

AMENDMENT NO"1 TO
SOFTWARE LICENSE AND MAINTENANCE AGREEMENT
BETWEEN
EMETER CORPORATION
AND
CITY OF SANTA CLARA, CA

This Amendment No. 1 to the Software License and Maintenance Agreement (this "Amendment"), effective as of this 17th day of September ~~August~~ 2012, is between eMeter Corporation, a Delaware Corporation located at 4000 E. Third Ave., Suite 400, Foster City, CA 94404 (hereinafter called "eMeter") and City of Santa Clara located at 1500 Warburton Ave., Santa Clara, CA 95050 (hereinafter called "SVP").

WITNESSETH:

Whereas, eMeter and SVP entered into a Software License and Maintenance Agreement as of August 18, 2009 (the "SLMA") pursuant to which eMeter agreed to provide, and SVP agreed to purchase, certain software and services; and

Whereas, the SLMA provides that [Exhibit A](#) may be amended from time to time by providing notice to eMeter; and

Whereas, SVP has provided such notice to eMeter that they desire to purchase eMeter's Energy Engage Licensed Product for the total number of meters listed in [Exhibit A](#); and

Whereas, SVP has provided such notice to eMeter that they desire to remove the MVRS Data Importer from the licensed product exhibit and designate the AMI Adapter as the Elster AMI Adapter; and

Whereas, the perpetual license grant in the SLMA was inadvertently omitted; and

Whereas, the parties desire to amend the SLMA to reflect the perpetual license grant, designation of the Elster AMI Adapter, the removal of the MVRS Data Importer from the license and the inclusion of Energy Engage (and the Supplemental Terms in [Exhibit D](#) and [E](#)) for the number of meters listed in [Exhibit A](#) as of the effective date of this Amendment 1.

(a) **AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing and of the mutual promises, covenants, and agreements contained herein, the parties agree as follows:

ARTICLE 1. AMENDMENTS.

1.1 The Software License and Maintenance Agreement is hereby amended by deleting Exhibit A (Licensed Products) to the SLMA in its entirety and replacing it with [Exhibit A](#), [Exhibit D](#) (Energy Engage Supplemental Terms), and [Exhibit E](#) (eMeter Weather Data Subscription Service) attached hereto and incorporated herein by this reference.

1.2 Article 6.1 of the SLMA is hereby amended by deleting the existing 6.1 and replacing it with the following language:

Licensed Product(s). Subject to the provisions of this SLMA as well as the timely payment of all applicable license fees, Licensor grants Licensee and Licensee accepts, a limited, nonexclusive, nontransferable, perpetual license to: (i) use and operate the Licensed Products, solely in Object Code, and solely for Licensee's internal use in the ordinary course of business; and (ii) to use the Documentation and Deliverables solely and as reasonably necessary to further Licensee's use of the Licensed Products as contemplated by this SLMA.


ARTICLE 2. MISCELLANEOUS

2.1.1 Except as expressly modified hereby, the Software License and Maintenance Agreement shall remain in full force and effect and unmodified.

2.1.2 Capitalized terms used herein and not otherwise defined shall have the meaning set forth in the Software License and Maintenance Agreement.

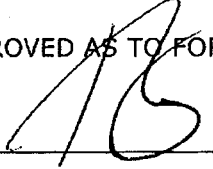
2. In Witness hereof, the parties have executed this Amendment as of the day and year ~~August 17~~, 2012.
September

EMETER CORPORATION

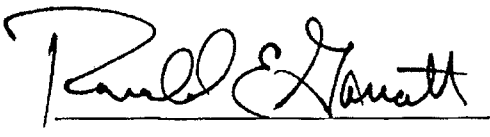
By: 

Name: Lisa Caswell
Title: President


CITY OF SANTA CLARA, CALIFORNIA,
a chartered California municipal corporation

APPROVED AS TO FORM:


RICHARD E. NOSKY, JR.
City Attorney



RONALD E. GARRATT
Interim City Manager
1500 Warburton Avenue
Santa Clara, CA 95050
Telephone: (408) 615-2210
Fax: (408) 241-6771

ATTEST: 

ROD DIRIDON, JR.
City Clerk

"CITY"

Exhibit D
Energy Engage Supplemental Terms

These terms shall only apply if Licensee is Licensing eMeter's Energy Engage™ Product*

In addition to the General Terms and Conditions of the Software License and Support Agreement (SLMA), the following terms shall apply to Licensees of eMeter's Energy Engage software when eMeter Installs the Portal Software on the servers of such Licensees. Any terms used but not otherwise defined herein shall have the meanings ascribed to them in the SLMA.

