

## NECS, INC. SOFTWARE TERMS OF SERVICE

NECS, Inc. (“NECS”) provides the Application Service (as defined below) to Customer (as defined below) subject to the following Terms of Service (the “**Agreement**”). By affirmatively accepting the Agreement during the registration process on the NECS website, or by otherwise accessing or using the Application Service or any portion thereof, Customer is deemed to agree to all terms, conditions, and notices contained or referenced in this Agreement. If Customer does not agree, Customer may not use the Application Service, and Customer must immediately cease using it. NECS and Customer may hereinafter also be referred to individually as “**Party**” and collectively as the “**Parties**.”

NECS reserves the right, at its discretion, to update or revise this Agreement from time to time without notice to Customer. Please check this Agreement periodically for changes. Customer can review the most current version of this Agreement at any time at <http://www.NECSEnergy.com>. Customer’s continued use of the Application Service following the posting of any changes to this Agreement constitutes acceptance of any such changes. In addition, when using particular services or features of the Application Service, Customer shall be subject to any policies, guidelines or rules applicable to such services which may be posted from time to time. All such guidelines or rules are hereby incorporated by reference into this Agreement.

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Customer and NECS agree as follows:

### 1. DEFINITIONS

As used herein, each of the following terms shall have the meanings attributed to them as follows:

“**Affiliate**” means, with respect to a Party, any entity that, directly or indirectly, controls, is controlled by, or is under common control with such Party; and “control” means the direct or indirect possession of the power to direct or cause the direction of the management and policies of another entity, whether through the ownership of voting securities, by contract or otherwise.

“**Aggregate Data**” means all aggregate and statistical information or analyses relating to Customer’s use of the Application Service.

“**Application Service**” means the proprietary hosted application service that NECS is making available to Customer hereunder and pursuant to the Customer Account and Service Agreement (if applicable). The Application Service is specified in the Customer Account and/or Service Agreement.

“**Confidential Information**” means all technical, business, financial and other information of Party that derives economic value, actual or potential, from not being generally known to others, including, without limitation, any technical or non-technical data, designs, methods, techniques, drawings, processes, products, inventions, improvements, methods or plans of operation, research and development, business plans and financial information of such Party. The Confidential Information of NECS shall include, without limitation, the Application Service (except those portions of the Application Service that are made publicly available by NECS or with NECS’s prior consent) and the Aggregate Data.

“**Customer**” means the entity or individual that registers for a Customer Account to access and use the Application Service.

“**Customer Account**” means Customer’s online subscription account on the NECS website.

“**Customer Content**” means any data, text, graphics, images, video clips, audio recordings, or other content or information provided to NECS by Customer, as well as any Customer-specific data or content that the Application Service generates from the use of the foregoing.

“**Customer Property**” means: (a) Customer Content; (b) Confidential Information of Customer; and (c) any and all look and feel, improvements, updates, modifications, translations, copies, compilations and derivative works related to any of the foregoing.

“**Fees**” means the NECS fees for the Application Service, as set forth in the Customer Account or Service Agreement (if applicable).

“**Intellectual Property Rights**” means patent rights (including patent applications and invention disclosures), design rights, copyrights, rights in database, moral rights, trademarks, service marks, trade secrets, know-how, rights in or relating to confidential information and any other intellectual property right (whether registered or unregistered) recognized in any country or jurisdiction in the world, now or hereafter existing, and whether or not perfected, filed or recorded including all rights of reversion and rights to any applications and pending registrations and the right to sue for and recover damages for past infringements.

“**NECS Property**” means: (a) the Application Service; (b) all Aggregate Data; (c) any Confidential Information of NECS; and (d) any and all look and feel, improvements, Upgrades, modifications, translations, copies, compilations, and derivative works related to any of the foregoing.

“**Restricted Content**” means any content or terms that: (a) are related to illegal activities (illegal drugs, terrorism, criminal activities, contests, pyramid schemes or chain letters); (b) are related to pornographic or obscene material; (c) are related to excessively graphic or explicit violence; (d) are defamatory, inappropriate or profane; or (e) constitute “hate speech”, whether directed at an individual or a group, and whether based upon the race, sex, creed, national origin, religious affiliation, sexual orientation or language of such individual or group.

