

APPLICATION SERVICES AGREEMENT

PLEASE READ THIS AGREEMENT CAREFULLY. BY ACCESSING OR USING ANY PORTION OF THE SERVICE, OR BY PAYING FOR THE SERVICE BY ANY MEANS OFFERED BY VITALITY, YOU ACCEPT ALL THE TERMS AND CONDITIONS OF THIS AGREEMENT. YOU AGREE THAT THIS AGREEMENT IS ENFORCEABLE LIKE ANY OTHER WRITTEN NEGOTIATED CONTRACT SIGNED BY YOU.

THE TERMS AND CONDITIONS OF THIS AGREEMENT APPLY TO ANY AND ALL USE OF THE SERVICE BY YOU OR OTHERS IN YOUR ORGANIZATION, AND YOU AGREE TO BE BOUND BY THIS AGREEMENT REGARDLESS OF THE TYPE OF USE OF THE SERVICE BY YOU OR YOUR ORGANIZATION.

This Agreement, effective as of the effective date of the applicable Proposal and is made and entered into by and between the signed Customer (hereinafter the “CUSTOMER” or “Customer”), and Summa Energy Solutions, LLC dba VITALITY, a Utah company, with a registered address located at 5286 South Commerce Drive, Suite A-186 Salt Lake City Utah 84107 (hereinafter “VITALITY”).

Whereas, VITALITY and CUSTOMER desire to enter into a relationship in which VITALITY will provide software and/or services as defined in the applicable executed Proposal, attached hereto and incorporated herein.

Now, therefore, in consideration of the premises, and of the mutual promises and undertakings herein contained, the parties, intending to be legally bound, do hereby agree as follows:

1. DEFINITIONS

For the purposes of the Agreement, the following terms shall have the following meanings:

- a. “Software” means any object code provided by VITALITY residing either on-site or “in the cloud”.
- b. “Uploads” refers to the collection of CUSTOMER’s meter data through data acquisition servers (“DAS”) or building automation systems (“BAS”) and the delivery of that data to VITALITY’s cloud-based servers for long-term storage and analysis. Uploaded data, while residing on VITALITY’s servers, remains the sole property of the CUSTOMER.
- c. “Storage” means the collection and retention of meter data on VITALITY’s cloud-based servers. VITALITY incurs data transfer and storage fees from the cloud-based host for this service and may opt to impose a fee for this service on a monthly or annual basis.

- d. “Vitality” refers to VITALITY’s web-based meter data dashboard and analytics software platform.
- e. “Billing” refers to VITALITY’s web-based billing services to tenants defined by CUSTOMER, not excluding any lease agreements for equipment to the CUSTOMER.

2. STATEMENT OF WORK

VITALITY shall enable the collection of data from CUSTOMER meters, data acquisition servers and utility bills and shall grant full access to Vitality administrative functions, dashboards, graphs, reports, and data as pertaining to CUSTOMER’s meter information. The following items are included:

- a. Setup of all data connections enabling flow of meter data to VITALITY’s cloud-based servers.
- b. Setup of automated utility bill data collection and storage to VITALITY’s cloud-based servers.
- c. A non-exclusive, enterprise-wide license to use the Vitality energy analytics software package
- d. Setup of Vitality credentials for CUSTOMER.
- e. Setup of company/campus/building/meter hierarchy within Vitality for CUSTOMER.
- f. Uploading to and storage of data in VITALITY’s cloud-based servers. VITALITY shall maintain CUSTOMER data files for as long as Vitality license remains in effect.
- g. Where applicable, VITALITY will provide billing services to tenants as defined by CUSTOMER in the applicable executed proposal. These tenants will be invoiced directly and collection of tenant payments will be completed by VITALITY and deposited into the appropriate account as identified by CUSTOMER minus applicable service charges, lease charges, and fees.
- h. Where applicable, VITALITY will provide leasing services for equipment and hardware used by the CUSTOMER. The lease charges will be applied to the CUSTOMER. Collection of the lease charges will be completed by VITALITY and processed through the billing services to tenants process. Until the billing services to tenants process is started, the CUSTOMER will be invoiced directly and collection of lease payments will be completed by VITALITY.

All data files are hosted by Amazon Web Services (“AWS”) and VITALITY will protect the integrity of CUSTOMER’s data, including backups, in accordance with Amazon’s data integrity and backup policies.

3. TERM

The term of the Agreement shall commence on the effective date as defined, and shall continue thereafter until terminated in writing by one of the parties, or as provided in Section 11 below.

