

This document details the contract comments received against the October 2008 version. For the avoidance of any doubt, this document is to assist in general understanding only. Nothing in it has any contractual effect nor shall any of it form any part of a contract for the provision of user pays services.

Clause reference	Proposed wording	Customer comment	xoserve view
Framework contract definitions	Contract Manager means the person appointed by the Customer in accordance with clause 2.4 below as its point of contact in respect of all matters relating to this Framework Contract and the performance of the Services; and	“Contract Manager”- this is defined in both this Part A and in Annex 2 - the Conditions. As definitions are common to both Part A and the Conditions, it can be deleted from the definitions in the Conditions.	The definition has been removed from the conditions.
	Effective date definition to be added to the Framework contract.	Definitions – “Effective date” is not defined with the framework agreement Part A, nor is it specified in the Conditions document Definitions either.	The definition has been moved from the conditions to the Framework contract
Framework Contract Clause 2.6	The parties agree that there is no obligation on the Customer to issue any requests for the provision of the Services, nor any obligation on the part of xoserve to accept such requests <u>(save that xoserve will not unreasonably refuse a Service Request properly submitted for a reasonable level of Services).</u>	1. Our preference is to delete the words “reasonable level of Services” after “properly submitted” - what is deemed to be reasonable is potentially difficult to quantify and may result in service requests being rejected arbitrarily. 2. This needs an obligation on xoserve to accept/refuse a request within a reasonable period of time. At present there is no time frame at all.	Proposed wording: The parties agree that there is no obligation on the Customer to issue any requests for the provision of the Services, nor any obligation on the part of xoserve to accept such requests (save that xoserve will not <u>unreasonably delay the issue of any such acceptance or refusal, nor will it</u> unreasonably refuse a Service Request properly submitted for a reasonable level of Services).

<p>Framework Contract new clause 4</p>	<p><u>4 EXISTING AGREEMENTS</u></p> <p><u>4.1 Without prejudice to any accrued rights or obligations of the parties:</u></p> <p>4.1.1. <u>in respect of the period prior to 1 April 2008, any contract or other terms between xoserve and the Customer for the provision of any of the Services prior to 1 April 2008 are terminated on and with effect from 31 March 2008; and</u></p> <p>4.1.2 <u>in relation to the period on and from from 1 April 2008, the terms of this Agreement shall supersede in their entirety any other prior agreements signed by the parties for services similar to the Services and any existing outstanding Service Requests under those agreements shall become Service Requests under this Agreement.</u></p>		<p>This clause has been added to ensure the new contract supersedes the existing contract.</p>
<p>Conditions Definitions</p>	<p>Contract</p> <p>means the contract between the Customer and xoserve incorporating the Framework Contract, any and all Service Requests submitted by the Customer and accepted by xoserve under the terms of the Framework Contract from time to time and any and all Service Request Acceptances;</p> <p>Framework Contract</p> <p>means the framework contract between the Customer and xoserve incorporating these Conditions pursuant to which: <u>(i) Part A thereto; Part B thereto (being Annex 1 and Annex 2 (these Conditions and the Schedules hereto); and (iii) the</u></p>	<p>“Contract” and “Framework Contract” - we don’t see a need for both definitions. The Framework Contract is the document under which Service Requests are made and accepted.</p>	<p>The ‘Framework Contract’ comprises the initial 3 page document to be signed (Part A) and its Annexures, the Conditions and Schedules and the Services Schedule. The ‘Contract’ as a whole includes the Framework Contract but also any accepted Service Requests and Service Request Acceptances. This distinction is set out in the definitions in the Conditions and was incorporated following</p>

	<u>Services Schedule, (as each may be varied from time to time in accordance with the provisions hereof) pursuant to which framework contract</u> the Customer may submit Service Requests for the provision of the Services;		feedback from customers on the previous drafting. It has been reviewed and approved both by the xoserve Legal Department and our external lawyers. There is only one 'Contract', not a series of individual contracts formed by each Service Request and Service Request Acceptance
	Contract means the contract between the Customer and xoserve incorporating the Framework Contract, any and all Service Requests submitted by the Customer and accepted by xoserve under the terms of the Framework Contract from time to time and any and all Service Request Acceptances;	If "Contract" is intended to be a definition for each individual accepted Service Request it needs to be amended to delete the reference to "any and all". We think confusion has arisen due to the two definitions being used, e.g. Conditions 10, 12 and 13 where the references to Contract should be to Framework Contract.	Please see above comments. We consider that all the references to 'Contract' are appropriate.
Amended definition	"Contract Manager"	means the person appointed by the Customer from time to time as its point of contact in respect of the Contract, as identified in Annex 1 to the Framework Contract;	Defined term removed.
Conditions Definitions	Effective date, means [—]	"Effective Date" as this is to be a variable date depending on the date the Framework Contract is intended to start the definition sits better clause 2.1 of Part A. The definition would apply to	Defined term moved to Framework contract section

		the date specified in that clause. As it is a variable date, it is not appropriate for inclusion in standard Conditions.	
<i>Amended definition</i>	"Change in Law"	<p>means the coming into effect, after the Effective Date, of a change in any applicable:</p> <p>(a) Legislation;</p> <p>(b) common law and law of equity to the parties;</p> <p>(c) binding court order, judgement or decree;</p> <p>(d) guidance, industry code, policy or standard enforceable by law <u>(including without limitation the Transporter's Licence or the Uniform Network Code)</u>; or</p> <p>(e) direction, policy, rule or order that is binding on a party and that is made or given by any regulator or relevant authority having jurisdiction over a party or any of that party's assets, resources or business, affecting the provision of the Services;</p>	Enhancement by xoserve to provide clarity

Amended definition	"Charges"		To be enhanced to cover for charging for change deliverables
Amended definition	"Services Schedule"	means the separate document entitled "Services Schedule For The Provision Of Non-Code User Pays Services (reference number XNCUP(SS)01)" signed by the Parties parties (and forming part of the Framework Contract), as such document may be amended from time to time pursuant to clause 3 of these Conditions and schedule 2 of these Conditions;	Amendment by xoserve for clarity.
Amended definition Clause 2.3	2.3 Without prejudice to any accrued rights or obligations of the parties in respect of the period prior to 1 April 2008, any contract or other terms between xoserve and the Customer for the provision of any of the Services prior to 1 April 2008 are terminated on and with effect from 31 March 2008.		Clause removed, replaced with clause 4.1 in Framework contract.
Conditions Clause 3 Amendments to these conditions and the service schedules		We would like to see a reference to the change process in the Conditions – Whilst we appreciate that changes will need to be agreed and executed by all parties there needs to be some cross reference to the actual process to ensure that it is legally binding on all the parties. In other documents like the MRA etc the change process is set out in the actual agreement (as the amendments to the services schedules are in the User Pays Agreement).	This is not the way xoserve understood the discussions on change. The proposal creates a less flexible arrangement. What does the industry think?

