Online Subscription Terms (Engagement)

1. DEFINITIONS.

“ABB Competitor” means an entity whose primary business is to develop and market software, data and services for external commercial sale and distribution in direct competition with the Licensed Software.

“Authorized User” means a person or device that accesses, loads, operates, maintains or otherwise uses the Licensed Software. If more than one person utilizes the applicable Licensed Software, even at separate times on the same hardware, they are considered different Authorized Users. Authorized Users are interchangeable only in the event they are no longer employed by the Subscriber or no longer access the applicable Licensed Software.

“Client Engagement” means a particular business arrangement identified in an Engagement Order Form whereby Subscriber provides consulting services to a third party, identified in the Engagement Order Form, using the Licensed Software.

“Concurrent Process” is the number of authorized simultaneous simulations of the Licensed Software at any point in time as set forth on the Engagement Order Form.

“Confidential Information” means non-public information of a party including, without limitation, the terms, conditions and pricing specified in any Engagement Order Form. Confidential Information of the Licensed Software, all software provided with the Licensed Software, the Source Code, and all algorithms, methods, techniques and processes revealed by the Source Code. Confidential Information does not include information that: (a) was in the possession of, or was rightfully known by, the recipient thereof without an obligation to maintain its confidentiality prior to receipt from disclosing party; (b) is or becomes generally known to the public without violation of these Subscription Terms; (c) is obtained by the recipient in good faith from a third party having the right to disclose it without an obligation of confidentiality; or (d) is independently developed by receiving party without reliance in any way on the Confidential Information.

“Documentation” means the user, installation, technical, and training publications delivered by ABB as available in conjunction with Licensed Software.

“Equipment” means the ABB certified hardware and systems software configuration as specified in the Documentation.

“Licensed Software” means the English language version of the particular ABB Software, Third-Party Software, and/or Documentation licensed by ABB to Subscriber pursuant to an Engagement Order Form.

“Engagement Order Form” means a duly executed order form relating to the provision of specific Licensed Software by ABB to Subscriber and that expressly incorporates by reference these Subscription Terms.

2. LICENSES AND RESTRICTIONS.

(a) Right to Use Licensed Software. ABB grants to Subscriber, during the Term (as defined on the applicable Engagement Order Form), a limited, non-exclusive, non-transferable, non-sublicensable license to use the Licensed Software for Subscriber to perform Client Engagements subject to the terms and conditions of these Subscription Terms. The license shall not extend to enabling, allowing or permitting any person, including any third-party clients, to use the Licensed Software in their own right or for Subscriber to use the Licensed Software as a service bureau or application service provider basis.

(b) Restrictions. Except as expressly authorized herein, Subscriber shall not (i) resell, broker, redistribute, republish, transfer, sublicense, or relicense the Licensed Software or use the Licensed Software for third party transactions, service bureau use or publicly perform or publicly display the License Software; (ii) cause or permit the reverse engineering, disassembly, or de-compilation of the Licensed Software; or (iii) modify or otherwise create any derivative works of or from the Licensed Software. Subscriber will not, and will not permit any Authorized User or third party to (i) allow any access to or use of the Licensed Software by any individual other than Authorized Users or by individuals in excess of the number of Authorized Users for each Licensed Software approved on the applicable Engagement Order Form; (ii) remove, alter, or obscure any proprietary notices (including, without limitation, any copyright or trademark notices) of ABB or its licensors from the Licensed Software; or (iii) access, use, reproduce, display, copy or use the Licensed Software for the benefit of any person or entity other than for Subscriber’s internal use. Subscriber hereby warrants that it is not an ABB Competitor or accessing the Licensed Software on behalf of, or at the direction of, an ABB Competitor. Subscriber may not, and will not permit its employees or agents to, sublicense, transfer, redistribute, resell or otherwise disclose Licensed Software to any other individual or legal entity, free of charge or for consideration, in whatever manner or form. Subscriber shall keep the Licensed Software in strictest confidence and use its best efforts to prevent the unauthorized publication, disclosure or copying of the Licensed Software. Any and all rights not expressly granted to Subscriber hereunder are
reserved by ABB. Nothing set forth in these Subscription Terms is intended to be, or is, a grant to Subscriber of any other intellectual property rights of ABB.