“**Service Agreement**” means a mutually executed written agreement between the Parties that incorporates the terms and conditions of this Agreement by reference.

“**Services**” means: (i) the Application Service; (ii) support and maintenance services to be provided by NECS pursuant to **Section 2.5**; and/or (iii) any other services performed by NECS under this Agreement.

“**Term**” means the service subscription term set forth in the Customer Account or Service Agreement (if applicable).

“**Upgrades**” means any upgrades, updates, revisions, corrections, modifications improvements, bug fixes, patches, maintenance releases, versions, and enhancements NECS makes to the Application Service during the Term, excluding any beta versions thereof.

## **2. APPLICATION SERVICE**

- 2.1. Application Service; Customer Account; Service Agreement. NECS shall host and provide the Application Service to Customer. NECS will establish in the Application Service a Customer Account for Customer. Customer will have the ability to manage the Customer Account, and view and create reports relating to Customer’s use of the Application Service. Customer agrees to keep all Customer Account information confidential and not to share it with any third party. Customer is fully responsible for all activities that occur under the Customer Account and for maintaining up-to-date and accurate information (including without limitation valid contact information) with respect to the Customer Account.
- 2.2. Reports. When available, the Customer Account shall make available to Customer, data regarding calculation of Fees for the Application Service. After the Effective Date, NECS shall also make available on the Application Service such other data and reports as the Parties may subsequently mutually agree in writing (email or other electronic notice sufficient).
- 2.3. Data Downloads. Customer may download then-current Customer Content in a standard format determined by NECS during the Term or up to expiration or termination of the Agreement. Unless otherwise mutually agreed by the Parties in writing, NECS will have no obligation to provide custom data extraction services for Customer or to provide or make available Customer Content in any format other than the standard format determined by NECS.
- 2.4. NECS Support. NECS will provide implementation and technical support to Customer during the Term. NECS will use commercially reasonable efforts to keep the Application Service operational on a continuous basis during the Term, exclusive of downtime necessary for scheduled, unscheduled and emergency maintenance. NECS shall provide reasonable support to Customer during the hours of 9 a.m. to 5 p.m. Eastern Time, Monday through Friday (excluding holidays), for all issues relating to the implementation and use of the Application Service. Customer may contact NECS at

support@NECSenergy.com. Customer may subscribe to premium support for the Application Service if NECS offers such service.

### **3. LICENSES**

- 3.1. Licenses to Application Service. Subject to the terms and conditions of this Agreement, NECS hereby grants to Customer a non-exclusive, non-transferable (except as expressly permitted under this Agreement), worldwide license during the Term to: (i) access and use the Application Service for Customer's internal business use, for managing the Customer Account, and for viewing, creating, and downloading reports and data relating to Customer's use of the Application Service; and (ii) use, reproduce, and internally distribute any documentation that NECS provides or makes available relating to use of the Application Service. If Customer fails to pay for Application Service, the license may be revoked by NECS upon written notice to Customer, electronic email sufficient.
- 3.2. Restrictions on Use of Application Service. Customer will not attempt to interfere with or disrupt the Application Service. Except as expressly authorized under this Agreement, Customer shall not: (a) reverse engineer, disassemble, reconstruct, decompile, copy, or create derivative works of the Application Service; (b) copy, modify, or distribute any portion of the Application Service; (c) rent, lease, or provide access to the Application Service on a service bureau basis; or (d) copy, transmit, or distribute any portion of the content on the Application Service (excluding Customer Property). Customer will use the Application Service solely for authorized and legal purposes and will not use the Application Service to knowingly violate any applicable laws or regulations.
- 3.3. License to Customer Content. Subject to the terms and conditions of this Agreement, Customer hereby grants NECS a perpetual, irrevocable, royalty-free, transferable, sublicensable, exclusive license, to store, reproduce, display, distribute and prepare derivative works from any Customer Content provided by Customer.

