

General Terms of Use

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1. Definitions	2
2. Terms that apply to you	4
3. Term and Software Licence	5
4. Data and Information	5
5. Protection of Intellectual Property	7
6. Confidentiality and publicity	8
7. Warranties	9
8. Limitation of liability	9
9. Termination	10
10. Consequences of termination	10
11. Governing Law and Jurisdiction	11
12. Force Majeure	11
13. Non-Assignment	11
14. Entire agreement	11
15. Amendments	12
16. Waiver	12
17. Partial invalidity	12
18. Notices	12
19. Dispute resolution	13
20. Privacy Statement	13
21. Service Level Agreement	13

PowerStats Limited

Welcome to PowerStats Limited's service, an online benchmarking platform that generates competitive insight in real time.

The Agreement (as defined in Clause 1) sets out PowerStats's, and your, rights and obligations in relation to the PowerStats service. Please read the Agreement carefully before registering to use the PowerStats service. By using the PowerStats service you agree to follow and be bound by the Agreement. If you do not agree to the Agreement, you must not use the PowerStats service.

1. Definitions

To help you understand this Agreement, here is a list of commonly used expressions and their meanings.

"Access Key" means a unique set of credentials (user name and password) that allows access to the Service;

"Agency" means a business entity that signs a Service Contract with us, and that supplies Confidential Business Data or Personal Information for their clients or persons related to those entities, directly to us, rather than our Service collecting Confidential Business Data or Personal Information directly from entities or persons related to those entities;

"Agreement" has the meaning set out in Clause 2.2;

"Anonymous Segregated Business Data" means non-confidential, anonymised form of business data that:

- (a) is new information that did not exist prior to a single or multiples sets of Confidential Business Data being being anonymised and processed by the Service; and
- (b) is not generally available from any source other than the Service; and
- (c) is generated through the manual use of the Service, or automatically by the Service; and
- (d) cannot be processed or manipulated to reveal Confidential Business Data; and
- (e) cannot be used to identify any specific organisation or its activities; and
- (f) in cases where the Service Contract is between us and an Agency, cannot be identified with that Agency or any of its clients.

"Anonymous Aggregated Business Data" means a non-confidential, aggregated form of business data that:

- (a) is new information that did not exist prior to multiple sets of Confidential Business Data being aggregated and processed by the Service; and
- (b) is not generally available from any source other than the Service or External Data; and
- (c) is generated through the manual use of the Service, or automatically by the Service; and
- (d) cannot be processed or manipulated to reveal Confidential Business Data; and
- (e) cannot be used to identify any specific organisation or its activities; and
- (f) in cases where the Service Contract is between us and an Agency, cannot be identified with that Agency or any of its clients.

"Anonymous Personal Information" means non-confidential aggregated Personal Information that:

- (a) is new information generated through the use of the Service by multiple End Users; and

(b) cannot be processed or manipulated to reveal confidential Personal Information; and

(c) cannot be identified with any specific End User or their business activities.

“Business Day” means a day that is not a Saturday, a Sunday or a statutory holiday in Auckland, New Zealand;

“Business Hours” means the hours between 8:00am and 6:00pm of any Business Day, in New Zealand time;

“Clause” refers to a Clause in these General Terms of Use, unless otherwise specified;

“Confidential Business Data” means any quantifiable and segregated data that is the subject of the benchmarking activity of the Service being used by you, that is collected on a regular basis by the Service from you by electronic or any other means, is directly related to business activities of your organisation or your clients’ organisations, and depending on the Service being used by you, Confidential Business Data can consist of:

(a) transactional data (i.e. measured in units); and/or

(b) financial data (i.e. measured in a currency or multiple currencies); and/or

(c) performance data (i.e. measured as a percentage); and/or

(c) other types of data.