(c) Authorized Users; Security. Subscriber acknowledges that it is Subscriber’s duty to keep secure and hold in the strictest confidence all user identification codes and passwords pertaining to the Licensed Software (the “User IDs”) and the information obtained through the Licensed Software. Accordingly, Subscriber agrees to: (i) unless otherwise agreed, prohibit the sharing of User IDs amongst Authorized Users; (ii) take all commercially reasonable measures to prevent unauthorized access to, or use of, the Licensed Software whether the same is in electronic form or hard copy, by any third party; (iii) not access and/or use the Licensed Software via mechanical, programmatic, robotic, scripted or other automated search means, other than through batch or machine-to-machine applications approved by ABB; (iv) ensure that each of the Authorized Users that is not an employee of Subscriber has signed a written agreement with terms at least as restrictive as those contained in these Subscription Terms; and (v) not use any framing techniques to frame, wrap, or enclose the Licensed Software or the information contained therein. Subscriber is liable for any breach of the terms of these Subscription Terms by any Authorized Users.

3. OWNERSHIP. “ABB Property” means all of the following: (i) the Licensed Software (including the Documentation thereto); (ii) any deliverables and/or work product developed while providing the Licensed Software under these Subscription Terms; and (iii) enhancements, modifications or derivative works to the Licensed Software. Subject only to the licenses expressly granted in these Subscription Terms, as between ABB and Subscriber, ABB shall be the sole owner of all intellectual property rights in and to the Licensed Software. ABB may utilize all ideas, suggestions and feedback, or the like that Subscriber provides to ABB or otherwise makes with respect to the Licensed Software without any obligation to Subscriber. To the extent that Subscriber has or later obtains any intellectual property rights in and to the ABB Property, or any future enhancement or modification thereto or any part thereof, by operation of law or otherwise, Subscriber hereby disclaims such rights, and assigns and transfers such rights exclusively to ABB, and agrees to provide reasonable assistance to ABB to give effect to such assignment and to protect, enforce and maintain such rights.

4. FEES AND PAYMENT.

(a) Fees. The Subscriber shall pay to ABB the license fees in the amounts set forth on the applicable Engagement Order Form (the “License Fees”). Subscriber shall also pay any other applicable fees and pre-approved expenses specified in the Engagement Order Form. Unless otherwise noted on the Engagement Order Form, the License Fees shall be payable in advance and shall be nonrefundable. All Engagement Order Forms are non-cancellable. The License Fees, together with any expenses and other amounts due and payable under the Engagement Order Form, constitute the “Fees.”

(b) Invoices and Payment. ABB will invoice Subscriber for all Fees incurred by Subscriber. Each invoice from ABB will state the basis for any Fees included therein. Subscriber will pay all amounts set forth on each such invoice in immediately available U.S. funds within thirty (30) days of the date of invoice. In addition to the payments required hereunder, Subscriber will be responsible and reimburse ABB for all sales, use, and other taxes, fees, or duties, whether federal, state, or local, however designated, that are levied or imposed by reason of the transactions contemplated hereby (other than any taxes based on ABB's net income). All unpaid fees and late payments will bear interest at a rate of 18% per annum. ABB may immediately suspend Subscriber’s access to the Licensed Software in the event of non-payment and/or late payment.

5. TERM AND TERMINATION.

(a) Term. Subscriber’s subscription to the Licensed Software will commence on the Effective Date and shall remain in effect for the service term set forth in the Engagement Order Form (the “Term”).

(b) Termination. In addition to any other remedy available to ABB under these Subscription Terms, ABB may terminate these Subscription Terms and/or Subscriber’s subscription to the Licensed Software (in whole or in part) if Subscriber commits a material breach. These Subscription Terms will automatically terminate in the event that either party becomes insolvent, admits its inability to pay its debts in writing, or ceases to carry on the business carried on by it. Provisions hereof relating to limits on liability, indemnification, use and protection of the Licensed Software and its information and data, payment for the Licensed Software, audits, and disclaimers of warranties shall survive the termination of these Subscription Terms.

(c) Effects of Termination. Immediately upon the effective date of the termination of these Subscription Terms for any reason, all of Subscriber’s rights granted hereunder will cease to exist. Subscriber will, at ABB’s sole discretion, return to ABB or destroy the Licensed Software and all copies thereof and certify in writing Subscriber’s compliance with such obligation.

