

# Terms & Conditions

## 1. Definitions

In these Conditions, the following expressions will have the following meanings, unless inconsistent with the context: "Acceptable Usage Policy" is the acceptable use policy found at [www.faircom.co.za/terms](http://www.faircom.co.za/terms) "Agreement" is the agreement between Faircape Communications and the Client for the provision of Services formed by these Conditions, the Acceptable Usage Policy, Application Form, and any other policies that Faircape Communications makes available on its website; "Application Form" means the application form to which these Conditions are attached; "Associated Company" in respect of either party, means a subsidiary or parent company of that party or any subsidiary of such parent company; "Business Day" is a day which is not a Saturday or Sunday or public holiday; "Business Hours" means 8am to 5pm on each Business Day; "Client" is the individual or entity as identified on the Application Form to which these Conditions are attached; "Client System" is the Client's computer system used and/or owned by the Client in connection with the Services; "Conditions" refer to these terms and conditions (in four parts) to be read in conjunction with the Acceptable Use Policy; "Defect" means any failure of the Services to function properly; "Fees" are the charges due to Faircape Communications by the Client under the Agreement in relation to the Services; "Intellectual Property Rights" means any and all patents, trademarks, service marks, copyright, rights in design, knowhow, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration; "Services" means such implementation, hosting and other services (if any) provided to the Client pursuant to the Agreement together with any Support Services; "Support Services" means those support and maintenance services that may be provided to the Client pursuant to the Agreement; "Support Hours" are the hours during which Faircape Communications will provide the Support Services.

## 2. Services

2.1 Faircape Communications agrees to supply the Services to the Client on the following conditions. These conditions are not an offer to provide service but merely a statement of the terms on which Faircape Communications would provide them.

2.2 Faircape Communications reserves the right at any time and from time to time, to improve, correct, add to, delete, terminate, or otherwise modify all or any of the Services without notice.

2.3 Without prejudice to its other rights and remedies, Faircape Communications may at any time in its sole discretion suspend the provision of the whole or any part of the Services (temporarily or permanently) with or without notice and will have no liability to provide the Services on the occurrence of any of the following events, as determined by Faircape Communications in its sole discretion:

2.4.1 the upgrade, repair, scheduled or emergency maintenance of Faircape Communication's IT systems;

2.4.2 if the Client fails to pay any Fees or any other sums owing to Faircape Communications by the Client when they fall due;

2.4.3 if an event occurs and Faircape Communications deems it to be appropriate to terminate the Agreement;

2.4.4 failure or deficiencies in the Client System relating but not limited to hardware, server corruption and security breaches; or

2.4.5 failure by the Client to adhere to any of the provisions of the Agreement, including without limitation the terms of Faircape Communication's Acceptable Use Policy.

2.5 Where Faircape Communications suspends provision of the Services in accordance with the Agreement, any recommencement of the Services shall only occur after the Client has paid all relevant outstanding amounts together with any relevant reinstatement fee (as published from time to time by Faircape Communications) and has accepted any revised payment terms requested by Faircape Communications (such as pre-payment).

## 3. No Warranty

3.1 The Client acknowledges that, given the nature of such services, Faircape Communications cannot guarantee that the Services, when delivered via the Internet, will be uninterrupted or error free.

3.2 To the fullest extent permitted by law, the Services are provided by Faircape Communications to the Client on an "as is" and "as available" basis and no warranty or representation (express or implied) of any kind are given in connection with the Agreement including without limitation as to satisfactory quality and fitness for a particular purpose. In particular, Faircape Communications gives no warranty or representation that:

3.2.1 the Services will meet the Client's requirements

3.2.2 the Services will be provided on an uninterrupted, timely, secure or error-free basis; or

3.2.3 Any results obtained from use of the Services will be accurate, complete or current.

3.3 The Client's only recourse in the event of a failure by Faircape Communications to provide and deliver the Services will be a refund of any Fees paid during a period that Services related to such Fees were not provided. Any such refund shall be at the sole and absolute discretion of Faircape Communications.