4. TERMS OF PAYMENT

- a. Price

Projects will be performed on a firm fixed price basis or a time and materials basis, as indicated in the applicable executed proposal and lease agreement. Any additional or unscheduled Services or

Deliverables to be provided by VITALITY outside of the Statement of Work must be mutually agreed upon in writing signed by both parties hereto referencing this Agreement.

b. Taxes

The Project Price does not include and CUSTOMER is responsible for all taxes (except taxes on VITALITY's income) tariffs, and any similar charges imposed upon or related to the Services or Deliverables or their delivery or use.

c. Payment Schedule

CUSTOMER and/or applicable Tenants will receive invoices based upon the billing/payment schedule contained in the applicable executed proposal. Invoices will contain a description of the Services or Deliverables provided. Invoices are due and payable within 10 days of VITALITY's invoice date. Interest may be charged on all amounts unpaid after 10 days at the rate of 1-1/2 percent per month or the highest legal rate, whichever is lower. If any invoice is not paid when due, VITALITY may suspend provision of Services and/or Deliverables without liability or penalty until final resolution of the matter.

5. DELIVERABLES

The Deliverables consist of services and licenses including some or all of the following without being limited to the following: assessments, designs, drawings, diagrams, installation contractor recommendations, installation contractor supervision, meter programming, other hardware programming, meter commissioning, other hardware commissioning, Vitality setup, Vitality training, meter system maintenance, Vitality license, meter data collection & storage, Utility Submetering and/or Tenant Billing, etc. The definitive list of Deliverables will be included in the official Proposal provided by VITALITY to the CUSTOMER.

CUSTOMER acknowledges that VITALITY uses, or may develop hereunder, methods, concepts, code sequences, format, sequence structure, organization, menu command hierarchy, templates, masks, user interface, techniques, program organization, database structuring techniques, and the like (VITALITY proprietary items) that are proprietary to VITALITY. It is agreed that these VITALITY proprietary items shall remain the sole and exclusive property of VITALITY. VITALITY grants CUSTOMER a non-exclusive, paid-up license to use VITALITY proprietary items subject to the following:

- a. CUSTOMER may use VITALITY proprietary items solely in connection with the products or services purchased hereunder, for the purpose for which those products/services were originally purchased.
- b. CUSTOMER may not transfer, sell, or otherwise dispose of any VITALITY proprietary items without the prior written consent of VITALITY.
- c. This agreement grants no title or ownership rights in VITALITY proprietary items or related intellectual property to CUSTOMER.

d. CUSTOMER grants VITALITY a perpetual non-exclusive, paid-up license to use all portions of the Deliverables first developed by VITALITY during the performance of this Agreement, not to include content or any material provided to VITALITY by CUSTOMER.

e. VITALITY recognizes that any and all energy data, utility data and, if applicable, Tenant information is solely the property of CUSTOMER and VITALITY is responsible for data warehousing and analytic display only. Any release of this data must be made in writing to VITALITY from CUSTOMER. In the event that this agreement is canceled, VITALITY will continue to warehouse said data for a period no longer than 30 days unless otherwise agreed upon. After 30 days data may be deleted at VITALITY's discretion.

6. DATA OWNERSHIP

Any energy related data gathered by VITALITY via installed and/or leased hardware is considered owned and sole property of the CUSTOMER. VITALITY agrees to warehouse and store the data for the duration of this agreement and for at a minimum of twenty-four months (2 years) after termination. This data is considered confidential and will not be released by VITALITY without expressed written permission from the CUSTOMER or authorized officer. VITALITY will provide the CUSTOMER access to their corresponding data in standard formats that at a minimum include web, .csv, .pdf, .html or any other applicable format consistent with this Application Service Agreement. In the event the customer does not wish to export their data after the course of twenty-four months, ownership of said data will transfer to VITALITY, at which time VITALITY reserves the right to condense, move or delete the data as necessary to continue standard business operations.

7. ACCEPTANCE

The Deliverables, if any, shall be deemed accepted by CUSTOMER upon completion of the following acceptance test:

a. Immediately upon receipt or completion of said Deliverables, CUSTOMER shall promptly perform testing of the Deliverables to confirm that the Deliverables perform in accordance with the documentation or other standards applicable thereto as set forth in the Statement of Work.

b. CUSTOMER shall either promptly provide VITALITY with written acceptance of the Deliverables, or deliver to VITALITY a detailed written statement of nonconformities to be corrected prior to CUSTOMER's acceptance of the Deliverables. Unless otherwise agreed to in writing by the parties, VITALITY will redeliver corrected Deliverables to CUSTOMER within a reasonable amount of time after receipt of such statement of nonconformities.