### **4. PROPRIETARY RIGHTS**

- 4.1. NECS Property. As between Customer and NECS, except for the limited license granted herein, all right, title, and interest in and to any NECS Property, including without limitation any Intellectual Property Rights therein, but excluding any Customer Property, are and will remain the exclusive property of NECS. Except for the limited license granted herein, NECS reserves all rights in and to all NECS Property, and nothing contained in this Agreement shall be construed as conveying any right or license in such NECS Property, by implication, estoppel, or otherwise.
- 4.2. Customer Property. As between Customer and NECS, except for the perpetual license granted herein, all right, title, and interest in and to any Customer Property, including without limitation any Intellectual Property Rights therein, are and will remain the exclusive property of Customer. Except for the perpetual license granted herein, Customer reserves all rights in and to all Customer Property, and nothing contained in this Agreement shall be construed as conveying any right or license in such Customer Property, by implication, estoppel, or otherwise.

### **5. PAYMENT OBLIGATIONS**

- 5.1. Fees and Payment. Customer shall pay NECS the Fees, if any, specified in the Customer Account or Service Agreement (as applicable). NECS shall invoice or automatically charge Customer for the Fees, as provided in the Customer Account or Service Agreement (as applicable). If NECS invoices Customer, each invoice shall be sent to Customer's email address and/or physical address specified in the Customer Account or Service Agreement, and Customer shall pay each invoice within thirty (30) days of receipt (unless otherwise specified in the Customer Account or Service Agreement (as applicable)). All fees quoted and payments made hereunder shall be in U.S. dollars.
- 5.2. Taxes. Customer shall bear all local, state and federal sales, use, gross receipts, excise, import or export, value added or similar taxes, duties, fees, assessments or levies ("**Taxes**"), if any, legally imposed in connection with the Fees paid for Application Service; provided, however, that Customer shall not be responsible for franchise taxes applicable to NECS or taxes on NECS's net income, profits, business assets, or ad valorem personal property.
- 5.3. Remedies for Non-Payment. In addition to any other remedies available to NECS, in the event that Customer fails to pay any Fees within the time frame specified in the Customer Account or Service Agreement (as applicable), NECS will have the

right to immediately suspend Customer's access and use of NECS services, and to the Application Service until such Fees are received.

## **6. CONFIDENTIALITY, DATA SECURITY, AND PRIVACY**

### **6.1. Confidentiality.**

(a) Use and Disclosure. Each Party ("**Receiving Party**") may be granted access to Confidential Information of the other Party ("**Disclosing Party**") during the Term. The Receiving Party shall: (a) strictly preserve and protect the confidentiality of the Disclosing Party's Confidential Information and not disclose such Confidential Information to any third party other than the Receiving Party's employees, subcontractors and agents who have a need to receive such Confidential Information and who are subject to nondisclosure obligations at least as protective as those set forth herein; and (b) refrain from using the Confidential Information of the Disclosing Party except as contemplated in this Agreement. In no event, will the Receiving Party use less care to prevent unauthorized disclosure or use of the Confidential Information of the Disclosing Party than the Receiving Party uses to maintain the confidentiality of its own non-public information, and in no event less than a reasonable degree of care. Notwithstanding the foregoing, the Receiving Party shall have no obligation with respect to information that the Receiving Party can demonstrate: (i) is or becomes publicly available through no act or omission of the Receiving Party; (ii) is lawfully obtained from a third party without restrictions on disclosure; (iii) is independently developed by the Receiving Party without access to such information; or (iv) was rightfully in possession of, or known to, the Receiving Party without any obligation of confidentiality prior to receiving it from the Disclosing Party. Furthermore, the Receiving Party may disclose the Confidential Information of the Disclosing Party if the Receiving Party becomes legally compelled to disclose such Confidential Information (whether by judicial or administrative order or applicable law, rule or regulation), provided that the Receiving Party so compelled shall use commercially reasonable efforts to avoid such disclosure and to provide the Disclosing Party with prompt notice thereof so that the Disclosing Party may seek a protective order or other appropriate remedy to prevent such disclosure. If such protective order or other remedy is not obtained prior to the time such disclosure is required, the Receiving Party will only disclose that portion of such Confidential Information of the Disclosing Party the Receiving Party is advised by counsel it is legally required to disclose. Each Party acknowledges that the unauthorized disclosure or use of the Confidential Information of the other Party may cause irreparable harm to the other Party, which harm cannot be compensated by damages alone. Therefore, in addition to all other rights and remedies at law and in equity, a Party may seek an injunction to prevent a violation of the obligations of confidentiality. For the avoidance of doubt, nothing in this Section 6.1 shall restrict NECS's rights to use and disclose the Customer Content as provided in Section 3.3.

