

# Terms & Conditions for Maintenance (Echo V10 05/09)



## 1. Definitions

In these terms and conditions, the following capitalised terms shall have the following meanings:

"Additional Equipment" means any additional equipment, software and/or systems supplied by Echo to the Customer during the Term;

"Agreement" means an agreement between Echo and the Customer on these Terms;

"Anniversary Date" means any anniversary of the Commencement Date;

"Annual Maintenance Charge" means the annual sum payable by the Customer in respect of the Services, which for the Minimum Term is as specified in the Pricing Schedule and thereafter is calculated in accordance with clause 3.5, and as adjusted in accordance with clause 3.4;

"Commencement Date" means the commencement date specified in the Pricing Schedule;

"Cover Days" means the days of the week (excluding bank holidays unless otherwise agreed by Echo) specified in the Pricing Schedule;

"Coverage Hours" means the hours specified in the Pricing Schedule;

"Customer" means the company, partnership or individual specified in the Pricing Schedule;

"Customer Alterations" means any alterations to Equipment, related apparatus and/or extensions to related wiring (including removal and reinstallation of the Equipment at a new site) carried out by the Customer;

"Echo" means Echo Communications Ltd, a company registered in England and Wales with registered number 01578483 and registered office at Chatfield Court, 56 Chatfield Road, London SW11 3UL;

"Equipment" means the equipment, software and/or systems specified in the Pricing Schedule, together with any Additional Equipment, at the site specified in the Pricing Schedule;

"Excluded Equipment" means overhead, underground or external cabling, two-wire telephone handsets and other related equipment.

"Fault Notification" means a notification to Echo by the Customer, in the manner specified by Echo, of any fault in the Equipment;

"Fault Response" means a response to a Fault Notification within the maximum number of hours specified in the Pricing Schedule for a Major Fault and a Minor Fault respectively;

"Major Fault" means: (i) 25% of all handsets forming part of the Equipment being unable to make any voice call (whether incoming or outgoing); (ii) a total voicemail or call centre application failure; (iii) a total failure of any other application specified in the Pricing Schedule; (iv) a total failure of all Equipment; and/or (v) an inability to make any voice calls across the Customer's private network;

"Minimum Term" means the minimum period stated in the Pricing Schedule, provided that it shall not in any event be less than twelve (12) months;

"Minor Fault" means any fault other than a Major Fault;

"Network" means any telecommunications network to which the Equipment is connected;

"Payment Method" means the payment method specified in the Pricing Schedule;

"Price Change Event" means, after the date of the Agreement, any increase in Echo's cost of performing the Agreement that Echo cannot reasonably control, including due to: (i) any currency exchange fluctuation; (ii) currency regulation; (iii) alteration of duties; (iv) increase in the cost of labour or materials; (v) the Customer not complying with clause 5 including resultant courier costs for transportation of Equipment; or (vii) increased engineering time required to maintain the Equipment;

"Pricing Schedule" means a pricing schedule or maintenance agreement that refers to, or is attached to, these Terms;

"RPIX" means the variance indicated by the retail prices index excluding mortgage interest payments (published by the Office of National Statistics) during the immediately previous twelve (12) month period;

"Service Package" means the service package specified in the Pricing Schedule as further detailed in Echo's service package descriptions from time to time;

"Services" means, in relation to the Equipment (but excluding Excluded Equipment), during the Coverage Hours on the Cover Days: (i) the provision of a Fault Response; and (ii) maintenance, repairs and replacement of parts in accordance with the Service Package, in both cases as required as a result of fair wear and tear;

"Term" means the term of an Agreement; and

"Terms" means these terms and conditions and any additional terms and conditions specified in the Pricing Schedule. In the event of any express conflict, the latter shall prevail.

Headings in these Terms are for convenience only and do not affect their interpretation. The words "including" and "includes" are used without limitation.

## 2. Duration

2.1 The Agreement shall start on the Commencement Date and shall continue for the Minimum Term, and thereafter shall continue until terminated;

2.1.1 on an Anniversary Date by either party on ninety (90) days' prior written notice to the other; or

2.1.2 at any time by Echo under Clause 9.

## 3. Charges and payment

3.1 The Annual Maintenance Charge shall be paid in advance by the Customer and shall be received by Echo on or before the Commencement Date and on commencement of each subsequent invoicing period, or fourteen (14) days after the date of the relevant invoice from Echo, whichever is the later. Echo shall issue invoices with the frequency specified on the Pricing Schedule.

3.2 The Annual Maintenance Charge must be paid to Echo in cleared funds by the Payment Method. All sums due under the Agreement must be paid in full without deduction, set off or withholding.

3.3 All sums in these Terms are expressed exclusive of value added tax which shall be paid to Echo in accordance with clause 3 together with any other applicable taxes, duties, or levies.