## 4. Client's Obligations

4.1 The Client agrees that it shall:

4.1.1 immediately notify Faircape Communications on becoming aware of any unauthorised use of all or any of the Services;

4.1.2 ensure that it has all necessary consents, permissions, waivers, and licences to make use of the Services;

4.1.3 independently monitor its use of the Services and its bandwidth in relation to the use of Services and report to Faircape Communications any use of bandwidth over and above those agreed, or any other misuse of the Services;

4.1.4 be entirely liable for all activities conducted and charges incurred under its passwords and user names whether authorised by it or not and the Client acknowledges that Faircape Communications shall not be liable for any loss of confidentiality or for any damages arising from the Client's inability to comply with these Conditions;

4.1.5 comply with any security policy notified to it from time to time by Faircape Communications;

4.1.6 provide to Faircape Communications accurate and up to date contact information, including full legal name, mailing address, telephone number, and e-mail address, and ensure that all such contact information which it provides to Faircape Communications are at all times true, current, accurate and complete. The Client will promptly notify Faircape Communications of any change to such details and acknowledges that Faircape Communications will not be liable for any loss suffered or incurred by the Client as a result of its failure to notify such changes to Faircape Communications; and

4.1.7 promptly provide to Faircape Communications and/or its consultants, employees and agents such information and assistance as they may reasonably require in order to be able to carry out the Services and any other obligations under the Agreement and will appoint a representative who is fully empowered and authorised to provide same.

4.2 The Client agrees that it shall not:

4.2.1 use the Services or allow them to be used for any unlawful purpose

## 5. Payment Terms

5.1 The Fees are payable to Faircape Communications subject to the following conditions:

5.1.1 Fees payable monthly, will be paid 30 (thirty) days in advance and call charges (actual usage) will be billed 30 (thirty) days in arrears and will not be refundable in whole or part if the Agreement or any relevant part is terminated during the period to which the payment relates, unless it is terminated by Faircape Communications without cause.

5.1.2 any set up fee will (unless stated otherwise) be payable immediately;

5.1.3 additional Fees will become payable if the Client exceeds agreed or stipulated use levels, including but not limited to bandwidth. In the event that the Client exceeds the agreed or stipulated bandwidth Client will be notified and charged for such excess use in accordance with applicable rates.

5.2 Any sums payable by the Client to Faircape Communications under the Agreement are exclusive of any applicable taxes, levies or duties, which will be added to such sums and be payable by the Client at the appropriate rate.

5.3 If Fees are not paid when due the Client will be liable to pay interest on any sum outstanding from the due date for payment accruing at the prime rate plus 2% per month until paid, without prejudice to Faircape Communication's other rights and remedies (including the right to suspend the Services).

5.4 All Accounts that have overdue unpaid balances may be subject to suspension and collection activities, and may be submitted to a third party collection company. If a further payment falls due during the suspension of the Client's account then this will be added to outstanding balance owed by the Client.

5.5 All sums payable to Faircape Communications under the Agreement must be paid in full with no set off or deduction.

#### **6. Confidential Information**

6.1 Customer shall:

6.1.1 keep confidential all information obtained from Faircape Communications under or in connection with the Agreement ("Information");

6.1.2 not disclose any Information to any third party without the prior written consent of Faircape Communications except to such persons and to such extent as may be strictly necessary for the performance of the Agreement, in which case the Client shall provide prompt notice of such mandated disclosure to Faircape Communications;

6.1.3 not use any Information otherwise than for the purposes of the Agreement.

6.2 The provisions of clause 6.1 do not apply to Information which:

6.2.1 is or becomes public knowledge (otherwise than by breach of this clause); or

6.2.2 was in the possession of the party concerned without restriction as to its disclosure before receiving it from the disclosing party; or

6.2.3 is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;

6.3 The provisions of this clause 6 will continue to apply notwithstanding termination of the Agreement.

#### **7. Intellectual Property**

7.1 The Client acknowledges and agrees that it will not own or acquire any rights under this Agreement in any Intellectual Property in or relating to the Services or created in performing the Services and that it will have no other rights in or to the Services other than the rights expressly granted by the Agreement.

7.2 The Client will indemnify Faircape Communications from and against any and all costs, expenses (including without limitation reasonable attorney fees), liabilities, injuries, losses, damages, claims, demands, and judgments that Faircape Communications incurs or suffers as a result of any actual or alleged infringement of any Intellectual Property Right of any third party arising directly or indirectly from:

7.2.1 the provision by Faircape Communications of Services making use of information or specifications supplied by the Client;

7.2.2 the Client's failure to procure all necessary rights from third parties which are from time to time required in order for Faircape Communications to be able legally to provide the Services; or

7.2.3 the use by Faircape Communications in connection with the Agreement of the Client System and the Client Content.