Conditions clause 3.1	If xoserve wishes to alter any of these Conditions (including but not limited to the terms of any Service Schedule), it shall: <u>xoserve, the Customer or any other User Pays Customer may propose a change to these Conditions at any time (a "Contract Change"). Contract Changes must be considered by xoserve and the User Pays Customers acting together through the User Pays Contract Expert Group. These Conditions (including the Schedules hereto) may only be amended by a written agreement signed by authorised representatives of all of:</u>	This clause needs to be revised to be easier to understand as at present it is unclear how the activities of the Contract Expert Group will have effect. Is 3.1.2 using the signed contract as the hook to achieve further “written acceptance” of change? Is it the case that the Contract Expert Group has the implicit consent of all Non Code User Pays Customers to operate on their behalf?	
<i>Amended condition 3.2</i>	The Services Schedule may only be amended in accordance with the Services Schedule Change Procedure. <u>If a change to the Services Schedule is effected in accordance with Schedule 2 of this Agreement then such change shall be automatically made to the Services Schedule and shall be binding on the Customer (whether or not it was in favour of such change).</u>		Enhancement provided by xoserve to link this part of the contract to the services schedule.
Conditions clause 5.2	The Charges payable by the Customer shall be those charges determined pursuant to the provisions of the Agency Charging Statement which are (subject to any contrary provision within a Service <u>the Services</u> Schedule), in force at the date on which the Customer submitted its Service Request or (if later) the date on which the Services specified in the relevant Service Request are due to commence. All Charges are exclusive of value added tax which will be charged for in addition.	We request to know how the ACS will work going forwards i.e. the fact that xoserve has agreed in their discussions with the parties that we will be given 2 months notice of the changes that are to made etc are reflected in the drafting of the agreement otherwise they will not be binding on xoserve.	Proposed wording The Charges payable by the Customer shall be those charges determined pursuant to the provisions of the Agency Charging Statement which are (subject to any contrary provision within the Services Schedule), in force at the date on which the Customer submitted its Service Request or (if later) the date on which the Services specified in the relevant Service Request are due to commence. All Charges

			are exclusive of value added tax which will be charged for in addition. <u>xoserve shall publish any changes to the levels of the Charges not less than 35 days prior to their anticipated date of implementation. Such publication shall be by means of the Website.</u>
Conditions clause 5.4.2	three months from the date of the last invoice issued by xoserve to the Customer for the provision of any of the Services or (if no invoice has previously been issued) three months from the date of the earliest Service Request;	The period has come down from 6 to 3 months. This change was already in place when discussions took place in June but they are not listed in the refinements register. Can xoserve confirm why the change took place?	This change was made by xoserve as an operational matter. The clause only affects those organisations who incur monthly service charges of less than £250.
Conditions clause 5.7 / 5.8	5.7 The Customer shall be responsible for the payment of any and all bank charges which may be incurred (either by the Customer or xoserve) in the payment and receipt of payment of xoserve's invoices. <u>All sums to be paid by the Customer under this Agreement shall be in pounds sterling by electronic transfer to xoserve's bank account at [Barclays Bank plc, Stratford Road, Shirley, Solihull] (Sort Code [20-77-62], Account Number [10322369]) or such other bank account as xoserve may from time to time require upon notice to the Customer, with any applicable charges on such payments (including, by way of illustration but without limitation, overseas bank transfer charges) being at the</u>	Although this clause has been amended we do not believe that the underlying intent of the clause has changed and it appears that we are still liable for any bank charges that may apply even though they may have been incurred due to a fault on xoserve's behalf. We request that the clause is amended accordingly.	Proposed wording: All sums to be paid by the Customer under this Agreement shall be in pounds sterling by electronic transfer to xoserve's bank account at [Barclays Bank plc, Stratford Road, Shirley, Solihull] (Sort Code [20-77-62], Account Number [10322369]) or such other bank account as xoserve may from time to time require upon notice to the Customer, with any applicable charges on such payments (including, by way of illustration but without limitation, overseas

	<p><u>Customer's expense.</u></p> <p>5.8 No payment shall be deemed to have been received by xoserve until it has received payment in full in pounds sterling and in cleared funds, including but not limited to any bank charges payable by the Customer in accordance with clause 5.8 above.</p>		<p>bank transfer charges) <u>not being due to any default of xoserve</u>, being at the Customer's expense.</p>
Conditions clause 5.9	<p>No payment shall be deemed to have been received by xoserve until it has received payment in full in pounds sterling and in cleared funds, including but not limited to any bank charges payable by the Customer in accordance with clause 5.8 above.</p>	<p>We acknowledge that an amendment has been made to clause 5.10. However, we still believes that this clause should commence with the words "Subject to clause 5.7,..."</p>	<p>5.10 references 5.7, this addresses the review comment.</p>
Conditions clause 5.10	<p>Failure by the Customer to make payment of monies due in full, in pounds sterling and in cleared funds on or by the due date for payment shall (save for amounts withheld pursuant to the provisions of clause 5.7) entitle xoserve (without prejudice to any other rights and/or remedies it may have) to:</p> <p><u>5.10.1 (provided that not less than 10 Business Days' notice of such suspension has first been sent to the Customer)</u> suspend the performance of the Services (whether such Services are being performed under the same Service Request to which the unpaid monies relate or any other Service Request); and</p> <p><u>5.10.2</u> charge the Customer interest on any unpaid amounts (both before and after any judgment) at the rate applicable from time to time under the Late Payment of</p>	<p>5.10.1 and 5.10.2 give the impression that if a Customer fails to pay an invoice all of their Services will be suspended regardless of the value of the invoice. To me this is excessive, specifically in regard to the potential for xoserve to suspend access to IAD as a result of a failure to pay for an email report. This to me is excessive and unnecessarily so, I expect these two clauses to be reviewed and revised. Clause 5.10 – we don't disagree with the principle of allowing xoserve to suspend services, however, we expect this to be limited to the service which is unpaid – not all services.</p>	<p>xoserve must retain the entitlement to suspend the services in the event of non payment.</p>