3.4 The Annual Maintenance Charge may be adjusted at Echo's reasonable discretion to take into account any Price Change Event, Customer Alterations or Additional Equipment. Echo shall be entitled to invoice the Customer, on the date of the Price Change Event or Customer Alterations or the delivery date of the Additional Equipment (as appropriate), for payment of the additional Annual Maintenance Charge pro-rata in respect of the period from the relevant date to the next Anniversary Date.

3.5 Echo may increase the Annual Maintenance Charge for each year during the Term (other than the Minimum Term) on an Anniversary Date, provided that (subject to clause 3.4) Echo may only increase the Annual Maintenance Charge by more than RPIX if Echo has given the Customer one hundred and five (105) days' written notice prior to the relevant Anniversary Date.

3.6 If, in Echo's reasonable opinion, maintenance, repairs and/or replacement of parts are required in relation to the Equipment other than as a result of fair wear and tear to the Equipment, Echo shall carry out the same provided that the Customer shall pay to Echo the cost of the same at Echo's then current rate, and the Fault Response hours shall not apply.

3.7 Without prejudice to any of Echo's other rights, Echo reserves the right to withdraw any discounts:

3.7.1 on any invoices that remain unpaid in breach of clause 3; and

3.7.2 in any of the circumstances specified in clauses 9.1.2 and 9.1.3;

and charge the Customer at Echo's then standard rates.

3.8 During the Term Echo may require the payment of a deposit by the Customer as security for payment of the Annual Maintenance Charge. The Customer may request the return of any deposit on any Anniversary Date, but the decision to return any deposit prior to termination of the Agreement is at the discretion of Echo.

3.9 Echo reserves the right to set off the deposit against any amount due and owing by the Customer to Echo (including under the Agreement).

3.10 If the Customer fails to pay any sum due under these Terms in accordance with clause 3, without prejudice to any of Echo's other rights, Echo may:

3.10.1 charge interest on such sum at the rate of four per cent (4%) per annum above Barclays Bank plc's base lending rate from time to time calculated from the invoice date until the date payment is made, whether before or after judgement; and

3.10.2 reclaim from the Customer all costs and expenses (including legal costs) reasonably incurred in the collection of such sums from the Customer.

## 4. Services

4.1 Echo or its authorised contractor shall, as soon as is reasonably practicable after the Customer has provided a Fault Notification in accordance with clause 5 use its reasonable endeavours to carry out the Services.

4.2 Echo or its authorised contractor will provide the Services with the reasonable skill and care of a competent provider of the Services.

4.3 All Services may be carried out at the premises where the Equipment is installed, by repair of the Equipment at Echo's premises, by remote access, by direct telephonic connection via a modem or similar device, or otherwise, at the option of Echo.

4.4 Echo reserves the right to hold all conversations between the Customer and Echo's customer service centre.

## 5. Customer's obligations

The Customer shall:

5.1 except if Echo was responsible for maintaining, or has supplied and installed, the Equipment immediately prior to the Commencement Date, ensure that the Equipment is in good working order on the Commencement Date;

5.2 provide Fault Notifications as soon as possible;

5.3 ensure that any Equipment which Echo or its authorised contractor is to collect from the Customer in response to a Fault Notification is duly packaged and addressed, corresponds to the description of the Equipment which the Customer has reported to Echo and is ready for collection by Echo at the date and time specified by Echo;

5.4 operate the Equipment in accordance with Echo's reasonable instructions, the manufacturer's guidance, and good industry practice;

5.5 ensure that adequate security is in place at the Customer's site to prevent damage to, unauthorised use of, or intrusion of any virus or malicious material into, the Equipment or the Site;

5.6 comply with all statutory requirements (including the requirements of the Wireless Telegraphy Act 2006 and the Communications Act 2003), bylaws, regulations, and Network operators' requirements;

5.7 provide at its expense stable and clean electrical power (without surges), heating, lighting, ventilation, private wires, jack sockets and any other items or conditions as are necessary for the efficient operation of the Equipment and for the Services;

5.8 obtain at its expense all wayleaves, planning permissions, licences and consents necessary for the provision of the Services and/or use of the Equipment;

5.9 provide Echo (including Echo's authorised contractors) with safe and unhindered access to the Customer's site and the Equipment at all reasonable times and provide such other reasonable assistance as Echo requests for the Services (including working and storage space at the Customer's site);

5.10 notify Echo fourteen (14) days prior to commencement of any Customer Alterations. The Customer shall ensure that all Customer Alterations are carried out by an installer approved in advance by Echo; and

5.11 be solely responsible for any costs or charges relating to the use (whether malicious, fraudulent or otherwise) of the Equipment by the Customer or a third party, whether from or within the Customer's premises or via external means. The Customer acknowledges that voicemail ports that are configured to allow external calls may be vulnerable to fraudulent access.