6. WARRANTY DISCLAIMER. To ABB’s knowledge, ABB takes reasonable measures to incorporate accurate and reliable data in the Licensed Software; however, ABB uses publicly available sources to collect the data and information incorporated into the Licensed Software and cannot verify the accuracy, completeness or timeliness of any such data or information. Accordingly, except as specifically set forth in these Subscription Terms, THE LICENSED SOFTWARE, AND ALL DATA AND RESULTS DERIVED THEREFROM, ARE PROVIDED TO SUBSCRIBER STRICTLY “AS IS,” AND ABB AND ITS SUPPLIERS EXPRESSLY DISCLAIM ANY AND ALL WARRANTIES AND REPRESENTATIONS OF ANY KIND WITH REGARD TO ANY LICENSED SOFTWARE, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF NON-INFRINGEMENT, TITLE, FITNESS FOR A PARTICULAR PURPOSE, FUNCTIONALITY OR MERCHANTABILITY, ACCURACY OF RESULTS OR INFORMATION, WHETHER EXPRESS, IMPLIED OR STATUTORY. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY ABB, ITS EMPLOYEES OR AGENTS WILL INCREASE THE SCOPE OF THE ABOVE WARRANTIES OR CREATE ANY NEW WARRANTIES.
7. INDEMNIFICATION.

(a) Indemnification by ABB. ABB will indemnify and defend Subscriber from and against damages, losses, expenses, and costs arising as a direct result of all claims, suits or proceedings brought by any third party to the extent any such claim, suit or proceeding alleges that the Licensed Software, when used in accordance with these Subscription Terms during the Term, infringe any U.S. copyrights or misappropriated any trade secrets (any such claim, suit or proceeding, a “Claim”). If the Licensed Software (or any portion thereof) become, or in ABB’s opinion are likely to become, the subject of a Claim, then ABB may, at ABB’s option and expense, either: (i) procure for Subscriber the right to continue exercising the rights licensed to Subscriber in these Subscription Terms, (ii) replace or modify the Licensed Software (or portion thereof) so that the Licensed Software (or such portion thereof) become non-infringing, or (iii) terminate these Subscription Terms by written notice to Subscriber and refund all current Fees actually paid by Subscriber (if any), on a prorated basis. Notwithstanding the foregoing, ABB will have no obligation under these Subscription Terms or otherwise with respect to any Claim based upon: (A) any unauthorized use, reproduction, or distribution of the Licensed Software; (B) any access, use, reproduction, or distribution of the Licensed Software after ABB provides Subscriber with written notice that such access, use, reproduction or distribution has been prohibited or superseded or may be infringing on a third party’s intellectual property rights; or (C) any modification of the Licensed Software by any person other than ABB or its licensors, suppliers, authorized agents or contractors. This Section 7(a) states ABB’s entire liability and Subscriber’s sole and exclusive remedy for infringement claims and actions.

(b) Indemnification by Subscriber. Subscriber will indemnify, defend and hold harmless ABB and its directors, officers and employees from and against any and all damages, liabilities, losses, fees, expenses, penalties and costs (including reasonable attorneys’ fees, costs and disbursements) arising as a result of or otherwise related to all claims, suits or proceedings to the extent any such claim, suit or proceeding arises from or relates to any acts or omissions on the part of Subscriber or any Authorized User (or any person using Subscriber’s User IDs) in connection with the Licensed Software. Subscriber agrees to indemnify and hold ABB harmless for any loss or damage suffered by ABB from any unauthorized disclosure by Subscriber of Third Party Data to any other party. Subscriber acknowledges that in the event ABB or its Third-Party Licensor brings an action to enforce their respective rights under this clause, the damage to ABB or its Third-Party Licensor for improper disclosure may be irreparable and ABB and its Third-Party Licensor will be entitled to an appropriate injunction in addition to other remedies available at law. This Section does not apply to Subscriber’s that are state or government agencies and which are exempt under applicable law.

