.1 For the purpose of clause 3.3 of the Agreement, the Providing Operator will not commence any Feasibility Study before the Providing Operator receives written confirmation from the Requesting Operator of its agreement to pay the amount of Feasibility Study Charge quoted by the Providing Operator under clause 3.3 of the Agreement.
- 1.2 The quoted Feasibility Study Charge will be based on information available to the Providing Operator at the time it provides the quote and may be revised if the Providing Operator becomes aware of other site circumstances and arrangements during the preparation of the Feasibility Study.
- 1.3 For the purpose of clause 3.6 of the Agreement, the Requesting Operator must pay the Feasibility Study Charge to the Providing Operator within      days of the Providing Operator providing the Requesting Operator the result of the Feasibility Study together with an invoice for the Feasibility Study Charge.

#### 2. Work Plan Charge

- 2.1 For the purposes of clause 5.2 the Providing Operator must notify the Requesting Operator of the Work Plan Charge in writing. The Providing Operator will not provide the Work Plan to the Requesting Operator until the Providing Operator receives written confirmation from the Requesting Operator of its agreement to the Work Plan Charge.
- 2.2 The Requesting Operator must pay the Work Plan Charge payable under Clause 6.2 within      days from the date of the invoice.

#### 3. Preparation Charge

- 3.1 For the purpose of clause 6.6 of the Agreement, the Providing Operator will not commence any Preparation Work before the Providing Operator receives written confirmation from the Requesting Operator of its agreement to pay the amount of the proposed Charges set out in the Work Plan.
- 3.2 The Requesting Operator must confirm in writing its agreement to the Preparation Charge set at in the Work Plan within      days of receipt of the Work Plan. If the Parties are unable to agree the amount of the Preparation Charge payable by the Requesting Operator within      days of receipt of the Work Plan, the Requesting Operator is deemed to have rejected the Work Plan under clause 6.2.
- 3.3 A quote of the Preparation Charge as provided in the Work Plan will be based on information available to the Providing Operator at the time of preparation of the Work Plan, and the Providing Operator may revise and re-quote the Preparation Charge including the reasons for the re-quote if the Requesting Operator subsequently changes its requirements or if changes become necessary during implementation of the Preparation Work due to site circumstances

and arrangements. If the Preparation Charge is revised and re-quoted as a result of changes that become necessary during implementation of the Preparation Work due to site circumstances and arrangements, the revised Preparation Charge must not be more than two times the original Preparation Charge.

3.4 For the purpose of clause 6.5 of the Agreement, the Preparation Charge will become payable days from the Preparation RFU Date for the relevant Preparation Work.

#### 4. Recurrent Charge

4.1 The quote of the Recurrent Charge will be based on information available to the Providing Operator as of the date of the Work Plan, and the Providing Operator may revise and re-quote the Recurrent Charge including the reasons for the re-quote if the Requesting Operator subsequently changes its requirements or if changes become necessary during implementation of the Preparation Work due to site circumstances and arrangements. If the Recurrent Charge is revised and re-quoted as a result of changes that become necessary during implementation of the Preparation Work due to site circumstances and arrangements, the revised Recurrent Charge must not be more than two times the original Recurrent Charge.

4.2 The Requesting Operator must confirm in writing its agreement to the Recurrent Charge set out in the Work Plan within days of receipt of the Work Plan. If the Parties are unable to agree the amount of the Recurrent Charge payable by the Requesting Operator within days of receipt of the Work Plan, the Requesting Operator is deemed to have rejected the Work Plan under clause 6.2 of the Agreement.

4.3 The Requesting Operator must pay the Recurrent Charge in accordance with clause 13 of the Agreement.

#### 5. Cable Work

5.1 The Requesting Operator must pay for the travelling expenses incurred by the Providing Operator for each occasion that it performs Cable Work. The Requesting Operator must also pay for the Cable Work according to the prevailing man-hour rates of the Providing Operator. On each occasion that the Providing Operator performs Cable Work, a minimum of two man-hours must be paid by the Requesting Operator.

5.2 As of , prevailing man-hour rates are as follows :

(a) for work performed during normal working hours HK\$314

(b) for work performed outside normal working hours HK\$397

The Providing Operator shall notify the Requesting Operator of the prevailing man-hour rates from time to time and on request by the Requesting Operator.

