

**SUBJECT TO LICENCE/ LICENCE DENIED**

**DUCT ACCESS LICENCE  
LICENCE AGREEMENT**

***eircom* Ltd**

AND

**Operator**

~~10<sup>th</sup> November 2014~~ ~~\_\_\_\_\_~~ ~~711 February 2019~~ \_\_\_\_\_

\_\_\_\_\_ -Duct Access Licence

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## LICENCE AGREEMENT

**THIS LICENCE** is made the \_\_\_\_ day of \_\_\_\_\_ 201\_\_\_\_ BETWEEN:

- (1) **eircom Ltd (“the Licensor”)** which expression shall, where the context so admits, include its successors and assigns, registered as a Branch in Ireland Number 907674, Incorporated in Jersey Number 116389, having its Branch Office at 1 Heuston South Quarter, St. John’s Road, Dublin 8

And

- (2) \_\_\_\_\_ referred to under this Licence as **“the Licensee”** whose registered office is at. The company’s registered number is .

Hereinafter collectively referred to as the “Parties” or separately the “Party

WHEREAS the Licensor has been mandated by the NRA to provide Duct Access to Other Authorised Operators (“OAOs”) who request such Access.

NOW IT IS AGREED as follows:-

### 1. DEFINITIONS

In this Licence the following terms shall bear the meanings hereby assigned to them namely:-

“Access” means the making available of eircom Sub Ducts to other Authorised Operators in accordance with the provisions of this Licence and ComReg Decision Notice D3/13 as amended from time to time

“Access Agreement” means the Agreement in respect of the provision of Physical Co-location, Unbundled

Local Metallic Path and Line Sharing at the Site, dated the [date to be inserted] and made between the Parties;

“Access Reference Offer” means the Reference Offer in relation to unbundling the local loop, for the time being published on *eircom*’s website;

“Access Regulations” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 SI 334 of 2011

“Accreditation Process” means the process more particularly described in the Technical and Operations Manual

“Authorised Undertaking” means authorised undertaking as defined in the Authorisation Regulations

“Business Days” means any day (other than a Saturday or Sunday) on which retail banks are open for normal business in Ireland;

“Clerk of Works” means a member of the Licensor’s staff tasked with the function of ensuring the safety and integrity of Licensor’s Network for the duration of the Licensee’s Works;

“Commencement Date” means the date specified in Part A of Schedule 1;

“Duct Access Product” means access to *eircom*’s sub duct network infrastructure granted by *Eircom* in accordance with ComReg Decision Notice D3/13 and the terms of this Licence Agreement

;

“Duct Access Technical and Operational Manual” The manual of that name as amended from time to time by the Local Loop Unbundling Forum established under the auspices of the NRA and published on *eircom* website;

“Ducts” means the means the Licensor’s Ducts, the Licensor’s Sub ducts and the Licensor’s chambers;

“*eircom*” means *eircom* limited;

“Emergency” means a situation where immediate action is required in order to prevent or limit injury to persons or damage to property;

Inter Operator Process Manual (“IPM”) means the manual of that name as amended from time to time by the Local Loop Unbundling Forum, established under the auspices of the NRA and published on *eircom* website;

“Licensor’s General Health and Safety Requirements” means the Licensor’s Health and Safety requirements which are specified in the Technical and Operations Manual;

“Licensor Staff” means any employee, contractor or agent of *eircom* involved in the granting of this Licence;

“Hazard” shall include, but not be limited to, any occurrence or threatened occurrence which, in the reasonable opinion of the Licensor, having

due regard to the Safety Statement published by the Licensor constitutes or is likely to constitute a risk to the health and safety of any person or which is likely to cause damage to equipment or property;

“Hazardous Material” has the meaning attributed to it in the Licensor’s Health and Safety Statement.

“Interest Rate” Euribor + one (1%) (3 month rate) applied to amount in default.

“The Licensee’s Cables” means the cables permitted to be installed by the Licensee in the Licensor’s Sub Duct shown for the purposes of identification only on Plan A annexed hereto and thereon coloured blue and other ancillary Licensee equipment at the Route which may be permitted by the Licensor to be at the Route, including the Licensee’s Chambers ;

“Licence” means the licence granted pursuant to clause 2.1;

“the Licence Fee” means the sum specified in Schedule 2 plus Value Added Tax (or any tax substituted therefor) (as may be varied in accordance with the provisions of this Agreement);

“Licensee’s Chambers” means that part of the Equipment indicated for the purposes of illustration only on Plan A annexed hereto;

“Licensee’s Egress Point” means the point at which the Licensee’s Cable exits the eircom chamber;

“Licensee’s Ingress Point” means the point at which the Licensee’s Cable is permitted to enter the eircom chamber

“Licensee’s Network”	means the Electronic Communications Network as defined in the Communications Regulation Acts 2002 to 2012 owned, operated and controlled exclusively by the Licensee;
“Licensee’s Staff”	means any employee, agent or contractor of the Licensee;
“Licensor’s Permitted Duct Route(s)”	means the section(s) of eircom duct through which the Licensee is permitted to instal the Licensees’ Cables shown purposes of illustration only on Plan A annexed hereto;
“Licensor’s Network”	means the Electronic Communications Network as defined in the Communications Regulation Acts 2002 to 2012 owned, operated and controlled exclusively by the Licensor;
“Licensor’s Staff”	means any employee, agent or contractor of the Licensor;
“National Management Centre or NMC”	means: <ul style="list-style-type: none"> <li>(a) in the case of <i>eircom</i>, National Management Centre, Citywest Business Park, Citywest, Naas Road, County Dublin,</li> <li>and</li> <li>(b) in the case of the Licensee;</li> </ul>
“the NRA”	means the National Regulatory Authority or such other body in whom the powers and

functions, currently vested in the Commission for Communications Regulation (“ComReg) are vested;

