

# Swoop Infrastructure Wholesale MSA

## Terms and Conditions

### Parties

Swoop Infrastructure Pty Ltd ACN 671 420 607 of Level 21, 135 King Street, Sydney NSW 2000 (**Swoop Infrastructure**)

The retail service provider identified in the details (**RSP**)

### Background

The RSP and Swoop Infrastructure have agreed to enter into this agreement for Swoop Infrastructure to provide wholesale telecommunication services to the RSP.

## 1. Agreement

- 1.1. This Wholesale Master Services Agreement (**MSA**) together with any applicable Swoop Infrastructure protocols, price lists, rules and policies constitute the entire agreement that governs Swoop Infrastructure's supply of Services to the RSP (**Agreement**).
- 1.2. Where there is any inconsistency between the documents forming the Agreement, the inconsistency shall be resolved in the following order of priority (with a document higher in the list taking priority over any document lower in the list):
  - (a) this MSA;
  - (b) the final Access Determination for Superfast Broadband Access Service (**SBAS**), made pursuant to section 152BC of the Competition and Consumer Act 2010 (Cth), or any relevant ACCC access determination, as revised from time to time (which applies to the extent that Swoop Infrastructure is required to comply with any standard access obligations in respect of the SBAS). Swoop Infrastructure will supply, upon request the declared Layer 2 SBAS on the terms specified in these determinations;
  - (c) Swoop Infrastructure protocols, price lists, rules and policies published on the Swoop Infrastructure website or otherwise notified to the RSP.

## 2. Term

- 2.1. The MSA commences on the day it is signed by both parties and continues until terminated in accordance with this Agreement.
- 2.2. A Service continues on a month-to-month Term until terminated by either party giving the other party notice of termination using the Swoop Infrastructure platform that Swoop Infrastructure will make available to the RSP, with termination taking effect at the end of the Term in which the notice is provided.

## 3. Title

- 3.1. Apart from rights expressly provided in this Agreement, the RSP acquires no right, title or interest in any component of Swoop Infrastructure's infrastructure, equipment, software or other components of the Network.

## 4. Co-operation

- 4.1. Each party must reasonably cooperate with the other in fulfilling obligations under this Agreement and must ensure that they and their contractors conduct activities at any Site in a manner that protects the safety of all persons and minimises interference with the activities of the other party and third parties working at the Site. Each party is responsible for the safe operation of its network, systems, equipment and facilities.

## 5. Provision of Wholesale Services

- 5.1. Swoop Infrastructure will provide Wholesale Services to Carriage Service Providers and Carriers on a non-discriminatory basis.
- 5.2. Swoop Infrastructure will provide Wholesale Services to the RSP at the Wholesale Service Charge.
- 5.3. Swoop Infrastructure may modify products, pricing and terms (including adding or modifying a Wholesale Service or a price change) by providing no less than 60 days prior notice to the RSP, except where lesser or no notice is required for any price reductions or to comply with any regulatory or legal requirement.
- 5.4. In accordance with its regulatory obligations, Swoop Infrastructure may use the Network to provide Wholesale Services to other Carriage Service Providers or Carriers who may provide Retail Services to End-Users at a Site.
- 5.5. Swoop Infrastructure will take all reasonable care to ensure that the Wholesale Service is fit for its intended purpose and provided to an industry standard.

- 5.6. The RSP will pay the Wholesale Service Charge to Swoop Infrastructure in accordance with the Agreement.
- 5.7. The Wholesale Service Charges for a Service commence from the RFS Date, regardless of End-User usage by that date.
- 5.8. Wholesale Service Charges cease when the Service is terminated in accordance with clause 13.
- 5.9. The RSP must comply with and, where reasonably possible, ensure End-Users comply with the Acceptable Use Policy.
- 5.10. The RSP will comply with all relevant legislation, regulations and directions from regulatory bodies, including the Australian Competition and Consumer Commission, Telecommunications Industry Ombudsman and Australian Communications and Media Authority.
- 5.11. The maximum period for Swoop Infrastructure to connect a Site after the RSP requests a Service on behalf of an End-User is:
  - (a) After RFS date – 14 days;
  - (b) Prior to RFS date – as mutually agreed between the parties.