Any such configuration is solely at the Customer's risk and Echo will have no liability for the cost of any external calls made using such voicemail ports.

## 6. Indemnity

The Customer shall indemnify and keep indemnified Echo against all liabilities, claims, actions, proceedings, losses, damages or expenses which are brought against or incurred by Echo and which result from any fraud, negligence, default or breach of the Agreement by the Customer.

## 7. Warranties and liability

7.1 Nothing in these Terms shall exclude or limit Echo's (including its employees', agents' and sub-contractors') liability for death or personal injury resulting from its negligence, for fraud or fraudulent misrepresentation, or for any matter which it would be illegal to exclude or attempt to exclude its liability.

7.2 All warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Agreement.

7.3 Without prejudice to the generality of clause 7.2, Echo does not warrant or represent that the Equipment will operate free from errors, viruses, fraudulent intrusion or unauthorised use (including its interconnection to long distance networks).

7.4 Subject to clause 7.1, Echo's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Agreement shall be limited to the Annual Maintenance Charge paid by the Customer under the Agreement in the twelve (12) month period immediately prior to the liability arising.

7.5 Subject to clause 7.1, Echo shall not be liable for any cost, loss, damage or expense:

7.5.1 arising from unauthorised, fraudulent or malicious use of the Equipment;

7.5.2 sustained by the Customer as a result of faults on any Network line or equipment, or in respect of faults on any services provided to the Customer directly by a service provider of Echo or a third party; or

7.5.3 arising from anything that Echo cannot reasonably control, including acts of God, inclement weather, failure or shortage of power supplies, difficulties in obtaining raw materials spare parts or machinery, flood, drought, lightning or fire, civil disorder, war or military operations, national or local emergency, acts or omissions of the Government, highways authority, other public telecommunications operators or other competent authorities, any Echo sub-contractor approved by the Customer, industrial dispute of any kind, or acts or omissions of any person or bodies for whom Echo is not responsible whether caused within or outside the United Kingdom.

7.6 Subject to clause 7.1, Echo shall not be liable for any pure economic loss, loss of profit, loss of business, depletion of goodwill or otherwise, loss of data, in each case whether direct, indirect or consequential, or any claims for consequential compensation whatsoever (howsoever caused) which arise out of or in connection with the Agreement. The Customer is advised to obtain its own insurance in respect of the same.

7.7 Echo will be under no obligation to provide the Services where the Equipment has been affected by:

7.7.1 accident, misuse, neglect, or breach of the Agreement by the Customer or any other user of the Equipment (including failure to undertake routine maintenance of the Equipment's in accordance with the manufacturer's guidance);

7.7.2 a failure or fluctuations of electrical power, surges or spikes in the electrical mains or currents induced into the exchange via external or internal extension cabling by external weather conditions such as but not limited to electrical storms; or

7.7.3 alterations to the Equipment by the Customer or their connection by mechanical or electrical means to another machine or device, other than alterations or connections carried out or approved in writing by Echo.

## 8. Suspension of Services

8.1 Echo may, where reasonable, from time to time and without notice suspend the performance of the Services or any other agreement between Echo and the Customer (including any parent, subsidiary or associated company of the Customer) in any of the following circumstances without liability:

8.1.1 if the Customer fails to comply with these Terms or any reasonable instruction of Echo in relation to the Equipment or the Services, and until such failure to comply is remedied;

8.1.2 if the Customer does or allows to be done anything which in Echo's reasonable opinion may jeopardise the operation of the Equipment or the Network;

8.1.3 if in the reasonable opinion of Echo the Equipment is being used in a manner prejudicial to the interest of the Customer and/or the provision of the Services by Echo;

8.1.4 if Echo reasonably suspects that the Equipment is being used for any illegal, improper, immoral, fraudulent or unlawful purpose;

8.1.5 if Echo reasonably believes that the Customer will not be able to make any payment to Echo as it falls due;

8.1.6 if Echo is obliged to comply with an order, instruction or request of the Government, an emergency services organisation or another competent administrative authority;

8.1.7 in the case of emergency; or

8.1.8 if the provision of the Services is prevented for any reason, including due to circumstances specified in Clause 7.5.3.

8.2 The Customer shall reimburse Echo for all reasonable costs and expenses incurred by the implementation of such suspension and/or the recommencement of the Agreement as appropriate, in any of the circumstances specified in clause 8.