“the Parties” means *eircom* and the Licensee and “a Party” shall be construed accordingly;

“the Payment Days” means the 1<sup>st</sup> April and 1<sup>st</sup> September in each year of the Term and “Payment Day” shall be construed accordingly;

“the Product Description” means the description of the Duct Access Product maintained by Eircom on the *eircom* Wholesale web site

“Registration Fee” means the fee levied by the Licensor as outlined in the Access Agreement;

“Regulatory Requirements” means the telecommunications requirements issued by the European Union (EU), ComReg or primary and secondary legislation issued by the Government for the time being of Ireland;

“The Route” means the section of the *eircom* Duct Network over which Access is granted to the Licensee in accordance with the terms of this Licence. ;

“Telecommunications Network” means transmission and, where applicable, switching equipment and other resources, which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means;



“Term” means the period specified in Part A of Schedule 1.

## **2. GRANT OF LICENCE**

2.1 In consideration of the Licence Fee, the Survey Fee and Clerk of Work Charges and any additional sums payable in accordance with the provisions of clause 3.7, the Licensor hereby grants to the Licensee a licence in common with the Licensor and any other person or persons who may be permitted by the Licensor so to do, and subject to the terms and conditions hereinafter contained, for and during the Term, and subject to the provisions of clause 11 (Termination) herein after contained, to: Instal, and maintain the Licensee’s Cable in the Licensor’s Ducts for the sole purposes of availing of the Duct Access Product in accordance with the Product Description. For the avoidance of doubt in the event of there being a conflict between this Licence Agreement and any term of the Product Description, the Licence Agreement shall take precedence.

For the avoidance of doubt, the Licence hereby granted does not confer and shall not be construed so as to confer on the Licensee any legal right or entitlement other than that as Licensee to use the Licensor’s Ducts serving the Route

2.2 The Licensor warrants to the Licensee that it has in place all requisite approvals, consents, easements, rights of way and wayleaves to enable access by the Licensee to all the Licensor’s Ducts for the purpose of availing of the Duct Access Product.  
The Route shall be under the control of the Licensor who shall be entitled to exercise such control by itself or through its servants or agents.

2.3 The installation of the Licensee’s Equipment shall be at the sole risk and expense of the Licensee.

2.4 The use and maintenance of the Licensee’s Cables shall be at the sole risk and expense of the Licensee.

- 2.5 The Licensor reserves the right to monitor the Licensee's Access to the Route in order to ensure that the Duct Access Product is used only by the Licensee for the purposes granted under this Licence Agreement~~provision of broadband services~~; provided always that this does not entitle the Licensor to intercept the Licensee's traffic. The Licensor's right to monitor as described in this clause is to be exercised only for the purposes of ensuring that the Licensee complies with its obligations under this Licence Agreement and under the Product Description .
- 2.6 The Licensor reserves the right to supervise all work carried out by the Licensee at the Route and all access of the Licensee to the site, in accordance with the IPM.
- 2.7 The Licensee is permitted to instal the Licensee's Cables in the Licensor's Duct in accordance with the provisions of this Licence and in accordance with the methods and procedures set out in the IPM and in accordance with the eircom Duct Access Technical and Operational Manual
- 2.8 The Licensee hereby acknowledges that the Licensor retains possession and control of the Route, whether the Route or any substituted Route and of any ducting whatsoever on the Route, whether housing cable belonging to the Licensor or to the Licensee ("the Licensor's Ducting") subject to the rights granted by this Licence and that nothing in this Licence is intended to or shall be deemed to confer any tenancy on the Licensee, and the Licensee undertakes with the Licensor that it will not in any way impede the Licensor or its servants or agents in the exercise of its rights of possession and control of the Route and the Licensor's Ducts and shall comply with all directions and regulations which the Licensor makes, or may make, from time to time, and notifies reasonably in advance to the Licensee, from time to time, governing the Route, and every and any part thereof and of the Licensor's ducting.
- 2.9 The Licensee hereby further acknowledges that this Licence is personal to the Licensee and not assignable and the rights given hereunder may only be exercised by the Licensee for its benefit and that of its customers.

2.10 Plan A annexed hereto is provided for the purposes of illustration only and is not intended to accurately reflect the ultimate position or size of the Equipment or the Licensee's Cable or any part thereof.

### **3. PAYMENTS BY LICENSEE**

3.1 In consideration of the grant by the Licensor of the Licence, the Licensee shall immediately pay the Licence Fee, and the Clerk of Works Charges and any additional sums payable in accordance with the provisions of clause 3.7, as outlined in Schedule 2.

3.2 Save for the first Licence Fee, the Licence Fee shall be paid half-yearly in advance by the Licensee on the Payment Days for the Term and in accordance with the provisions in respect of Billing and Payment contained in the Duct Access Product Description.

3.3 The first Licence Fee shall be payable on the date that either;

- (a) the Licensor commences the Route Preparation Works; or
- (b) the date hereof;

whichever is the earlier.

3.4 The first Licence Fee shall be apportioned from the date specified in the preceding sub-clause to the next Payment Day.

3.5 Where the Licence is to expire on a date less than six (6) months from the Payment Day, then that Licence Fee shall be apportioned from the Payment Day to the date of expiry of the Licence.

