

## TERMS AND CONDITIONS OF OpenISP CC (trading as "Openweb")

### 1. SCOPE OF AGREEMENT

OpenISP hereby provides the service to the user on the terms and conditions set out below.

By entering your name into the required space thereby creating a profile on the Openweb customer portal and by further logging into the Openweb ADSL account, the user (or his/her/its representative) indicates that the user irrevocably accepts the terms and conditions. **Please pay special attention to the terms below which are in bold.** This page will not time out even if it takes some time to read and understand the terms and conditions.

### 2. INTERPRETATION

In these terms and conditions:

- 2.1 *"Consumer Protection"* means the protection afforded by chapter VII of the Electronic Communications & Transactions Act ("ECTA"), Act 25 of 2002.
- 2.2 *"Cooling off"* is the right of the user to invoke the provisions of ECTA to cancel the service agreement.
- 2.2.1 Section 44 (1)(b) of ECTA gives the user the right to cancel without reason and without penalty any transaction and any related credit agreement for the supply of services within seven days after the date of the conclusion of the agreement.
- 2.2.2 Section 42 (2)(d) provides that Section 44 does not apply to an electronic transaction for services which began with the user's consent before the end of the seven-day period referred to in section 44(1);
- 2.2.3 OpenISP offers 7 day complimentary trial accounts for the purpose of client evaluation – these are available on request by emailing : [admin@openweb.co.za](mailto:admin@openweb.co.za) (To prevent abuse only one account is available to each client per month). Since Openweb offers the capacity for clients to evaluate it's ADSL service before purchasing, the "cooling off" period as regulated by ECTA is inapplicable.
- 2.3 *"Logging on"* means the user entering the OpenISP ADSL credentials (username and password) provided into a router, modem or computer with the intent of connecting to the electronic communications infrastructure.
- 2.4 *"OpenISP"* means OpenISP CC, a registered close corporation which trades as Openweb;
- 2.5 *"OpenISP network"* means the electronic communication infrastructure used by OpenISP to provide Internet access and bandwidth to the user;
- 2.6 *"parties"* means OpenISP and the user;
- 2.7 *"the service"* means the provision of access to the electronic communication infrastructure by OpenISP to the user in accordance with these terms and conditions;

- 2.8 *"terms and conditions"* means the terms and conditions set out herein;
- 2.9 *"the user"* means the person who has purchased access to the electronic communications infrastructure via OpenISP and/or any person using such access with the user's authority.

### **3 PROVISION OF SERVICE**

- 3.1 **The user acknowledges that he/she has the prerequisite infrastructure in place to make use of the service.** The user will be solely responsible for obtaining and arranging, configuring and maintaining all of the user's equipment, including (but not limited to) computer hardware equipment, telecommunication equipment, modems/router, smart phones, tablets and the like, used by the user to obtain and maintain access to the electronic communications infrastructure provided by OpenISP.
- 3.2 The user will be liable for all telephone call charges and other costs payable to third parties relating to obtaining and arranging, configuring and maintaining equipment as described in 3.1 above.

### **4 NETWORK & AVAILABILITY OF ACCESS AND ASSOCIATED ACCEPTABLE USAGE**

- 4.1 The OpenISP network may be used to link into other networks in South Africa and universally and the user **agrees to conform** to the use policies of these networks. (This means that the user must make sure that it does not use other networks, for example Internet Solutions in South Africa, in a way that **breaches the rules of use and acceptable usage policies of those networks**. All OpenISP ADSL accounts run on the Internet Solutions backbone are therefore also subject to the Internet Solutions Acceptable Usage Policy found at <http://www.is.co.za/Legal/Pages/default.aspx>.
- 4.2 The user may not circumvent user authentication or security of any host, network, or account (referred to as "cracking" or "hacking"), nor interfere with data package to any user, host, or network (referred to as "denial of service attacks") and accepts that it is illegal to do so, constitutes a material breach of the agreement, and affords OpenISP the right to suspend and/or terminate the agreement forthwith.
- 4.3 In addition and without prejudice to (without overriding or taking away from) what is set out above, the **use of any application that overloads the OpenISP network** by whatever means will be regarded as making reckless use of the OpenISP network and is NOT allowed.
- 4.4 Users who violate systems or network security may incur criminal or civil liability. OpenISP **will fully co-operate with investigations of suspected criminal violations**, violation of systems or network security under the leadership of law enforcement or relevant authorities.
- 4.5 OpenISP will make every effort to make the service available at all times and will use its utmost endeavours to strive for 100 % (one hundred percent) uptime and associated bandwidth speeds. However, since OpenISP relies on numerous suppliers in order to provide the service, **OPENISP is unable to and does not guarantee 100 % (one hundred percent) uptime and associated bandwidth speeds. The bandwidth speeds advertised on the Openweb website indicate the maximum theoretical speed and no warranties are made in this regard. All access to the electronic communications infrastructure is rendered on a**

**“best effort” basis and OpenISP accordingly does not offer any form of service level agreement whatsoever.**

- 4.6 OpenISP will strive at all times to provide users with prior notice, where possible, of scheduled maintenance which may result in users having to log-off for any period of time.
- 4.7 OpenISP will not be responsible for the performance of external communications networks and protocols to which the service is connected, including the networks of Internet data package providers other than OpenISP.

