

## Terms and Conditions

**1. Master Agreement.** These Terms and Conditions govern and are incorporated into the Master Agreement made by and between the Provider and Customer identified on the Master Agreement. Unless otherwise defined herein, capitalised terms in these Terms and Conditions shall have the meanings given to them in the Master Agreement. Provider will provide Customer with the Solutions in accordance with the Master Agreement.

**2. Use and Access License.** For the duration of the Term, Provider grants to Customer a limited, revocable, non-transferable (except as set forth herein) and non-exclusive right to use and access (including through remote means) the Solutions solely for Customer's internal business operations and subject to the terms of the Master Agreement. Without limiting the terms of the Master Agreement, Customer agrees not to decompile, disassemble, reverse engineer or otherwise attempt to perceive the source code relating to the Solutions or any web-based portal relating thereto or assign, sublicense, sell, resell, lease or otherwise transfer, convey, or pledge as security or encumber, any right in the Solutions. Except as expressly permitted herein, Customer agrees that it shall not receive any right, title or interest in, or any license or right to use or access, the Solutions or any patent, copyright, trade secret, trademark or other intellectual property rights therein by implication or otherwise.

**3. Confidentiality.**

**a. NonDisclosure to Third Parties.** In performing its obligations under the Master Agreement, each Party may receive non-public information of the other Party ("Confidential Information"). Each Party, on behalf of itself and its employees, contractors and agents (collectively, "Representatives"), agrees not to, except as set forth in Section 3(b) or as required by applicable law or regulation, use or disclose Confidential Information during or after the Term without the prior written consent of the other Party. To protect Confidential Information, each Party agrees to: (i) limit dissemination of Confidential Information to only those Representatives having a "need to know"; (ii) advise each Representative who receives Confidential Information of the confidential nature of such information; and (iii) have appropriate agreements, policies and/or procedures in place with such Representatives sufficient to enable compliance with the confidentiality obligations contained herein.

**b. Use of Confidential Information.** Customer acknowledges that Provider may receive Confidential Information of Customer from the applicable independent system/grid operator, utility and/or supplier, through data collected through the Solutions or otherwise, which may be used or disclosed by Provider as necessary for the performance of the Master Agreement.

**c. Privacy.** Except for the purposes of fulfilling its obligations under the Master Agreement, each Party will hold and use any and all consumer confidential information ("Consumer Confidential Information") in confidence and will not copy, sell, transfer, sublicense, assign, distribute or disclose it or any part or parts of it, in any form to any other person, nor permit its employees, agents or representatives to do so, without the prior written consent of the Party that owns such Consumer Confidential Information. Each Party hereto shall adhere to all applicable privacy and data protection laws and regulations applicable to it with respect to gathering, processing, storing and using Consumer Confidential Information.

**4. Aggregate Data Collection and Usage.** Notwithstanding anything to the contrary contained herein, Customer acknowledges and agrees that Provider may: (i) collect, process, store and disclose any data used with, stored in, or related to the services by Provider, including, without limitation, end-user energy usage and demand data, provided however that Provider will promptly de-identify or anonymise such data ("Service Data") so that it does not include any personal information (as defined in the Privacy Act 1988 (Cth)) or any other information that would tend to identify an individual (together "PII"); (ii) combine Service Data relating to one or more individuals or accounts to create aggregate data records ("Aggregate Data"); (iii) use such Service Data or Aggregate Data to improve its products and services, develop new products and services, understand actual energy usage and demand trends and general industry trends, develop white papers, reports, or databases summarising the foregoing, and generally for any legitimate purpose related to Provider's business; and (iv) share Aggregate Data with third parties or publish any reports, white papers, or other summaries based on Aggregate Data.

**5. Logo Authorisation.** In connection with the Master Agreement, Customer hereby consents to Provider's use of Customer's name and logo in Provider's promotional materials, including, but not limited to, website, presentations and other printed materials. Provider acknowledges that Customer is the owner of all right, title and interest in and to Customer's name and logo and shall not take any action that is inconsistent with such ownership.

**6. Indemnification.** Provider agrees to defend and indemnify (subject to the terms of this Section), at its own expense, any third party claim against Customer, its parent corporation, affiliates, directors, employees and agents that arise due to any (i) bodily injury, death or damage to tangible personal property to the extent caused by the negligent acts or omissions of Provider or its employees in the performance of the Master Agreement; and (ii) a claim that the Solutions (or any software, hardware, or other component thereof) or any other goods, software or Solutions provided by Provider hereunder (so long as the foregoing have not been altered or modified by a party other than Provider) or the use thereof by Customer infringes upon any copyright, trademark, trade secret or proprietary right of any third party. Provider will pay reasonable legal fees as incurred and such damages or costs as are finally awarded against Customer or agreed to in settlement for such claim provided that Customer gives Provider (i) prompt written notice of any such claim or threatened claim; (ii) sole control of the defense, negotiations and settlement of such claim; and (iii) full cooperation in any defense or settlement of the claim. The foregoing indemnification obligations shall not apply to the extent that any such claims or damages result from goods, software or Solutions provided by a party other than Provider, or are the fault of or caused by the sole acts or omissions of Customer.