3.6 The Licensor shall be entitled to review the Licence Fee every one (1) year, in accordance with the pricing mechanism agreed with ComReg and the Licensor shall notify the Licensee in respect of any variation of the Licence Fee as a result of the review.

- 3.7 In addition to the Licence Fee and the Clerk of Works Charges, the Licensee shall pay the Licensor on receipt of a valid invoice the reasonable costs and expenses necessarily incurred by the Licensor:
- (a) in respect of the supervision by the Licensor of the installation, use and maintenance of the Equipment by the Licensee, in accordance with clause 2.6. ;
  - (b) in making good any damage to the Route caused by the Licensee;
  - (c) in enforcing its rights under this Licence where the Licensee is found to be in breach of its obligations under the Licence Agreement ;
  - (d) in acceding to any requests of the Licensee, which results in expenditure by the Licensor outside of the terms of this Licence. This shall include, but not be restricted to, requests for additional security, at the Route. The Licensor shall charge a fifteen (15%) per centum administration fee in respect of any such requests
  - (e) in respect of the administration of the Licence Agreement including where applicable, charges which arise as a result of the cessation of by an Operator of a Route

Any such fully invoiced demands will be issued at least twenty-one (21) days in advance of the due date for payment.

- 3.8 The Licensee shall pay a proportion of the Local Authority Rates exigible in respect of the Route which proportion shall be included in the Licence Fee. The Parties acknowledge that the manner of the calculation together with the proportion of the Licensee's contribution towards Local Authority Rates shall be amended from time to time in accordance with the basis of the valuation of the Route and/or the practice of the competent rating authority.

- 3.9 If any payment under this Licence is not made on the Payment Day, without prejudice to any other rights which the Licensor may have, the Licensee shall pay interest on the outstanding amount from the Payment Day when that amount shall become payable, until the date of actual payment (whether before or after any judgement) at the Interest Rate.

3.10 The Licensee acknowledges that it shall not be entitled to withhold the Licence Fee. Save for the Licence Fee, any disputes or queries that arise in relation to the charges raised on foot of this Agreement or invoices furnished by the Licensor to the Licensee shall be subject to the dispute resolution provisions of clause 20 hereof. Where the Licensee raises a dispute under this clause then in relation to an amount payable in respect of an invoice then the Licensee shall be entitled to withhold payment of the disputed amount due for payment, upon serving the Licensor with a Level 1 notice and provided that the disputed amount is greater than ten percent (10%) of the total invoice amount due for payment:

- (a) Where the Licensee invokes the provisions of this Clause 3.10 after the due date of a disputed invoice, then the Licensee shall not be entitled to withhold any portion of the amount due and payable.
- (b) Following resolution of the dispute, the appropriate Party will issue a credit or tender payment.

#### **4. RIGHTS AND OBLIGATIONS OF LICENSEE**

4.1 The Licensee shall during the continuance of this Licence:

- (a) comply with the provisions of all Acts of the Oireachtas and statutory instruments or regulations made thereunder (including but not limited to) the Environmental Protection Agency Act, 1992; the Safety, Health and Welfare at Work Acts, 2005; the Planning and Development Act 2000; the Building Control Act, 1990); the Data Protection Acts, 1988 and 2003 and all amendments made thereto and all regulations made thereunder;
- (b) obtain all and any licences, approvals, clearances or consents necessary to lawfully install, maintain or use the Licensee's Cables (including without limiting the generality of the foregoing, any planning permissions, rights-of-way or wayleaves); but excluding any responsibility to obtain any wayleaves, approvals licences and consents in respect of the construction and maintenance of the Route.

- (c) observe and perform any conditions attaching to any licence, approval, clearance or consent granted to it in respect of the installation, use or maintenance of the Licensee's Cables;
- (d) Ensure that no nuisance is caused directly or indirectly from the granting of this Licence;
- (e) Ensure that this Licence is exercised in a quiet, peaceful and orderly manner, making good any damage caused;
- (f) Ensure that the Licensee's Staff behave in a responsible manner and adhere to the Licensor's General Health and Safety Requirements while at the Route
- (g) ensure that the Licensee's Staff comply with all reasonable requests of any of the Licensor's Staff while at the Route provided that in the view of the Licensor such requests relate to the safe and proper use of the Route;
- (h) Comply with all Regulatory Requirements and notify the Licensor of any such requirements immediately upon receipt of same in so far as such requirements relate to the Licensee's obligations under this Licence;
- (i) Comply with all applicable provisions of the eircom Duct Access Technical and Operational Manual and the eircom Duct Access Methods and Procedures Manual;
- (j) Maintain the Licensee's Cables located at the Route in good repair;
- (k) Comply with the provisions of the eircom Duct Access Methods and Procedures Manual;
- (l) be responsible for the safety of its operations at the Route and ensure that its employees and agents in addition to their obligations laid down in paragraph 4.1(a) of this Licence are aware of and comply with the Licensor's General Health and Safety Requirements for Licensees while on or working at the Route which must be observed.

(m) Comply with the provisions of the Access Agreement.

4.2 The Licensee shall not during the continuance of this Licence:

- (a) do or permit anything to be done which might cause interference with, damage or cause injury to the Licensor or the Licensor's Staff or any of the Licensor's installation or any other existing installation or equipment at the Route or any equipment subsequently installed by any authorised user of the Route;
- (b) Display any signs, notices or manufacturers' motifs or advertising material at the at the Route;
- (c) Store any Hazardous Material at the Route;
- (d) Do or permit to be done anything which would compromise the integrity of the Licensor's Network.