## **6. Service Suspension**

- 6.1. Swoop Infrastructure may suspend or restrict a Service:
  - (a) with 7 days' notice if the RSP or End-User fails to comply with the Acceptable Use Policy, however Swoop Infrastructure may immediately suspend without notice if there is material non-compliance or if Swoop Infrastructure reasonably believes suspension is necessary to:
    - (i) comply with any law or government/regulatory direction;
    - (ii) protect any person, facility, equipment or network;
    - (iii) address an emergency situation;
  - (b) with 14 days' notice for technical issues or scheduled maintenance, however Swoop Infrastructure may immediately suspend without notice for emergency maintenance.

## **7. Payment**

- 7.1. The RSP agrees to pay interest on overdue amounts at 2% per annum above the 60-day Bank Bill Swap Reference Rate.
- 7.2. All amounts payable are exclusive of GST. The RSP will pay Swoop Infrastructure the GST applicable to any amounts payable to Swoop Infrastructure.
- 7.3. Swoop Infrastructure will issue monthly invoices in advance for Wholesale Service Charges. Swoop Infrastructure may include amounts in invoices relating to previous billing periods not previously invoiced.
- 7.4. The RSP will pay invoices within 14 days of issue by Swoop Infrastructure.

## **8. Subcontracting**

- 8.1. A party may subcontract any obligations under this Agreement but remains fully responsible to the other party for performance of those obligations.

## **9. Insurance**

- 9.1. Swoop Infrastructure must maintain with reputable insurers:
  - (a) public and product liability insurance for individual claims of at least \$10 million;
  - (b) professional indemnity insurance for individual claims of at least \$2 million; and
  - (c) workers compensation insurance as required by law.
- 9.2. The RSP must maintain with reputable insurers public and product liability insurance for individual claims of at least \$10 million.
- 9.3. Upon request, each Party must provide the other with copies of required insurance policies.
- 9.4. Swoop Infrastructure must ensure subcontractors maintain appropriate insurance coverage for their work under this Agreement.

## **10. Representations and Warranties**

- 10.1. Each party represents and warrants that:
  - (a) it is a corporation validly incorporated under Australian law;
  - (b) it has legal capacity to enter this Agreement and necessary authority to fulfil its obligations;
  - (c) it will perform obligations with due care and skill in accordance with applicable laws; and
  - (d) any equipment used will be fit for purpose.

- 10.2. Each party acknowledges it has not relied on representations or warranties except as stated in this Agreement.
- 10.3. Where the RSP acts as trustee, it warrants it has and will maintain full indemnification rights from trust assets for obligations under this Agreement.

## **11. Confidentiality**

- 11.1. The terms of this Agreement and each party's Confidential Information are confidential and may not be disclosed to third parties except:
  - (a) as necessary to exercise rights under this Agreement;
  - (b) as required by law; and
  - (c) with the written consent of the non-disclosing party.

## **12. Intellectual Property**

- 12.1. This Agreement does not transfer either party's Intellectual Property to the other party, except as provided in subclauses 12.2 and 12.3.
- 12.2. Swoop Infrastructure grants the RSP a non-exclusive, non-transferable licence during the Agreement term to use Swoop Infrastructure's Intellectual Property to the extent necessary to obtain benefits under this Agreement.
- 12.3. The RSP grants Swoop Infrastructure a non-exclusive, non-transferable licence to:
  - (a) reproduce, communicate and adapt the RSP's Intellectual Property internally as necessary to supply Services; and
  - (b) list and refer to the RSP and display the RSP's logo on websites, advertising and marketing materials.