“Confidential Information” means any proprietary information or know-how disclosed by one party to the other party, but does not include any information which is:

(a) on receipt, in the public domain or which subsequently enters the public domain without any breach of this Agreement;

(b) on receipt, already known from a third party source by the party receiving it and that third party source is not under any obligation of confidentiality in respect of that information;

(c) at any time after the date of receipt, received in good faith from a third party;

(d) required by law to be disclosed;

“Documentation” means all instruction manuals, user guides, videos and other information relating to the Service made available with the Service, including information contained in our on-line support portal;

“End User” means an individual who has a current Licence to access the Service, and who has been provided with an Access Key to the Service;

“External Data” means data (excluding Confidential Business Data) whether owned by you, us or a third party, that is entered into the Service by you, or provided as part of the Service by us or via a live subscription to a data feed provided by a third party. External Data is generally displayed by the Service alongside Confidential Business Data, Anonymous Segregated Business Data and/or Anonymous Aggregated Business Data for comparison purposes;

“Force Majeure Event” means any war, riot, strike, natural or man-made disaster, failure of a utility service, telecommunications network or service of a third party provider, or other circumstance of a similar nature beyond the reasonable control of the party claiming to be excused from performance of its obligations;

“General Terms of Use” means this document;

“Intellectual Property” means copyright, patents, designs, service marks, trade marks, trade names, goodwill rights, trade secrets, confidential information, licences, inventions, moral rights, know-how and any other intellectual proprietary right or form of intellectual property and includes any developments to that intellectual property by either party;

“Licence” means the licence granted to you under Clause 3;

“Licence Fees” means the amounts payable by the Service Contract Holder that enters into the Service Contract with us, for your right to access the Service, during the Term, as specified in the applicable Service Contract;

“**Other Services**” means any services other than the Software specified in the Service Contract;

“**Personal Information**” means any information that has been added into the Service by us, you or any other End User, and relates to or identifies you or another individual, including, without limitation: (i) name; (ii) physical address (iii) email address or other online contact information that reveals the email address; (iv) telephone number; (v) data collected using a cookie, web beacon, pixel tracker, web bug or similar tracking device; (vi) role and / or company and (vii) any information that is combined with any of the foregoing, and any information derived therefrom, in any media, but specifically excluding any Confidential Business Data and/or External Data;

“**Privacy Policy**” means our Privacy Policy as published on our website and updated by us from time to time;

“**Service**” means the functionality and services provided to you by the Software as defined in the Service Contract, together with any Other Services;

“**Service Contract**” means a separate document signed by the Service Contract Holder and us setting out the key terms of the Agreement including but not limited to the Service to be provided by us, Software specification, the Licence Fees to be paid, initial term and renewal terms;

“**Service Contract Holder**” means the entity that enters into the Service Contract with us;

“**Software**” means the object code version of the software application (with your specification defined in the Service Contract) that includes all components, updates and upgrades of the Software made generally available for access by End Users (subject to payment by the Service Contract Holder of all Licence Fees) but excludes the source code;

“**Specific Terms of Use**” means the specific terms and conditions (if any) that modify, and/or are in addition to, the terms and conditions set out in these General Terms of Use, as set out in the Service Contract;

“**Term**” means the period during which you have a Licence to access the Service, as defined in the Service Contract and subject always to earlier termination in accordance with this Agreement;

“**we**”, “**us**” or “**our**” means PowerStats Limited;

“**you**” or “**your**” means you, the End User or the Service Contract Holder.

2. Terms that apply to you

2.1 If you are:

(a) an End User but not a Service Contract Holder, then these General Terms of Use and the Specific Terms of Use apply to you and you agree to be bound by them; or

(b) a Service Contract Holder and you will:

(i) be using the Service (i.e. you are an End User) then these General Terms of Use, the Specific Terms of Use, and the Service Contract apply to you and you agree to be bound by them;

(ii) not be using the Service (i.e. you are not an End User) then clauses 1, 2, 5, 6 and 8 to 20 of these General Terms of Use (“**Applicable Terms**”), and the Service Contract, will apply to you (except to the extent the Applicable Terms specifically relate to the use of the Service) and you agree to be bound by them.