## 9. Termination

9.1 Without prejudice to any of Echo's other rights, Echo may terminate the Agreement with immediate effect on notice to the Customer:

9.1.1 if the Customer fails to comply with any of these Terms after having been given seven (7) days' written notice of its failure (including failure to pay any sums due hereunder);

9.1.2 if the Customer ceases to carry on business or is or becomes unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986;

9.1.3 if the Customer makes or offers to make any arrangement or composition (including any voluntary arrangement) with any one or more of its creditors, or commits any act or acts of bankruptcy or if any petition or receiving order in bankruptcy is presented or made against the Customer, or if any resolution or petition to wind up the Customer is issued or passed or presented (other than for reconstruction or amalgamation), or if a receiver is appointed over any of the Customer's assets;

9.1.4 if there is a change of control or ownership of the Customer;

9.1.5 if the performance of the Agreement is prevented in the circumstances specified in clause 7.5.3 for a continuous period of ten (10) days or more;

9.1.6 if the Customer does or allows to be done anything which in Echo's opinion will or may have the effect of jeopardising the operation of the Equipment or the Network;

9.1.7 if any licence or permission to operate or use the Equipment or the Network or any part of them is revoked or terminated for any reason;

9.1.8 if the operation of the Network is terminated or the provision of the Equipment to Echo is discontinued for any reason; or

9.1.9 if any information supplied to Echo by the Customer is false or misleading.

## 10. Consequences of Termination

10.1 If the Agreement is terminated before the expiry of the Minimum Term for any reason, then without prejudice to any of Echo's other rights, the Customer shall immediately pay to Echo a sum equal to any unpaid part of the Annual Maintenance Charge for the Minimum Term.

10.2 If the Agreement is terminated for any reason after the expiry of the Minimum Term but prior to the next Anniversary Date, then without prejudice to any of Echo's rights, the Customer shall immediately pay to Echo a sum equal to any unpaid part of the Annual Maintenance Charge in respect of the period from the date of expiry of the Minimum Term to such Anniversary Date.

10.3 Additionally, if the Agreement is terminated by Echo under clause 9.1 the Customer shall immediately pay to Echo a sum equal to any discount which reduced the Annual Maintenance Charge below Echo's standard rates in respect of the first twelve months of the Minimum Term.

10.4 For the duration of the Agreement and for one (1) year following its termination, the Customer agrees not to employ any representative of Echo who has provided Services to the Customer.

## 11. Assignment

11.1 Echo may at any time assign its rights and obligations under the Agreement to any third party.

11.2 The Customer shall not (without the prior written consent of Echo) assign, transfer or delegate or otherwise deal with all or any of its rights and obligations under the Agreement.

11.3 Echo's acceptance of payment from a person other than the Customer does not imply that Echo has amended or waived any of its rights or obligations of the Customer.

## 12. Variation

12.1 Echo may vary these Terms to take account of new legislation, statutory instruments, regulations or licences or similar matters, provided that the Customer is notified of any such variation in writing.

12.2 Any other variation to the Agreement shall be in writing and signed by a duly authorised representative of each party.

## 13. Data Protection

The Customer acknowledges that details of the Customer's name, address and payment record may be submitted to a credit reference agency, and personal data will be processed by and on behalf of Echo and Echo's suppliers in connection with the Equipment.

## 14. Miscellaneous

14.1 The Customer agrees that these Terms govern the Agreement between Echo and the Customer to the exclusion of any other terms and conditions, oral or written, and all representations or communications between the parties relating to the subject matter of the Agreement. The Customer expressly affirms that it has neither relied on, nor been induced to enter into an Agreement by, any warranty, condition or representation not contained in these Terms.

14.2 Any notice given under the Agreement shall be in writing and shall be served by delivering it personally or sending it by post (with proof of posting) to: (a) Echo at Customer Services at Echo's registered office; or (b) the Customer at any address of the Customer, unless otherwise notified by the relevant party. Any such notice shall be deemed to have been received: (a) if delivered personally, at the time of delivery; and (b) in the case of posting, 48 hours from the date of posting. The Customer shall immediately notify Echo of any changes relevant to the provision of the Services e.g. change of address.

14.3 Any concession or waiver allowed by Echo to the Customer shall neither prevent Echo from exercising any of its rights nor prejudice Echo's rights to take any subsequent action.

14.4 If any of the words or provisions of these Terms shall be deemed to be invalid for any reason then they shall be read as if the invalid provisions had to that extent been deleted and the validity of the remaining provisions shall not be affected.

14.5 Nothing in these Terms shall create a partnership or joint venture between the parties nor shall the Customer have any authority to bind or commit Echo or to act as Echo's agent.

14.6 Nothing in the Agreement shall confer any rights or benefits on any third party under the Contracts (Rights of Third Parties) Act 1999 or otherwise.

14.7 The Agreement is governed by English law and both parties agree to submit to the exclusive jurisdiction of the English courts.