	Commercial Debts (Interest) Act 1998.	Suspension of IAD may be disproportionate to an unpaid amount for an AQ enquiry for example!	
Conditions clause 5.11	<p>5.11 f in accordance with clause 5.7 above the Customer has withheld any monies due to xoserve and it is subsequently found that the Customer's dispute was incorrect and the monies were indeed due to xoserve:</p> <p>5.11.1 subject to clause 5.11.2 below, interest shall be payable on the withheld monies at the base rate from time to time of Barclays Bank Plc plus 1% per annum from the date on which the withheld monies should have been paid to xoserve until the date on which such monies are paid in full in cleared funds; and</p> <p>5.11.2 if the sums due to xoserve are not paid within the 15 Business Day payment period referred to in clause 5.7 above, interest shall be payable on the unpaid sum at the rate specified in clause 5.10.2 as from the end of that 15 Business Day period and the provisions of clause 5.10.1 may also apply.</p>	5.11 – if the dispute was a validly held belief is it reasonable to charge interest? There is no incentive for xoserve to resolve queries quickly if they can attract interest!	
Conditions clause 6.1	xoserve warrants that it will perform the Services with all reasonable skill and care. All other warranties (whether express or implied) are excluded from the Contract to the fullest extent permitted by law, including but not limited to any relating to fitness for purpose, quality and/or adequacy.	We request that xoserve is more explicit in the drafting as to what “reasonable skill and care” will be measured against – as the drafting stands this is very subjective. We would be happy if a cross reference to what is considered to	xoserve consider the drafting is appropriate for User Pays services. xoserve is unclear regarding the UNC references.

		be reasonable in the UNC is included in the drafting.	
<i>Amended condition Clause 6.1</i>	<u>Subject to clause 6.2</u> , xoserve warrants that it will perform the Services with all reasonable skill and care. All other warranties (whether express or implied) are excluded from the Contract to the fullest extent permitted by law, including but not limited to any relating to fitness for purpose, quality and/or adequacy.		Enhancement proposed by xoserve to make it clear 6.1 is not overriding 6.2
Conditions clause 6.2	In performing the Services, xoserve will be using data, information and/or other materials which have been provided to xoserve by the Customer and/or one or more third parties. xoserve will not verify their accuracy and/or completeness. As such, xoserve makes no warranty and accepts no liability in respect of the accuracy or completeness of any of such data, information and/or materials which are subsequently included in reports provided to the Customer as part of the Services or in any reports which are based upon such data, information and/ or materials.	We believe that if the data that we provide is correct then xoserve should warrant that the data that is provided in return is accurate. We would also like to know what happens if their data is very obviously incorrect will xoserve try to use the data and charge us for doing so or will they contact us to check – in which case that should be reflected in this clause.	In performing the services, xoserve will provide data as held on UK Link systems. xoserve is not in a position to verify the accuracy of the data held on UK Link systems – if a shipper submits an asset update to say the meter is a 4 dial, xoserve do not conduct a site visit to verify this, so xoserve makes no warrant etc to the accuracy of the data provided.
<i>Amended clause 6.3</i>	6.3 If xoserve breaches any of the warranties set out in this clause 6 and/or any other standards for the performance of the Services as set out in these Conditions and/or the Services Schedule, the Customer's sole remedy shall be the operation and payment of the rebate mechanisms set out in the Services Schedule.		This clause has been moved to 9.4 as it is associated with liabilities not warranties.

Conditions clause 7.1	The Customer grants to xoserve a non-exclusive, royalty free licence to use all information, data and/ or materials supplied by it to xoserve in connection with the Contract (including but not limited to any Intellectual Property Rights which may exist in the same) for the purposes of performing the Services.	This is another instance where "Contract" (if used at all) needs to be restricted to the appropriate Service Request	Please see the above explanation (contract definition). The current drafting is considered to be appropriate.
Conditions clause 7.2	Any and all Intellectual Property Rights created during the performance of the Services shall be owned by xoserve. The Customer shall have a non-exclusive, royalty free licence for both it and members of its Group to use for their own internal business purposes only, any written material provided by xoserve as part of the relevant Services. The Customer may not (other than to members of its own Group) distribute such material in any form without the prior written consent of xoserve or unless required to do so in order to comply with any statutory and/or regulatory obligations.	Our previous views about the benefits of new IPR rights arising from a Service Request, being shared between xoserve and the relevant customer has not been dealt with. At the 2 day workshop in June xoserve stated they were happy with our comments but they have not been included in the refinements register	The Services will comprise work and reports undertaken by xoserve in a manner and format developed by xoserve. There is no mutuality of work involved in them and so shared IPR would not be appropriate. We believe that the licence to use set out in Clause 7.2 provides customers with appropriate usage rights in respect of the material produced.
Conditions clause 7.4	<p>In performing the Services, to the extent that xoserve is processing any Personal Data provided to it by the Customer xoserve agrees to comply with its obligations under the DPA as a Data Processor. <u>In particular, xoserve shall:</u></p> <p>7.4.1 <u>only process Personal Data for the purposes necessary for the fulfilment of the Services and not process the data for any other purpose save to the extent that xoserve is properly processing it in its role as Transporter Agency or otherwise to the extent that it is properly authorised to</u></p>	<p>1. We acknowledges that there have been amendments to this clause. However, in light of recent very public data losses we do not feel they go far enough – as we are providing the data we are the data controller and xoserve are data processor – it is not enough to refer back to the clauses in the Act and as such the data processing principles as set out in the Act need to be set out in</p>	<p>Proposed wording: 7.4 In performing the Services, to the extent that xoserve is processing any Personal Data provided to it by the Customer xoserve agrees to comply with its obligations under the DPA as a Data Processor. In particular, xoserve shall:</p> <p>7.4.1 <u>only process Personal</u></p>