2.2 The General Terms of Use, the Specific Terms of Use and/or the Service Contract that are applicable to you in accordance with Clause 2.1 will be referred to as the “**Agreement**”.

3. Term and Software Licence

3.1 The length of the initial term and any subsequent renewal term during which you can access the Service, together with the details of the renewal mechanism, are defined in the Service Contract and the Service Contract Holder will inform you of these details, as well as any other details in the Service Contract relevant to your use of the Service. If you are not informed of these details you must request the Service Contract Holder to provide these details to you before using the Service.

3.2 In consideration for us receiving payment of Licence Fees from the Service Contract Holder, you are granted by us a non-exclusive, non-transferable Licence to use the Service during a current Term.

3.3 You must use the Service for your own business purposes only and must not, nor may you permit any other person to:

(a) sell, rent, lease, lend, sublicense, assign or time share the Service or act as a service bureau or application service provider that allows third party access to the Service or resell or offer for resale, reproduce, modify, copy, reverse assemble, reverse compile or enhance any part of the Service;

(b) permit or enable any third party to access the Service, without our specific prior written consent;

(c) alter, remove or tamper with any trade marks, any patent or copyright notices, or any confidentiality, proprietary or trade secret legend or notice, or any numbers, or other means of identification used on or in relation to the Service;

(d) do any act, which would or might invalidate or be inconsistent with our Intellectual Property rights.

3.4 Our Service is for use by business entities only, and cannot be used by non-business consumers.

3.5 You acknowledge that we regularly upgrade and update the Service and that the Service is continually evolving. Some of these changes will occur automatically, while others may require you to upgrade or update your software and/or devices, in order to make efficient use of the Service. We will provide you with reasonable notice of any such changes.

4. Data and Information

4.1 We do not own any Confidential Business Data or Personal Information. Additionally:

(a) If you input your own Confidential Business Data or any Personal Information into our Service, your Confidential Business Data and Personal Information remain your sole property at all times; and:

(b) If you are a Service Contract Holder and your organisation is an Agency, and we hold Confidential Business Data and Personal Information of your clients or persons related to those entities as a part of our Service to you and/or your clients, it is your responsibility to establish ownership of this Confidential Business Data and Personal Information, ensuring that you have your clients' (or those persons related to those entities) consent for their Confidential Business Data and Personal Information to be utilised through our Service.

4.2 We are not authorized to use or access your Confidential Business Data and/or Personal Information other than as allowed by Clauses 4.3 and 4.4 of these General Terms of Use, and otherwise to the extent required so that we can provide the Service to you, and we undertake to keep all Confidential Business Data and/or Personal Information in strict confidence. You grant us, or will procure the relevant party to grant us, a licence to use or access the Confidential Business Data and/or Personal Information in the manner contemplated under this Agreement.

4.3 We may access Confidential Business Data and/or Personal Information to provide the Service that we have agreed to provide you under this Agreement, to help us improve our Service, to generate, process and distribute Anonymous Segregated Business Data and Anonymous Aggregated Business Data, and/or to prevent or address technical problems.

4.4 We must disclose Personal Information and/or Confidential Business Data, and on request supply this Personal Information and/or Confidential Business Data within a reasonable timeframe, if:

(a) such disclosure is required by law; or

(b) such disclosure is requested in writing by the Service Contract Holder, and where the Service Contract Holder has the approval of the owners of the Personal Information and/or Confidential Business Data, and accepts the responsibility for such disclosure; or

(c) such disclosure is requested in writing by the End User (or group of End Users), but only where the Personal Information and/or Confidential Business Data being requested to be disclosed belongs to the End User (or group of End Users) making such request; or

(d) such disclosure is requested in writing by the Service Contract Holder and/or the End Users as a part of the normal day-to-day Service to be provided by the Software, as defined in the Service Contract.

