

# **Service Agreement (Embedded Network Management Services)**

SAMPLE - SUBJECT TO CHANGE UPON NEGOTIATION

# Service Agreement

## Detail

|                    |  |
|--------------------|--|
| Service Provider:  | Active Utilities Pty Ltd in its capacity as trustee for the Active Utilities Unit Trust ABN 43 818 767 917 of 40 English Street, Essendon Fields, Victoria, 3041 |
| Customer:          | <b>INSERT CUSTOMER</b> ABN   |
| Premises:          | INSERT ADDRESS   |
| Commencement Date: | XXXX 2010  |
| Term:              | XX months  |
| Services:          | As described in Schedule A   |
| Charges:           | As described in Schedule B   |

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# Service Agreement

## 1. Appointment

The Customer appoints the Service Provider to provide the Services from the Commencement Date for the Term at the Premises and the Service Provider accepts the appointment.

## 2. Project Plan

The Service Provider will co-ordinate with the Hardware Provider and other relevant service providers appointed by the Customer in the development and implementation of a Project Plan.

## 3. Customer's obligations

### 3.1 General Responsibilities

The Customer must:

- (a) provide, and ensure that its other service providers provide, all reasonable assistance and cooperation in relation to matters within their control where this is necessary for the Service Provider to perform the Services;
- (b) provide the Service Provider with such reasonable access to the Premises and employees as may be necessary for the Service Provider to carry out the Services;
- (c) not unreasonably withhold or delay its assistance or approval in relation to the development or implementation of the Project Plan or other matters relevant to the commencement of the Services under this Agreement;
- (d) ensure that all information and data given to the Service Provider are correct, current and complete; and
- (e) comply with all applicable laws, regulations, standards and codes.

### 3.2 Hardware and other Specific Responsibilities of Customer

- (a) The Customer acknowledges that it and its suppliers or other service providers are already responsible for (including all costs associated with):
  - (i) Insert Detail;and further the Customer acknowledges that an omission or failure by it or its service providers in respect of the above matters may affect the ability of the Service Provider to provide the Services.
- (b) The Customer acknowledges that it has sought or been encouraged to seek independent expert advice as to potential financial outcomes and risks associated with the intermediary supply project and not relied on any representations made by the Service Provider in this regard.

# Service Agreement

## 4. Service Provider's obligations

- (a) The Service Provider will:
- (i) provide the Services with care and skill;
  - (ii) comply with all applicable laws, regulations, standards and codes; and
  - (iii) begin providing the Services within a reasonable time and, in any event, by any agreed connection date, installation date or other time, subject to completion by other service providers of appropriate installation, commissioning and acceptance testing.
- (b) The Service Provider will not, without the prior written consent of the Customer:
- (i) exercise any right, power or discretion whatsoever provided by the Utility Purchase Agreement and the Utility Sale Agreements except to the extent that it is expressly authorised by the Customer;
  - (ii) accept the repudiation by any tenant of the Property of any Utility Sale Agreement;
  - (iii) waive or grant any time for the performance by a tenant of the Property of their obligations under any Utility Sale Agreement;
  - (iv) pay or receive any commission or other amount or consideration to or from any person which would involve a contravention of any law regulating secret commissions;
  - (v) agree to the termination of an Utility Purchase Agreement or to any amendment or variation of their terms; or
  - (vi) give any consent, notice or other document whatsoever under an Utility Purchase Agreement.
- (c) The Customer acknowledges that Service Provider is not responsible for, has made no representations in relation to and has no liability in respect of any of the following:
- (i) supply or distribution of the Property Utilities;
  - (ii) supply, installation, or commissioning equipment;
  - (iii) forecasts of future demand by Retail Customers, of on-sell tariff discounts or of Customer earnings during the Term; and
  - (iv) preparing or attending to lodgement of any taxation returns (including, without limitation, BAS) relating to the Services.
- (d) The Service Provider will work closely with the Customer to resolve any issues or complaints that an existing or potential tenant may have, as follows:
- (i) upon receipt of a complaint from a tenant directly the Agent will adhere to its website published complaints handling procedure; and
  - (ii) Upon receipt of a complaint from the Customer directly the Service Provider will formally respond to the complaint and have it rectified (where possible) within 14 working days.