## 5. RIGHTS AND OBLIGATIONS OF THE LICENSOR

The Licensor shall during the continuance of this Licence:

- (a) except in cases of Emergency (when all reasonable endeavours will be made to notify the Licensee forthwith of the action taken) give the Licensee at least ten (10) Business Days' notice in writing to the address provided for service of Notices in clause 15 of the Agreement of all proposals to carry out work of whatsoever nature insofar as such works may affect the operation of, or access to, the Licensee's Cables provided that the Licensor shall use its reasonable endeavours at all times to ensure that the Licensee's services are maintained at all times even in the case of an Emergency ;
- (b) comply with the provisions of all Acts of the Oireachtas and statutory instruments or regulations made thereunder (including but not limited to) the Environmental Protection Agency Act, 1992 as amended; the Safety, Health and Welfare at Work Act, 2005, as amended; the Planning and Development Act 2000 as amended; the Building Control Act, 1990 as amended; the Data Protection Act, 1988 as amended; and all regulations made thereunder;

- (c) comply with all provisions of the eircom Duct Access Technical and Operational Manual and the eircom Duct Access Methods and Procedures Manual Process Manual, insofar as same relate to the Licensor;
- (d) Maintain the Licensor's Ducts in good repair,
- (e) Comply with the provisions of the Access Agreement insofar as they relate to the Licensor;
- (f) Where the Licensor occupies the Route by virtue of a lease or licence, observe and perform the terms of the Head Lease or License and make available to the Licensee any notices served on the Licensor by the Head Lessor. The Licensor agrees to indemnify the Licensee against any direct losses, damages, costs and expenses incurred by the Licensee arising from the non-observance and/or non-performance of the said Head Lease or License;
- (g). Apply reasonable care to ensure that equivalent measures are taken to ensure that the Licensee's Cables are as safe and secure against interference by third parties as the Licensor's own fibre optic cables.

## **6. CONFIDENTIALITY**

- 6.1 Each Party shall treat as confidential all information received as a result of entering into or performing this Licence which relates to the provisions or subject matter of this Licence, to any other party or the negotiations relating to this Agreement.
- 6.2 Any Party may disclose information which would otherwise be confidential if and to the extent:-
  - (a) it is required on a need to know basis to its employees, agents, contractors, or sub-contractors to ensure compliance with the provisions of the within Licence or in the case of the Licensee for the purpose of providing information to its parent company or where it is



required to do so by law or any securities exchange or regulatory or government body to which it is subject wherever situate and it has, so far as reasonably practicable, consulted with the other parties and given them an opportunity to oppose the disclosure or otherwise agree the timing of such disclosure;

- (b) each Party to whom it relates has given its consent in writing;
- (c) it is in the public domain other than in breach of this Licence;
- (d) it is or becomes publicly available through no fault of the licensee;
- (e) it is in the possession of the Licensee before such disclosure has taken place;
- (f) It is required to be disclosed by a government regulatory body, NRA or a court or other comparable authority of competent jurisdiction.

## **7. OBLIGATIONS AND RIGHTS OF THE PARTIES**

7.1 Where it is suspected that the Licensee's Cable interferes with any other transmission or reception in such a way as to affect other services operating at the Route then the Licensor shall carry out an investigation within 48 hours and if it is established that the Licensee's Cable is the cause of the interference, it shall immediately advise the Licensee, in writing of the outcome of its investigations. . Unless the Licensee can prove that the Licensee's Cable is not the cause of the interference within the 48 hours of notification by the Licensor of the results of its investigations, then the Licensor and the Licensee shall immediately meet at the Route and work together over the next 24 hour period to ascertain whether the Licensee's Cable is the cause of the interference. If, at the end of this further period the interference remains and it has not been possible to prove that the Licensee's Cable is not the cause of the interference, then clause 7.6 shall apply.

7.2 If the Licensee' Cable is proven to be the cause of the interference, the Licensee shall take all necessary action in relation to the Licensee's Cable in order to cease the interference. The Licensee shall take such action as soon

as possible after it has been proven that the Licensee's Cable is the cause of the interference but, in any case, no later than 48 hours after the Licensor has served a written notice upon the Licensee, requesting the Licensee to take all such action.

7.3 Where it is suspected that the Licensee's Cable interferes with any other transmission or reception, but in a manner which does not affect any other services operating at the Route, the Licensee shall as soon as possible upon written request from the Licensor, but in any event no later than five (5) Business Days after receipt of such request from the Licensor, use its reasonable endeavours to examine the Licensee's Cable, to establish whether the Licensee's Cable is, in fact, the cause of the interference. The Licensee shall advise the Licensor in writing of the outcome of its investigations as soon as same shall be known to the Licensee.

7.4 If the Licensee's Cable is proven to be the cause of the interference referred to in clause 7.3 above, then the Licensee shall use all efforts to remove the interference as soon as possible after it has been proven that the Licensee's Cable is the cause of the interference but, in any event, not later than three (3) Business Days after written notification from the Licensor.

7.5 In the event of an Emergency, the Licensor may either:

- (a) Request, by contacting the Licensee's NMC, or otherwise designated point of contact, that the Licensee take all actions, which the Licensor, in the light of the Emergency, deems appropriate; or
- (b) The Licensor's Staff may take all actions which the Licensor, in light of the Emergency, deems appropriate, without prior notice to the Licensee but as soon as possible thereafter inform the Licensee that it has done so.