4.5 Access to External Data within the Service is provided subject to the following conditions:

(a) You acknowledge and agree that any External Data you enter into the Service may be used by us and/or our other customers who we provide the same or similar services to on a perpetual and an irrevocable basis;

(b) If you enter External Data into the Service then you warrant that you own the External Data or otherwise have all rights and licences from the applicable owner of that External Data for us and for you to use that External Data as part of the Service. You will grant, or will procure the applicable owner to grant, to us a non-exclusive, royalty-free, perpetual and irrevocable licence to use the External Data for the purpose of providing the Service to you and the same or similar services to our other customers;

(c) The parties acknowledge and agree that the owner of the External Data remains the owner of that External Data once that External Data is entered into the Service.

4.6 We reserve all rights related to, and own, all Anonymous Personal Information, Anonymous Segregated Business Data and Anonymous Aggregated Business Data that is generated by the Service, including all reports or other output containing Anonymous Personal Information, Anonymous Segregated Business Data and Anonymous Aggregated Business Data that can be generated through the use of the Service.

4.7 We grant the Service Contract Holder and all End Users limited rights to the use of Anonymous Segregated Business Data, Anonymous Aggregated Business Data and/or External Data provided by us with the following conditions:

(a) the type of Anonymous Segregated Business Data, Anonymous Aggregated Business Data and/or External Data that can be accessed via the Service by the Service Contract Holder and/or End Users is defined in the Software Specification part of the Service Contract; and

(b) the Service Contract Holder and/or End Users undertake not to supply or sell, or facilitate the supply or sale of, any such Anonymous Segregated Business Data, Anonymous Aggregated Business Data and/or External Data to an unrelated entity.

4.8 We shall maintain appropriate administrative, physical and technical safeguards for protection of the security, confidentiality and integrity of the Confidential Business Data, Personal Information, Anonymous Segregated Business Data, Anonymous Aggregated Business Data, Anonymous Personal Information and External Data and, where applicable, comply with the New Zealand Privacy Act 1993.

4.9 You shall:

- (a) be responsible for the accuracy, quality and legality of the Confidential Business Data and Personal Information and the means by which you acquired and use that Confidential Business Data and Personal Information, including by use of the Service;
- (b) prevent unauthorised access to or use of the Service and notify us promptly of any such unauthorised use or access;
- (c) use Confidential Business Data, Anonymous Segregated Business Data, Anonymous Aggregated Business Data, External Data and the Service only in accordance with this Agreement and applicable laws and government regulations (including those that apply to your business entity in its country of incorporation). In particular, in using the Service, you will be responsible for complying (and shall indemnify us in respect of any failure by you to comply) with all relevant competition, privacy and anti-spam laws and will only send emails to entities who, in the normal course of business, would expect email of the type and content being sent by you, from you;
- (d) not process, manipulate or reverse engineer Anonymous Segregated Business Data, Anonymous Aggregated Business Data or Anonymous Personal Information to reveal, or attempt to reveal, confidential data or identify a particular organisation or natural person;
- (e) not use the Service to store or transmit inaccurate, misleading, deceptive, infringing, obscene, indecent, libellous, defamatory, or otherwise unlawful or tortuous material.

4.10 The Service is accessible in many countries. As such, you understand that Software used in the provision of the Service, Confidential Business Data, Anonymous Segregated Business Data, Anonymous Aggregated Business Data, Personal Information, Anonymous Personal Information and/or External Data may be stored on a server/s not located in the country of residence of us, the Service Contract Holder and/or the End User.

4.11 We do not systematically and/or independently verify the Confidential Business Data, Personal Information and/or External Data entered into the Service by the End Users, or by us, or supplied to us by Agencies. As such, you acknowledge that any report generated by the Service may not be accurate, and under no circumstances do we guarantee the accuracy of any reports generated by the Service, or accept liability for any form of damage arising out of the Service Contract Holder's and/or End User's use of reports generated through the use of the Service.