	<p><u>do so; and</u></p> <p>7.4.2 <u>use reasonable measures to ensure that appropriate technical and organisational safeguards are taken to protect against unauthorised disclosure or unlawful processing of the Personal Data and against accidental loss or destruction of, or damage to, the Personal Data.</u></p>	<p>full in this agreement.</p> <p>2. All of our previous wording needs to be used, as discussed at the June workshop, not the edited version currently added. Included within this, we think the present wording is insufficient for personal data being passed out with the EEA.</p>	<p><u>Data for the purposes necessary for the fulfilment of the Services and not process the data for any other purpose save to the extent that xoserve is properly processing it in its role as Transporter Agency or otherwise to the extent that it is properly authorised to do so; and</u></p> <p>7.4.2 <u>use reasonable measures to ensure that appropriate technical and organisational safeguards are taken to protect against unauthorised disclosure or unlawful processing of the Personal Data and against accidental loss or destruction of, or damage to, the Personal Data.</u></p> <p>7.4.3 <u>take all reasonable steps to ensure the reliability of any of its staff who have access to Personal Data processed in connection with this Agreement;</u></p> <p>7.4.4 <u>provide such information</u></p>
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			<p><u>as is reasonably necessary to enable the Customer to satisfy itself of xoserve's compliance with this clause 7.4. xoserve will be entitled to recover from the Customer its reasonable costs of providing such information and to require the Customer to enter a confidentiality agreement prior to the disclosure of any such information;</u></p> <p>7.4.5 <u>provide reasonable assistance to the Customer in complying with any subject access request and/or responding to any enquiry made, or investigation or assessment of processing initiated by the Information Commissioner in respect of the Personal Data as soon as is possible. xoserve will be entitled to recover from the Customer its reasonable costs of providing such</u></p>
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			<p>assistance; and</p> <p>7.4.6 inform the Customer of any request for disclosure of Personal Data from a data subject or any other third party which it receives directly and provide a copy of such request without disclosing or releasing any Personal Data to such third party without first consulting with the Customer.</p>
Conditions clause 7.5	<p>xoserve has appointed third party contractors who are located outside the European Economic Area ("EEA") to provide it with technical support and assistance with regard to the use and operation of its computer systems. Such third party contractors will have access to information and data held by xoserve on its computer systems but xoserve shall continue to comply with its obligations under clause 7.4 above.</p>	<p>1. The clause has been amended. However, we require more comfort over what is going to happen to our customers data – in the event that we have not notified customers that their data may be sent abroad we may, as data controller, be in breach of the DPA. Either this clause recognises that data will not be sent outside of the EEA OR xoserve must ensure that any contract entered into with a third party overseas will guarantee that the same precautions as are required of that third party as a required of xoserve under the DPA.</p> <p>2. All of our previous wording needs to</p>	<p>Proposed wording:</p> <p>xoserve has appointed third party contractors who are located outside the European Economic Area ("EEA") to provide it with technical support and assistance with regard to the use and operation of its computer systems. Such third party contractors will have access to information and data held by xoserve on its computer systems butand xoserve shall continue to complyensure that any Personal Data is handled in compliance with its obligations under clause 7.4 above.</p>

		be used, as discussed at the June workshop, not the edited version currently added. Included within this, we think the present wording is insufficient for personal data being passed out with the EEA.	
Conditions clause 7.6	If any data held by xoserve relating to and/or provided by the Customer is lost, damaged or otherwise destroyed due to xoserve's own negligence and/or breach of the Contract, xoserve shall use all reasonable endeavours (at its own cost and expense) to reconstitute such data from any back up copies it may have. The Customer shall provide xoserve with all such assistance as xoserve may reasonably request to assist in the re-instatement of the data <u>and xoserve shall reimburse the Customer for all costs reasonably incurred by it as a consequence of complying with any such request.</u>	<p>1. We requests that xoserve indemnify the suppliers for any data loss that occurs as a result of xoserve's breach of this clause 7 and that this is included in the drafting of the agreement.</p> <p>2. We still consider this Condition has to be 2-way – not an obligation on only the Customer, as presently worded.</p>	<p>1. This suggested indemnity is not part of xoserve's risk profile, to provide it (even if possible) would increase the costs of user pays services.</p> <p>2. Wording will be proposed</p>
Conditions clause 7.7	In providing information, data and other materials to xoserve (including but not limited to any Personal Data), the Customer warrants and represents that it either holds all Intellectual Property Rights in the same or that it has obtained from the relevant third parties all necessary consents, licences and authorisations to enable xoserve to use such information, data and materials in accordance with these Conditions and/or in order to perform its obligations under the Contract.	We request that xoserve provide the same warranty as the suppliers are being asked to provide in relation to breach of any third party rights and that this is reflected in the drafting of the agreement.	
New Conditions clause 7.8			<u>In providing information, data and other materials to the Customer (including but not limited to any Personal Data but excluding any information, data and materials</u>

