

**OUT OF HOURS SYSTEM MAINTENANCE AGREEMENT TERMS AND CONDITIONS  
(Annual Payments)**

**1. INTERPRETATION**

- 1.1 In these Conditions  
**Commencement Date:** means the date specified overleaf as the commencement date or if later the date that the Equipment is installed by the Supplier;  
**Customer:** means the person named overleaf;  
**Equipment:** means the equipment detailed overleaf and all internal cabling up to the network test termination point or other demarcation point;  
**Group:** in relation to the Supplier means 4Com plc, any company of which 4Com plc is a subsidiary (its holding company) and any other Subsidiaries of any such holding Company;  
**Initial Period:** means, subject to extension in accordance with clause 8, the period of 7 years;  
**Out of Hours Line:** mean the designated out of hours telephone number provided by the Supplier to the Customer from time to time;  
**Supplier:** means 4Com Customer Services Ltd, of Loewy House, 11 Enterprise Way, Aviation Park West, Christchurch, Dorset BH23 6EW. Registered in England Number 3601393;  
**Maintenance Services:** means the fault rectification service described in clause 4 below;  
**Extended Hours:** between 5pm and 9am Mondays to Fridays including weekends and public holidays;  
**Renewal Period:** each successive 12-month period after the Initial Period for which this Agreement is renewed;  
**Response Time:** means 8 working hours;  
**Service Effecting Fault:** a malfunction or failure of the Equipment causing a complete system failure, line failure or the inability to make or receive any telephone calls;  
**Standard Maintenance Agreement:** the standard system maintenance agreement in place between the Supplier and the Customer in respect of the maintenance of the Equipment between the hours of 9am and 5pm Monday to Friday excluding weekends and public holidays;  
**Subsidiary:** in relation to a company wherever incorporated (a holding company) means a "subsidiary" as defined in section 1159 of the Companies Act 2006 and any other company which is a subsidiary (as so defined) of a company which is itself a subsidiary of such holding company;  
**Term:** the Initial Period together with all Renewal Periods.

**2. SUPPLIER'S UNDERTAKING**

- 2.1 In consideration of the payment by the Customer of the annual service charge in accordance with the terms of clause 3 and subject to clause 2.2, the Supplier undertakes to provide the Maintenance Services in respect of the Equipment upon the terms and conditions of this Agreement.  
2.2 The Customer must have (a) a valid Standard Maintenance Agreement and (b) a valid BT Total Care contract in respect of their telephone lines and such telephone lines must be provided by the Supplier.

**3. MAINTENANCE CHARGES**

- 3.1 The annual service charge for the Maintenance Service is payable annually in advance. Payment for services provided to the Customer in addition to the Maintenance Services is due on presentation of an invoice by the Supplier.  
3.2 The Supplier reserves the right to submit invoices to the Customer via e mail.  
3.3 Where payment is outstanding for more than 30 days in respect of any invoice due under this Agreement the Supplier may without liability suspend its obligations under this Agreement until payment of the overdue amount is made.  
3.4 The Supplier reserves the right to charge interest at an annual rate of 4% above the base rate of HSBC Bank plc calculated on a daily basis in respect of any sum which is due and unpaid, that interest to run from the date on which that sum is due and payable until receipt by the Supplier of the full amount, whether before or after judgment .

**4. MAINTENANCE SERVICES**

- 4.1 On the Customer informing the Supplier that the Equipment has suffered a Service Effecting Fault, the Supplier shall use reasonable endeavours during the Extended Hours:  
4.1.1 to inspect, test and diagnose the fault remotely within the Response Time; and  
4.1.2 to remedy the fault remotely and if remote rectification cannot be achieved the placement of call diverts via BT and the escalation of the fault for rectification pursuant to the Standard Maintenance Agreement.  
4.2 Maintenance services will be carried out by duly qualified engineers.  
4.3 The Response Time will commence from the time the Customer informs the Supplier in accordance with clause 3.1 provided that such notification is made to the Supplier during the Extended Hours via the Out of Hours Line. The Supplier shall be under no liability or obligation to provide Maintenance Services outside of the Extended Hours or if the Customer fails to notify the Supplier of a Service Effecting Issue in accordance with these terms.  
4.4 Any call diverts implemented by the Supplier will be subject to BT lead times via the BT total care service.