#### **IMPORTANT WAIVER AND INDEMNITY**

- 4.8 The user waives all and any claims that may arise as a result of OpenISP being unable to make the service available to the user under the circumstances contemplated in 4.7 above and indemnifies OpenISP and holds OpenISP harmless against all and any claims that may arise as a result of OpenISP being unable to make the service available to the user under the circumstances contemplated in 4.7 above.

More specifically:

- 4.8.1 The user cannot bring any such claim against OpenISP;
- 4.8.2 In relation to third party claims:
  - 4.8.2.1 the user will pay all costs, damages, awards and judgments finally awarded against OpenISP arising from such claims;
  - 4.8.2.2 the user will pay all legal fees incurred in connection with such claims on an attorney and own client scale (fees will be “as incurred” and not limited to any amount set in terms of public regulation), including fees incurred prior to or during the institution of legal proceedings, and/or in connection with the satisfaction of any costs, damages, awards and/or judgments awarded against OpenISP.
  - 4.8.2.3 the user will, at the user’s expense, notify OpenISP of any such claim which comes to the user’s attention; where applicable give OpenISP the authority to defend, compromise or settle any such claim; and give OpenISP all reasonable assistance necessary to defend such claims.
  - 4.8.2.4 the user’s indemnity against third party claims will not apply to the extent that it is not permitted under the Consumer Protection Act.

Reference to OpenISP in this clause 4.8 includes reference to any employee, representative or other personnel of OpenISP.

- 4.9 OpenISP will provide the service strictly subject to the terms and conditions prescribed by its third party bandwidth resellers and the national regulator (Independent Communications Authority of South Africa, ICASA) and prevailing legislation.
- 4.10 OpenISP will be entitled to suspend the service if, during the user's use of the service, the OpenISP network is or potentially may be endangered, harmed and/ or impeded. Where

possible, OpenISP will notify the user prior to such a suspension. **This includes the use of 'electronic measures' in the form of bandwidth 'shaping' that ensures that the OpenISP network is not compromised or over burdened by abuse as defined in Section 5.3 and 5.4 of these 'terms'.**

- 4.11 OpenISP will not be held responsible for any bandwidth loss or theft as it is the user's responsibility to ensure proper management of their usage.
- 4.12 Local usage (relating to the use of internet sites and email servers hosted in South Africa): In some cases, the local usage provided after the initial cap has been depleted, is capped at a set number of gigabytes (e.g. 1GB, 10GB or 30GB's depending on the account purchased). Once the user's account has reached the applicable local usage cap, the account will be hard-capped until the following month. (The user will not be able to make use of the service while the user's account is hard-capped). Additional accounts can be purchased, at the user's discretion.

## **5. USER ETIQUETTE, ILLEGAL USE & ACCEPTABLE USE**

- 5.1 The user acknowledges and agrees that the user is expected to abide by generally accepted *Netiquette*.
- 5.2 The user acknowledges that OpenISP is unable to exercise control over the content of the information passing over the OpenISP network and is accordingly not responsible or in any way liable for such content.
- 5.3 The OpenISP network **may only be used for lawful purposes**. The user will accordingly not use the service in any manner which:
  - 5.3.1 constitutes a violation of any law, regulation and/or tariff that is in force in the Republic of South Africa;
  - 5.3.2 constitutes an act or omission that is generally unacceptable or offensive to internet users in general or the public at large, specifically including but not limited to the hosting of pornographic or other obscene material, spamming, hacking, unsolicited mailing or use of material that violates export control laws;
  - 5.3.3 is defamatory, fraudulent or deceptive;
  - 5.3.4 is intended to threaten, harass or intimidate;
  - 5.3.5 damages the name and/or reputation of OpenISP;
  - 5.3.6 interferes with the use and enjoyment of internet related services by other users or OpenISP services;
  - 5.3.7 forwards or propagates chain letters or malicious email; and/or
  - 5.3.8 solicits mail for any address other than that of the user, except with full consent of the owner of such other address.

To assist the user to comply with the user's obligations under this clause 5.3, OpenISP will forward or communicate to the user any notifications which OpenISP receives relating to the improper use of the service or the OpenISP network by the user.