1. Definitions

(a) "Agreement" means the Software License and Maintenance Agreement between eMeter and Licensee.

(b) "Authorized Portal Users" means Licensee's Portal Users and Licensee's Portal Customers, collectively

(c) "Excused Portal Outage" means any outage, unavailability, interruption, delay or other degradation of the Portal resulting from or caused by any of the following: (a) a scheduled downtime, maintenance or repair by eMeter; (b) any act or omission of Licensee or Authorized Portal Users; (c) any equipment, networks, products or services provided or controlled by Licensee; or (d) any event of Force Majeure.

(d) "License Termination Breach" shall have the same meaning as set forth in the Agreement and shall also include a breach of Section 6(b) of these Energy Engage Supplemental Terms (Non-Circumvention).

(e) "Portal" means the private, restricted-access Internet-based computer application installed on Licensee's own servers, to which Licensee may grant access for (a) Licensee's Portal Users to (i) resolve customer support issues, (ii) view aggregated data to assess the effectiveness thereof, whether overall or of a particular feature, or (iii) schedule promotions of Licensee energy efficiency programs, and (b) Licensee's Portal Customers to assess their electricity usage.

(f) "Portal Services" means the Portal Support and any Portal training provided by eMeter under the SLMA and these supplemental terms,

(g) "Portal Software" means the Portal and other proprietary Portal-related software products owned by eMeter or Its licensors, including but not limited to software created by eMeter for Licensee's benefit.

(h) "Portal Support" means Portal-related technical support provided by eMeter to Licensee in accordance with the Support and Maintenance Terms and [Exhibit B](#).

(i) "Usage Data" means the electricity usage statistics and other data of a Licensee Portal Customer, as further specified in [Exhibit A](#) of the Agreement.

(j) "Licensee Portal Customer" means a customer for a particular electric meter to whom Licensee has granted access to the Portal as provided herein.

(k) "Licensee Portal User" means a Licensee employee (e.g., a customer support representative or marketing personnel) to whom Licensee has granted access to the Portal as provided herein.

(l) "Licensee's Marks" means such trademarks and/or service marks (including logos) owned and used by Licensee that Licensee may reasonably request eMeter to depict on the Portal front page designed by eMeter for Licensee Portal Customers' use.

2. Energy Engage Portal

(a) Installation of Portal. Siemens will install the Portal on Licensee's servers or enable Licensee to do so.

(b) Authorized Portal User Access. Licensee may permit Authorized Portal Users to have access to the Portal; provided that Licensee shall require Licensee Portal Customers to agree to be bound by the terms and conditions of Energy Engage Schedule 1 attached hereto. Licensee shall cause Licensee Portal Customers' use of the Portal to be: (i) password controlled; (ii) subject to the restrictions set forth in the Agreement; and (iii) strictly limited to use only for such Licensee Portal Customers' electricity and water usage assessment purposes for which the Portal is designed. Licensee Portal Customers shall be required to confirm their acceptance of these conditions in writing (or electronically by clicking a prominent "I Accept" icon) to access the Portal. Licensee shall not allow access to the Portal except to individuals who have been designated Authorized Portal Users.

(c) Access Limitations. Under no circumstances shall Licensee permit access to the Portal by the general public or by third persons other than Authorized Portal Users.

3. Licenses.

(a) In addition to the licenses set forth in Article 6 of the SLMA, eMeter hereby grants to Licensee a nonexclusive, nontransferable, nonsublicensable license during the term of the Agreement, to use the Portal: (i) as installed on Licensee's own servers for those of Licensee's internal business purposes for which the Portal is designed, and (ii) to allow Authorized Portal Users to access the Portal and obtain Usage Data for the electricity usage assessment purposes for which the Portal is designed.

(b) Additionally, should Licensee opt to subscribe to the eMeter Weather Data Subscription Service, it shall be licensed in accordance with terms and conditions attached hereto as [Exhibit E](#).

(c) Utility represents and warrants that it has a valid and current license to use eMeter's (or a third party's) meter data management product.