			<u>provided by the Customer to xoserve), xoserve warrants and represents that it either holds all Intellectual Property Rights in the same or that it has obtained from the relevant third parties all necessary consents, licences and authorisations to enable the Customer to use such information, data and materials in accordance with these Conditions.</u>
Conditions clause 8.3	The obligations of confidentiality shall continue indefinitely except they shall not apply to information:	We believe 5 years is sufficiently long a period for the obligation to remain alive. We are happy to be contradicted (with proof) but we can't imagine that anything done under this Framework Agreement needs to remain confidential beyond that period. If there is work which needs a longer confidentiality period, we suggest the relevant parties agree a longer period of confidentiality for that piece of work.	This change was proposed to the User Pays Contract Expert Group in June. The clear consensus from that meeting was that the confidentiality period should continue without limit for so long as the information remains confidential.
<i>Amended clause 9.2</i>	Nothing in these Conditions shall exclude or limit a party's liability for death or personal injury caused by its negligence and/or for its fraud <u>or in the case of the Customer to pay Charges properly due under this Agreement.</u>		Enhancement proposed to clarify clause.
Conditions clause 9.2	Nothing in these Conditions shall exclude or limit a party's liability for death or personal injury caused by its negligence and/or for its fraud	9.2 should stipulate any loss as there is no justification for limiting to death or personal injury caused by negligence	

		or fraud y any party.	
Conditions clause 9.3	Each party's total aggregate liability to the other party (including but not limited to in the case of xoserve, the financial value of any rebates and/or liquidated damages payable by xoserve to the Customer in accordance with the provisions of the Services Schedules <u>Schedule</u>) shall not exceed in any Year 120% of the Charges paid by the Customer to xoserve in that Year.	We see the limit on xoserve's liability has not been changed. Our views haven't changed. Rebates cannot be included as they are money being paid back separately from the actual damages claim. Because of that inclusion the present wording does not give a properly reciprocal set of circumstances. SP considers the limit on xoserve, as the Service Provider, needs to be higher than that of the Customer as xoserve is carrying out the bulk of the work	<p>Proposed wording:</p> <p><u>9.3 Each</u>Subject to clauses 9.1, 9.2 and 9.4, each party's total aggregate liability to the other party <u>for liability arising in each Year of this Agreement</u> (including but not limited to in the case of xoserve, the financial value of any rebates payable by xoserve to the Customer in accordance with the provisions of the Services Schedule) shall not exceed in any Year 120% of the Charges paid by the Customer to xoserve in that<u>the</u> Year <u>in which the liability arose.</u></p> <p><u>9.4 xoserve's total aggregate liability to the Customer and the Customer's sole and exclusive remedy in respect of a breach of the warranties set out in clause 6, a breach of the provisions of the Services Schedule or a breach of any other provisions that relate to the quality or timeliness of the Services shall be the mechanisms for the</u></p>

			<p>reduction of Charges payable by the Customer set out in the Services Schedule.</p> <p><i>(the above clause 9.4 has been refined moved from 6.3 and refined to provide clearer wording).</i></p> <p>9.5 9.4—Each of the limitations and exclusions of liability set out in these Conditions shall apply as a separate provision for each of the following:</p> <p>9.5.1 9.4.1—liability in contract (including but not limited to fundamental breach);</p> <p>9.5.2 9.4.2—liability in tort (including but not limited to negligence);</p> <p>9.5.3 9.4.3—liability for breach of statutory duty; and</p> <p>9.5.4 9.4.4—liability for breach of common law and/or under any other legal basis</p> <p>except that the aggregate financial cap on each party's liability shall apply only once in</p>
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			<p>respect of <u>set out in clauses 9.3 and 9.4 shall include</u> all types of liability - including those set out in this clause 9.5.</p> <p><i>(9.5.4 has been refined to provide clearer wording)</i></p>
Contract clause 10.1	<p>If the Customer wishes to terminate a specific Service Request or the Contract it may do so on not less than 28 days' written notice in accordance with the provisions of clause 12.7 on condition that (subject to any specific provisions in any of the Service Schedules <u>the Services Schedule</u>) the Customer pays any and all sums then accrued for Services performed under any Service Request up to and including the date of termination and any applicable early termination charges as set out in the relevant Service Schedules <u>Services Schedule</u>.</p>	<p>1. We request that xoserve clarify how it believes that the remedies are already provided for in the agreement in relation to xoserve being responsible for termination.</p> <p>2. We do not consider that the changes have dealt with our main point that the Customer should not be obliged to pay xoserve's costs where the termination is due to xoserve's fault.</p> <p>3. 10.1 – termination of service schedules is covered in each of the schedules itself, therefore this clause should only relate to the contract itself.</p>	<p>Upon termination due to xoserve's material breach or insolvency then xoserve should rightly be paid for the services it has delivered up to termination if they have been properly delivered. If they have not been properly delivered then the relevant rebate mechanisms would of course apply. Termination payments for early termination as set out in paragraph 2.3 of Part 4, 2.3 of Part 5 and 2.4 of Part 6, expressly exclude termination due to xoserve's material breach or insolvency.</p> <p>xoserve needs to have a right of termination if there is a Change in Law which affects its right, authority or ability to</p>

			<p>deliver the Services since without such a right it could be locked into contracts with multiple parties which it was unable to perform. Whilst agreeing a workable alternative may be an option in a different type of contract where there was only a one off bilateral arrangement, the multiple parties involved would prevent this being a realistic option in these circumstances.</p> <p>Reciprocity is not necessary here because customers have a right to terminate on 28 days' notice, xoserve does not.</p>
<i>Amended clause 10.1</i>	<p>If the Customer wishes to terminate a specific Service Request or the Contract it may do so on not less than 28 days' written notice in accordance with the provisions of clause 12.7 on condition that (subject to any specific provisions in the Services Schedule) the Customer pays any and all sums then accrued for Services performed under any Service Request up to and including the date of termination and any applicable early termination charges as set out in the Services Schedule. <u>A Service Request shall continue for the period stated in the Service Request or until the Services to be provided under the Service Request have been completed or until terminated in accordance with these Conditions.</u></p>		<p>Enhanced wording to clarify the termination clause.</p>