- 5.4 The user undertakes to abide by all laws applicable to copyright and intellectual property, redistribution or re-sale of any data and/or publications, compositions, productions and software information retrieved from the service and/or the internet by the use of the service. **Transmission, distribution or storage of any material protected by copyright, trademark, trade secret or other intellectual property right without proper authorization, is strictly prohibited.**
- 5.5 The user will not, without the express written permission of OpenISP, resell or otherwise make the service the user may receive from OpenISP, available to any third party.
- 5.6 The user acknowledges that third party product and service providers advertise their products and services on the OpenISP website. Open ISP forms partnerships or alliances with some of these vendors from time to time in order to facilitate the provision of these products and data packages to the user. However, the user acknowledges and agrees that at no time is OpenISP making any representation or warranty regarding any third party's products or data packages, nor will OpenISP be liable to the user or any third party for any claims arising from or in connection with such third party products and/or data packages.

#### **IMPORTANT INDEMNITY**

- 5.7 The user indemnifies and holds OpenISP harmless against all and any third party claims that may arise from the user's use of the OpenISP network and/or the telecommunication line and/or the service. More specifically:
  - 5.7.1 the user will pay all costs, damages, awards and judgments finally awarded against OpenISP arising from such claims;
  - 5.7.2 the user will pay all legal fees incurred in connection with such claims on an attorney and own client scale. (Fees will be "as incurred" and not limited to any amount set in terms of public regulation), including fees incurred prior to or during the institution of legal proceedings and in connection with the satisfaction of any costs, damages, awards and/or judgments awarded against OpenISP
  - 5.7.3 the user will, at the user's expense, notify OpenISP of any such claim which comes to the user's attention; where applicable, give OpenISP full authority to defend, compromise or settle such claims; and give OpenISP all reasonable assistance necessary to defend such claims.
  - 5.7.4 The user's indemnity against third party claims will not apply to the extent that it is not permitted under the Consumer Protection Act.

Reference to OpenISP in this clause 5.7 includes reference to any employee, representative or other personnel of OpenISP

## **6 PAYMENT FOR THE SERVICE**

- 6.1 The user will pay to OpenISP a monthly subscription as set out in the applicable tariff guide appearing at: [http:// www.Openweb.co.za](http://www.Openweb.co.za) and associated pages.
- 6.2 Subscriptions are due on or before the 27th of each month, paid in advance for the following month's service if paid for by means of an EFT or via credit card. Subscriptions may be paid by way of electronic transfer, credit card payment or debit order.
- 6.3 The user is responsible for ensuring that debit order and credit card payments are honoured and that the necessary payment mechanisms are in place. If the user pays by electronic transfer, the user is responsible for sending proof of payment to OpenISP by email to [admin@Openweb.co.za](mailto:admin@Openweb.co.za) or by fax to 086 691 2166 and for verifying that OpenISP has received the proof of payment and marked the user's account as PAID on or before the 27<sup>th</sup> of each month.
- 6.4 The service will be terminated without notice to the user, with effect from the first day of the following month, if:
- 6.4.1 a subscription which is due for the following month is not paid; or
- 6.4.2 in the case of electronic transfers, proof of payment of a subscription is not received by the 27th of the month preceding the month of usage and OpenISP does not subsequently receive the subscription in its bank account after the 27th but before the end of that month.

**OpenISP will not be liable for any loss (including loss of business or revenue), damages, expenses, costs or claims arising due to the termination of the service in these circumstances.**

- 6.5 Except to the extent the following limitations may be prohibited by the Consumer Protection Act in certain circumstances:
- 6.5.1 subscriptions are to be paid without deduction, set-off or demand; and
- 6.5.2 subscriptions paid are non-refundable.
- 6.6 Access to the service paid for within a month (i.e. after the first day of the month), will only last until the end of the month it was purchased in.

## **7 SUSPENSION / TERMINATION OF SERVICE BY OPENISP**

- 7.1 The service may be suspended by OpenISP in the following circumstances:
- 7.1.1 During any technical failure, modification or maintenance of the service or the network, including but not limited to:
- 7.1.1.1 a failure due to activity such as cracking, hacking or denial of service attacks described in 4.2 above; and

7.1.1.2 any maintenance contemplated in 4.6 above, provided that OpenISP will use its reasonable efforts to resume the service as soon as possible.

**7.1.2 If and when the OpenISP network is or potentially may be endangered, harmed and/or impeded as described in 4.10 above.**

**7.1.3 If a user directly or indirectly abuses or harasses an OpenISP staff member or agent.**

7.2 In addition to the right of termination set out in 6.4 above, the service may be terminated by OpenISP immediately and without notice to the user should the user fail to comply with any material term or condition set out in these terms and conditions.