c. Following redelivery of corrected Deliverables, a new acceptance test shall be immediately commenced by CUSTOMER. Any such written statement of nonconformities shall provide sufficient detail to enable VITALITY to remedy the failure to conform to the Completion Criteria. If CUSTOMER fails to provide a written acceptance or a written statement of nonconformities within five (5) days of

initial receipt of said Deliverables or such other mutually acceptable period as defined in the applicable Statement of Work, or within five (5) days of re-delivery of said corrected Deliverables or such other mutually acceptable period, the Deliverables shall be deemed immediately accepted by CUSTOMER.

d. Any Deliverables provided by a third party contractor or vendor, not sub-contracted by VITALITY, in connection with this agreement are the responsibility of said contractor or vendor. VITALITY will assist in the verification of said Deliverables, insofar as they relate to this agreement, but is not responsible for the work, hardware or software provided by the third party contractor or vendor.

8. WARRANTIES AND REMEDIES

a. VITALITY warrants Deliverable functionality substantially as defined in the applicable Proposal for a period of 365 days following final delivery.

b. VITALITY warrants that with respect to any Deliverable assigned by VITALITY to CUSTOMER that VITALITY has the right to transfer title to CUSTOMER.

c. VITALITY further warrants that to its knowledge the Deliverables do not infringe any intellectual property right held by a third party.

d. CUSTOMER's sole and exclusive remedy and VITALITY's only obligation for breach of the warranty hereunder will be, at VITALITY's option, to correct any material errors in provision of Services or to replace or repair Deliverables which do not conform to the warranty. In order for CUSTOMER to exercise this remedy, CUSTOMER must give VITALITY written notice of such nonconformity within the warranty period, and VITALITY must determine that any nonconformity did not arise due to any cause specified below. VITALITY shall be given free and full access to deliverables to make corrections, and CUSTOMER shall promptly inform VITALITY of any changes in the location of Deliverables during the warranty period. If this remedy is adjudged to have failed of its essential purpose, VITALITY's total liability will be to refund the price paid to VITALITY by CUSTOMER for the nonconforming Deliverables. The remedy provided by VITALITY for breach of warranty does not include the following, which may be provided, at VITALITY's sole option, at VITALITY's then-current time and materials rates:

1. Repair of damage to Deliverables caused by CUSTOMER during unpacking.
2. Repair of damage caused by events beyond VITALITY's reasonable control.
3. Repair of damage caused by CUSTOMER's improper installation, relocation, or rearrangement of Deliverables.

e. Except for the warranties stated in this Section, VITALITY DISCLAIMS ALL OTHER WARRANTIES WITH RESPECT TO THE SERVICES AND DELIVERABLES, EXPRESS OR IMPLIED, ARISING BY OPERATION OF LAW, COURSE OF DEALING, USAGE OF TRADE OR OTHERWISE, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND WARRANTIES

AGAINST NON-INFRINGEMENT. VITALITY expressly does not warrant that the operation of Deliverables which are software shall be uninterrupted or error-free; or that Deliverables will operate on any system, or with any software, other than the system with which the VITALITY tested such Deliverables. VITALITY does not warrant any third-party software development tools. VITALITY specifically does not warrant the accuracy of any technical or subject matter content of the courseware or software that is based upon information or direction provided by CUSTOMER.

9. LIMITATION OF LIABILITY

The total liability of VITALITY to CUSTOMER from any cause whatsoever, will be limited to the lesser of CUSTOMER's actual damages or the Project price paid to VITALITY for those Services and Deliverables in a Project that are the subject of CUSTOMER's claim. In no event will either party be liable for SPECIAL, INDIRECT, CONSEQUENTIAL, OR INCIDENTAL DAMAGES, including but not limited to loss of profits, revenues, data or power, damage to or loss of the use of products, damage to property, claims of third parties, including personal injury or death, suffered as a result of provision of Services or use of Deliverables.

Time for Claims. All claims against VITALITY must be brought within one (1) year after the cause of action arises and CUSTOMER waives any statute of limitations which might apply by operation of law or otherwise.