Contract clause 10.2	<p><u>xoserve may terminate the Contract and/or a Service Request:</u></p> <p>10.1 10.2 <u>xoserve may terminate the Contract and/or a Service Request</u> by giving the Customer 12 months' notice of termination in writing <u>at any time; or</u></p> <p>10.2 <u>immediately by giving the Customer notice of termination in writing in the event of a Change in Law which affects the right, authority or ability of xoserve to deliver the Services.</u></p>	<p>1. Please can xoserve clarify in what circumstances they will terminate the agreement and what happens if the services they provide (i.e. any new ones) are not covered under the ASA?</p> <p>2. We must say that the new right of xoserve to immediately terminate the Contract /Service Request on a "Change of Law" is yet again going too far. We would have expected a provision to allow xoserve and the affected Customers to first of all try to agree a workable alternative. If xoserve want such a right then it is equally applicable to the Customers and should therefore be reciprocal.</p>	<p>1. xoserve is not in a position to answer the first point of this question, and we are unclear on the second point.</p> <p>2. See comments in 10.1</p>
Amended clause 10.3.2	<p>is declared or becomes insolvent or bankrupt, enters into any composition or arrangement (whether formal or informal) with its creditors, is unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986, has a receiver, manager, administrator or administrative receiver appointed of its undertaking, assets or income or any part thereof, has passed a resolution for its winding up, or has a petition presented by or in respect of it to any Court for its winding-up or for an administration order <u>or a similar event or analogous procedure occurs in another jurisdiction.</u></p>		Enhanced wording to cover any overseas customers.
Contract clause 10.4	<p>The Contract shall terminate with immediate effect upon the expiry or termination of the Agency Services Agreement (and xoserve shall give to the Customer as much notice as is reasonably practicable of any early termination of the Agency Services Agreement). xoserve will have no liability to the</p>	<p>We do not consider that the changes have dealt with our main point that the Customer should not be obliged to pay xoserve's costs where the termination is due to xoserve's fault.</p>	See comments in 10.1

	Customer as a result of such termination.		
Contract clause 10.7	<p>On termination of the Contract and/or a Service Request:</p> <p>10.7.1 xoserve shall be entitled to issue an invoice to the Customer for all Services performed under the Contract/terminated Service Request up to and including the date of termination. <u>Unless otherwise agreed in writing between the parties, the Customer shall pay such invoice within 28 days after the date of the invoice;</u></p> <p>10.7.2 if the Customer has paid in advance for Services which were to be provided under the Contract and/or a terminated Service Request, the Customer shall (subject to any specific provisions in any of the Service Schedules<u>the Services Schedule</u>) be entitled to a refund of a proportion of the advance payment, pro rated to reflect the Services provided up to the date of termination. Any refunds due to the Customer shall be paid to it by xoserve within 28 days of the date of termination of the Contract and/or the relevant Service Request; and</p> <p>10.7.3 if the relevant Service<u>Services</u> Schedule requires the payment of early termination charges, xoserve shall, as soon as reasonably possible following termination of the Contract and/or the relevant Service Request, issue an invoice to the Customer for the amount of the early termination charges. <u>Unless otherwise agreed in writing between the parties, the Customer shall pay such invoice</u></p>	xoserve is “being ambitious” as regards the rights they’ve given themselves to issue invoices. Again that can be allowed only where termination is due to the fault of the Customer.	Please see our comments in relation to Clause 10.1 above. It is only right and proper that, whatever the reason for termination, xoserve is paid those sums properly payable in respect of services performed.

	<u>within 28 days after the date of the invoice.</u>		
Contract clause 11.1	Due to the need to perform planned and/or emergency maintenance work in respect of its computer systems on which it holds the data and/or information required to perform the Services, xoserve may from time to time be unable to perform the Services. xoserve shall use all reasonable endeavours to ensure that the provision of the Services is resumed as promptly as possible following such maintenance work. Subject to any specific provisions in the Service Schedules <u>Services Schedule</u> , xoserve will have no liability to the Customer for its failure to perform or any delay in performing the Services as a result for <u>the period notified by xoserve</u> of any planned <u>downtime</u> or emergency maintenance work.	<p>Clause amended so that there is no liability for a delay in services for planned downtime that we have been notified of and “emergency” work has been deleted.</p> <p>The wording was amended to clarify that liabilities are limited to the period for which maintenance is planned. This suggests that xoserve may be accepting liability for work that overruns but it is not clear – please will explain what the amendments are intended to cover?</p>	xoserve are accepting liability for maintenance work that overruns, subject to other exclusions within the contract.
Contract clause 11.2.2	in respect of all other Services, giving notice of the planned downtime in UK Link Committee meetings,	11.2.2 – Also to the Customer by email for all services – not sure why this is limited to IAD – telephone service is not part of UK Link, nor is the use of the Spec Calc	Wording to be proposed
Contract clause 12.1	The Contract is entered into between xoserve and the Customer as principals and the Customer shall not be entitled to assign the benefit or burden of it or any interest in it without the prior written consent of xoserve (not to be unreasonably withheld or delayed). xoserve shall be entitled to sub-contract the whole or part of its obligations under the Contract at any time but will	As said before this Condition needs to be reciprocal. Because of the specific knowledge of xoserve, Customers must have the right to agree to or prohibit xoserve from transferring its rights/obligations under the Framework	xoserve does not accept this point. As a single service provider to many parties it would be unreasonable to request consent from many parties.

	remain responsible for the actions and/or omissions of its sub-contractors as if they were its own actions and/or omissions under the Contract.	Contract to a third party. Customers have to be sure that the third party is competent and suitable. We can suggest using the usual wording re “consent not to be unreasonably withheld or delayed” in a reciprocal Condition.	
Schedule 2 general	<u>This schedule establishes the change procedure which will apply if xoserve, the Customer or any other User Pays Customer wishes to initiate a change to the Services Schedule (a "Service Change"). This schedule may only be amended in accordance with clause 3.1 of the Conditions.</u>	<p>1. We accept it is difficult to set completion timescales as different changes will need different end dates, but, at least, there needs to be an obligation on all parties (including xoserve) to proceed without delay at each stage of the process</p> <p>2. There needs to be more clarity around the definition of a "new requirement" and what is defined as a change to an existing requirement.</p> <p>3. How will forecast usage (and therefore voting rights) be apportioned to new requirements?</p> <p>4. Where there is a change to existing requirements which involves considerable cost of change (group to define) then these costs should be borne wholly by those in favour of the</p>	1. Wording will be proposed.