7.6 Where:

- (a) The Licensor requests the Licensee to comply with the provisions of clauses 7.1, 7.2, 7.3 and 7.4, and
- (b) The Licensee fails to comply with that request within the periods as mutually agreed or as set out in the said clauses, as the case may be,

Then the Licensor shall be entitled to take any action in relation to the Licensee's Cable in whatever manner it deems appropriate and the Licensee shall be liable to the Licensor for all loss which the Licensor may suffer as a result of the failure by the Licensee to comply with such a request.

## **8. LIMITATION OF LIABILITY**

8.1 Save where such loss is attributable to the breach by the Licensor of the terms of this Licence or is attributable to either the negligent or malicious acts on the part of the Licensor or the Licensor's Staff,, the Licensee acknowledges that the Licensor shall not be liable to the Licensee, its servants or agents for any loss or damage whatsoever sustained by it relating to or arising out of:

- (a) the installation, operation, use or maintenance of the Licensee's Cable (including, but not limited to, any damage sustained by reason of any delay in commencing to install, operate, use or maintain or failure to commence to install, operate, use or maintain the Licensee's Cable;
- (b) Any interruption of any Service provided by the Licensee using the Licensee's Cables;
- (c) Any damage to the Licensee's Cables caused by third parties;
- (d) The Licensor shall not be held liable by the Licensee whatsoever sustained by it either in contract, tort, including negligence or otherwise, for loss of profit, revenue, business or goodwill nor for indirect and consequential loss nor, for the acts or omissions of other providers of telecommunications services (within the meaning of the Regulations) at the Route.
- (e) The total liability of the Licensor arising under this Licence shall be limited to €10 million per individual incident or series of related incidents for a single year under this Licence;

8.2 The Licensee accepts unlimited liability for death or personal injury resulting from its negligence or its malicious acts or the negligence or malicious acts of the Licensee's Staff. Clause 8.3 below does not apply to such liability.

8.3 Without prejudice to clause 8.2 above, the Licensee's liability under this Licence shall be limited as follows:

(a) The total liability of the Licensee arising under this Licence shall be limited to €10 million per individual incident or series of related incidents for a single year under this Licence;

(b) The Licensee shall not be held liable by the Licensor whatsoever sustained by it either in contract, tort, including negligence or otherwise, for loss of profit, revenue, business or goodwill nor for indirect and consequential loss nor, for the acts or omissions of other providers of telecommunications services (within the meaning of the Regulations) at the Site.

## **9. INDEMNITY**

9.1 (a) The Licensee shall indemnify the Licensor, its servants and agents against all claims, demands, actions, suits, proceedings, judgements, orders and decrees brought, made or rendered against it and all damages, costs, charges and expenses suffered or incurred by the Licensor in respect of property damage to the Route arising out of or occasioned by anything done by the Licensee as a result of the negligence or malicious acts of the Licensee, its employees, agents and subcontractors pursuant to this Licence or which ought to have been done by the Licensee pursuant to this Licence but was omitted to be done. The obligation to indemnify will be limited exclusively to direct loss sustained to the property itself and rebuild costs.

(b) The Licensor will notify the Licensee as soon as reasonably possible of the event giving rise to the indemnity. The Licensee shall have the right to conduct any claims arising under this clause, provided that the Licensor shall provide whatever reasonable assistance in this regard and will take steps to mitigate its losses.

9.2 (a) The Licensor shall indemnify the Licensee, its servants and agents, against all claims, demands, actions, suits, proceedings, judgements, orders and decrees brought, made or rendered against it and all damages, costs, charges and expenses suffered or incurred by the Licensee in respect of damage to the the Licensee Cable arising out of or occasioned by the negligent or malicious acts of the Licensor, its employees, agents and subcontractors from carrying out any activity, including Works at the Route.

(b)The Licensee will notify the Licensor as soon as reasonably possible of the event giving rise to the indemnity. The Licensor shall have the right to conduct any claims arising under this clause, provided that the Licensee shall provide whatever reasonable assistance in this regard and will take steps to mitigate its losses.

## **10. INSURANCE**

10.1 The Licensee shall insure at their own cost, throughout the duration of this Licence, its liability in respect of:

- (a) Employer's liability; and
- (b) Third party liability or loss, injury or damage,

such insurances shall be for amounts of not less than €13million.

10.2 The Licensee shall, prior to the installation of the Equipment, provide the Licensor with evidence that the insurance referred to in clause 10.1 above has been put in place together with evidence that the insurance premium has been paid. After installation the Licensee shall provide such evidence when requested to do so by the Licensor.

## **11. TERMINATION**

- 11.1 For the purposes of this clause, 'Material Breach' shall include but not be limited to acts of the Licensee or its the Licensee's Staff which affect the safe and efficient management of the Route or the eircom Network by the Licensor, which shall include, but not be limited to the acts which are in contravention of the Licensor's Health and Safety Statement.
- 11.2 This Licence shall terminate on the expiration of the Term or on the happening of one of the events referred to in this clause.
- 11.3 The Licensor shall issue an invoice in respect of the Licence Fee to the Licensee thirty (30) Business Days before the Payment Date.
- 11.4 If the Licence Fee remains due after the issue of a written demand for payment and the expiry of the due date for payment, as set out in the written demand the Licensor shall serve a notice upon the Licensee calling upon it to pay the arrears plus interest, within ten (10) Business Days. Should the Licensee fail to pay the arrears and interest thereon within the said period, the Licensor shall serve a notice upon the Licensee advising that, due to non-payment of the Licence Fee, the Licence shall be at an end five (5) Business Days from the date of the notice. At the expiration of the said five (5) Business Day periods, this Licence shall be at an end unless the Licensor shall have received an acknowledgement of the arrears thereon.
- 11.5 In the event that the Licensee is in Material Breach of any term or provision of this Licence or any part thereof, other than the payment of the Licence Fee, the Licensor may, and so often as same may occur, serve a notice in writing on the Licensee, specifying the breach complained of and giving the Licensee what the Licensor considers, acting reasonably, to be a reasonable time to remedy the matter complained of (such reasonable time not, in any event, being a period less than one (1) calendar month), and if the Licensee shall fail or neglect, within such period of time aforesaid, to remedy and make good the matter aforesaid, then, and in any such case, the Licensor shall be entitled without further notice to terminate the Licence.
- 11.6 In the event that the Licensee is in breach of any term or provision of this Licence, other than a breach referred to in either clauses 11.4 or 11.5, the Licensor may and so often as same may occur, take the following actions:

- (a) where the breach complained of requires the Licensee to either take action or desist from a particular action, in order to remedy the breach, the Licensor shall serve a notice in writing upon the Licensee, specifying the breach complained of and giving the Licensee what the Licensor considers, acting reasonably, a reasonable time to remedy the matter complained of (such reasonable time not, in any event, being a period of less than one (1) calendar month). If the Licensee shall fail or neglect within such period of time aforesaid to remedy or make good the said matter as aforesaid then the Licensor shall be entitled to serve further notice upon the Licensee, calling upon the Licensee to remedy the matter complained of within one (1) calendar month of the date of the notice. If the Licensee shall fail or neglect, within such further period of one (1) calendar month to remedy and make good the matter aforesaid then the Licensor shall serve a notice upon the Licensee advising that, in light of the persistent breach, the Licensor considers the breach to be Material. In that event, clause 11.5 shall apply and the Licensor shall follow the notice requirements set out in clause 11.5;
  
- (b) if the breach is of a nature which neither requires the Licensee to take action or to desist from taking an action in order to remedy the breach, the Licensor may and so often as may occur, serve a notice in writing upon the Licensee, specifying the breach complained of and calling upon the Licensee to ensure that the breach is not repeated. If the Licensor has cause to serve three (3) such notices upon the Licensee in respect of the same type of breach within a twelve (12) month period then, on the third such notice, the Licensor shall advise the Licensee in writing that, in light of the persistent breach, the Licensor considers the breach to be Material. In that event, clause 11.5 shall apply and the Licensor shall follow the notice requirements set out in clause 11.5.

11.7 The Licensor shall be further entitled to terminate this Licence by notice in writing to the Licensee on:

- (a) the making of an order or the passing of a resolution to wind-up the Licensee;
- (b) the appointment of a receiver, examiner or liquidator to the Licensee;
- (c) the Licensee ceasing to be an Authorised Operator for the purposes of the Authorisation Regulations.

11.8 The Licensee acknowledges that, subject to the provisions of clause 11.13 it shall not be entitled to any compensation upon the expiry or in the event of termination of this Licence by the Licensor pursuant to the provisions of this clause and that upon such expiry or termination any sum due by the Licensee to the Licensor shall become immediately payable.

11.9 Either Party shall have the right to terminate the within Licence at any time during the Term on giving to the other party not less than 12 (twelve) months notice in writing of its intention to terminate.

11.10 The Licensor shall have the right to terminate the within Licence at any time during the Term on giving the Licensee not less than 12 (twelve) months notice in writing of its intention to terminate in the following circumstances:

- (a) where the Licensor proposes to dispose of all or part of the Route
- (b) where the Licensor plans to build on the Route;
- (c) where the Licensor plans to develop the Route
- (d) where the Licensor determines that it is necessary to excavate the Route to lay ducts for cables for other services;
- (e) where the Licensor ceases to be an Authorised Operator under the Access Regulations is otherwise no longer a telecommunications provider to whom the Regulations apply.

11.11 This Licence shall automatically terminate on the termination, for whatever reason, of the Access Agreement.

11.12 (i) On determination, for whatever reason, of this Licence the Licensee hereby undertakes at its own cost and expense, to remove the



Licensee's Cables within thirty (30) Business Days thereafter from the Route and shall make good, at its own cost and expense, any damage occasioned to the Route in the course of such removal;

- (ii) In the event that the Licensee fails to disconnect and remove Licensee's Cables as set out above, the Licensor shall be entitled to disconnect and remove the Licensee's Cable forthwith and at the expense of the Licensee. Where the Licensor has disconnected the Licensee's Cables in this manner, the Licensor shall serve a notice upon the Licensee, calling upon him to remove the Licensee's Cables within ten (10) Business Days of the date of the notice. If the Equipment is not removed by the Licensee within the said ten (10) Business Day period, the Licensor shall be at liberty to remove the Licensee's Cables as it sees fit and without further notice to the Licensee and the Licensee shall bear the cost of this removal;
- (iii) On the removal by the Licensee of the Licensee's Cables in accordance with clause 11.13 (i) above, the Licensee shall reimburse the Licensor the cost of the removal by the Licensor of the Licensee's Cable and the sealing by the Licensor of the openings.

11.13 Termination of this Licence shall not prejudice or affect any accrued rights or remedies available to either Party against the other in respect of any antecedent breach of this Licence.

Termination will not affect the rights and liabilities of the Parties which are expressly or impliedly to survive termination.

## **12. MANAGEMENT OF ROUTE**

12.1 In the context of this clause, "Services" means the Services to be provided by the Licensee from the Route with due regard to the permitted user specified in clause 2.1.