10. INDEMNIFICATION

a. CUSTOMER shall defend, indemnify, and save VITALITY harmless, at CUSTOMER's own expense, against any action or suit brought for any loss, damage, expense or liability that may result by reason of an infringement of any patent, trademark, copyright, or trade secret based upon the normal and intended use of the Deliverables furnished to VITALITY hereunder. Should any of the Deliverables furnished to VITALITY hereunder become the subject of a claim of any infringement of a patent, trademark, copyright, or trade secret, CUSTOMER shall, at its option and expense, deliver non-infringing material, modify the material so that it becomes non-infringing, or procure for VITALITY the right to continue using CUSTOMER's infringing material.

b. CUSTOMER agrees to indemnify and hold VITALITY harmless against all claims, liabilities, demands, damages, or expenses (including attorneys' fees and expenses) arising out of or in connection with CUSTOMER's use of the Deliverables.

c. VITALITY will defend at its own expense any action brought against CUSTOMER to the extent it is based on a claim that the Licensed Programs used within the scope of the license granted hereunder infringe a United States patent, copyright or other proprietary right of a third party. VITALITY will pay any costs, damages or attorney fees finally awarded against Licensee in such action which are attributable to such claim, provided VITALITY is promptly notified in writing of such claim, may control the defense and/or settlement of such claim, and is provided with all requested assistance, information and authority.

In the event that a Licensed Program becomes, or in VITALITY's opinion is likely to become, the subject of a claim of infringement of a United States patent, copyright or trade secret, VITALITY may at its option either secure Licensee's right to continue using the Licensed Programs, replace or modify the Licensed Programs to make them not infringing, or provide Licensee with a refund of the license fee less depreciation on a 5 (five) year, straight-line basis. The foregoing states Licensee's entire liability for infringement or claims of infringement of patents, copyrights or other intellectual property right.

11. FORCE MAJEURE

Neither party shall be liable for failure to perform, nor be deemed to be in default, under this Agreement for any delay or failure in performance resulting from causes beyond its reasonable control, including but not limited to failure of performance by the other party, acts of state or governmental authorities, acts of terrorism, natural catastrophe, fire, storm, flood, earthquake, riot, insurrection, civil disturbance, sabotage, embargo, blockade, acts of war, or power failure. In the event of such delay, the date of delivery or time of completion will be extended by a period of time reasonably necessary to overcome the effect of any such delay.

12. TERMINATION

Termination of Project. CUSTOMER reserves the right to terminate a Project in whole or in part, upon 30 days written notice to VITALITY. In the event the Project is terminated by CUSTOMER prior to completion, VITALITY shall use its best efforts to conclude or transfer the Project, as directed by CUSTOMER, as expeditiously as possible. VITALITY shall not undertake further work, incur additional expenses, or enter into further commitments with regard to the Project after receiving such notice of termination from CUSTOMER, except as mutually agreed upon by the parties. In the event of termination of a Project as described above, VITALITY shall be entitled to compensation as follows:

- a. All payments due and owing under this Agreement at the time of VITALITY's receipt of the written notice of termination for work completed and in progress;
- b. Reimbursement for any non-cancelable services and commitments entered into by VITALITY, in connection with the Project being terminated, provided VITALITY provides CUSTOMER with documentation of completion of work or expenses incurred.

Termination of the Project shall not affect either party's obligations in connection with any other ongoing Projects and the rights and obligations of all non-terminating parties to the Agreement shall remain in full force and effect.

Failure by either party to comply in any material respect with any of its obligations in this Agreement shall entitle the other party to give notice to the party in default requiring it to cure such default. If such default is not cured within 30 days after receipt of such notice, the notifying party shall be entitled to terminate this Agreement by giving notice of such termination to take effect immediately. The right of either party to terminate this Service Contract, as herein provided, shall not be affected in any way by its waiver of, or failure to take action with respect to, any previous default.

13. DELAY OR SUSPENSION OF WORK

If CUSTOMER's acts or failure to act causes VITALITY to delay or suspend performance of Services, VITALITY and CUSTOMER will mutually agree to one of the following remedies:

- a. VITALITY will use reasonable efforts to continue performance as practicable under the circumstances and CUSTOMER will continue to make all scheduled payments; or
- b. VITALITY will re-assign personnel to extend VITALITY's work schedule without liability, and CUSTOMER will pay all additional costs, if any.

Notwithstanding the above, VITALITY shall have the right to invoice CUSTOMER for any work performed to date of suspension.

14. CONFIDENTIALITY

VITALITY and CUSTOMER acknowledge that during the course of the performance of a Project, information of a confidential nature may be disclosed between the parties. Such information, excluding the Deliverables and any other information incident to the Deliverables that a party could reasonably be expected to be provided to the other party as contemplated hereunder, shall be considered confidential information ("Confidential Information"). Neither party has the right to disclose the Confidential Information of the other, in whole or in part, to any third party, and neither party will make use of the Confidential Information of the other for its own or a third party's benefit or in any way use such Confidential Information other than for the purposes of performance of this Agreement without the prior written consent of the disclosing party. Each party agrees to take all steps reasonable to protect the other's Confidential Information from unauthorized use and/or disclosure. The parties agree not to copy in whole or in part, any Confidential Information nor modify the same in any way without prior written consent from the other party. Neither party will be liable to the other for the disclosure of Confidential Information if, as shown by clear and convincing evidence, the Confidential Information: (a) is generally known to the public at the time of disclosure by the disclosing party; or (b) becomes generally known to the public through no fault of the receiving party; or (c) was lawfully in the possession of the receiving party prior to signing this Agreement; or (d) is subject to applicable United States laws or a valid court order requiring disclosure of such Confidential Information.