**7. Limitation on Liability.** Except for breaches of confidentiality and claims involving the indemnification obligations contained herein, Provider's liability hereunder is limited to direct actual damages as the sole and exclusive remedy, and total damages under the Master Agreement shall not exceed \$100,000. In no event shall either Party, its officers, directors, partners, shareholders, employees or affiliates, or any contractor or subcontractor or its employees or affiliates, be liable to the other Party for special, indirect, exemplary, punitive, incidental or consequential damages of any nature whatsoever connected with or resulting from the Solutions or from performance or non-performance of obligations under the Master Agreement, including without limitation, damages or claims in the nature of lost revenue, income or profits, loss of use, or cost of capital, irrespective of whether such damages are reasonably foreseeable and irrespective of whether such claims are based upon negligence, strict liability contract, operation of law or otherwise.

**8. Warranty Limitations.** IF THE SOLUTIONS BECOME OR ARE LIKELY TO BECOME THE SUBJECT OF ANY THIRD PARTY INTELLECTUAL PROPERTY INFRINGEMENT CLAIM OR ACTION, PROVIDER MAY, AT PROVIDER'S SOLE OPTION, EITHER: (I) REPLACE SUCH SOLUTIONS WITH AN EQUALLY SUITABLE SOLUTION FREE OF INFRINGEMENT; (II) MODIFY OR OBTAIN A LICENSE FOR THE SOLUTIONS SO THAT THEY NO LONGER INFRINGE ON ANY RIGHTS; OR (III) AFTER PROVIDER HAS DEMONSTRATED ITS GOOD FAITH EFFORTS TO ACHIEVE THE FOREGOING WITHOUT SUCCESS, TERMINATE THE MASTER AGREEMENT. EXCEPT AS PROVIDED HEREIN, THE SOLUTIONS (AND ANY SOFTWARE, HARDWARE, OR OTHER COMPONENT THEREOF) ARE PROVIDED AS IS WITHOUT ANY WARRANTY OF ANY KIND. ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE EXPRESSLY DISCLAIMED TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW.

**9. Choice of Law.** The Master Agreement shall be governed by and construed and enforced in accordance with the laws of Victoria, Australia and the Commonwealth of Australia.

**10. Data Enablement.** If required by Provider for Customer's use and access to the Solutions, Customer shall, within twelve (12) days following execution by the Parties of the Master Agreement or an Order Form, as applicable, provide Provider with reasonable access to perform a data enablement for the Solutions, including the installation of an EnerNOC site server that allows for Internet-based power metering, data collection, near real-time data communication, and Internet-based reporting and analytics.

Customer agrees to collaborate with Provider in a timely manner in enabling data for the Solutions and in testing, enabling and maintaining the installed EnerNOC site server, the Solutions and any other components of the EnerNOC system.

**11. Non-Payment.** In the event that Customer fails to make any payment to Provider for undisputed amounts by the date such payment is due, Provider may (i) immediately suspend Customer's access to the Solutions and all related services until payment is received by Provider if payment is past-due by more than ten (10) business days; (ii) offset unpaid amounts due against any demand response payments to Customer; and/or (iii) terminate the Master Agreement or the applicable Order Form if Customer's non-payment continues for more than thirty (30) days following date of written notice of non-payment from Provider. Such remedies are in addition to any legal or equitable remedies available to Provider.

**12. Customer's Support Requirements.**

**a. Customer Data.** Customer agrees to provide or cause to be provided to Provider such contact, billing and energy usage data, and facility information as is required by Provider to support the Solutions ("Customer Data"). Customer (i) represents that it has the right to provide Customer Data to Provider and will provide Customer Data to Provider in compliance with applicable legal requirements; (ii) authorises Provider to use, copy, store, modify and display Customer Data for Customer's benefit and as expressly set forth in Section 4 of these Terms and Conditions; and (iii) authorises Provider to access Customer Data to provide quality assurance, perform software maintenance, and deliver customer service and technical support. During the Term and for thirty (30) days following expiration or termination of the Master Agreement, Provider will preserve and maintain Customer Data. Thereafter, Provider will have no obligation to preserve or return any Customer Data.

**b. Demand Response.** If Customer is enrolled in a demand response programme, Customer represents and warrants that (i) it holds all licenses and/or permits that are required by applicable law for the proper participation in such demand response programme; and (ii) when responding to a demand response event, it will comply with, and be responsible for any violation of applicable law.

**13. Provider Limitation.** Provider shall be Customer's exclusive provider during the Order Term for the site addresses listed on the [Site Address Attachment](#) for any demand response programme and/or demand management services, irrespective of whether such programme and/or service is set forth in an Order Form.