6.2. Data Security; Privacy. NECS shall maintain a data security program that includes physical, technical, and managerial procedures that are up-to-date and generally accepted in the industry to prevent unauthorized use or disclosure of Customer Property and other Confidential Information of Customer. NECS will have the right to suspend Customer's access to the Services on an emergency basis: (a) in the event that NECS detects any actual or apparent theft, unauthorized access or use of the Services, or other malicious activity by Customer or any third party; and/or (b) to maintain data integrity within the Services. The parties shall each comply with all applicable privacy laws and regulations relating to the protection of personal or personally identifiable information of all third parties. Customer hereby consents to NECS's use of Customer's personally identifiable information: (i) for the purpose of providing the Services to Customer; (ii) as provided in Section 3.3; and (iii) in the manner described in the NECS privacy policy governing the Application Service.

## **7. REPRESENTATIONS AND WARRANTIES**

7.1. Representations and Warranties of Customer. Customer represents and warrants during the Term that no Customer Content will contain any viruses, Trojans, spyware, adware, or other malicious code.

7.2. Representations and Warranties of NECS. NECS represents and warrants during the Term that: (a) the Application Service will not contain any viruses, Trojans, spyware, adware, or other malicious code; and (b) any Services will be performed in a competent and workmanlike manner in accordance with generally accepted industry standards.

7.3. Warranty Disclaimer. EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO ANY ITEMS OR SERVICES PROVIDED HEREUNDER, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR ARISING BY

USAGE OF TRADE, COURSE OF DEALING, OR COURSE OF PERFORMANCE, AND EACH PARTY HEREBY DISCLAIMS THE SAME. NECS DOES NOT REPRESENT OR WARRANT THAT ANY SERVICES OR NECS PROPERTY WILL BE FREE OF ERRORS, DEFECTS OR INACCURACIES, OR THAT THEY WILL BE ACCESSIBLE WITHOUT INTERRUPTION. NECS DOES NOT WARRANT OR GUARANTEE THAT ANY TECHNICAL ASSISTANCE WILL RESULT IN A RESOLUTION OF THE ISSUES FOR WHICH THE ASSISTANCE WAS PROVIDED. NECS DOES NOT WARRANT OR GUARANTEE THAT THE APPLICATION SERVICE WILL FUNCTION ON ALL COMPUTERS. LIKEWISE, NECS DOES NOT GUARANTEE THAT ANY WEB FORM PROVIDED AS PART OF THE APPLICATION SERVICE WILL FUNCTION ON ALL BROWSERS OR OPERATING SYSTEMS. FOR THE AVOIDANCE OF DOUBT, NOTWITHSTANDING **SECTION 7.2**, ANY SERVICES PROVIDED BY NECS IN BETA FORMAT ARE PROVIDED AS IS, WITHOUT ANY WARRANTIES EXPRESS OR IMPLIED, AND CUSTOMER UNDERSTANDS THAT ALL FUNCTIONS OF THE APPLICATION SERVICE MAY NOT BE AVAILABLE AT THE TIME OF THE BETA TEST.

