

EMPIRIX PASS THRU TERMS FOR THE EMPIRIX PRODUCTS

1. Empirix licensed software ("Software"), software as a service ("SaaS") and Empirix hardware ("Hardware"), are to be used solely for internal business purposes to test and/or monitor the licensor's voice and/or web applications and Infrastructure. Customer may not use Software or Hardware (Software and Hardware, collectively referred to as a "Product") (a) for the primary benefit of any third party, including without limitation, using the Product to provide voice and/or web application or infrastructure testing or monitoring services for others, whether or not the application or infrastructure being tested or monitored is installed or operated by the Customer, or (b) in a service bureau or time-sharing arrangement.
2. Licensed Software Terms
 - a. Empirix hereby grants to the Customer a non-exclusive, non-sub licensable, non-transferable license to use the Software ordered by Customer in accordance with the end user documentation accompanying the Software ("Software Documentation"), subject to the terms and conditions of this Agreement. The Customer shall be entitled to make a single copy of the Software exclusively for back-up or disaster-recovery purposes, provided that all copies bear Empirix's proprietary notices. The Customer shall have the right to make copies of the Software Documentation, in form and quantity as is reasonably required for Customer's internal use of the Software, consistent with the terms and restrictions contained in this Agreement.
 - b. Licensed Software may utilize Open Source Software that may be included as a part of the Software, included in the same medium on which the Software is delivered or as a part of the download of Software received by Customer, or pre-loaded on Hardware. For the purpose of this Agreement, "Open Source Software" means any software for which the source code and certain other rights normally reserved for copyright holders are provided under an Open Source Software License or that is in the public domain, and an "Open Source Software License" is any license to software that meets the Open Source Definition of the Open Source Initiative at <http://www.opensource.org/docs/definition.php>. Because Empirix distributes its Software in object code form, Empirix will provide Customer, on request, with the complete corresponding machine readable source code of Open Source software that is subject to any Open Source License that requires that Empirix provide, without charge (other than a charge for the cost of distribution), source code to the Software, whether in original form or as modified by Empirix, for a period of up to three (3) years after delivery of the Software within which the Open Source software is included. Any such Open Source Software requested and so received by Customer shall be subject to the applicable Open Source License and this Agreement does not modify or abridge any rights or obligations Customer may have under such Open Source License. Any permitted use or distribution of Open Source Software separate and apart from use of the Software shall be governed by the relevant Open Source License and, with respect to which, Empirix disclaims all warranties and indemnification obligations.
 - c. Customer may not sublicense, distribute, rent, lease or transfer the Software to any third party; provided that Customer may authorize third party integrators and consultants to support its installation or implementation of the Product. Customer shall be responsible for the acts and omissions of any consultants retained to assist it with the installation or deployment of the Product.
 - d. Customer may not alter, adopt, modify, vary, or create derivative works based on the whole or any part of the Software in any way whatsoever. except as permitted by law, nor permit any third party to alter, modify, vary, or create derivative works based on the whole or any part of the Software; and Customer shall not make or permit to be made any translation, alteration, adaptation, enhancement, modification, update or addition to, nor decompile, reverse engineer or disassemble the Software without the prior written consent of Empirix.
 - e. When Software is licensed as a part of, in conjunction with, or intended to be used with Hardware, Software may only be used with the Hardware. The Software may include license management components designed to administer usage rights and restrictions. Customers agree not to permit the circumvention or any attempt to circumvent such technical means to enable usage rights in excess of those purchased. Unless otherwise stated In a quote, Customers may only deploy a single Instance of the Software at a single location. Customer shall retain and shall not alter or obscure any notices, markings or other insignia that are affixed to the Software, Hardware or associated documentation or any part thereof at the time of delivery of such Product or associated documentation by Empirix.
 - f. Customer acknowledges that certain of Empirix products or components thereof may be supplied by third parties. Licensed Software may utilize open source technology and technology from third party suppliers that may be included as a part of the Software, included in the same medium on which the Software is delivered or as a part of the download of Software received by Reseller, or pre-loaded on Hardware (collectively the "Third Party Technology"). All Third Party Technology is identified in the Software Documentation or in a quote and is subject to the third party supplier's license restrictions or the applicable open source license such as GNU General Public License ("GPL") (www.gnu.org/licenses/gpl.txt) or similar agreement (an "Open Source License").