4. Licensee's Obligations For Portal Use

(a) Cooperation. Licensee agrees, as reasonably requested by eMeter and Siemens, to cooperate with eMeter and Siemens in performing the Portal Services. Licensee agrees that Authorized Portal Users shall be responsible for providing and maintaining their own Internet access and all necessary telecommunications equipment, software and other materials ("Equipment") at their locations necessary for accessing the Portal. Licensee agrees to notify eMeter of any changes in the Equipment (Including any system configuration changes or any hardware or software upgrades) that may affect the Portal Services provided hereunder, to allow eMeter effectively to provide Portal Services as specified In the SLMA.

(b) General Responsibilities. Licensee shall be solely responsible for all Usage Data available on or through the Portal, and Licensee represents and warrants that the Licensee's Marks, any content transmitted via the Portal and all other information and materials provided by Licensee hereunder: (i) will not infringe or contain any content that infringes, misappropriates or violates any copyright, patent, trade secret or other third-party Intellectual property right; (ii) violate any applicable law, rule or regulation; or (iii) contain any virus or harmful component.

5. Terms Applicable to Licensee Portal Customers. Licensee shall ensure that the following terms are made binding upon Licensee Portal Customers.

(a) Usage Restrictions. Licensee grants Licensee Portal Customer a nonexclusive, nontransferable license to access and use the Portal only to monitor and assess his or her own electricity usage and obtain information related thereto, and for no other purpose. Licensee Portal Customer will not: (i) share usernames and passwords with other parties or otherwise allow access to the Portal by any other parties; or (ii) transfer, lease, loan, resell for profit, distribute or otherwise grant any rights In the Usage Data or Portal In any form to any other party, including commercial time-sharing, rental, or service bureau use.

(b) Warranty. THE PORTAL PROVIDED HEREUNDER AND ANY SERVICES RELATED THERETO ARE PROVIDED "AS IS" AND "WITH ALL FAULTS," AND EMETER MAKES NO WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED EITHER IN FACT OR BY OPERATION OF LAW, STATUTORY OR OTHERWISE, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, UNINTERRUPTED SERVICE, ERROR-FREE SERVICE, INTEROPERABILITY, OR AGAINST INFRINGEMENT.

(c) Excused Portal Outage. Licensee Portal Customer acknowledges and agrees that, from time to time an outage, unavailability, interruption, delay or other degradation of the Portal could occur resulting from or caused by any of the following: (i) a scheduled downtime, maintenance or repair by eMeter; (ii) an act or omission of Licensee or Licensee Portal Customer; (c) any equipment, networks,

products or services provided or controlled by Licensee; or (d) an event of force majeure. Licensee Portal Customer releases eMeter from any liability therefore.

6. Privacy Policy and Non-Circumvention

(a) Privacy Policy. Licensee shall post a written privacy policy on its website in respect of the collection and handling of personally identifiable information, and specifically as related to the Portal, and shall comply strictly with such policy. If eMeter reasonably believes that such privacy policy is insufficient or inappropriate for protecting applicable information, eMeter shall notify Licensee in writing and Licensee shall make such changes to the policy as eMeter may reasonably request.

(b) Non-Circumvention of Security Measures. Licensee shall not allow, facilitate, or encourage circumvention of access restrictions and other security measures Implemented as part of the Portal.

7. No Third Party Warranty. eMeter's warranties in Article 15 of the Agreement are made solely to Licensee, and not to Authorized Portal Users or other third parties.

8. Ownership. Notwithstanding the ownership provisions set forth in Section 7.2 of the SLMA, in the case of the Portal Software, eMeter shall not have any right, title, or interest in the Usage Data or Licensee's Marks. Additionally, any intellectual property rights developed, created, or acquired by eMeter for Licensee and/or in connection with the Portal Services shall be and remain the exclusive property of eMeter,

9. Indemnification.

(a) In addition to the indemnification provided by Licensee in Section 16.2 of the SLMA, Licensee shall indemnify eMeter and defend at its own expense any action against eMeter brought by a third party to the extent that the action is based upon, or arises out of, or relates to an act or omission of any Authorized Portal User, including but not limited to those relating to Usage Data available through the Portal.

(b) The limitation set forth in Section 16.6(a)(v) of the SLMA shall also include the willful misconduct or negligent act or omission of any Authorized Portal User.

10. Confidentiality. In addition to the obligations set forth in Article 12 of the Agreement, the parties agree that Usage Data (although not included in the definition of "Confidential Information") shall be subject to the same protections enumerated for Confidential Information in the SLMA. However, provided that such disclosure does not identify the disclosed information as Licensee's or any Licensee Portal Customer's information, eMeter shall have the right to disclose: (a) Usage Data to third parties where such disclosure is necessary or appropriate to assist eMeter in its provision and improvement of Portal Services, and (b) aggregated

information for promotional and data analysis purposes, though such aggregated Information may include certain non-personally identifiable elements of Usage Data.