#### **8. Limitation of Liability**

THE CLIENT EXPRESSLY UNDERSTANDS AND AGREES THAT, TO THE FULLEST EXTENT UNDER APPLICABLE LAW, FAIRCAPE COMMUNICATIONS SHALL NOT BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, OR EXEMPLARY DAMAGES, INCLUDING BUT NOT LIMITED TO DAMAGES FOR LOSS OF PROFITS, GOODWILL, USE, DATA, OR OTHER INTANGIBLE LOSSES (EVEN IF FAIRCAPE COMMUNICATIONS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES), RESULTING FROM (i) THE USE OF OR THE INABILITY TO USE THE SERVICES; (ii) THE COST OF PROCUREMENT OF SUBSTITUTE GOODS AND SERVICES RESULTING FROM ANY GOODS, DATA, INFORMATION, OR SERVICES PURCHASED OR OBTAINED OR MESSAGES RECEIVED OR TRANSACTIONS ENTERED INTO THROUGH OR FROM THE SERVICES PROVIDED HEREUNDER; (iii) UNAUTHORIZED ACCESS TO OR ALTERATION OF YOUR TRANSMISSIONS, DATA, USER CONFIGURED SETTINGS, OR UPLOAD CONTENT; (iv) STATEMENTS OR CONDUCT OF ANY THIRD PARTY ON THE SERVICE; OR (v) ANY OTHER MATTER RELATING TO THE AGREEMENT OR THE SERVICES. UNDER NO CIRCUMSTANCES WILL FAIRCAPE COMMUNICATIONS OR ITS ASSOCIATED COMPANIES LIABILITY UNDER THIS AGREEMENT

FOR A GIVEN CLAIM EXCEED AN AMOUNT EQUAL TO THE TOTAL FEES PAID TO FAIRCAPE COMMUNICATIONS BY THE CLIENT FOR THE SERVICES.

#### **9. Force Majeure**

Other than with respect to the Client's payment obligations, neither party shall be liable to the other party for any failure to meet its obligations under the Agreement arising by reason of force majeure, which means, in relation to either party, circumstances beyond the reasonable control of that party including acts of God, acts of any governmental authority, war or national emergency, riots, civil commotion, fire, network failure, systems fault, unauthorised use or access to the IT systems of Faircape Communications or the Client, explosion, flood, epidemic, lock outs (whether or not by that party), strikes and other industrial disputes (in each case, whether or not relating to that party's workforce), restraints or delays affecting shipping or carriers, inability or delay in obtaining supplies of adequate or suitable materials and currency restrictions, to the extent outside of its reasonable control.

#### **10. Breach**

Should the Client commit a breach of any of the provisions of this Agreement and fail to remedy such breach within seven (7) days after receiving written notice from Faircape Communications requiring it to do so then Faircape Communications shall be entitled, without prejudice to its other rights in law, to cancel this Agreement or to claim specific performance, in either event, without prejudice to Faircape Communication's rights to claim damages.

#### **11. Legal Costs**

11.1 The Client shall be responsible and liable for all and / or any legal costs on an Attorney and Own Client scale, incurred by Faircape Communications to recover any monies due by the Client and / or occasioned by a breach of any of the terms and conditions contained herein by the Client, which legal costs shall include tracing costs, collection commission and any related cost or expenses.

11.2 The parties hereby agree that this agreement is subject to the Law of South Africa and consent to the jurisdiction of the Magistrate's Court should any claim arising out of the terms and conditions of this Agreement be beyond the jurisdiction of the Magistrate's Court. Notwithstanding the aforesaid, Faircape Communications shall have the right to take legal action against the Client in any other Court of competent jurisdiction.

#### **12. Notices**

All notices to be given in terms of this Agreement shall be given in writing and shall be addressed and delivered as follows :- either by electronic mail to support@faircom.co.za ; or by hand delivery to ground floor, 25 Protea Road, Claremont Terraces, Claremont, 7780 or by fax to fax number 0865 110 120;

#### **13. Termination**

This Agreement will terminate on 30 (thirty) days written notice.

#### **14. Entire Agreement**

This Agreement, together with all annexures annexed thereto, if any, represents the entire agreement between the parties and supersedes all other agreements or understandings, written or verbal, that the parties may have had with respect to the subject matter of this Agreement.

#### **15. Assignment**

Neither party shall be entitled to assign its rights and obligations under this Agreement without the prior written consent of the other party.

#### **16. Variation**

No addition to, variation or consensual cancellation of any provision in this Agreement, including this provision, shall be of any force or effect unless reduced to writing and signed by or on behalf of both parties.