# Service Agreement

## 5. Charges, Fees and Account Management

### 5.1 Services

The Customer agrees to pay the Charges for all Services the Service Provider provides in accordance with this Agreement.

### 5.2 Invoicing and payment

- (a) the Service Provider will invoice the Customer monthly for all Charges.
- (b) if the Customer considers there is a mistake in any invoice, it must notify the Service Provider within 14 days of receipt of the invoice with full details of the mistake. The Service Provider will investigate the matter and report back to the Customer as soon as practicable. If the Service Provider has made a mistake, it will adjust a later invoice.
- (c) the Customer authorises the Service Provider to deduct from any receipts collected by it from tenants payment of the Service Provider's invoices once the 14 day period specified in clause 6.2(b) has elapsed.

### 5.3 Changes to Charges

The Service Provider may vary the Charges:

- (a) with effect from each anniversary of this Agreement in the manner set out in item 3 of Schedule B; or
- (b) where, after the Service Provider has advised the Customer of the additional cost of a variation to the Service, the Customer proceeds to request it and the Service Provider agrees in writing to that variation.

### 5.4 Early Termination Fee

- (a) The Customer will be liable to pay an early termination fee if:
  - (i) it terminates a Service during the Term other than in accordance with clause 7.5(a); or
  - (ii) the Customer terminates this Agreement prior to the end of the Term in accordance with clause 7.5(b).
- (b) The early termination fee will be calculated as follows:
  - (i) the amount of any Charges which would have been payable by the Customer from the date of termination to the end of the Term, unless otherwise stated in Schedule B. (This amount will be calculated by multiplying the number of months of the Term which were remaining immediately prior to termination (which figure may be a fraction) by the average monthly Charges over the first part of the Term); and
  - (ii) reimbursement to the Service Provider of any rebates, credits, refunds or discounts, including but not limited to volume rebates, loyalty discounts and Service credits on the full amount of our standard charges, provided to the Customer during the Agreement.

# Service Agreement

- (c) the early termination fee is a reasonable estimate of the Service Provider's likely financial loss if the Service is terminated early.

## 6. Duration and termination

### 6.1 Term of this Agreement

Subject to clause 7.2, this agreement commences on the Commencement Date and, unless terminated earlier in accordance with clause 7.5, will continue for the Term.

### 6.2 Good faith negotiation

On or prior to the expiry of the Term, the Customer and Service Provider will negotiate in good faith to renew this contract on terms agreeable to both the Service Provider and Customer.

### 6.3 Suspension and Termination Rights

In the event of non-payment of the Charges when due, the Service Provider has the right to suspend performance of any or all of its obligations under the Agreement immediately upon providing written notice of such breach to the Customer.

### 6.4 Right to terminate

This agreement may be terminated:

- (a) by the Customer, if:
  - (i) the Service Provider is in default of an essential term of this agreement, or has otherwise been negligent in the performance of its obligations under this agreement;
  - (ii) the Customer has given the Service Provider written notice of the alleged breach or negligent act or omission referred to in clause 6.5(a)(i); and
  - (iii) the Service Provider has not rectified or otherwise corrected the alleged breach or negligent act or omission referred to in clause 6.5(a)(i) within 20 Business Days of receiving the written notice referred to in clause 6.5(a)(ii); or
  - (iv) the Service Provider becomes insolvent; or
  - (v) the Service Provider fails to comply with minimum statutory standards of service or conduct required for the businesses of providing the Services.
- (b) by the Service Provider, if:
  - (i) the Customer is in default of an essential term of this agreement (other than payment which is dealt with under clause 6.5(b)(v), or has otherwise been negligent in the performance of its obligations under this agreement;
  - (ii) the Service Provider has given the Customer written notice of the alleged breach or negligent act or omission referred to in clause 6.5(b)(i); and
  - (iii) the Customer has not rectified or otherwise corrected the alleged breach or negligent act or omission referred to in clause 6.5(b)(i) within 20 Business Days of receiving the written notice referred to in clause 6.5(b)(ii); or
  - (iv) the Customer becomes insolvent.
  - (v) any amounts due and payable from the Customer remain outstanding longer than seven days after issue of a final request for payment.