12.2 In the event of the Licensor determining, for any reason, during the continuance of this Licence to alter the location of the Route it shall first notify the Licensee and allow the Licensee twenty (20) Business Days to set out its

requirements in relation to the substituted locations, in writing. It shall then select an alternative route which it considers, acting reasonably, to be as suitable and as sufficient for the purposes of providing, for the time being, the Services provided by and from the Route by the Licensee. The Licensor shall give not less than thirty (30) Business Days notice in writing to the Licensee, of its decision to re-locate the Licensee to the substituted Route

12.3 For the avoidance of doubt, the Licensor shall not be obliged to pay any consequential loss incurred by the Licensee as a result of the said removal nor shall the Licensor be obliged to replace any of the Licensee's Cables where necessary.

12.4 In the event that the Parties are unable to agree on alternative locations pursuant to the provisions of clause 12.2 above within the period of thirty (30) Business Days specified therein, either Party shall be entitled to submit the matter for dispute resolution in accordance with clause 20 hereof. Where the Licensee fails to submit the matter for dispute resolution within the said period of time, the Licensor shall be entitled:

- (a) To remove all or any part of the Licensee's Cable from the Route; or
- (b) To move the Licensee's Equipment to a substituted Route

The Licensee acknowledges that the Licensor reserves to itself the right to use the Route and to allow others to do so.

### **13. ACCESS**

13.1 Where Access to the Route is by a right of way granted to the Licensor by a third party, the Licensor does not warrant that it has the right to grant the Licensee a right of way and a wayleave agreement to the Route. and the Licensee acknowledges that it shall be its responsibility to negotiate such a right of way and wayleave agreement with the grantor of the right of way provided that the Licensor will always notify reasonably in advance where this is the case, and will in the first instance use its reasonable endeavours to obtain on behalf of the Licensee the relevant right of way and wayleave,

and/or facilitate and provide all reasonable assistance the Licensee in relation to same

#### **14. ASSIGNMENT**

14.1 This Licence is personal to the Licensee who shall not be entitled to assign, charge or mortgage this Licence or any benefit under it, either in whole or in part, or otherwise dispose of this Licence.

14.2 Where the Licensee is a body corporate, in the event of a reconstruction or amalgamation of the Licensee, the Licensee shall be entitled to apply to the Licensor to accept a surrender of the Licence and to grant to the amalgamated or reconstructed body corporate a new licence on substantially the same terms as the within Licence, for the residue of the Term of the Licence. In order to avail of the within clause, the Licensee must first satisfy the Licensor that the proposed amalgamation or reconstruction is bona fide and the decision as to the bona fides of the amalgamation or reconstruction of the Licensee shall be at the sole discretion of the Licensor.

#### **15. NOTICES**

15.1 A notice shall be deemed to have been served:

- (a) at the time of delivery, if served personally;
- (b) forty-eight (48) hours after posting in the case of an address in Ireland or ninety-six (96) hours after posting for any other address; or
- (c) two (2) hours after transmission, (upon the sender obtaining a valid transmission receipt) if sent by facsimile on a Business Day or prior to 3.00p.m. or in any other case at 10.00a.m. on the Business Day after the date of dispatch.

If the deemed time of service is not during normal business hours of the country of receipt, the notice shall be deemed to be served at or in the case of faxed service two (2) hours after the opening of business on the next Business Day of that country.

15.2 The deemed service provisions set out at clause 15.1 above do not apply to:

- (a) a notice served by post if there is a national or local suspension, curtailment or disruption of postal services which affects the collection of the notice or is such that the notice cannot reasonably be expected to be delivered within forty-eight (48) hours or ninety-six (96) hours (as appropriate) after posting; and
- (b) a notice served by facsimile, if, before the time at which a notice would otherwise be deemed to have been served, the receiving party informs the sending party that the notice has been received in a form which is unclear in any material respect, and, if after informing the sending party by telephone, it also dispatches a confirmatory facsimile within two (2) hours.

15.3 In the case of personal service, that it has been handed to the party or delivered to or left in an appropriate place of letters at its address:

- (a) in the case of a letter sent by post, that the letter was properly addressed, stamped and posted; and
- (b) in the case of the facsimile that it was properly addressed and dispatched to the number of the party.

A Party shall not attempt to prevent or delay the service on it of a notice connected with this licence.

Unless alternative written instructions are received, any notices served on the Licensor shall be marked for the attention **THE COMPANY SECRETARY and the Managing Director of Wholesale, eircom** and in the case of an e-mail shall be addressed to [insert e-mail address details if you want to use e-mail -----] respectively and in the case of a notice to the Licensee shall be marked for the attention of **THE COMPANY SECRETARY** and in the case of an e-mail shall be addressed to [insert e-mail address} and copied to (to be inserted) .

**16. NO RELATIONSHIP OF LANDLORD AND TENANT**

16.1 Nothing in this Licence is intended to create nor shall be treated or construed as creating the relationship of landlord and tenant between the Parties.

**17. TITLE NOT TO PASS**

17.1 Title to the Route remains with the Licensor and no right or interest in that property passes to the Licensee.

**18. WAIVER**

18.1 None of the Licensor's rights under this Licence shall be prejudiced or restricted by any indulgence or forbearance extended to the Licensee and no waiver by the Licensor in respect of any breach shall operate as a waiver in respect of a subsequent breach by the Licensee.