## **13. Termination**

### **13.1. Termination by Swoop Infrastructure**

Swoop Infrastructure may terminate this Agreement or a Service without liability by written notice if:

- (a) the RSP experiences an Insolvency Event;
- (b) the RSP fails to pay an undisputed invoice within 30 days of the due date and fails to remedy within 30 days of a reminder notice;
- (c) the RSP fails to pay invoices by the due date on 3 or more occasions in any 12-month period and fails to remedy within 30 days of each reminder notice;
- (d) the RSP commits a material breach incapable of remedy;
- (e) the RSP commits a material breach capable of remedy but fails to remedy within 30 days of Swoop Infrastructure's notice;
- (f) a Force Majeure Event prevents Swoop Infrastructure from substantially performing for more than 60 days; or
- (g) a Supplier failure occurs, a Supplier alters supply terms, or required permits/licences cannot be obtained or retained and cannot be remedied within 30 days of notice.

### **13.2. Termination by RSP**

The RSP may terminate this Agreement or a Service by written notice if:

- (a) Swoop Infrastructure commits a material breach incapable of remedy;
- (b) Swoop Infrastructure commits a material breach capable of remedy but fails to remedy within 30 days of RSP's notice;
- (c) a Force Majeure Event prevents Swoop Infrastructure from substantially performing for more than 60 days;
- (d) Swoop Infrastructure experiences an Insolvency Event; or
- (e) for a Service only, by providing written notice before the RFS Date and paying Swoop Infrastructure all reasonable preparation costs including equipment, infrastructure, installation and Supplier costs.

### **13.3. Effect of Termination**

- (a) Termination of the Agreement also terminates all Services.
- (b) Service termination does not automatically terminate the Agreement.
- (c) Termination does not affect accrued rights, remedies or payment obligations.
- (d) If termination occurs under clauses 13.1(a)-(e), the RSP must pay Swoop Infrastructure outstanding charges on demand.
- (e) Upon Agreement termination, each party must return or destroy the other's Confidential Information.
- (f) Termination does not waive breaches or affect rights, liabilities or obligations accrued before termination, including indemnification rights. Provisions that by nature survive termination continue in effect.

## 14. Liability and Indemnity

### 14.1. Indemnity

- (a) Each party indemnifies the other against loss suffered as a result of death, personal injury and property damage directly caused by the indemnifying party's acts.
- (b) Each party must mitigate an indemnified loss.
- (c) For third-party claims under this indemnity, the claiming party must:
  - (i) provide full claim particulars promptly;
  - (ii) make no admissions or settlement offers without written consent;
  - (iii) allow the other Party to conduct negotiations and litigation at its expense; and
  - (iv) provide reasonable assistance with the claim.

### 14.2. Limitation of Liability

- (a) To the extent permitted by law, Swoop Infrastructure excludes all warranties and conditions including merchantability and fitness for purpose. Swoop Infrastructure does not warrant Services will be secure, continuous or error-free. Swoop Infrastructure's liability for non-excludable conditions is limited to resupplying Services or paying resupply costs.
- (b) Neither party is liable for Consequential Loss, lost revenue, profit or anticipated profit, or indirect loss not naturally resulting from acts, omissions or breach.
- (c) Except for charges payable under this Agreement, each party's aggregate liability to the other party for all losses including indemnified loss is limited to the proceeds of any insurance policy.

### 14.3. Proportionate Liability

Each party's liability for loss is reduced to the extent that the other party caused or contributed to the death, injury, damage or loss. is

## 15. Force Majeure

15.1. Neither party is liable for delay or failure to perform due to events beyond their reasonable control but must take reasonable steps to overcome such events and resume performance promptly. This does not relieve payment obligations.

## 16. Assignment

16.1. Neither party may assign rights under this Agreement without the other party's consent, except as provided in subclause 16.2.

16.2. Swoop Infrastructure may, with prior notice, assign rights and obligations to a Related Body Corporate or purchaser of Swoop Infrastructure's business or assets.

## 17. Relationship Between Parties

17.1. The parties are independent contractors. This Agreement creates no partnership, joint venture, employment or agency relationship.

## 18. Failure or Delay in Exercising Rights

18.1. Unless otherwise stated, partial exercise, failure to exercise, or delay in exercising legal rights does not waive, prevent or limit a party's rights or remedies.