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## 6.5 Effect of termination

Any termination under clause 6.3 by either party does not affect the accrued rights and obligations of the other party up to the date of termination and clauses 5, 6, 8, 9, 10, 11 and 12 survive termination.

## 7. Notice

A notice, approval, consent or other communication in connection with this Agreement:

- (a) may be given by an authorised officer of the relevant party; and
- (b) must be in writing; and
- (c) must be left at the registered office, or sent by prepaid ordinary post to the registered
- (d) office set out in the Detail, or if the addressee notifies another address, then to that address or communicated by electronic mail.

## 8. Liability

### 8.1 Limitation of Liability

- (a) Except as otherwise expressly set out in this Agreement, the Service Provider:
  - (i) excludes all conditions, warranties and representations, whether express or implied, to the extent permitted by law; and
  - (i) limits its liability for any breach of any conditions, warranties and representations set out in this Agreement or that cannot be excluded or restricted by law, at the option of the Service Provider, to the repair or re-supply of the Services or the payment of the cost of having the Services re-supplied.
- (b) Where the Service Provider is liable to pay the Customer any refunds, rebates or other compensation ("Compensation") under this Agreement the following applies, to the extent permitted by law:
  - (i) the maximum combined amount of Compensation the Service Provider will have to pay the Customer, is the sum of the Charges paid or payable by the Customer for the affected Service in the 12 month period preceding the event that gave rise to the claim;
  - (ii) The Service Provider excludes any liability to the Customer for any indirect, special or consequential loss; and
  - (iii) the amount of Compensation that the Service Provider has to pay the Customer will be reduced to the extent that the event giving rise to the obligation to pay Compensation has been caused or contributed to by the Customer (or the Customer's other service providers).

### 8.2 Events Beyond Reasonable Control

The Service Provider will not be liable for failing to meet its responsibilities under this Agreement because of events beyond its reasonable control, including but not limited to acts or omissions of third party network operators or suppliers, acts of war or terrorism, natural disasters, strikes and lockouts.

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## 8.3 Indemnity

The Service Provider is not responsible for loss or damage suffered by the Customer, a tenant or any other person as a result of the due provision by the Service Provider of the Services in accordance with the terms of this Agreement or as instructed by the Customer from time to time, and the Customer must indemnify the Service Provider against any such Claims.

## 9. GST

### 9.1 Definitions

(a) In this clause 9:

**GST** means goods and services tax or similar value added tax levied or imposed in Australia pursuant to the GST law or otherwise on a supply;

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

**GST law** has the same meaning as in the GST Act; and

**Tax Invoice** includes any document or record treated by the Commissioner of Taxation as a tax invoice or as a document entitling a recipient to an input tax credit.

(b) Words used in this clause 9 which have a defined meaning in the GST law have the same meaning as in the GST law unless the context indicates otherwise.

### 9.2 GST

(a) Unless expressly included, the consideration for any supply under or in connection with this agreement does not include GST.

(b) To the extent that any supply made under or in connection with this agreement is a taxable supply, the recipient must pay, in addition to the consideration provided under this Agreement for that supply (unless it expressly includes GST) an amount (**additional amount**) equal to the amount of that consideration (or its GST exclusive market value) multiplied by the rate at which GST is imposed in respect of the supply. The recipient must pay the additional amount at the same time as the consideration to which it is referable.

(c) Whenever an adjustment event occurs in relation to any taxable supply to which clause 9.2(b) applies:

(i) the supplier must determine the amount of the GST component of the consideration payable; and

(ii) if the GST component of that consideration differs from the amount previously paid, the amount of the difference must be paid by, refunded to or credited to the recipient, as the case may be.

### 9.3 Tax Invoices

The supplier must issue a Tax Invoice to the recipient of a supply to which clause 9.2 applies no later than 7 days following payment of the GST inclusive consideration for that supply under that clause.