 - g. Certain Software may be distributed to Customer with, as separate works, software that is subject to the terms and conditions of the GPL. Because Empirix distributes its software in object code form, Empirix will, upon written request, provide Customer with the complete corresponding machine-readable source code of software that is subject to the GPL license, for a period of up to three (3) years after delivery of the relevant software. This license does not modify or abridge any rights or obligations Customers may have with respect to open source technology included as a part of the Software under an applicable Open Source License. Any use (or distribution) of open source technology separate and apart from use of the Software is governed by the relevant open source license, and with respect to which no indemnification obligations pertain.

- h. Empirix Products are not fault-tolerant and are not designed, manufactured or intended for use for testing of on-line control equipment in hazardous environments requiring fail-safe performance, such as the operation of nuclear facilities, aircraft navigation or communication systems, air traffic control, direct life support machines, or weapons systems, in which the failure of the Software or Hardware could lead directly to death, personnel injury or severe physical or environmental damage High Risk Activities"). Accordingly, Empirix and its suppliers specifically disclaim any express or Implied warranty of fitness for High Risk Activities and no license is granted to use the Software or Hardware for such activities.
 - i. The Software and associated documentation are "commercial computer software" and "commercial computer software documentation," and, as such, the rights of U.S. Government End Users with respect to the Software and documentation in accordance with FAR 12.212 or DFARS 227.7202-1, as applicable.
3. SaaS Terms.
- a. Empirix will (a) provide Technical Support for the SaaS to Customer at no additional charge, and (c) provide the SaaS in accordance with applicable laws and government regulations when used according to this Agreement and the documentation accompanying such SaaS (the "SaaS Documentation").
 - b. Unless otherwise provided in the applicable purchase or sales order ("Order"), (a) SaaS is purchased as a subscription, (b) subscriptions may be added during a subscription term at the same pricing as the underlying subscription pricing, prorated for the portion of that subscription term remaining at the time the subscriptions are added, and (c) any added subscriptions will terminate on the same date as the underlying subscriptions.
 - c. SaaS is subject to usage limits, including, for example, the quantities specified in an Order. Unless otherwise specified, (a) a quantity in a purchase or sales order refers to users, and the SaaS may not be accessed by more than that number of users, (b) a user's password may not be shared with any other individual, and (c) a user identification may be reassigned to a new individual replacing one who no longer requires ongoing use of the SaaS. If Customer exceeds a contractual usage limit, Empirix may work with Reseller and Customer to seek to reduce Customer's usage so that it conforms to that limit. If, notwithstanding Empirix's efforts, Customer is unable or unwilling to abide by a contractual usage limit, Reseller or Customer will execute an Order for additional quantities of the applicable SaaS promptly upon Empirix's request, and/or pay any invoice for excess usage in accordance with Section 3 hereof.
 - d. Customer will (a) be responsible for users' compliance with these terms, (b) be responsible for the accuracy, quality and legality of Customer data and the means by which Customer acquired Customer data, (c) use commercially reasonable efforts to prevent unauthorized access to or use of SaaS, and notify Empirix promptly of any such unauthorized access or use, and (d) use the SaaS only in accordance with the SaaS Documentation and applicable laws and government regulations.
 - e. In addition to the restrictions set forth in Section d hereof, Customer will not (a) interfere with or disrupt the integrity or performance of any SaaS or third-party data contained therein, (b) attempt to gain unauthorized access to the SaaS or its related systems or networks, (c) permit direct or indirect access to or use of any SaaS in a way that circumvents a contractual usage, (d) copy the SaaS or any part, feature, function or user interface thereof, (e) frame or mirror any part of the SaaS, other than framing on Customer's own intranets or otherwise for its own internal business purposes or as permitted in the Documentation, and (f) access the SaaS in order to build a competitive product or SaaS.