#### 6. Adjustments of Recurrent Charge

6.1 During the period from the date of the Agreement to , the Recurrent Charge will be subject to an annual increase on and from each Review Date until the next Review Date in accordance with the formula described below :

$$A = B \times C/D.$$

Commercial In Confidence

- 6.2 If the Parties are not able to agree new Recurrent Charge before \_\_\_\_\_, then the Recurrent Charge will be increased with effect from \_\_\_\_\_ in accordance with the following formula:

$$A = B \times (C/D + 0.03).$$

After the increase made as from \_\_\_\_\_, the Recurrent Charge will be subject to an annual increase on and from each Review Date until the next Review Date in accordance with the formula set out below, unless the Parties agree otherwise.

$$A = B \times C/D.$$

- 6.3 For the purpose of the above clauses, the following will apply:

A is the adjusted amount which applies on and from the Review Date;

B is the amount of the relevant charge as at the Base Date;

C is the CPI (A) index for Hong Kong last published before the Review Date;

D is the CPI (A) index for Hong Kong last published before the Base Date;

The **Base Date** is \_\_\_\_\_ and for each subsequent review after the first review, is the anniversary of that date immediately prior to that Review Date; and

The **Review Date** is \_\_\_\_\_ of each year.

If the CPI (A) for Hong Kong ceases to be published quarterly, then for the purposes of applying this clause, the CPI(A) for Hong Kong is to be replaced by the nearest equivalent index published at that time. The average figure of the CPI(A) over the relevant \_\_\_\_\_ month period will be used for the purpose of this clause.

- 6.4 If in making any adjustment in accordance with this clause, the adjustment commences on a date other than the first day of a calendar month then the charges due for that month should be the pro-rata calculated on a 30-day month basis.
- 6.5 No adjustment will be made under any part of this clause 5 if the resulted Recurrent Charge after making an adjustment would be lower than the amount payable without making that adjustment.

## 7. Payment

- 7.1 Unless otherwise agreed to by the Providing Operator, all invoices must be settled in Hong Kong dollars by company cheques made payable to the Providing Operator or by electronic transfer to the nominated bank account of the Providing Operator. Unless otherwise provided all Charges must be credited to the Providing Operator within \_\_\_\_\_ from the date of the invoice or the next day if the \_\_\_\_\_ day is not a Business Day ("due date").
- 7.2 If the amount payable under an invoice is not received by the due date, the Requesting Operator must pay interest in respect of the overdue amount calculated at a rate equal to 2% above the prime lending rate of The Hongkong and Shanghai Banking Corporation Limited

as current from time to time. Overdue interest will start to accrue from the due date and will be capitalised daily on all outstanding amounts until the date that the outstanding amount is received in full by the Providing Operator. Overdue interest will continue to accrue despite termination of the Agreement.

- 7.3 The Requesting Operator must pay all invoices issued by the Providing Operator pursuant to the Agreement without set-off or counterclaim and free and clear of any withholding or deduction (including but not limited to a withholding or deduction in respect of any Tax).
- 7.4 The Providing Operator may, at its discretion, set off amounts due to be paid by it to the Requesting Operator against any amounts due to be paid by the Requesting Operator to the Providing Operator under the Agreement.

## SCHEDULE 2

### INSTALLATION AND CONNECTION SPECIFICATIONS

Terms defined in the Self-Build Fibre Into Colocation Exchange Agreement apply in the Schedule unless the context requires otherwise.

#### 1. Requesting Operator's Work

- 1.1 As part of the Requesting Operator's Work, the Requesting Operator must connect and seal the Connecting Piece to the Requesting Operator's Manhole in accordance with the specifications set out in Attachment A.
- 1.2 The Requesting Operator is responsible for the ongoing maintenance of the connection and sealing of the Connecting Piece to the Requesting Operator's Manhole.

#### 2. Self-Build Fibre

- 2.1
  - (a) Cable diameter :  $\leq 25$  mm
  - (b) Cable Sheath : Low Smoke Zero Halogen (LSOH) and fire retardant
  - (c) Filling of interstices : completely filled with water repellent or if not completely filled with water repellent then it must be filled with non-toxic, free from bad smell, and non-irritable jelly compound
- 2.2 Must comply with the Technical Specifications set out in Attachment B.

## **SCHEDULE 3**

### **1. NOTICES**

A notice, consent or any other communication under the Agreement must be addressed as set out below.

### **2. LOCAL ACCESS LINK AGREEMENT**

Exchange Co-location and Local Access Link Agreement dated

### **3. CONFIDENTIALITY AGREEMENT**

Confidentiality Agreement between the parties dated

**Attachment A**  
**SEALING OF CONNECTING PIECE**

1. (unused clause number)
2. (unused clause number)
3. Material for sealing

- 3.1 Diameter

Where 107mm diameter PVC duct or above must be sealed with Resin (Specification No. EX 0041). If the duct bore is less than 107mm, Compound (Specification No. EX 0035).

- 3.2 Resin

Resin is supplied in two tins of equal size, one containing Resin the other Hardener. When mixed in equal proportions each pack contains enough resin to construct approximately ten duct seals.