### 9.4 Reimbursements

If either party is entitled under this agreement to be reimbursed or indemnified by the other party for a cost or expense incurred in connection with this Agreement, the reimbursement or indemnity payment must not include any GST component of the cost or expense to the extent that the cost or expense is the consideration for a creditable acquisition made by the party being reimbursed or indemnified, or by its representative member.

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## 10. Confidentiality and Privacy

### 10.1 Disclosure of Confidential Information

No Confidential Information may be disclosed by the Service Provider or Customer to any person except:

- (a) Representatives of the Service Provider or Customer or its related entities requiring the information for the purposes of this Agreement; or
- (b) with the consent of the other party which consent may be given or withheld in its reasonable discretion; or
- (c) if the Service Provider or Customer is required to do so by law; or
- (d) if the Service Provider or Customer is required to do so in connection with legal
- (e) proceedings relating to this Agreement.
- (f) By the Customer in the event of the sale of the Property.
- (g) By the Service Provider in the sale of the agency with the consent of the Customer.

### 10.2 Disclosure by recipient of Confidential Information

The Service Provider or Customer must use all reasonable endeavours to ensure that persons receiving Confidential Information from it do not disclose the information except in the circumstances permitted in clause 10.1.

### 10.3 Use of Confidential Information

The Service Provider or Customer must not use Confidential Information except for the purpose of exercising its rights or performing its obligations under this Agreement.

### 10.4 Return of Confidential Information

The Service Provider or Customer must, on the request of the other party, immediately deliver to the other party all documents or other materials containing or referring to Confidential Information which are in its possession, power or control or in the possession, power or control of persons who have received Confidential Information from it under clause 10.1 (a) or (b).

### 10.5 Termination

This clause 10 will survive termination (for whatever reason) of this Agreement.

### 10.6 No disclosure of terms of this Agreement

Except as otherwise agreed or duly required by law or any regulatory authority, neither the Service Provider nor the Customer may disclose the terms of this Agreement to any person other than its employees, accountants, auditors, financial advisers or legal advisers on a confidential basis. This clause will survive termination (for whatever reason) of this Agreement.

### 10.7 Personal Information

- (a) During the Customer's relationship with the Service Provider, the Service Provider may collect information from the Customer or from a credit provider or credit reporting agency ("Personal Information").
- (b) The Customer agrees that the Service Provider may:

# Service Agreement

- (i) hold the Personal Information and share it with the Service Provider's employees, contractors and other agents or where relevant other credit providers but only where this is necessary to enable the Service Provider to provide the Customer with the Services, send the Customer bills, check the Customer's creditworthiness, check that the Customer's responsibilities are being met, or otherwise to administer and enforce this Agreement. If this Personal Information is not provided to the Service Provider, the Service Provider may be unable to provide the Services to the Customer; and
- (ii) use any information about the Customer for statistical purposes, so long as the Customer is not identified.

## 11. Governing law

- (c) This agreement is governed by the law in force in the State of Victoria.
- (d) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the State of Victoria and courts of appeal from them.

## 12. Interpretation

### 12.1 Definitions

These meanings apply in this agreement:

**Business Day** means a day other than a Saturday, Sunday or public holiday in Victoria.

**Claim** means any allegation, debt, cause of action, liability, claim, proceeding, suit or demand of any nature howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.

**Confidential Information** means any information related to the supply or purchase of equipment, telecommunications services, power supplies and the agency agreement and its commercial terms, with the exception of information and contract terms made publicly available to power customers.

**Detail** means the section of this agreement headed "Detail".

**Government Agency** means any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity.

**Hardware** means meters, communications equipment (if applicable) and any other equipment necessary to the provision by the Service Provider of the Services.

**Hardware Provider** means the party (or parties) nominated by the Customer as supplier(s) of the Hardware and any other party responsible for its installation, commissioning and maintenance.

**Project Plan** means a description of the project that divides it into sub projects, including start and completion times, responsible parties and resources required

**Utility Purchase Agreement** means an agreement for the purchase of a utility from a utility company between a utility company and the Customer.

