



## Terms and Conditions

**1. Sales Order Form.** These Terms and Conditions as amended from time to time (these "Terms and Conditions") govern the Sales Order Form (the "Sales Order Form" and together with these Terms and Conditions, collectively the "Agreement") by and between the provider identified on the Sales Order Form ("Provider") and the customer identified on the Sales Order Form ("Customer"). Provider and Customer are referred to herein collectively as the "Parties" and each individually as a "Party" to the Agreement. Unless otherwise defined herein, capitalized terms in these Terms and Conditions shall have the meanings given to them in the Sales Order Form. Provider will provide Customer with the Solutions in accordance with the Agreement.

**2. Use and Access License.** For the duration of the Term (as defined below), Provider grants to Customer a limited, revocable, non-transferrable (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 Agreement. Without limiting the terms of the 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. Term.** The Agreement shall commence on the effective date indicated on the Sales Order Form ("Effective Date") and continue until the expiration date indicated on the Sales Order Form, unless earlier terminated in accordance with the terms herein (the "Term"). Notwithstanding the foregoing (i) if Customer is enrolled in a Program with a Program Period (as defined in the applicable Program Rule Attachment) that would otherwise extend beyond the Term, then the Term with respect to such Program shall be extended until the end of such Program Period; and (ii) if Customer is receiving Procurement and Advisory Services Solutions and enters into any Supply Contracts during the Term or within thirty (30) days following an Auction, all payment obligations for such Solutions, as outlined on the Sales Order Form, shall survive the expiration or earlier termination of the Agreement and continue until the respective terms of all such Supply Contracts have ended.

### 4. Confidentiality.

**a. Nondisclosure to Third Parties.** In performing its obligations under the 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 4(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 and/or utility, through data collected through the Solutions or otherwise, which may be used or disclosed by Provider as necessary for the performance of the Agreement.

**5. Aggregate Data Collection and Usage.** Customer acknowledges and agrees that Provider may: (i) collect, process and aggregate any data used with, stored in, or related to the Solutions, including, without limitation, end-user energy usage and demand data, and create aggregate data records ("Aggregate Data") by removing any personally identifiable information ("PII") from the underlying data; (ii) use such Aggregate Data to improve the Solutions, develop new solutions, understand actual energy usage and demand trends and general industry trends, develop white papers, reports, or databases summarizing the foregoing, and generally for any legitimate purpose related to Provider's business; and (iii) share Aggregate Data with third parties or publish any reports, white papers, or other summaries based on Aggregate Data.

**6. Logo Authorization.** In connection with the 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.

**7. Limitation on Liability.** Except for breaches of confidentiality, Provider's liability hereunder is limited to direct actual damages as the sole and exclusive remedy, and total damages under the 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 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 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 Agreement shall be governed by and construed and enforced in accordance with the laws of the Commonwealth of Massachusetts, without giving effect to choice of law rules.

**10. 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 Sales Order Form, provide Provider with reasonable access to install an EnerNOC site server ("ESS") 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 testing, enabling and maintaining the installed ESS, the Solutions, and any other components of the EnerNOC system ("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 Agreement 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 (x) 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; (y) authorizes Provider to use, copy, store, modify and display Customer Data for Customer's benefit and as expressly set forth in Section 5 of these Terms and Conditions; and (z) authorizes 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 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 Program, Customer represents and warrants that (i) it holds all applicable licenses and/or permits not otherwise facilitated by Provider, as described in the product specification sheet applicable to the Solutions, that are required for the proper participation in such Program, including any local licenses and/or permits necessary to utilize on-site electric generation; and (ii) it has the intent and ability to generate and/or reduce electrical demand to achieve Accepted Capacity (as defined in the applicable Program Rule Attachment) when notified by Provider during demand response events.

**13. Provider Limitation.** Customer agrees not to contract with any other provider of the Solutions during the Term.

**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 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 Agreement, including any addenda, exhibits and attachments, constitutes the entire agreement between Provider and Customer with respect to Provider's provision of the Solutions, and may only be amended in writing signed by each of the Parties. In the event of any conflict between these Terms and Conditions and the Sales Order Form, these Terms and Conditions shall control. If any of its provisions shall be held invalid or unenforceable, the 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 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 Agreement.

**16. Taxes.** Fees, costs, and expenses described in the Agreement do not include any sales, use, personal property, duty, levy, or similar governance charge, value added or good/services taxes. Provider may include applicable taxes as separate items on Customer's invoice, and Customer shall be responsible to pay and/or reimburse Provider for all taxes (other than taxes based on Provider's income), unless Customer has provided adequate evidence of exemption upon execution of the Agreement. If withholding of taxes is required by any government, Customer shall remit such taxes in accordance with applicable law, gross up the applicable payment amounts so that Provider receives the full amount of fees invoiced, and provide Provider with applicable evidence of withholding.

**17. Termination.** Either Party may terminate the Agreement (i) 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; or (ii) 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. In addition, if Customer is enrolled in a Program, either Party may terminate the Agreement (iii) if such Program is materially altered, suspended or ended; or (iv) in accordance with the terms set forth in the applicable Program Rule Attachment.

**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 recognized overnight delivery company; or (iii) electronic mail. If notice is given by personal delivery, bonded courier or nationally recognized 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, Inc., Attn: Legal Department, One Marina Park Drive, Suite 400, Boston, MA 02210; and to Customer at the Customer address indicated on the Sales Order Form. 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 Sales Order Form.