## **8. INDEMNIFICATION**

- 8.1. NECS Indemnification. In the event the use of the NECS Property is, or NECS believes is likely to be, alleged or held to infringe any Intellectual Property Right, NECS shall at its sole option and expense: (a) replace or modify the NECS Property so it is non-infringing (provided, that the replaced or modified NECS Property is substantially equivalent); (b) obtain for Customer a license to continue using the NECS Property in accordance with this Agreement; or (c) terminate this Agreement and refund to Customer the pro-rata amount of any unused prepaid Fees.
- 8.2. Customer Indemnification. Customer, at its own expense, will indemnify, defend and hold harmless NECS, its Affiliates and their respective employees, representatives and agents (collectively, the “**NECS Indemnitees**”) from and against any Claim brought by any third party against any NECS Indemnitee to the extent that such Claim is based on, or arises out of: (a) a breach, or purported breach, by Customer or its subcontractors of Customer’s representations, warranties, or obligations set forth in this Agreement; (b) any allegation that the Customer Property violates any applicable laws, including without limitation any privacy laws, is defamatory, or infringes or misappropriates any Intellectual Property Right, publicity or privacy right or other proprietary right of any third party; or (c) the fraud, gross negligence or willful misconduct of Customer or its employees or subcontractors.
- 8.3. Indemnification Procedures. The obligations of each Party (the “**Indemnitor**”) under this Agreement to defend, indemnify and hold harmless the other Party and its Affiliates, and their respective employees, representatives and agents (each, an “**Indemnitee**”) shall be subject to the following: (a) the Indemnitee shall provide the Indemnitor with prompt notice of the claim giving rise to such obligation; provided, however, that any failure or delay in giving such notice shall only relieve the Indemnitor of its obligation to defend, indemnify and hold the Indemnitee harmless to the extent it reasonably demonstrates that its defense or settlement of the claim or suit was adversely affected thereby; (b) the Indemnitor shall have sole control of the defense and of all negotiations for settlement of such claim or suit; provided, however, that the Indemnitor shall not settle any claim unless such settlement completely and forever releases the Indemnitee from all liability with respect to such claim or unless the Indemnitee consents to such settlement in writing (which consent shall not be unreasonably withheld); and (c) the Indemnitee shall cooperate with the Indemnitor in the defense or settlement of any such claim or suit; provided, however, that the Indemnitee shall be reimbursed for all reasonable out-of-pocket expenses incurred in providing any cooperation requested by the Indemnitor. Subject to clause (b) above, the Indemnitee may participate in the defense of any claim or suit in which the Indemnitee is involved at its own expense.

## **9. LIMITATION OF LIABILITY**

EXCEPT FOR A PARTY’S BREACH OF **SECTIONS 3, 4 OR 6** OR WITH RESPECT TO ANY INDEMNIFICATION OBLIGATION SET FORTH IN THIS AGREEMENT: (a) TO THE MAXIMUM EXTENT PERMITTED BY LAW, NEITHER PARTY, ITS AFFILIATES OR LICENSORS SHALL BE LIABLE, UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER LEGAL OR EQUITABLE THEORY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES; AND (b) IN NO EVENT SHALL THE TOTAL LIABILITY OF EITHER PARTY, ITS AFFILIATES OR ITS LICENSORS UNDER THIS AGREEMENT EXCEED THE TOTAL FEES PAID OR PAYABLE TO NECS HEREUNDER DURING THE TWELVE (12) MONTH PERIOD IMMEDIATELY PRIOR TO THE DATE THE CAUSE OF ACTION AROSE. NEITHER NECS NOR ITS AFFILIATES OR LICENSORS SHALL BE LIABLE FOR DAMAGES OF ANY KIND, WHETHER DIRECT OR INDIRECT, RESULTING FROM ANY LOSS OR CORRUPTION OF CUSTOMER CONTENT. IF CUSTOMER IS

UNABLE TO USE THE APPLICATION SERVICE AS A RESULT OF ANY DATA LOSS OR CORRUPTION, OR ANY MALFUNCTION OR INCOMPATIBILITY, AS ITS SOLE AND EXCLUSIVE REMEDY, CUSTOMER MAY ELECT TO TERMINATE THIS AGREEMENT AND RECEIVE A REFUND OF ANY UNUSED PRE-PAID FEES.