**5. EXCLUDED MAINTENANCE**

- 5.1 The Supplier is not obliged to perform any Maintenance Service or suffer any liability in relation thereto where the Service Effecting Issue results from or is caused by any of the following ("**Excluded Causes**"):  
5.1.1 any defect arising from wilful damage, negligence (including improper storage), abnormal working conditions, failure to follow the Supplier's instructions (whether oral or in writing), misuse or alteration or repair of the Equipment without the Supplier's approval; or  
5.1.2 faults in the service provided by the network provider or defects in electricity or network supply to the Equipment; or  
5.1.3 defects caused by failures or surges of electrical power or a failure of the Equipment due to changes in the electrical supply service or the public network; or  
5.1.4 a defect in the manufacturer's design of the Equipment; or  
5.1.5 faulty materials or workmanship in the manufacture of the Equipment.  
5.2 Where the Supplier is performing or has performed Maintenance Services in circumstances where it is established that the Service Effecting Issue is due to any Excluded Causes, the Supplier may charge, and the Customer shall pay a fee, calculated in accordance with the Supplier's then current rates, in respect of that work.

**6. LIMITATION OF LIABILITY**

- 6.1 Except as expressly stated in this Agreement, all warranties, conditions and terms, whether express or implied by statute, common law or otherwise (including fitness for purpose and suitability) are hereby excluded to the extent permitted by law.  
6.2 Subject always to clause 6.4 the Supplier shall not be liable whether in contract, tort (including for negligence and breach of statutory duty), misrepresentation (whether innocent or negligent), restitution or otherwise, for (a) any loss (whether direct or indirect) of profits, business, revenue, or goodwill; (b) any special, indirect or consequential loss, costs, damages, charges or expenses however arising under this Agreement.

- 6.3 Subject always to clause 6.4 the Supplier's total aggregate liability in contract, tort (including negligence and breach of statutory duty), misrepresentation (whether innocent or negligent), restitution or otherwise, arising in connection with the performance or contemplated performance of this Agreement shall be limited to £200,000.

- 6.4 The Supplier does not exclude or limit liability for fraud or fraudulent misrepresentation or death or personal injury caused by negligence.

- 6.5 The Supplier shall not be in breach of this Agreement nor liable for any delay in performing or failure to perform, any of its obligations under this Agreement if that delay or failure results from circumstances beyond the Supplier's reasonable control including (without limitation) flood, fire, lightning, war, sabotage, civil disturbance or governmental action, import regulations or embargoes; or any delay on the part of BT.

**7. THE CUSTOMER'S OBLIGATIONS**

- The Customer agrees that it will:-  
7.1 pay the Supplier all amounts due under this Agreement at the due times;  
7.2 ensure that the Equipment is not moved at any time from the address at which it was originally installed, or altered, adjusted or interfered with in any way except by the Supplier's servants or agents. Alterations include the reprogramming of the Equipment to change network providers for the purpose of least cost routing;  
7.3 provide the Supplier with remote access to the Equipment;  
7.4 pay the Supplier's charges for reprogramming the Equipment required as a result of an error by any person other than the Supplier's servants or agents;  
7.5 take any steps reasonably necessary to ensure the safety of the Supplier's personnel when attending the Equipment;  
7.6 not alter or extend the Equipment without prior notification to the Supplier (an additional charge may, at the Supplier's sole discretion be made for the maintenance of altered Equipment);  
7.7 provide the Supplier with details of the installer of the Equipment, a copy of its Pre-Connection Inspection Certificate, a copy of its BT Total Care contract and access to all relevant site records;  
7.8 notify the Supplier promptly if it suffers a Service Effecting Fault within the Extended Hours via the Out of Hours Line.