In any judicial proceeding, it will be presumed that the Confidential Information in question constitutes protectable trade secrets of the disclosing party, and the receiving party shall bear the burden of proving that the Confidential Information was publicly or rightfully known or disclosed.

15. PUBLICITY

VITALITY may use CUSTOMER's name or mark and identify CUSTOMER as a client of VITALITY, on VITALITY's website and/or marketing materials. VITALITY may issue a press release, containing CUSTOMER's name, related to any award under this Agreement. Neither party will use the other party's

name or marks, refer to or identify the other party for any other reason, except as established in this section, without such other party's written approval. Any approval required under this Section shall not be unreasonably withheld or delayed by either party.

16. SUBCONTRACTING

VITALITY may, at its option, subcontract work under a Statement of Work but VITALITY's use of subcontractors shall not affect its responsibilities under the applicable Proposal. Moreover, VITALITY shall be fully responsible for work done by its subcontractors within the scope of the applicable Statement of Work as it is for work done by its own employees. VITALITY shall have written agreement(s) with its subcontractors that contain, at a minimum, clauses that are the same as or comparable to the sections of this Agreement regarding ownership rights and confidentiality of CUSTOMER's materials.

17. GENERAL TERMS

a. Jurisdiction

This agreement shall be deemed to have been made, executed and delivered in the State of Utah and shall be construed in accordance with the laws of the State of Utah.

b. Notices

Notices to be given by either party under this Agreement shall be sent by certified mail, express overnight delivery, or telecopy (fax) to the attention of the other party at the addresses of the parties as first set forth above.

c. Severability and Assignment

The invalidity or unenforceability, in whole or in part, of any provision in this Agreement shall not affect in any way the remainder of the provisions herein. This Agreement may not be assigned by CUSTOMER without VITALITY's consent.

d. Entire Agreement

This Agreement, together with any other materials referenced in or expressly made a part of the Agreement, constitutes the final and entire Agreement between VITALITY and CUSTOMER and supersedes all prior and contemporary agreements, oral or written.

e. Counterparts

The Parties hereto agree that facsimile signatures shall be as effective as if originals. This Agreement may be executed via facsimile in any number of counterparts, all of which taken together shall constitute one and the same agreement.

In Witness Whereof, this Agreement is duly executed by the duly authorized representatives of the parties as set forth below:

**Summa Energy Solutions dba
Vitality Energy**

CUSTOMER

Signature _____

Signature _____

Name Clayton C. Erekson _____

Name _____

Title Chief Executive Officer _____

Title _____

Date _____

Date _____

ATTACHMENT A

VITALITY ENTERPRISE LICENSE AGREEMENT

1. GRANT OF LICENSE

Upon execution of the LICENSE AND SERVICE AGREEMENT to which this VITALITY ENTERPRISE LICENSE AGREEMENT is attached, VITALITY hereby grants a license to CUSTOMER for unlimited use of the web-based Vitality software platform at any of its locations and by any of its authorized users, to be determined by CUSTOMER'S administrators.

2. CONSIDERATION

A. CUSTOMER shall pay, in accordance with the terms of the VITALITY invoice, the license fees set forth in ATTACHMENT A attached hereto.

B. License fees do not include any shipping, duties, bank fees, sales, use, excise or similar taxes due. If VITALITY is required to pay any such amounts, CUSTOMER shall reimburse VITALITY in full.

3. TERM OF LICENSE

The term of this License shall commence on the effective date listed in the LICENSE AND SERVICE AGREEMENT above, and shall continue thereafter until terminated in writing by one of the parties, or as provided in Section 11 of the LICENSE AND SERVICE AGREEMENT above and to which this VITALITY ENTERPRISE LICENSE AGREEMENT is attached.

4. OWNERSHIP

VITALITY retains exclusive ownership rights to the Vitality software. This is a “license to use” only.

5. OTHER

All other terms and conditions of the SERVICE AND LICENSE AGREEMENT to which this is attached are fully applicable to this VITALITY ENTERPRISE LICENSE AGREEMENT.