		<p>change.</p> <p>5. This schedule is unacceptable for a number of reasons:</p> <ul style="list-style-type: none"> • Divergence from the principles set out in Mod 213 and the accompanying guidance document – it would make sense to mirror wherever possible the arrangements which will come into force for Code User Pays Services • Currently the UPUC doesn't have the vires to approve funding or indeed release funds to xoserve to pay for the BER – there need to be hooks into the ACS to facilitate this. This need substantive review and discussion • In commercial contracts the customer would not pay the service provider for producing BER's • Xoserve stating that their decision is final in relation to whether a service can reasonably be implemented, this needs to be toned and rephrased 	
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Schedule 2 - 1.1	<u>If the Customer or any other User Pays Customer wishes to propose a Service Change, it must submit to xoserve a change order (any such change order to be in the form prescribed by xoserve and notified to User Pays Customers from time to time) (“Change Order”). xoserve shall then submit the Change Order to the User Pays User Committee for consideration. xoserve itself may submit a Change Order to the User Pays User Committee at any time</u>	There has to be prior agreement with all of the Customers on the wording of both the Change Order and BEO. We would suggest any amendments are approved by the UPUG.	This would be a fundamental change to the business rules proposed by customers that any customer can raise a Change Order and that it then goes through the Services Schedule Change Procedure which does not require 100% agreement of all customers for a change to be effective (although any such change would then be binding on all customers whether or not they voted for it). A change of the nature you suggest would need to be raised by SP at the UPCEG and UPUC meetings.
Schedule 2 – 2.1.4	<u>if xoserve has determined that it needs to recover the costs of preparing the BER, a quotation for such costs (and the mechanism for recovery); and</u>	are xoserve intending to include in the ACS additional descriptions of how they are going to calculate these quotes? 2.1.4 – explain, are xoserve intending to specify how the costs should be recovered from parties?	
Schedule 2 - 3.1	<u>If the EQR states that, in xoserve's view, the Service Change cannot reasonably be implemented, then the relevant Change Order will be referred back to the User Pays Customer which originally submitted it. Such User Pays Customer may then,</u>	3.1 – should provide an explanation of why the change, in xoserve’s view, cannot be implemented.	

	<u>should it choose to do so, submit a revised Change Order pursuant to the provisions of paragraph 1.1 above and the Services Schedule Change Procedure will recommence.</u>		
Schedule 2 - 3.2	<u>If the EQR states that, in xoserve's initial view, the Service Change may reasonably be implemented then the UPUC will then consider the EQR. The Services Schedule Change Procedure will not progress until the UPUC has agreed and approved the EQR (including any quotation for the funding required by xoserve to complete the BER) in accordance with its then prevailing terms of reference. The UPUC will notify xoserve that it has approved the EQR by submitting a business evaluation order ("BEO") to xoserve. Any such BEO shall be in the form prescribed by xoserve and notified to User Pays Customers from time to time.</u>	<p>1 There has to be prior agreement with all of the Customers on the wording of both the Change Order and BEO. We would suggest any amendments are approved by the UPUG.</p> <p>2 What criteria should UPUC use to assess the funding quotation?</p>	1. See comments in 1.1 above
Schedule 2 – 4.1	<u>Once UPUC has provided xoserve with the BEO and, if relevant, the necessary funding outlined in the quotation forming part of the EQR, xoserve will prepare the BER. Once the BER is complete, xoserve shall submit it to the UPUC. The BER will set out:</u>	<p>UPUC doesn't have a budget or a capacity to raise monies in its own right]</p> <p>4. 1 – there needs to be transparency on the methodology for calculating the BER/BEO, similarly we need to understand how the UPUC could actually pay xoserve – since it doesn't have a budget or a payment mechanism, or a Memorandum and Articles of Association that allow it to have</p>	

		such powers.	
Schedule 2 - 5.1	<u>If the BER states that, in xoserve's view, after further business analysis, the Service Change cannot reasonably be implemented, then the relevant Change Order will be referred back to the User Pays Customer which originally submitted it. Such User Pays Customer may then, should it choose to do so, submit a revised Change Order pursuant to the provisions of paragraph 1.1 above and the Services Schedule Change Procedure will recommence.</u>	A rejected CO should be sent back to the originator and an update provided at the next UPUG. This would allow any other interested party to review the CO. 5.1 – this cannot be xoserve's decision – the customers should have the right to progress a change which although maybe unpopular with xoserve, is in the interests of customers who have made an informed decision based on the BER provided by xoserve.	Wording will be proposed.
Schedule 2 – 9.1	<u>For the purposes of this Schedule 2, in assessing whether a Service Change can or cannot reasonably be implemented, xoserve's decision is final and in making such decision xoserve may have regard to, by way of illustration but without limitation, the following factors:</u>	as a service provider how can xoserve's decision be final?] 9.1 xoserve cannot have the final decision – these are services for the benefit of and paid for by it's customers, and whilst customers will have regard to the advice offered by xoserve on the basis of costs or service impacts, should the customers agree to progress a change that xoserve may deem undesirable, this must remain the decision of the UPUC. This clause needs further work to protect xoserve from unreasonable requests which it cannot deliver on the grounds of regulaory or legal impediment or to the detriment of other services, but must reflect customers desire to progress work on an informed	

		basis.	
Schedule 2 – 9.1.3	xoserve and the Transporters’ regulatory obligations (including without limitation those under the Uniform Network Code and the Transporter’s Licence); and	what regulatory obligations do xoserve have? It is the Large Transporters who have Licence and Regulatory obligations.]	
Part 2	<p>2.3 In the event that:</p> <p>2.3.1 the number of Email Reports being prepared by xoserve on the date of issue of its Email Reporting Request Acknowledgement exceeds twenty (20) in aggregate in respect of all persons (including the Customer)User Pays Customers; or</p> <p>2.3.2 Uniform Network Code obligations (including without limitation the Annual Quantity (as defined in the Uniform Network Code) review process and system changes notified via the UK Link Committee) at the relevant time are such that it is not reasonably practicable for xoserve to produce the Email Reports in accordance with such performance measures,</p> <p>then the performance measures specified in paragraph 2.2 above shall not apply and xoserve’s obligation shall instead be only to use reasonable endeavours to provide the relevant Email Report as soon as reasonably practicable having regard to the demands placed upon and capacity of its relevant systems (xoserve notifying the Customer at the time of issue of its Email</p>	<p>Xoserve have not made any amendments to the agreement but have said:</p> <p>“Where daily volume is exceeded, xoserve will not acknowledge the Service Request without first notifying the customer that the daily volume has been exceeded. If the customer still wishes the Service Request to proceed, xoserve will then issue an acknowledgement (assuming all other relevant validations have been passed).”</p> <p>They have also added that the UNC may take priority or may impact on the data to be delivered under this contract -</p> <p>They have said it is best to advise the industry in advance of the impact of other UNC events and then the customer can go ahead and decide if it</p>	Revised wording to be proposed