## 19. Costs

19.1. Each party will pay its own costs for preparing and executing this Agreement.

## 20. Authorised Representative and Notices

20.1. Each party confirms its listed authorised representative is authorised for all Agreement matters. Representatives may be changed by notice to the other party.

20.2. All notices must be given to the other party's authorised representative or registered business address.

20.3. Notices are deemed given:

- (a) when emailed, upon receiving automated read receipt;
- (b) when hand delivered, upon delivery during business hours;

- (c) when posted by certified/registered mail, on the third business day (same country) or tenth business day (different country) after posting.

## 21. Disputes

- 21.1. If the parties cannot resolve a matter, a party may issue dispute notice. If unresolved after 5 business days, the parties must exchange written dispute summaries, and within a further 5 business days, senior employees or directors must attempt resolution. If unsuccessful within 10 business days (or longer agreed period), either party may refer the dispute to an agreed person or nominee of the Institute of Arbitrators and Mediators of Australia President. This does not prevent urgent court applications. The parties must continue performing obligations despite disputes where possible.

## 22. Governing Law

- 22.1. This Agreement is governed by New South Wales law and each party submits to the jurisdiction of courts in that State.

## 23. Definitions and Interpretation

### 23.1. Definitions

**Acceptable Use Policy** means Swoop Infrastructure's policy published on its website and amended from time to time, setting rules for RSP and End-User Service use to ensure lawful purposes and prevent Network interference.

**Agreement** means this Wholesale Master Services Agreement, Swoop Infrastructure protocols, price lists, policies published on Swoop Infrastructure's website or notified to the RSP, as amended from time to time.

**Carriage Service Provider** has the meaning in the Telecommunications Act 1997 (Cth).

**Carrier** has the meaning in the Telecommunications Act 1997 (Cth).

**Confidential Information** means information treated as confidential by the disclosing Party, including strategy, personnel, Intellectual Property, and commercial information, except information independently created by the recipient, publicly known (not through breach), or properly acquired from entitled third parties.

**Consequential Loss** means lost revenue, profits, anticipated savings, business opportunities, data, equipment value (other than repair costs), and any consequential, special, indirect, punitive or exemplary loss.

**Control** has the meaning in the Corporations Act 2001 (Cth).

**End-User** means a retail customer of a Service at the Site.

**Force Majeure Event** means unforeseeable events beyond reasonable control preventing obligation performance, including acts of God, natural disasters, general strikes, war, terrorism, and civil disturbances.

**GST** has the meaning in A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**Insolvency Event** means appointment of administrator, liquidator, receiver or other controller over assets/business, or entering composition/arrangement with creditors.

**Intellectual Property** means all industrial and intellectual property rights including trademarks, patents, copyright, circuit layout rights, trade secrets, confidential information and applications for registration.

**Network** means telecommunications networks operated by Swoop Infrastructure where Services are provided to the RSP.

**Retail Services** means Services provided to End-Users.

**RFS Date** means ready for service date, being the earlier of when Swoop Infrastructure notifies the RSP through its platform that a Service is operational, or when the End-User commences Service use.

**Service** means telecommunications services supplied over the Network at a Site.

**Site** means buildings or locations where Services are provided or to be provided.

**Supplier** means third parties supplying goods or services to Swoop Infrastructure used in providing Services to the RSP.

**Wholesale Service** means Services supplied by Swoop Infrastructure to the RSP, Carriage Service Providers or Carriers.

**Wholesale Service Charge** means charges for Wholesale Services payable by the RSP, including recurring and non-recurring costs, development charges and labour services.