**8. ADDITIONAL EQUIPMENT**

- 8.1 If at any time throughout the Term the Supplier provides the Customer with any additional equipment ("Additional Equipment") then to the extent that the Customer requires the Additional Equipment to be maintained by the Supplier and a separate out of hours maintenance agreement has not been entered into in respect of the Additional Equipment:  
8.1.1 such Additional Equipment will form part of the Equipment for the purposes of this Agreement and the Initial Term shall be extended to a period of 5 years from the date on which the Additional Equipment was provided to the Customer; and  
8.1.2 the annual service charge for the Maintenance Service of the Equipment shall be increased by an amount equal to the agreed service charge for the Maintenance Service as specified on the Additional Equipment purchase order in respect of the Additional Equipment such increase to be effective from the date on which the additional equipment is provided to the Customer.

**9. TERM & TERMINATION**

- 9.1 This Agreement shall commence on the Commencement Date and unless terminated earlier in accordance with clause 9.2 shall remain in force for the Initial Term. The Term of the Agreement shall automatically be extended for a Renewal Period at the end of the Initial Period and at the end of each Renewal Period, unless a party gives written notice to the other party, not later than 90 days before the end of the Initial Term or the relevant Renewal Period, to terminate this Agreement.  
9.2 Subject to clause 9.1, this Agreement may be terminated:  
9.2.1 by the Customer during the Initial Term by giving at least 90 days written notice to the Supplier expiring on an anniversary of the Commencement Date; or  
9.2.2 by the Supplier if the Customer is in breach of any provision of this Agreement and does not rectify the breach within 14 days of the Supplier's notice of such breach;  
9.2.3 by the Supplier if the Customer becomes unable to pay its debts in within the meaning of the Insolvency Act 1986, enters into liquidation or administration is subject to any other analogous insolvency proceeding.  
9.3 On termination the Customer shall immediately pay any outstanding amounts owed to the Supplier pursuant to this Agreement.  
9.4 Notwithstanding 9.3 in the event of termination pursuant to clause 9.2.1, 9.2.2 and/or 9.2.3 the Customer shall immediately pay the annual service charges in respect of the remainder of the Initial Term after the date of termination.

**10. GENERAL**

- 10.1 The terms of this Agreement including the details overleaf, represent the entire agreement between the parties in relation to the maintenance of the Equipment in the Extended Hours and no variation shall be binding unless signed by the director of the Supplier.  
10.2 The terms of this Agreement may be varied by the Supplier if the Supplier deems such variation to be necessary to comply with any statute, regulation or British Standards Institute requirement.  
10.3 The annual charge payable under this Agreement shall be reviewed annually and may be increased by the Supplier by not more than the rate of inflation determined in accordance with the Retail Prices Index.  
10.4 The Supplier reserves the right to make a charge in accordance with its current rates if it is erroneously notified of an Equipment fault on more than two occasions in any calendar month.  
10.5 Any notice shall be in writing addressed to the addressee at its registered office or principal place of business or such other address as may at the relevant time have been notified pursuant to this provision to the party giving the notice and in respect of a notice given under clause 9 shall be sent by recorded delivery.  
10.6 No delay or failure by the Supplier in enforcing any provision of this Agreement shall constitute a waiver of that provision or any other provision. No waiver by the Supplier of any breach of the Maintenance Agreement by the Customer shall be considered as a waiver of any subsequent breach of the same or any other provision. No waiver by the Supplier shall be effective unless in writing.  
10.7 If any provision of this Agreement is held by any competent authority to be invalid or unenforceable in whole or in part the validity of the other provisions of this Maintenance Agreement and the remainder of the provision in question shall not be affected.  
10.8 The Supplier may assign its rights and obligations. The Customer may not assign its rights and obligations. In the event the Customer wishes to transfer all or a material part of its business and assets it shall give the Supplier at least 30 days prior notice of such intention.  
10.9 The Supplier may change the terms of this Agreement (including the charges) at any time. The Supplier will publish details of such changes on line on the Supplier's website [www.4com.co.uk](http://www.4com.co.uk) at least two weeks before the change is to take effect.  
10.10 This Agreement shall be governed by the laws of England and the parties submit to the exclusive jurisdiction of the English courts.