**Utility Sale Agreement** means agreements for the utilities from the Customer to tenants of the Property.

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## 12.2 References to certain general terms

Unless the contrary intention appears, a reference in this agreement to:

- (a) a document (including this agreement) includes any variation or replacement of it;
- (b) a clause is a reference to a clause in this agreement;
- (c) a statute or other law includes regulations and other instruments under it and
- (d) consolidations, amendments, re-enactments or replacements of any of them;
- (e) "law" means common law, principles of equity, and laws made by parliament (and laws made by parliament include State, Territory and Commonwealth laws and regulations and other instruments under them, and consolidations, amendments, re-enactments or replacements of any of them);
- (f) the singular includes the plural and vice versa;
- (g) the word "person" includes an individual, a firm, a body corporate, a partnership, a joint venture, an unincorporated body or association, or any Government Agency;
- (h) a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by notation) and assigns;
- (i) if a period of time dates from a given day or the day of an act or event, it is to be calculated exclusive of that day;
- (j) a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later;
- (k) the words "include", "includes" and "including" are not used as, nor are they to be interpreted as, words of limitation;
- (l) if an event under this agreement must occur on a stipulated day which is not a Business Day then the stipulated day will be taken to be the next Business Day;
- (m) anything (including any amount) is a reference to the whole and each part of it.

## 12.3 Headings

Headings are for convenience only and do not affect the interpretation of this agreement.

## 12.4 Special conditions

If any special conditions are contained in Schedule 3, those special conditions are deemed to be incorporated into this Agreement.

## 12.5 Assignment

The Service Provider may assign or novate its rights under this Agreement to a related entity at any time without needing the Customer's consent. The Customer cannot assign its rights and responsibilities under this Agreement without the Service Provider's prior written consent.

## 12.6 Severability

The provisions of this Agreement will be separate and severable from each other to the extent that if any provision or provisions are considered inoperative, then the remaining provision or provisions will be binding and enforceable on the parties.

## 12.7 Entire Agreement

The Agreement is the entire agreement between the parties in relation to its subject matter to the exclusion of any prior or collateral agreement or understanding of any kind relating to the subject matter.

## 12.8 Waiver

No failure, delay or indulgence by either party in exercising any power or right conferred by the Agreement on either party will operate as a waiver of that power or right.

# Service Agreement

## 12.9 Variations

This Agreement and its Schedules may only be varied by written agreement between the parties.

SAMPLE - SUBJECT TO CHANGE UPON NEGOTIATION

# Service Agreement

EXECUTED as a agreement

## Signing page

DATED:

EXECUTED by **ACTIVE UTILITIES PTY LTD** in accordance )  
with section 127(1) of the Corporations Act 2001 (Cwlth) by )  
authority of its directors: )

..... )  
Signature of director )

..... )  
Name of director (block letters) )

..... )  
Signature of director/company secretary\* )  
\*delete whichever is not applicable )

..... )  
Name of director/company secretary\* )  
(block letters) )  
\*delete whichever is not applicable )

EXECUTED by **[INSERT COMPANY]** in accordance with )  
section 127(1) of the Corporations Act 2001 (Cwlth) by )  
authority of its directors: )

..... )  
Signature of director )

..... )  
Name of director (block letters) )

..... )  
Signature of director/company secretary\* )  
\*delete whichever is not applicable )

..... )  
Name of director/company secretary\* )  
(block letters) )  
\*delete whichever is not applicable )



# Service Agreement

## Schedule B- Charges

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|--|-----------|
| <b>1. Charges</b>  | <b>\$</b> |
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| •  |           |
| •  |           |
| •  |           |
| <b>Notes &amp; Qualifications:</b>                         |           |
|  |           |
| <b>2. Additional Fees and Service Charges</b>              | <b>\$</b> |
|  |           |
| <b>3. Annual charges review</b>                            | <b>\$</b> |
|  |           |
| <b>4. Early Termination Calculation Special Conditions</b> |           |
|  |           |

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## Schedule C- Special Conditions

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