(c) Indemnification Procedures. As a condition of the foregoing indemnification obligations, the indemnified party will (i) promptly notify the indemnifying party of any indemnifiable Claim; (ii) give the indemnifying party sole control over the defense and settlement of such Claim; and (iii) provide reasonable cooperation and assistance to the indemnifying party in conducting its defense, at the indemnifying party’s expense; provided, however, that the indemnified party may participate in the defense at its expense and the indemnified party’s advance written approval is required for any settlement that (A) imposes any obligation of payment on the indemnified party, (B) does not unconditionally release indemnified party, or (C) requires any binding admission made on behalf of the indemnified party.

8. LIMITATIONS ON LIABILITY. TO THE EXTENT PERMISSIBLE UNDER APPLICABLE LAW, IN NO EVENT WILL ABB BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, EXEMPLARY, SPECIAL, OR INCIDENTAL DAMAGES, INCLUDING WITHOUT LIMITATION ANY LOST DATA, LOST PROFITS AND COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, OR OTHER ECONOMIC LOSS, ARISING FROM OR RELATING TO THESE SUBSCRIPTION TERMS (INCLUDING, WITHOUT LIMITATION, IN RELATION TO THE LICENSED SOFTWARE, SERVICES, CONTENT, DATABASE OR SEARCH RESULTS), HOWEVER CAUSED AND UNDER ANY THEORY OF LIABILITY (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE), EVEN IF ABB HAVE BEEN ADVISED OF THE POSSIBILITIES OF SUCH DAMAGES. FURTHER, ABB AND SHALL NOT BE LIABLE FOR ANY DAMAGES, ARISING OUT OF OR RELATED TO (i) ANY DATA OR CONTENT CONTAINED IN OR OBTAINED THROUGH THE LICENSED SOFTWARE OR (ii) SUBSCRIBER’S USE OF THE LICENSED SOFTWARE, WHETHER SUFFERED BY SUBSCRIBER OR ANY THIRD PARTY. IF, NOTWITHSTANDING THE FORGOING, LIABILITY CAN BE IMPOSED UPON ABB, THE TOTAL CUMULATIVE LIABILITY OF ABB IN CONNECTION WITH THESE SUBSCRIPTION TERMS, THE LICENSED SOFTWARE, AND ANY INFORMATION, DATA, OR CONTENT, WHETHER IN CONTRACT, TORT OR OTHERWISE, SHALL NOT EXCEED THE AMOUNT OF FEES ACTUALLY PAID TO ABB BY SUBSCRIBER DURING THE TWELVE (12) MONTH PERIOD PRECEDING THE EVENTS GIVING RISE TO SUCH LIABILITY.

9. FOR U.S. GOVERNMENT END USERS. The Licensed Software was developed at private expense and is a “commercial item” as that term is defined at 48 C.F.R. 2.101, consisting of “commercial computer software” and “commercial computer software documentation” as such terms are used in 48 C.F.R. 12.212. Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4, all U.S. Government end users acquire the Licensed Software with only those limited rights set forth therein.

10. EXPORT CONTROL NOTICE. Subscriber acknowledges the Licensed Software, or any part thereof, is being released or transferred to Subscriber in the United States and is therefore subject to United States export control laws. Subscriber acknowledges its exclusive obligation to ensure that its exports are in compliance with all applicable export control laws. Subscriber shall defend, indemnify, and hold ABB and its licensors harmless from and against any and all claims, judgments, awards, and costs (including Subscriber’s noncompliance with applicable export laws with respect to the use or transfer of the Licensed Software outside the United States by Subscriber.

11. RELATIONSHIP OF THE PARTIES; PUBLICITY. Subscriber and ABB are independent contractors of one another. Neither party shall at any time represent that they are authorized agents or representatives of one another. Without ABB’s prior written consent, Subscriber will not issue press releases relating to its status as a subscriber of the Licensed Software or use ABB’s logos
or trademarks in promotional materials or on its web site. ABB may, upon notice to Subscriber, issue press releases relating to Subscriber’s status as a subscriber of the Licensed Software and display Subscriber’s name in ABB’s customer list in promotional materials and on its web site, unless Subscriber specifically requests ABB not to do so.

12. CHANGES TO SUBSCRIPTION TERMS. Subscriber agrees to comply with changes to the restricted license granted in paragraph 2 above, changes in pricing, and changes to other provisions of these Subscription Terms as ABB shall make from time to time upon notice to Subscriber. Such changes may be made from time to time by any of the following methods: online announcements, customer bulletins, emails, online “click wrap” amendments, changes to the Subscription Terms, mail, facsimile, announcements in invoices, revised published price lists, or any other written notice.