5. Protection of Intellectual Property

5.1 Nothing in this Agreement operates to assign ownership of the Intellectual Property in the Confidential Business Data, Personal Information, and/or External Data provided by you, to us. You must maintain copies of all Confidential Business Data, Personal Information and/or External Data provided by you, and we will not be liable for any loss, cost or expense suffered by you or any other party as a result of the Confidential Business Data, Personal Information and/or External Data provided by you being lost by us or through the Service.

5.2 You acknowledge that we (or our licensor) own all Intellectual Property rights in the Service, Software, Documentation, Anonymous Segregated Business Data, Anonymous Aggregated Business Data, Anonymous Personal Information and External Data provided by us, and that nothing in this Agreement assigns ownership of the Intellectual Property in the Service, Software, Documentation, Anonymous Segregated Business Data, Anonymous Aggregated Business Data, Anonymous Personal Information and External Data provided by us to you. You acknowledge and agree that we own all enhancements, modifications, improvements and other developments to the Service, Software and/or Documentation that you have requested, recommended or suggested through other feedback provided by you to us.

5.3 All information relating to the Service, Software, Documentation, Anonymous Segregated Business Data, Anonymous Aggregated Business Data, Anonymous Personal Information and External Data provided by us will be treated by you as confidential unless it is in the public domain, otherwise than by a breach of this Agreement.

6. Confidentiality and publicity

6.1 The parties recognise and acknowledge the confidential nature of the Confidential Information.

6.2 Neither party may use or disclose any Confidential Information other than:

- (a) to its directors or employees to the extent necessary in the performance of this Agreement;
- (b) with the express prior written consent of the other party;
- (c) to its professional advisers;
- (d) if compelled to in accordance with Clause 6.3.

6.3 Either party may disclose Confidential Information if that party (Disclosing Party) is compelled to do so by law, provided that the Disclosing Party gives the other party prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at the other party's cost, if the Disclosing Party wishes to contest the disclosure. The non-disclosing party will reimburse the Disclosing Party for its reasonable cost of compiling and providing secure access to such Confidential Information.

6.4 You undertake:

- (a) not to copy any Documentation, except to the extent necessary for your own back-up purposes;
- (b) to maintain the confidentiality of your Access Key and to the best of your ability not allow any unauthorised person to use your Access Key;
- (c) not to transfer or otherwise deal in the Documentation or your rights under this Agreement;
- (d) to maintain all copyright notices on the Documentation;
- (e) to notify us immediately if you become aware that any person may have unauthorised knowledge, access to or use of the Service, the Software, the Documentation, your Access Key, Anonymous Segregated Business Data, Anonymous Aggregated Business Data, Anonymous Personal Information, Confidential Business Data, Personal Information and/or External Data;
- (f) to notify us immediately if you consider that any Anonymous Segregated Business Data, Anonymous Aggregated Business Data or Anonymous Personal Information has been processed, manipulated or reverse engineered to reveal, or attempt to reveal, confidential data or identify a particular organisation or natural person, or if there is a risk of this occurring based on the nature of the relevant data.

6.5 You agree to:

- (a) serve as a "reference site" and allow us to refer to you as a user of the Service in our promotional materials and/or discussions with prospective customers or other stakeholders in our business; and/or
- (b) be included in any case studies regarding the Service,

provided that we do not disclose any Confidential Information other than the fact that the parties have entered into a commercial relationship for the use of the Service. Where we refer potential customers to you as a reference for the Service, you will respond reasonably to all such reference contacts. You agree that we may use your name, trade marks, branding, logos and other non-Confidential Information about your business for the purposes set out in this clause 6.5

6.6 The parties' obligations under this Clause will survive termination of this Agreement.

7. Warranties

7.1 Except as expressly set out in this Agreement, we exclude, to the maximum extent permitted by law, all warranties whether express or implied by statute, common law or otherwise.

7.2 We warrant that the Service will perform substantially in accordance with the Documentation and the key functions as defined in the Service Contract, but you acknowledge that the Service is of a complicated and technical nature and may have inherent defects. We will provide prompt and commercially reasonable programming and remedial services to correct documented code errors caused by a defect in the Service. You acknowledge that we accept no liability, and are not in any way responsible for any interference in your access to the Service caused by these defects. Nothing in this Clause waives any of your rights under Clause 9.3.