 - f. Customer agrees that it will not alter, modify, vary, or create derivative works based on the whole or any part of the Software or SaaS in any way whatsoever, nor permit any third party to alter, modify, vary, or create derivative works based on the whole or any part of the Software or SaaS; and Customer shall not make or permit to be made any translation, alteration, adaptation, enhancement, modification, update or addition to, nor decompile, reverse engineer or disassemble the Software or SaaS without the prior written consent of Empirix.
 - g. Customer grants Empirix and its hosting providers a worldwide, limited-term license to host, copy, transmit and display Customer data as necessary for Empirix to provide the SaaS in accordance with this Agreement. Subject to the limited licenses granted herein, Empirix acquires no right, title or interest from Customer or its licensors under this Agreement in or to any Customer data.
4. Ownership. Except for the license rights granted hereunder, all right, title and interest in and to the Software, SaaS, Software Documentation and SaaS Documentation (as well as all test scripts and other similar items delivered by Empirix to Customer) shall be retained by Empirix and its suppliers.
5. Technical Support. Empirix's policy and terms governing the provision of Technical Support is described at www.empirix.com/support/maintenance/, under the heading "Package Details" ("Technical Support"). Empirix will, subject to the payment of the corresponding Technical Support fee, provide Technical Support for all Software and Hardware for a period of twelve (12) months beginning on the date of delivery of a Product (the "Initial Support Period"). Unless canceled in writing by either party at least thirty (30) days prior to expiration of the Initial Support Period, Technical Support shall automatically and continue to renew for additional twelve (12) month terms (each, a "Renewal Service Term") until canceled in writing by either party at least thirty (30) days prior to expiration of the applicable Renewal Service Term. Technical Support fees shall not increase during the Initial Support Period or any Renewal Service Term. Notwithstanding the foregoing, Technical Support fees may be increased for any subsequent Renewal Service Term provided Empirix discloses such increase prior to renewal. All Technical Support fees are invoiced annually in advance. The Initial Support Period and each Renewal Service Term, once commenced, are non-cancelable, and Technical Support fees are non-refundable. Technical Support for SaaS is provided at no additional charge.

6. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, NOWARRANTY, WHETHER EXPRESS OR IMPLIED, IS MADE WITH RESPECT TO THE SOFTWARE, HARDWARE, SOFTWARE DOCUMENTATION OR SERVICES, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. WHETHER OR NOT SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS, NEITHER RESEUER NOR CUSTOMER, NOR ANY OF THEIR RESPECTIVE PARENTS, SUBSIDIARIES, SUPPLIERS OR LICENSORS, SHALL BE LIABLE FOR ANY OTHER INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL LOSS, INCLUDING BUT NOT LIMITED TO LOSS OF REVENUE, LOSS OF PROFITS, LOSS OF BUSINESS OR GOODWILL, HOWEVER CAUSED, OR OTHERWISE BE LIABLE IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE AND WHETHER SUCH LOSS ARISES OUT OF OR IN CONNECTION WITH THE USE OF THE SOFTWARE, HARDWARE, SERVICES OR OTHERWISE UNDER THIS AGREEMENT. THE MAXIMUM LIABILITY OF RESELLER, ITS SUPPLIERS AND UCENSORS FOR CLAIMS ARISING FROM OR IN CONNECTION WITH THIS AGREEMENT SHALL BE THE FEES PAID TO RESELLER FOR THE SOFTWARE, HARDWARE OR SERVICES GIVING RISE TO THE CLAIM.
7. Customer may not publish any results of benchmark tests run on the Software.
8. Customer shall comply fully with all relevant export laws and regulations of the United States and other applicable export and import laws to assure that neither the Products, nor any direct product thereof, are exported, directly or indirectly, in violation of applicable laws.
9. Reseller may audit Customer's use of the Software and report such use to Empirix or assign Reseller's right to audit the Customer's use of the Software to Empirix.
10. Empirix and its suppliers are third party beneficiaries of the Customer license and may directly enforce the obligations of Customer under the license.
11. The Parties exclude the application of the United Nations Convention on Contracts for the International Sale of Goods.