13. FORCE MAJEURE. Other than for payments due, neither party will be liable to the other for any failure or delay in performance due to circumstances beyond its reasonable control including, without limitation, acts of God, labor disruption, war, terrorist threat, public health emergency, epidemic, virulent or contagious outbreak or government embargo, order, border restriction or border closure or other government action; provided that if either party is unable to perform its obligations for one of the foregoing reasons it shall give prompt written notice thereof to the other party and the time for performance, if any, shall be deemed to be extended for a period equal to the duration of the conditions preventing performance.

14. CONFIDENTIALITY. Each party may furnish the other party with Confidential Information. The parties agree that, during the Term and thereafter, each party shall not (a) directly or indirectly use, copy, reproduce, distribute, manufacture, duplicate, reveal, report, publish, disclose or cause to be disclosed, or otherwise transfer any Confidential Information of the other party to any third party (except as expressly contemplated by these Subscription Terms), or (b) utilize Confidential Information for any purpose, except as expressly contemplated by these Subscription Terms or authorized in writing by the other party. Subscriber will limit the disclosure of ABB’s Confidential Information, to employees with a need-to-know and who have been advised of the confidential nature thereof, or third party consultants who are not ABB Competitors with a need-to-know and who have been contractually obligated to maintain such confidentiality through signature of a nondisclosure agreement acknowledging the non-disclosure obligations of these Subscription Terms and naming ABB as an intended third-party beneficiary. Subscriber shall provide copies of these agreements upon the written request of ABB. Subscriber shall be liable for any breach by any third-party consultant of the confidentiality obligations contained herein.

15. GENERAL. Any Engagement Order Forms may be executed in counterparts and/or by facsimile, each of which shall constitute an original and both of which, together with these Subscription Terms, constitute a single document and agreement. These Subscription Terms and all Engagement Order Forms will be governed by the laws of the State of Georgia, USA, without regard to or application of conflicts of law rules. The parties explicitly disclaim the application of the UN Convention on the Sale of Goods. If any provision of these Subscription Terms is held to be unenforceable, that provision will be reformed in order to comply with the law and to the extent possible give effect to the original intent and economic impact of the original provision, and the remaining provisions will remain in full force. The failure of either party to require performance by the other party of any provision hereof will not affect the full right to require such performance at any time thereafter, nor will the waiver by either party of a breach of any provision hereof be taken or held to be a waiver of the provision itself. Neither these Subscription Terms, nor any Engagement Order Form, nor any rights or obligations of Subscriber under these Subscription Terms or any Engagement Order Form, may be assigned, delegated or transferred by Subscriber (in whole or in part and including by sale, merger, or operation of law) without the prior written approval of ABB. The Parties recognize the intended sale and transfer of the power grids division of ABB to a company held by Hitachi and ABB (the “Joint Venture”) which will be majority owned, and might be at some stage fully owned, by Hitachi. In this context, the Parties agree that ABB has the right to subcontract, assign, transfer, novate or otherwise dispose of these Subscription Terms and all of its rights and obligations under these Subscription Terms, without prior consent of the other Party, to either a legal entity in the ABB Group or directly to the Joint Venture or any legal entity in the Joint Venture group. The other Party agrees, at the request of ABB, to promptly execute all agreements and/or other documents required to effect such subcontract, assignment, transfer or novation. ABB Group means any legal entity directly or indirectly majority owned or controlled by ABB Asea Brown Boveri Ltd, a company incorporated under the Laws of Switzerland, registered with the commercial registry of the Canton of Zurich under number CH 106.239.600. Except as permitted herein, these Subscription Terms, together with all Engagement Order Forms executed in connection with these Subscription Terms, comprise the complete and exclusive statement of the agreement between the parties, and shall supersede any proposal or prior agreement, oral or written, and any other communications between the parties in relation to the subject matter hereof. These Subscription Terms will not be modified except by a subsequently dated written amendment or exhibit signed by both parties by their duly authorized representatives. These Subscription Terms shall control over any inconsistent provision contained in any purchase order or other documentation submitted by Subscriber in connection herewith, except for those terms accepted by ABB in writing.