7.3 We (or our licensor) warrant that we own all right, title and interest in the Software used in the Service (including all Intellectual Property rights), and have the right and power to grant the licences granted to the Service Contract Holder and you and that, to the best of our knowledge, the use of the Service in accordance with this Agreement will not constitute an infringement of the Intellectual Property rights of a third party.

7.4 You acknowledge that:

(a) you are solely responsible for acquiring, servicing, maintaining and updating all equipment, computers, software, interfaces and communication services required to access and use the Service;

(b) the operation and availability of the system used for accessing the Service, including public telephone services, computer networks, telecommunications links, and the Internet, can be unpredictable and may from time to time interfere with or prevent access to the Service, or prevent the Software from carrying out automated tasks; and

(c) we are not in any way responsible for any interference with or prevention of your access and/or use of the Service caused by failures in systems, networks or hardware outside of our control.

7.5 You are responsible for protecting your computer against interference, spyware, malware or viruses (together, "Malicious Code") that may be encountered for items downloaded or emailed from our Service and you must ensure that any Confidential Business Data, Personal Information, External Data provided by you, or any other items uploaded or otherwise provided by you to the Service does not contain any Malicious Code. We recommend you install a spyware, malware and virus protection program on your computer and keep it up to date.

8. Limitation of liability

8.1 You accept full responsibility for the accuracy of the Confidential Business Data, Personal Information and/or External Data provided by you, and you agree to indemnify us against any claims or actions against us for loss however suffered as a result of any inaccurate Confidential Business Data, Personal Information, and/or External Data provided by you. You further agree to use the Service in accordance with this Agreement and agree to indemnify us against any claims or actions arising from your use or misuse of the Service or any breach by you of your confidentiality obligations, or an infringement by you of the Intellectual Property in the Service (including the Software and Confidential Business Data).

8.2 If we are liable to you for loss, damage or any other liability arising out of or in connection with this Agreement, then our maximum aggregate liability to you in your capacity as: (a) an End User that is not a Service Contract Holder for all claims will not exceed the Licence Fees paid by the Service Contract Holder to us in respect of your use of the Service for the three months immediately preceding the event giving rise to the claim under this Agreement; or (b) a Service Contract Holder (whether or not you are also an End User) for all claims will not exceed the Licence Fees paid by you to us for the three months immediately preceding the event giving rise to the claim under this Agreement.

8.3 Except for a breach by either party of its confidentiality obligations and an infringement by you of the Intellectual Property rights in the Service, neither party will have any liability or responsibility to the other party for loss of business, loss of revenue or profits, data loss, and any indirect or consequential loss whether arising in contract, tort (including negligence), equity or otherwise.

9. Termination

9.1 Either party may terminate this Agreement immediately by notice in writing:

(a) upon the other party committing any material breach of this Agreement that is incapable of remedy;

(b) upon the other party failing to remedy any breach of this Agreement that is capable of remedy within 30 Business Days of notice of that breach having been given by the non-defaulting party to the other party;

(c) upon the commencement of liquidation or the insolvency of the other party (except for the purposes of solvent amalgamation or reconstruction) or upon the appointment of a receiver, statutory manager or trustee of the other party's property or upon an assignment for the benefit of the other party's creditors or upon execution being levied against the other party or upon the other party compounding with its creditors or being unable to pay its debts in the ordinary course of business or the other party ceasing to carry on its business activities. Where any of the events in this Clause 9.1(c) occur to us, and you have a right to terminate this Agreement, you will not terminate this Agreement if we are able to appoint a Related Company (as defined in section 2(3) of the Companies Act) or other third party to carry out our obligations otherwise owing to you under this Agreement and we may novate this Agreement to such Related Company or third party.