	Reporting Request Acknowledgement of any such constraints and of its estimated time of delivery of any such relevant Email Reports).	<p>wishes to order the services (see most recent list of issues at the end in the “additional section”).</p> <p>If this is not reflected in the wording of the schedule then it is merely comfort offered by xoserve and will not be contractually binding. Therefore Npower requests that the agreement is amended accordingly to reflect what has been agreed during the discussions with the suppliers.</p>	
<i>Part 3 Introduction – amended</i>			<p>The IAD Service (as defined below) is a web based tool operating on [web browser to be specified] designed to be used by the Authorised Users to interrogate certain data relating to a supply meter point. In addition, the IAD Service also provides Authorised Users the opportunity to access further details pertaining to supply meter points that are within their supply meter point portfolio and other Authorised Users the opportunity to view details of particular supply</p>

			meter points relating to properties they own.
General comment re LSO		Since xoserve approve and create the LSO to support the IAD service, and the time taken to create an LSO can have a detrimental impact on a party ability to work, there should be some reference to the process and performance standards need to be agreed.	
<i>Additional clause</i>			To be drafted to cover bulk password re-set submissions.
Part 4	Introduction The M Number DVD Service (as defined below) is designed to provide customers with an electronic copy in DVD format of selected data items for supply meter point records.	Please can xoserve confirm whether or not they propose to encrypt DVDs. we request that any such data should be encrypted and that this requirement is reflected in the drafting of the agreement. If a DVD is lost we may be held liable as the data controller for the failure of xoserve to encrypt such data.	xoserve are reviewing encryption options.
Part 4 3.5.2 amended clause			Clause to be amended to limit period of claim for corrupt or incomplete data for the purposes of calculating a rebate

<p>Part 6 3.2</p>	<p>The Customer may change its User Telephone Enquiry Service Volume Band upon not less than 20 Business Days' written notice <u>(or such shorter period as xoserve may from time to time determine in its absolute discretion)</u>, such notice to have effect from the first day of a calendar month. If the Customer alters its User Telephone Enquiry Service Volume Band part way through a Year, the maximum number of Telephone Calls permitted in respect of the selected new User Telephone Enquiry Service Volume Band (as set out in the table at paragraph 3.1 above) shall be reduced proportionately based upon the number of complete calendar months remaining in the Year in which the Customer's notice to change its User Telephone Enquiry Service Volume Band is to take effect <u>(and the maximum number of Telephone Calls permitted in respect of the old User Telephone Enquiry Service Volume Band shall be reduced proportionately based on the number of complete calendar months in the Year for which the banding was held)</u>. Where the amended User Telephone Enquiry Service Volume Band is to be decreased as a consequence of such notice, the Customer shall pay to xoserve an administration fee as set out in the then applicable Agency Charging Statement, such fee to be invoiced by xoserve following receipt of the Customer's request for the change.</p>	<p>3.2 We can terminate a service on 28 days notice, but have to give 20 business days notice for a change and the change can only take effect on the first day of a calendar month This means that if we were to review our decision on the volume band we can only do this within the first one or two days of calendar moth, and in for 2009 to change the volumes in June the decision needs to be made and accepted in April, and to change the volume in May the decision needs to be made and accepted in March!</p>	<p>The clause was expanded from the June meeting to allow for xoserve to do things quicker if it can.</p>
<p>3.4</p>	<p>xoserve will inform the Customer as soon as reasonably practicable after the Customer has exceeded the maximum number of telephone calls permitted in a Year for its chosen User Telephone Enquiry Service Volume Band. xoserve will not<u>shall have no obligation to</u> inform the Customer if it exceeds the maximum level of calls permitted in any calendar month.</p>	<p>3.4 – if xoserve intend to levy month charges for calls exceeding the prescribed limit, we believe there should be a duty on xoserve to inform us as soon as we are within striking distance of the limit and enable u to review our usage levels.</p>	<p>Usage data is provided in the invoice information.</p>

4.3.3	<p><u>In the event that xoserve does not amend a Customer Password within 2 Business Days of receipt by xoserve of a written request from the Customer for such Customer Password amendment or (if later) by such other date as may be agreed by the Customer and xoserve, then provided that no more than 2 amendment requests have been received from the Customer in the relevant month, the monthly Charge shall be reduced in accordance with the provisions of the following table in respect of the month in which the Customer Password amendment request was made:</u></p> <table><tr><th><u>Number of whole Business Days for which the Customer Password has not been amended following the relevant due date</u></th><th><u>Reduction applied to monthly Charge</u></th></tr><tr><td><u>1</u></td><td><u>5%</u></td></tr><tr><td><u>2</u></td><td><u>10%</u></td></tr><tr><td><u>3</u></td><td><u>25%</u></td></tr><tr><td><u>4</u></td><td><u>50%</u></td></tr><tr><td><u>5</u></td><td><u>75%</u></td></tr><tr><td><u>More than 5</u></td><td><u>100%</u></td></tr></table>	<u>Number of whole Business Days for which the Customer Password has not been amended following the relevant due date</u>	<u>Reduction applied to monthly Charge</u>	<u>1</u>	<u>5%</u>	<u>2</u>	<u>10%</u>	<u>3</u>	<u>25%</u>	<u>4</u>	<u>50%</u>	<u>5</u>	<u>75%</u>	<u>More than 5</u>	<u>100%</u>	<p>4.4 – failure to update passwords will restrict our ability to use the services, but we will still be charged for them!</p>	<p>Clause 4.3.3 was added from the June discussions to cover this point.</p>
<u>Number of whole Business Days for which the Customer Password has not been amended following the relevant due date</u>	<u>Reduction applied to monthly Charge</u>																
<u>1</u>	<u>5%</u>																
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