## 10. TERM AND TERMINATION

- 10.1. Term. This Agreement shall be effective during the Term.
- 10.2. Termination for Breach. Either Party may terminate this Agreement by written notice to the other Party if the other Party commits a material breach of this Agreement and such breach remains uncured for thirty (30) days following written notice of breach by the terminating Party; provided, however, that NECS may immediately terminate this Agreement without refund, upon written notice to Customer, in the event that Customer breaches **Section 3.2**.
- 10.3. Effect of Expiration or Termination; Survival. Upon the expiration or termination of this Agreement for any reason: (a) Customer will immediately cease all access to and use of the Application Service, and NECS will immediately cease all access to and use of all Customer Content; (b) all licenses granted hereunder will immediately terminate; (c) within thirty (30) days after the date of expiration or termination, each Party will either return to the other Party or destroy all copies of the Confidential Information of the other Party, and will, upon request, deliver to the other Party a certificate signed by an officer or duly authorized representative certifying that it has complied with the foregoing requirement; (d) Customer shall, within thirty (30) days of expiration or termination, pay to NECS all outstanding accrued and payable amounts owed by Customer to NECS under this Agreement; (e) upon the written request of Customer (email sufficient), NECS will, at NECS's standard professional services rates, provide to Customer a copy of all Customer Content then hosted in the Application Service in a standard format determined by NECS, provided Customer will not have the right to receive a copy of any configuration information, account information, or any other information NECS uses to provide the Application Service; and (f) **Sections 1, 3.2, 3.3, 4, 6, 7.3, 8, 9, 10.3 and 11** shall survive. Upon any termination of this Agreement by Customer pursuant to **Section 10.2**, NECS shall promptly provide Customer with a pro-rata refund of any unused pre-paid Fees. Neither Party will be liable for exercising any termination right in accordance with this Agreement. Except as expressly provided, expiration or termination of this Agreement shall not release either Party from any liability or obligation that had already accrued as of the effective date of expiration or termination, and the expiration or termination shall not constitute a waiver or release of, or otherwise be deemed to prejudice or adversely affect, any rights, remedies or claims, whether for damages, injunctive relief, or otherwise, which a Party may have hereunder at law, in equity or otherwise or which may arise out of or in connection with such termination.

## 11. MISCELLANEOUS

- 11.1. Compliance with Laws. Each Party shall comply with all applicable laws, rules and regulations in the performance of this Agreement.
- 11.2. Force Majeure. Neither Party shall be liable to the other for any default or delay in the performance of any of its obligations under this Agreement if such default or delay is caused, directly or indirectly, by any cause beyond such Party's reasonable control (each, a "**Force Majeure Event**"); provided, however, that the Party affected by the Force Majeure Event shall provide the other Party with prompt written notice of the Force Majeure Event and use commercially reasonable efforts to minimize the effect of the Force Majeure Event upon such Party's performance; provided, further, that should the performance by either Party of its obligations under this Agreement be prevented by a Force Majeure Event for more than thirty (30) days, the other Party shall have the right to terminate this Agreement without liability to the non-performing Party.
- 11.3. Publicity. NECS will have the right to list Customer's name and logo in a list of NECS customers on the NECS website and in marketing materials. Except as otherwise provided in the prior sentence, neither Party shall disclose the existence of this Agreement or use or refer to the name of the other Party or any trademark or service mark of the other Party in any marketing, advertising, press release, or other public announcement without the prior written consent of the other Party.
- 11.4. Assignment. Neither Party may assign this Agreement or any of its rights or obligations hereunder without the prior written consent of the other Party, which consent will not be unreasonably withheld or delayed. Notwithstanding the foregoing, without securing such prior consent, either Party shall have the right to assign this Agreement and the obligations hereunder to any Affiliate or to any successor of such Party by way of merger, consolidation, reorganization or in connection with the

acquisition of at least a majority of the business and assets of the assigning Party relating to the Agreement, provided that: (a) the assigning Party provides the other Party with written notice when such transaction becomes public; (b) the successor or assignee agrees in writing to be bound by the obligations set forth herein and is capable of performing its duties under the Agreement; (c) the assigning Party is not in material breach or default of this Agreement at the time of the assignment; and (d) in the case of an assignment by Customer, the assignee is not a competitor of NECS. This Agreement shall be binding on, and shall inure to the benefit of, the authorized successors and assigns of the Parties. Any attempt to assign other than in accordance with this provision shall be null and void.