11. Support

(a) Scope. The terms of [Article 9](#) and [Exhibit B](#) (which are incorporated herein by this reference) shall govern the scope of the support and maintenance services provided by eMeter. Notwithstanding anything to the contrary set forth In [Article 9](#), subject to the timely payment of all Support Fees, with respect to the Portal Software, eMeter shall provide Support only for the then-current Release of such Portal Software.

(b) No Authorized User Support. eMeter shall provide support only to the Licensee representative(s) authorized by eMeter in writing to access eMeter Portal Support. In no event shall eMeter be expected or required to provide any support directly to any Authorized Portal User or other Licensee employee, representative or customer.

12. Training. eMeter shall provide to Licensee such training as it deems necessary for Licensee to effectively address Licensee Portal Customers' support needs in connection with the Portal.

13. Reverse Engineering. In addition to the prohibitions set forth in [Section 6.2](#) (c) of the Agreement, Licensee shall not permit its Authorized Portal Users to undertake any of the prohibited activities set forth therein.

14. Effects of License Breach Termination. In addition to the obligations set forth in [Section 13.2](#) of the Agreement, In the event of a License Termination Breach, eMeter will immediately cease providing all Portal Services and Licensee will immediately cease use of the Portal.

15. Maintenance of Proprietary Markings. Licensee shall not, and shall not permit others to remove or modify any markings or other notice of the proprietary rights of eMeter or eMeter's licensor(s) or their licensor(s)' proprietary rights.

16. No Export. Licensee shall not export the Portal Software (including any Third Party Software) outside of the country specified in [Exhibit A](#) without eMeter's prior written permission, which eMeter may grant or deny in its sole discretion. To the extent eMeter permits any export, Licensee shall fully comply with all relevant export laws and regulations of the United States and any other applicable export and import laws to assure that neither the Portal Software, nor any direct product thereof, is exported directly or indirectly In violation of applicable laws.

17. Copying Restrictions and Limitations. Except as otherwise provided herein, Licensee agrees not to download or otherwise create any more copies of the Licensed Products than are required to operate it for the Meter Count as increased from time to time upon the payment of the additional license fees (if any) as specified in the Agreement for Services between Licensee and Siemens; provided, however, that

Licensee may download one copy for backup purposes. In the event of a License Termination Breach, Licensee shall destroy or return to eMeter all copies of the Third Party Software and related documentation remaining in the possession of Licensee or any third party that acquired any such copy through Licensee.

Energy Engage Schedule 1

LICENSEE PORTAL CUSTOMER TERMS

1. **Usage Restrictions.** Licensee grants Licensee Portal Customer a nonexclusive, nontransferable license to access and use the Portal only to monitor and assess his or her own electricity usage and obtain information related thereto, and for no other purpose. Licensee Portal Customer will not: (a) share usernames and passwords with other parties or otherwise allow access to the Portal by any other parties; or (b) transfer, lease, loan, resell for profit, distribute or otherwise grant any rights in the Usage Data or Portal in any form to any other party, including commercial time-sharing, rental, or service bureau use.

2. **Warranty.** THE PORTAL PROVIDED HEREUNDER AND ANY SERVICES RELATED THERETO ARE PROVIDED "AS IS" AND "WITH ALL FAULTS," AND EMETER MAKES NO WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED EITHER IN FACT OR BY OPERATION OF LAW, STATUTORY OR OTHERWISE, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, UNINTERRUPTED SERVICE, ERROR-FREE SERVICE, INTEROPERABILITY, OR AGAINST INFRINGEMENT.

3. **Limitation of Liability.** IN NO EVENT SHALL EMETER BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND (INCLUDING LOSS RESULTING FROM BUSINESS DISRUPTION), OR DAMAGE TO SYSTEMS OR DATA, WHETHER IN AN ACTION FOR CONTRACT OR TORT, EVEN IF EMETER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

4. **Excused Portal Outage.** Licensee Portal Customer acknowledges and agrees that, from time to time an outage, unavailability, Interruption, delay or other degradation of the Portal could occur resulting from or caused by any of the following: (a) a scheduled downtime, maintenance or repair by eMeter; (b) an act or omission of Licensee or Licensee Portal Customer; (c) any equipment, networks, products or services provided or controlled by Licensee; or (d) an event of force majeure. Licensee Portal Customer releases eMeter from any liability therefore.