#### **17. Waiver**

No relaxation which either party may give in regard to the performance of the other party's obligations in terms of this Agreement shall constitute a waiver of rights unless reduced to writing and signed by such party.

# Service Level Agreement (SLA) Terms & Conditions

## 1. Definitions

- 1.1. "After hours" refers to the period from 17h00 to 08h00 on a business day, weekends and on any public holiday officially recognised in the Republic of South Africa.
- 1.2. "Core network" refers to the central part of Faircape Communications network that provides various services to the Client who is connected to the network.
- 1.3. "Fault" is defined as a system affecting interruption that is classified as one of 3 Severity levels; S1, S2 or S3.
- 1.4. "Firmware Upgrades" are limited to equipment rented from Faircape Communications.
- 1.5. "Latency" refers to the average time required for round-trip packet transfers between two adjacent designated points of presence (POP) on the selected portions of the Faircape Communications core network during a calendar month, as measured by Faircape Communications.
- 1.6. "Monthly Service Fee" shall be the annuity billing amount of the underlying Service after any discounts.
- 1.7. "Physical fibre" refers to the last-mile between the Client and Faircape Communications that provides the infrastructure for the Service.
- 1.8. "Response time" refers to the time taken by Faircape Communications to act on a fault / interruption affecting the Service.
- 1.9. "S1": Severity 1 – Fibre Optic Cable Network down and not functional.
- 1.10. "S2": Severity 2 – Metro Ethernet or Fibre optic cable is down or use is severely impacted.
- 1.11. "S3": Severity 3 – Metro Ethernet or Fibre optic cable network is active with problems that can be circumvented.
- 1.12. "S4": Severity 4 – Query to be logged.
- 1.13. "Service" is defined as the internet and / or data facility provided to the Client by Faircape Communications.
- 1.14. "Software Upgrades": are limited to equipment rented from Faircape Communications.
- 1.15. "Support staff" refers to the Faircape Communications staff that is responsible for the maintenance, monitoring and upgrades on the Faircape Communications network.
- 1.16. "Uptime" is the amount of Service availability measured at a percentage rate of 98.7%.
- 1.17. "Office hours" refers to the period 8h00 to 17h00, excluding weekends and public holidays.

## 2. Conditions of Service

- 2.1. Faircape Communications offers a four-hour response time on the physical fibre;
- 2.2. Faircape Communications' support staff are on standby 24/7 to resolve any Service issues;
  - 2.2.1. The contact details for Support Staff are as follows:
    - 2.2.1.1. Support telephone number: 021 812 2799
    - 2.2.1.2. Support e-mail address: support@faircom.co.za
- 2.3. Faircape Communications monitors both ends of the physical fibre link
  - 2.3.1. An alert system is in place to inform Support of any issues regarding the link and/or dropping of the link.
- 2.4. Reporting of incidents will be logged according to Severity levels; see table below setting out the response times of logging of an incident.

	Support staff assigned to resolve issues	Connection restored to working condition (even if temporary) *	The fault cleared on a permanent basis within following period
S1 - Severity 1	30 minutes	8 hours	30 days
S2 - Severity 2	30 minutes	10 hours	30 days
S3 - Severity 3	30 minutes	Next business day	40 business days
S4 - Severity 4	Next business day	N / A	20 business days

### **3. Scheduled and emergency maintenance**

- 3.1. The Customer acknowledges that in order to meet its obligations herein; Faircape Communications may from time to time be required to perform maintenance on equipment used in the provision of the Services.
- 3.2. Any impact on the Services as a result of the need to conduct maintenance shall be considered a scheduled event, provided that:
  - 3.2.1. Faircape Communications informs the Client, with as much notice as operationally possible in the circumstances, of the maintenance schedule, including:
    - 3.2.1.1. Scheduled start time;
    - 3.2.1.2. Expected duration; and
    - 3.2.1.3. Anticipated impact on the Services.
  - 3.2.2. Faircape Communications endeavours, whenever circumstances permit, to seek approval from the Client of the maintenance schedule, so as to allow the Client to plan and inform its users of any impact on the Services. Any other impact on Services where maintenance is required, and no notice is given, will be deemed an emergency.

021 815 5700 | [info@faircom.co.za](mailto:info@faircom.co.za) | [www.faircom.co.za](http://www.faircom.co.za) | fax: 086 511 0120 6th Floor, The Terraces, 25 Protea Road, Claremont, 7708 | PO Box 13214, Mowbray 7705