9.2 We may terminate this Agreement by notice in writing if the Service Contract terminates for any reason.

9.3 Additionally, should you find that the Service has, at any time, failed to perform any of its key functions as specified in the Service Contract, the Service Contract Holder must notify us of such failure as soon as possible. Unless we have remedied this failure ahead of such failure notification, or remedy it immediately on receipt of the failure notification, we will review this failure notification within 3 Business Days and confirm whether or not we are responsible for this failure (our responsibilities in regards to Service availability are as defined in this Agreement). Should we confirm that we are responsible for this failure, and we are subsequently unable to remedy this failure within 30 Business Days of confirming our responsibility, the Service Contract Holder may terminate this Agreement immediately by notice in writing, but only until such time that we have returned the Service to a state where the Service can substantially provide all of its key functions, and we have notified the Service Contract Holder of this in writing.

10. Consequences of termination

On the expiry of the Term, or termination of this Agreement by either party:

(a) your licence to access the Service will immediately cease and you must cease accessing the Service, and you must also return to us, or at our election destroy, all copies of the Documentation in whatever form possessed by you;

(b) we will make all of your Confidential Business Data and Personal Information available to you for 10 Business Days (or longer at our discretion) after termination so that you can make a backup of, or otherwise retrieve, that Confidential Business Data and Personal Information;

(c) the Service Contract Holder will, promptly and no later than the due date, pay us all amounts due and all amounts for Service undertaken up until the date of termination;

(d) where termination is a result of a breach by us or other event not being a breach of this Agreement by you, we will refund to the Service Contract Holder any portion of the Licence Fees pre-paid by the Service Contract Holder relating to period after the date of termination; and

(e) all provisions of this Agreement, which by their nature survive termination, will survive.

11. Governing Law and Jurisdiction

This Agreement is subject to the laws of New Zealand and a party will only bring any claim or other action against the other party arising out of or in connection with this Agreement in New Zealand.

12. Force Majeure

12.1 Either party may suspend its obligations to perform this Agreement if it is unable to perform as a direct result of a Force Majeure Event. Any such suspension of performance must be limited to the period during which the Force Majeure Event continues.

12.2 Where a party's obligations have been suspended pursuant to Clause 12.1 for a period of 30 Business Days or more, the other party may immediately terminate this Agreement by giving notice in writing to the other party.

13. Non-Assignment

You are not permitted to assign your rights or transfer your obligations under this Agreement without our prior written consent. We may sub-contract any of our obligations under this Agreement without obtaining your prior written consent. If we use a sub-contractor, we will not be relieved of any of our liabilities or obligations under this Agreement.

14. Entire agreement

The Agreement, as defined in Clause 2.2, constitutes the complete and exclusive statement of the agreement between the parties, superseding all proposals or prior agreements, oral or written, and all other communications between the parties relating to the subject matter of this Agreement.

15. Amendments

15.1 We may amend these General Terms of Use and/or the Specific Terms of Use (where those amendments to the Specific Terms of Use have been agreed between the Service Contract Holder and us in accordance with Clause 15.2), and such amendments will be effective once communicated to you inside the Settings tab of your PowerStats user account or otherwise notified to you in writing.

15.2 If you are a Service Contract Holder, any amendment to the Service Contract will only be effective if made in writing and signed by you and us, or otherwise agreed to by you and us via email.

16. Waiver

No exercise or failure to exercise or delay in exercising any right or remedy by a party will constitute a waiver by that party of that or any other right or remedy available to it. No waiver of any breach of this Agreement will be deemed to be a waiver of any other or any subsequent breach.

17. Partial invalidity

If any provision of this Agreement or its application to any party or circumstance is or becomes invalid or unenforceable to any extent, the remainder of this Agreement and its application will not be affected and will remain enforceable to the greatest extent permitted by law.

18. Notices

18.1 Any notice or other communication in connection with this Agreement will be: (i) in writing (including by email or via a pop-up message served by us to you inside the Service); (ii) marked for the attention of the relevant party; and (iii) left at the address or sent by post, served as a pop-up message inside the Service or sent by email to the address or email address of the relevant party or any replacement address or email address notified by that party.