### 23.2. Interpretation. Unless the context requires otherwise:

- (a) headings and underlinings are for convenience only and do not affect the construction of the Agreement;
- (b) a provision of the Agreement will not be interpreted against a party because the party or the party's legal representative prepared or was responsible for the preparation of the provision;

- (c) currency or “\$” refers to Australian dollars;
- (d) a reference to a statute or regulation includes amendments and replacements thereto;
- (e) a reference to a clause, subclause or paragraph is a reference to a clause, subclause or paragraph of the Agreement and a reference to a subclause or paragraph is a reference to the subclause or paragraph in the clause in which the reference is made;
- (f) a reference to time is to time in New South Wales;
- (g) if an obligation must be performed by two or more persons, it binds them jointly and individually;
- (h) a reference to a person includes a reference to an individual, a partnership, a company, a joint venture, government body, government department, and any other legal entity; and
- (i) the words “includes”, “including” and similar expressions are not words of limitation and shall be interpreted as if the words “but not limited to” followed them.

## Price List

### Wholesale Service Charges

#### Service Charges

All charges listed in the section are ex GST.

#### Network to Network Interface (NNI)

NNI charges are detailed in the table below.

This is a mandatory component for the Swoop Infrastructure Ethernet Bitstream Service (SEBS) product.

NNI Type	Once Off Charge	Monthly Charge
10G NNI	\$3,000	\$200
100G NNI	POA	POA

#### Access Virtual Circuits (AVC)

##### TC-4 AVC

AVC charges are detailed in the table below.

Speed Tier	Monthly Charge
25/10	\$33
50/25	\$45
100/25	\$50
500/50	\$55
750/75	\$62
1000/100	\$70

#### Service Activation Fee

A Service Activation Fee is chargeable for the activation of each of AVC (including where an End-user changes their Service from the losing RSP to the gaining RSP).

The Service Activation Fee applies only to connection of the relevant AVC and does not cover or apply to service changes in bandwidth or simple configuration changes.

Charge	Description	Once Off Charge
Service activation	Charged for each new service activated	\$5 per activation

#### Additional Connection Charges – NDC and NCC

Additional connection charges may apply based on the status of the premises which the AVC has been ordered for:

- New Development Charge (NDC), as described below
- New Connection Charge (NCC), as described below

These charges will be billed by Swoop Infrastructure to the RSP. The RSP is responsible for paying this charge to Swoop Infrastructure and seeking repayment from its own End-User.



### New Development Charge (NDC)

A New Development Charge (NDC) will apply to premises that have the NTD preinstalled by Swoop Infrastructure however has never had an active service connected.

Charge	Description	Once Off Charge
New Development Charge (NDC)	Charged for inaugural connection into a premise.	\$272.73 per premise

### New Connection Charge (NCC)

A New Connection Charge (NCC) will apply to premises within the Swoop Infrastructure Network that have not been connected before and require the physical installation of equipment to support the first ever installation for that premises. This charge covers the provision of lead-in infrastructure from the boundary of the property to the Swoop Infrastructure Network and a truck role to cater for the PCD, tie cables and NTD installation.

Charge	Description	Once Off Charge
New Connection Charge (NCC)	Charged for inaugural installation and connection of an NTD in the premise.	\$ 272.73 per premise

### Service Change Requests

RSP's can submit requests for Swoop Infrastructure to change elements in the Swoop Infrastructure Network that can be configured remotely by Swoop Infrastructure in the Swoop Infrastructure Network.

Charge	Description	Once Off Charge
Service Change	Request for logical change to the service.	\$ 5.00 per request

### Other Charges

These charges will be billed by Swoop Infrastructure to the RSP and the RSP will be responsible for payment of the amounts to Swoop Infrastructure. The RSP will be responsible for these seeking repayment of these costs from its End-User.

Charge	Description	Once Off Charge
Missed appointment	Charge if technician attends the premise for installation but the premise is not ready for installation, or the appointment representative is not present for the appointment window.	\$ 150.00 per event
No fault found (no truck roll)	Charges where no fault found or fault is outside of the Swoop Infrastructure Network, but no truck roll occurred.	\$50.00 per event
No fault found (truck roll)	Charges where no fault found or fault is outside of the Swoop Infrastructure Network, but truck roll occurred.	\$135.00 per event
Supplementary works	Supplementary work includes but not limited to, trenching, ducting, cabling between the boundary of End-User premises and the service delivery point (UNI of the ONU)	Time + Materials