7.3 OpenISP reserves the right to levy a re-connection charge (an amount determined and calculated at the discretion of OpenISP) for re-connection to the use of the service or OpenISP network after suspension or termination of the service for any reason. Any re-connection charge will be payable immediately when the user receives an invoice from OpenISP for the re-connection charge.

7.4 the user will remain liable for all charges due throughout a period of suspension of the service unless OpenISP in its sole discretion determines otherwise in writing.

## **8 TERMINATION OF USE OF THE SERVICE BY THE USER**

The user may terminate the the use of the service by giving written notice to OpenISP at cancellations@Openweb.co.za or 086 691 2166 as follows:

8.1 **one (1) calendar months' notice for all users making use of debit/credit order payment facilities, given before the 25th day of the month before the last month for the provision of the service** (e.g. if the user wishes the use of the service to terminate at the end of April, notice of termination must be given before 25 March). Users may not downgrade their ADSL account/s during the one (1) calendar months' notice period. Where proper notice is given in time, **OpenISP will issue, by email, a cancellation reference number. Only once a cancellation reference number has been issued will the user's account be deemed to be cancelled.**

8.2 Subject to 8.3 and 8.4 below, 10 (ten) days' notice for all users using other methods of payment, given before the 27th day of the month before the last month for the provision of the service (i.e given on or before the 17th day of the last month of service) .

8.3 **Nothing set out in clauses 7 or 8 shall detract from the legal right of OpenISP to recover any amount due owing and payable in terms of this agreement from the user together with interest thereon at the prime rate of interest levied by ABSA Bank SA and all costs incurred in the collection of monies owed.**

8.4 **It is specifically recorded that in terms of section 42(2)(d) of ECTA, section 44 of the Act relating to a cooling off period is not applicable to all electronic transactions where the user has waived the right to make use of a complimentary trial account and has consented to enter into a service contract with OpenISP and that accordingly any purported cancellation in terms thereof will be invalid.**

## **9 DISPUTE RESOLUTION**

- 9.1 Save and except relating to the provisions of 8.3 above, any dispute between the user and OpenISP in regard to any matter arising out of these terms and conditions or their interpretation, or the parties' respective rights and liabilities under these terms and conditions or the cancellation of these terms and conditions or any matter relating to these terms and conditions will be submitted for mediation and, failing resolution at mediation, for arbitration.
- 9.2 The mediator/arbitrator will be appointed by agreement between the parties and will be, if the question in issue is:
- 9.2.1 primarily an accounting matter, an independent chartered accountant based in Durban;
  - 9.2.2 primarily a legal matter, a practising advocate of not less than 5 (five) years' standing accredited as a mediator (where the advocate is required to mediate) based in Durban;
  - 9.2.3 any other matter, an independent person agreed on between the parties and failing agreement appointed by the CEO of Africa Dispute Resolution or his/her nominee.

## **10 REGULATORY COMPLIANCE**

- 10.1 The user undertakes to comply with all regulatory obligations that may now or in the future be imposed by the body under whose authority the service falls, currently the Independent Communications Authority of South Africa, ICASA.
- (To help the user to comply with the user's obligations under this clause 10.1, OpenISP will forward or communicate to the user any notifications which OpenISP receives relating to the user's regulatory obligations as imposed by ICASA or its successor.)
- 10.2 The user acknowledges that the imposition of regulatory obligations by such body may result in the need to change these terms and conditions and the user undertakes to co-operate with OpenISP in this process.

## **11 GENERAL**

- 11.1 The user acknowledges and agrees that these terms and conditions govern the user's use of the service and that there are no other agreements, guarantees, warranties or representations, either verbal or in writing, governing or relating to the user's use of this service.
- 11.2 Any explanations in brackets are for explanatory purposes only, to aid understanding by the user, and will not govern the interpretation of these terms and conditions.
- 11.3 These terms and conditions may be clarified or modified periodically. Such changes are deemed effective as soon as they are published on the OpenISP website ([www.Openweb.co.za/terms.pdf](http://www.Openweb.co.za/terms.pdf)).



Any queries regarding these terms and conditions can be sent to [admin@Openweb.co.za](mailto:admin@Openweb.co.za)

***Domicilium citandi et executand and Legal Information***

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|-----------------------------|--|
| <b>Registered name:</b>     | OpenISP CC (Openweb).  |
| <b>Registration number:</b> | 2005/156968/23.  |
| <b>Physical address:</b>    | International Lighting / OpenWeb, Unit 24 Kingfisher Park, 25<br>Marseilles Crescent, Briardene, Durban. |
| <b>Postal address:</b>      | PO Box 491 Ballito 4420.   |
| <b>Members:</b>             | AJ Wesselink, K Wright.  |
| <b>VAT number:</b>          | 402023006  |
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