18.2 Notices or other communications are deemed received: (a) if delivered by hand, on delivery; (b) if delivered by post: (i) on the third day following posting if sent and received within the respective territory; and (ii) on the tenth day following posting to or from an overseas destination; (c) if delivered by email, on receipt of confirmation of the email from the recipient; (d) if delivered by means of a pop-up message inside the Service, on your closing of the pop-up message.

19. Dispute resolution

19.1 Where any dispute arises between the parties concerning this Agreement or the circumstances, representations, or conduct giving rise to the Agreement, neither party may commence any court or arbitration proceedings relating to the dispute unless that party has complied with the procedures set out in this Clause 19.

19.2 The party initiating the dispute (“the first party”) must provide written notice of the dispute to the other party (“the other party”) and nominate in that notice the first party’s representative for the negotiations. The other party must within 5 Business Days of receipt of the notice, give written notice to the first party naming its representative for the negotiations. Each representative nominated will have authority to settle or resolve the dispute.

19.3 If the parties are unable to resolve the dispute by discussion and negotiation within 30 Business Days of receipt of the written notice from the first party (or within such longer period as the parties may agree in writing) either party may, by giving written notice to the other, require the dispute to be determined by a single arbitrator. The arbitrator will be appointed by the parties or, failing agreement within 5 Business Days of the notice requiring arbitration, by the Arbitrators’ and Mediators’ Institute of New Zealand on the application of either party. The arbitration will be conducted as soon as possible and in accordance with the Arbitration Act 1996 (New Zealand).

20. Privacy Statement

20.1 We will process all Personal Information in accordance with our Privacy Policy.

20.2 You agree to receive emails from us that we send you from time to time. While you are able to unsubscribe from any communication not related to your use of the Service, we reserve the right to contact you at any time so we can provide a better service to you, while also enabling us to meet our obligations under this Agreement.

21. Service Level Agreement

21.1 Support costs: any support that is required due to our Service failing to provide the functionality as defined in the Agreement will be provided free of charge.

Any other support may, at our full discretion, be treated as “Product Training” and charged to the Service Contract Holder in accordance with the Service Contract.

21.2 Service Contract Holder’s responsibilities include:

(a) payment for all support provided to you and which we are eligible to charge the Service Contract Holder in accordance with Clause 21.1;

(b) reasonable availability of customer representative(s) whenever support is requested by the Service Contract Holder.

21.3 Our responsibilities include:

(a) using our reasonable commercial endeavours to meet response times associated with support requests, as defined in Clause 21.5,

(b) appropriate notification to you for all scheduled maintenance and upcoming changes.

21.4 Support availability:

- (a) telephone support will be provided during Business Hours.
- (b) we will use reasonable commercial endeavours to answer / action phone calls outside Business Hours and there will be a backup answer phone service available.
- (c) we will use reasonable commercial endeavours to action support requests received by email.
- (d) remote assistance will be available during Business Hours and will require prior scheduling.

21.5 Response times: We will use reasonable commercial endeavours to respond to support requests submitted by you within the following response times based on the priority level that we assign to the support request:

- (a) high priority: 1 Business Day
- (b) medium priority: 2 Business Days
- (c) low priority: 5 Business Days

If we are able to, as part of our response to your support request, we may also specify the estimated resolution time to resolve the support request.

21.6 Service Level Commitment: we will use reasonable commercial endeavours to make the Software available through the Service with at least 99.9% availability during any calendar month. The parties acknowledge that the following events are excluded from the calculation of the availability of the Service (and we will not be liable for such events):

- (a) downtime attributable to your telecommunication or other systems;
- (b) any scheduled maintenance;
- (c) any delay resulting from you not being able to provide assistance or information to us where such assistance or information is necessary for the restoration of the Service;
- (d) simultaneous use of the Service by you and/or other licensees at any time, which significantly exceeds normal Service usage during peak times.