- 11.5. Notice. Notices to NECS shall be in writing and shall be personally delivered, sent by a reputable overnight courier service (e.g., Federal Express), or sent by first class mail (certified or registered) to: NECS, Inc., Attn: Chief Executive Officer, 1274 49<sup>th</sup> Street Suite 194 Brooklyn, NY 11219. Such notices shall be considered to have been given at the time of actual delivery in person, one (1) business day after deposit with an overnight courier service, or five (5) business days after deposit in the mail. Notices to Customer may be sent via Customer's email address on record in the Customer Account or Service Agreement, or in a service notice sent to Customer via the Application Service. Such notices shall be considered to have been given when sent.
- 11.6. Independent Contractors. The Parties acknowledge that the relationship of Customer and NECS is that of independent contractors and that nothing contained in this Agreement shall be construed to place Customer and NECS in the relationship of principal and agent, master and servant, partners or joint ventures.
- 11.7. Dispute Resolution. If any dispute arises under this Agreement, each Party shall submit the dispute for resolution by a level of employee or officer with decision-making authority. If the dispute cannot be resolved in thirty (30) days, any Party may pursue all available remedies at law or in equity.
- 11.8. Choice of Law; Jurisdiction and Venue. This Agreement shall be governed by the laws of the State of California, without regard to its conflict of law rules. Any claims or litigation arising under this Agreement will be brought by the Parties solely in state and federal courts located in Orange County, California.
- 11.9. Attorneys' Fees. If any action at law or in equity is necessary to enforce the terms of this Agreement, the prevailing Party shall be entitled to reimbursement from the other Party for its expenses and reasonable attorneys' fees associated with the action, in addition to any other relief to which such prevailing Party may be entitled.
- 11.10. Entire Agreement. This Agreement, together with the Customer Account, and Service Agreement (if applicable), embodies the entire agreement between the Parties with respect to the subject matter hereof and thereof, and supersedes all prior agreements and understandings between the Parties relating to the subject matter hereof and thereof. In the event of a conflict between the provisions of this Agreement and those of the Customer Account or Service Agreement (if applicable), the provisions of this Agreement shall control unless modified in the Customer Account or Service Agreement by specific reference to the provision or provisions of this Agreement.
- 11.11. Amendment; Waiver. NECS may amend this Agreement as provided in the second paragraph of this Agreement. No amendment of any provision of this Agreement by Customer shall be effective unless set forth in a writing signed by a representative of Customer and NECS, and then only to the extent specifically set forth therein. No course of dealing on the part of either Party, nor any failure or delay by either Party with respect to exercising any of its rights, powers or privileges under this Agreement or law shall operate as a waiver thereof. No waiver by either Party of any condition or the breach of any provision of this Agreement in any one or more instances shall be deemed a further or continuing waiver of the same or any other condition or provision.
- 11.12. Severability. If any term of this Agreement or part hereof not essential to the commercial purpose of this Agreement shall be held to be illegal, invalid or unenforceable, it is the intention of the Parties that the remaining terms hereof or part hereof shall constitute their agreement with respect to the subject matter hereof and thereof and all such remaining terms, or parts thereof, shall remain in full force and effect. To the extent legally permissible, any illegal, invalid or unenforceable provision of this Agreement shall be replaced by a valid provision which will implement the commercial purpose of the illegal, invalid or unenforceable provision.

11.13. Headings. The headings contained in this Agreement are for convenience of reference only and are not intended to have any substantive significance in interpreting this Agreement.