**14. Payments to Utilities or Other Suppliers.** In no event shall Provider or its affiliates, directors, employees and agents (collectively, the "Indemnified Parties") be responsible or liable for payment of any utility bill of Customer or any amount Customer may owe to any utility or other supplier. To the fullest extent permitted by law, Customer shall defend and indemnify, at its own expense, any third party claim against the Indemnified Parties, that arise due to any allegation that the Indemnified Parties are responsible for payment of any utility bill of Customer or a portion thereof, or any other amounts due by Customer to any utility or other supplier. In connection with the foregoing indemnification obligations, Customer shall pay reasonable legal fees as incurred and such damages or costs as are finally awarded against Provider or agreed to in settlement for such claim.

**15. Miscellaneous.** Customer may not assign any of its rights or delegate any of its performance obligations hereunder without the prior written consent of Provider; except that Customer may assign the Master Agreement to its successor or any entity acquiring all or substantially all of the assets of Customer by providing Provider with written notice promptly following the acquisition date. The Master Agreement, including any addenda, exhibits and attachments, constitutes the entire agreement between Provider and Customer with respect to Provider's provision of the Solutions identified on an Order Form, and may only be amended in writing signed by each of the Parties. If any of its provisions shall be held invalid or unenforceable, the Master Agreement shall be construed as if not containing those provisions and the rights and obligations of the Parties hereto shall be construed and enforced accordingly. The Master Agreement shall be binding upon the Parties together with their successors and permitted assigns. Each Party shall be responsible for its Representatives' compliance with the Master Agreement.

**16. Taxes.** In this Section (i) GST means GST as defined in *A New Tax System (Goods and Services Tax) Act 1999* as amended ("GST Act") or any replacement or other relevant legislation and regulations; and (ii) words or expressions used in this Section which have a particular meaning in the GST law (as defined in the GST Act, and also including any applicable legislative determinations and Australian Taxation Office public rulings) have the same meaning, unless the context otherwise requires.

**a.** Unless GST is expressly included, the consideration to be paid or provided under any other clause of the Master Agreement for any supply made under or in connection with the Master Agreement does not include GST.

**b.** To the extent that any supply made under or in connection with the Master Agreement is a taxable supply, the GST exclusive consideration otherwise to be paid or provided for that taxable supply is increased by the amount of any GST payable in respect of that taxable supply and that amount must be paid at the same time and in the same manner as the GST exclusive consideration is otherwise to be paid or provided.

**c.** Despite any other clause of the Master Agreement, it is agreed that (i) Provider will issue tax invoices in the form of recipient created tax invoices in respect of taxable supplies of aggregated capacity made by Customer to Provider under the Master Agreement; and (ii) Customer will not issue tax invoices in respect of its taxable supplies of aggregated capacity to Provider under the Master Agreement.

**d.** Customer acknowledges that it is registered for GST, or will be registered for GST by the Effective Date, and agrees that it will immediately notify Provider if it ceases to be registered for GST.

**e.** Customer is responsible for and must pay all duties, taxes and other government charges imposed or levied in connection with the Master Agreement. Customer must indemnify the principal from and against all such duties, taxes and other government charges.

**17. Termination.** Either Party may terminate (i) the Master Agreement or the applicable Order Form in the event of the other Party's material breach, provided that the breaching Party fails to cure the specific breach within thirty (30) days following date of written notice from the non-breaching Party specifying the purported breach; (ii) the Master Agreement or any Order Form immediately upon the institution by or against the other Party of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of the other Party's debts; or (iii) the Master Agreement for convenience by giving the other Party sixty (60) days prior written notice, provided, however, that neither Party may terminate the Master Agreement so long as any Order Form thereunder remains in effect. In addition, if Customer is enrolled in a demand response programme, either Party may terminate the portion of the Order Form applicable to such programme (iv) if such programme is materially altered, suspended or ended; or (v) in accordance with the terms set forth in the applicable Programme Rule Attachment attached to the Order Form.

**18. Notices.** Any notices required or permitted to be given hereunder by either Party to the other Party shall be given in writing by: (i) personal delivery; (ii) bonded courier or nationally recognised overnight delivery company; or (iii) electronic mail. If notice is given by personal delivery, bonded courier or nationally recognised overnight delivery company, such notice shall be addressed to the Parties as follows (or to such other addresses as the Parties may request in writing by notice given pursuant to this Section): to Provider at EnerNOC Pty Ltd, Attn: Legal Department, One Marina Park Drive, Suite 400, Boston, MA 02210 USA; and to Customer at the Customer address indicated on the Master Agreement. If notice is sent by electronic mail, such notice shall be sent to Provider at [contractmanagement@enernoc.com](mailto:contractmanagement@enernoc.com); and/or to Customer at the email address, if any, indicated on the Master Agreement.