**19. WHOLE AGREEMENT**

19.1 Save for the provisions of the Access Agreement and the Non Disclosure Agreement, this Licence supersedes any previous agreement between the Parties in relation to the matters dealt with herein and represents the entire understanding between the Parties in relation thereto. In the case of a conflict between the Access Agreement and this Licence or the Non Disclosure Agreement and this Licence, the terms of this Licence shall prevail.

**20. DISPUTE RESOLUTION**

20.1 This clause shall not be applicable to disputes arising in respect of clauses 11.2 (Payment of Licence Fee) and 11.5 (Material Breach) of this Licence.

20.2 Save as provided in clause 20.1 above, each Party shall use its best endeavours to resolve any disputes arising concerning implementation, application or interpretation of this Licence in the first instance through

negotiation between the Parties through the normal contacts. This phase of the dispute resolution shall be referred to as 'Level 1'.

20.3 In the event of the Parties failing to resolve the dispute at Level 1 negotiation within two (2) weeks either Party shall have a right to invoke the dispute procedures specified herein on the service of notice ("the Dispute Notice") on the other Party. The Party serving the notice ("the Disputing Party") shall include in the Dispute Notice all relevant details including the nature and extent of the dispute.

20.4 Service of the Dispute Notice shall constitute escalation to Level 2. Level 2 shall consist of consultation between the parties in good faith to resolve the dispute.

20.5 If the endeavours of the parties to resolve the dispute at Level 2 are not successful within two (2) weeks of escalation of the Dispute to Level 2, either Party may upon service of notice ("the Level 3 Notice") on the other, escalate the dispute for determination by the National Regulator, hereinafter referred to as Level 3. The Level 3 Notice shall be served on both the NRA and the other Party. The Level 3 Notice shall include all details relevant to the dispute together with a submission from both Parties as to the nature and extent of the dispute.

20.6 The normal contact for the Licensor is:

**Level 1** Wholesale Contract Manager,  
*eircom*,  
1 Heuston South Quarter,  
St.John's Road,  
Dublin 8,  
**Tel:** (00) 353 1 600  
**Fax:** (00) 353 1 428 6240

**Level 2** **Insert Title**  
*Eircom*,  
1 Heuston South Quarter,  
St.John's Road,  
Dublin 8,  
**Tel:** (00) 353 1 600  
**Fax:** (00) 353 1 428 6240

The normal contact for the Licensee is:

**Level 1**

Copy to:

**Level 2**

No change to the normal contact details shall be effected until same has been notified to the other Party.

- 20.7 The time limits specified at paragraphs 20.3 and 20.5 above may be extended by mutual agreement between the parties.
- 20.8 The above procedures are without prejudice to any rights and remedies that may be available to the Parties in respect of any breach of any provision of this Licence.
- 20.9 Nothing herein contained shall prevent a Party from:
- (a) seeking (including obtaining or implementing) interlocutory or other immediate or equivalent relief; or
  - (b) automatically referring the dispute to the National Regulator without recourse to Level 1 or Level 2 in accordance with any right either Party may have to request a determination or other appropriate steps for its resolution.
  - (c) automatically referring the dispute to Arbitration in accordance with clause 21 hereof, once Level 1, Level 2 and Level 3 of the dispute resolution process has been exhausted.

**21. ARBITRATION**

- 21.1 All disputes between the Parties in connection with this Licence may be submitted for arbitration by a sole arbitrator once, Level 1, Level 2 of the

dispute resolution set out in Clause 20 has been exhausted. The arbitration shall be held in Dublin and shall be governed by the provisions of the Arbitration Act 2010. The arbitrator shall be appointed by agreement between the Parties or, in default thereof, by the President for the time being of the Law Society of Ireland or other officer endowed with the functions of such President. If the arbitrator shall relinquish his appointment or die, a substitute arbitrator may be appointed in his place in the manner hereinbefore provided.

## **22. FORCE MAJEURE**

- 22.1 If and to the extent that either party (the “**Affected Party**”) is hindered or prevented by circumstances not within its reasonable ability to control, including, but not limited to, acts of God, inclement weather, flood, lightning, fire, acts or omissions of Governments or other competent authority, industrial action, acts of terrorism, industrial action, war, military operations or acts or omissions of third parties for whom the Affected Party is not responsible (“**Force Majeure**”) from performing any of its obligations under this Licence, the Affected Party shall be relieved of liability for failure to perform such obligations under this Licence solely to the extent circumstances may require.
- 22.2 The Affected Party shall promptly notify the other party of the estimated extent and duration of such inability to perform its obligations and upon the cessation of the event of Force Majeure the Affected Party shall notify the other party of such cessation.
- 22.3 Each Party shall use its reasonable endeavours (i) to avoid or remove the circumstances constituting the Force Majeure and (ii) to mitigate the effect of the Force Majeure as and when it exists.

## **23. VARIATION:**

- 23.1 Any variation to the terms and conditions of this Licence shall be recorded by memorandum in writing, executed by both Parties, which variation shall be read in conjunction with the terms and conditions of this Licence.



## **24. GOVERNING LAW**

24.1 The construction, validity and performance of this Licence shall be governed in all respects by Irish Law and the Parties hereby submit to the exclusive jurisdiction of the Irish Courts.

Plan A

Drawing setting out the Route, the Ingress Chamber and the Egress Chamber

SCHEDULE 1

Part A

**Term for a period of ten years from the Commencement Date**

**Commencement Date:**

**Termination Date:**

## SCHEDULE 2

### **(a) Payment Terms**

**Full connection / installation Fee:**

**Annual Licence Fee:**