The resin when mixed will foam to give a volume at least ten times greater than the mixed amount. Each pack is supplied with a polyethylene syringe.

- 3.4 Compound

Compound is packed in 1kg bags. It can be handled freely without protective clothing and is NON TOXIC. But, for hygienic reason, workers are recommended to wear gloves during working.

The Compound is permanently plastic, adhesive, waterproof, non-shrinking and non-corrosive. Its superior property of being adhesive even under water makes it applicable in wet situations.

4. Methods Of Installation

- 4.1 Using Resin

- 4.1.1 Empty Duct

Using polystyrene sheeting of 25mm thickness for 107mm duct, and 50mm sheeting for duct above 107mm, cut out two discs 5mm greater in diameter than the duct. Use either the hot wire method or a hacksaw blade to cut the polystyrene.

Before commencing construction of the seal, all dirt, grease and water should be removed from the duct. One of the discs should then be

compressed slightly and placed in the duct ensuring a tight fit. The disc is pushed into the duct until it rests squarely at the required position 94mm inside the duct.

The gap between each disc forms a cavity for the mixed resin.

#### 4.1.2 Duct Containing Cable(s)

The method is basically the same as that for empty duct with the exception that split discs are cut to fit around the cable.

#### 4.1.3 Removal of Seal Prior to Cabling

When it is necessary to remove an existing duct seal constructed using Resin it will be found that by the use of a medium size screwdriver the resin can be chipped away quite easily. Care must be taken not to damage existing cables. Always arrange for the duct to be re-sealed.

### 4.2 Using Compound

#### 4.2.1 Sealing Duct Containing Cable(s) or Empty

Before commencing the sealing, all dirt, grease, dust and mud must be removed.

The compound is hand-packed into the duct which could be wet. It should be inserted into the bore for a distance of 75mm.

If the duct contains cable(s), a collar of compound is built up around each cable at a length of 75mm and thick enough to fill the space. The collar should be formed outside the duct in order to get a consistent sealing length. The collar is then pushed into the duct mouth evenly by hand or with a suitably blunt instrument. Care must be taken to completely surround all cable(s) and to separate them from the duct and themselves.

The compound should be faced off level with the Lead-In Access Chamber wall to ensure that the duct is completely sealed. The same applies to the subscribers premises termination.

4.2.2 Compound can be easily removed by hand and, provided it is clean, can be reused. Always arrange for duct to be re-sealed.

Table 1  
QUANTITY OF RESIN REQUIRED  
IN DIFFERENT SITUATIONS

DIAMETER OF EMPTY DUCT	QUANTITY OF RESIN & HARDENER	NO. OF MIXES	LENGTH OF CAVITY
107mm	40ml + 40ml	1	94mm
UP TO 155mm	45ml + 45ml	2	94mm
UP TO 200mm	50ml + 50ml	3	94mm
DIAMETER OF EMPTY DUCT	QUANTITY OF RESIN & HARDENER	NO. OF MIXES	LENGTH OF CAVITY
107mm WITH ONE CABLE UP TO 50mm IN DIAMETER	40ml + 40ml	1	94mm
107mm WITH TWO CABLES UP TO 50mm IN DIAMETER OR ONE 75mm CABLE	25ml + 25ml	1	94mm
UP TO 155mm WITH ONE CABLE UP TO 75mm IN DIAMETER	35ml + 35ml	2	94mm
UP TO 155mm WITH TWO CABLES UP TO 75mm IN DIAMETER	50ml + 50ml	1	94mm
UP TO 200mm WITH THREE CABLES UP TO 75mm	45ml + 45ml	2	94mm

It is not possible to cover all situations due to the many combinations of duct and cable sizes. It is therefore better to use more resin when any doubt exists regarding quantities.

- END -

**Attachment B**  
**SPECIFICATION FOR**  
**FLAME RETARDANT CABLE SHEATH**

The cable sheath shall be low-smoke, low-fume, halogen free (LSOH) and fire retarding, meeting the following standards where applicable.

- a) Flame retarding tests to IEC 332
  - Part 1 - Test on a single vertical insulated cable
  - Part 3 - Test on bunched wires and cable
  - Category C: 1.5 l/m combustible materials,  
20 min. flame application
  
- b) Test on halogen content to IEC 754 Part 1 & 2
  - Evolving halogen acid : less than 0.5%
  - PH value : Not less than 4.3
  - Weighted conductivity lower than 10 $\mu$ S/mm
  
- c) Limiting Oxygen Index test to ASTM D-2863 minimum : 27%
  
- d) Temperature Index test to ASTM D-2863 minimum : 260°C
  
- e) Smoke Emission test conforming to IEC 1034 with minimum Transmittance Luminous Index (TLI) not less than 70