Exhibit E
eMeter Weather Data Subscription Service

These terms and conditions are only applicable and associated with eMeter's Weather Data Subscription Service. Terms of the Weather Data Subscription Service Program may be updated and change from time to time. For the avoidance of doubt, these are separate terms and the Weather Data Subscription Services are not subject to the terms of Article 6 (License Grants and Limitations), 7 (Ownership) 9 (Support and Maintenance), 13 (Term and Termination), 14 (Source Code Escrow), 15 (Representations and Warranties) or 16 (Indemnification) or any of the eMeter SLMA, but may be subject to additional terms as defined in the Weather Data Subscription Service Program provided in the online Documentation. Should there be a conflict of terms between the SLMA and this Exhibit E, the terms of this Exhibit E shall prevail only insofar as the eMeter Weather Data Subscription Service is concerned.

In order to provide Licensee with context to their energy Information, Licensor has developed a weather data loader application as a component within the EnergyIP Meter Data Management platform. This allows weather data to be leveraged by additional functions and other third party applications that run on the EnergyIP platform.

- (a) Use of Data. Licensor's Energy Engage product shall display the Meteorological Data in real-time or archived mode as part of subscription services provided by Licensor to end users.
- (b) License. Licensee shall have a non-exclusive right to use the data in real-time or archived mode as part of the subscription services provided by Licensor to its end users for the limited purposes described above, and does not constitute nor include a sale, lease, or transfer of the Meteorological Data in any form.
- (c) Representations and Warranties. Licensor represents and warrants that (i) they have obtained all necessary rights of clearance for exhibition of the Meteorological Data, (ii) Licensor will comply with all federal, state or local laws, rules, regulations, executive orders or other requirements, and (iii) the Meteorological Data will not violate or infringe upon any statutory or common law or other rights of any kind of any person or other entity.
- (d) Termination. It shall constitute a breach of this Agreement hereunder if either party fails to observe, keep or perform any material provision of this [Exhibit E](#) required to be observed, kept or performed by either party and such failure is not cured within thirty (30) days after notice thereof to breaching party;
 - (i) In the event of a breach not cured by the breaching party, such affected party shall have the right to suspend or terminate this agreement with 30 days written notice in advance to the other party;

(ii) Other Terminations. If either party files a petition in bankruptcy (or is the subject of an Involuntary petition in bankruptcy that is not dismissed within sixty (60) days after the effective filing date thereof); or is or becomes Insolvent; or admits of a general inability to pay its debts as they become due; then the other party will have the right to terminate this Exhibit E effective upon notice from the other party.

(iii) Effects of Termination. For the avoidance of doubt, the termination of the Weather Data Subscription Service under this Exhibit E shall not affect the rights and obligations of either party under the SLMA and Exhibits A-D.

(e) Payment. The subscription is paid on annual basis and may be renewed each year on the anniversary of the effective date. Should Licensee choose not to renew the subscription, Licensor must be notified in writing no later than 45 days prior to the renewal date. Any termination prior to the expiration of an annual subscription shall not entitle Licensee to the refund of any paid subscription fees.

**Exhibit A
Product Schedule**

ORDERED PRODUCTS:

The following software programs shall be deemed Licensed Products under the SLMA and are Included in the original software license purchase,

LICENSED PRODUCTS AND ENVIRONMENTS FOR USE WITH ENERGYIP

Platform and Applications

EnergyIP Core Systems
VEE
Advanced Billing
Data Aggregation
Remote Connect/Disconnect
Energy Engage version 1.x (Including the optional eMeter Weather Data Subscription Service)

Adapters and Data Importers

AMI Adapter – Elster EnergyAxis
Data Importer – Itron MV90

Environments

Development
Test
Quality Assurance

The net License Price includes the right to use the Licensed Products for **88,000** meters.

The eMeter Weather Data Subscription Service is billed on an annual subscription basis and shall be renewable at the Licensee's option on the anniversary date each year.

Authorized Third Party Representatives:

Project Managers:

PROJECT MANAGERS FOR **LICENSEE:**
Ronald E. Garratt
Interim City Manager

PROJECT MANAGERS FOR EMETER:

4000 E. Third Ave.
Suite 400
Foster City, CA 94404
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EMAIL: info@emeter.com