

**TERMS OF USE AGREEMENT  
FOR THE EVALUATION OF HIGHWINDS TECHNOLOGY ACCESS PROGRAM**

**Terms last updated [February 1, 2012]**

This Terms of Use Agreement (the “Agreement”) is a legally binding agreement between you or the entity for which you are accepting this Agreement (the “Company”) and Highwinds Network Group, Inc. (“Highwinds”). This Agreement governs Company’s use of certain Highwinds’ services and products in a test environment under Highwinds Technology Access Program (“TAP”). Company agrees to read this Agreement carefully before completing Company’s application for its participation in TAP and accepting this Agreement. BY CLICKING ON THE “I AGREE” BUTTON AND PARTICIPATING IN TAP, COMPANY ACKNOWLEDGES THAT IT HAS READ THIS AGREEMENT, THAT COMPANY UNDERSTANDS THE AGREEMENT, AND THAT COMPANY AGREES TO BE BOUND BY ITS TERMS. If Company does not agree to the terms and conditions of this Agreement: (i) do not click the “I agree” button, and (ii) Company cannot access the programs or services within TAP (collectively, the “Services”) or otherwise participate in TAP. For Company’s convenience and records, Highwinds suggests that Company print and keep a copy of this Agreement.

Highwinds reserves the right to change this Agreement at any time, so we encourage Company to review this web page periodically. The changes will be effective immediately when posted. Company’s continued participation in TAP following the posting of any changes to this Agreement shall constitute Company’s acceptance of the changed Agreement.

1. Defined Terms. In addition to other terms defined elsewhere in this Agreement, the following terms shall have the meanings set opposite such terms as follows:

“AUP” shall mean Highwinds’ Acceptable Use Policy found at [www.highwinds.com/legal](http://www.highwinds.com/legal).

“Term” shall mean from Highwinds’ notice to Company of Highwinds’ acceptance of Company in TAP until the date that Company or Highwinds provides notice to the other of its desire to terminate this Agreement, such notice to be effective upon delivery.

“Software” means the object code form of all software and related documentation owned by Highwinds or its suppliers that may be furnished to or used by Company under this Agreement for use with the Services.

2. Enrollment in the Program

(a) The terms of Sections 3-8 of the Agreement shall only become effective upon Highwinds’ notice to Company of Highwinds’ acceptance of Company to be included in TAP pursuant to Section 2(b).

(b) To begin the enrollment process, Company must submit a completed application available on Highwinds’ website. Highwinds will evaluate Company’s application and will notify

Company of Company's acceptance or rejection of such application. Highwinds may reject Company's application for any reason or no reason at all.

(c) If Highwinds rejects Company's application, this Agreement shall automatically terminate upon the date that Highwinds sends notification of its rejection of the application to Company. Upon such termination, Highwinds shall owe no duties or obligations to Company whatsoever.

### 3. Limited Use and Support of the Services.

(a) Company's use of the Services shall be limited solely to evaluating the Services during the Term and as set forth herein and in the AUP. Highwinds may terminate this Agreement and Company's access to and use of the Services at any time, for any reason and without prior notice to Company. Company may use the Services in production, for its business use and to provide services to the Company's customers or end users; PROVIDED, HOWEVER, THAT ANY SUCH USE OF THE SERVICES BY COMPANY SHALL BE AT ITS OWN RISK, AND HIGHWINDS SHALL HAVE NO LIABILITY TO COMPANY WITH RESPECT THERETO.

(b) In connection with Company's limited use of the Services hereunder, Highwinds will provide Company with access to Highwinds' technical support team with respect to the Services. To report any service performance issue with the Services, Customer may email [support@highwinds.com](mailto:support@highwinds.com) to generate a ticket for Highwinds' NOC team. Highwinds will use commercially reasonable efforts to respond to any such service performance issue and to resolve such issue within a reasonable period of time after receiving notice of the issue as described in this paragraph; PROVIDED, HOWEVER, THAT COMPANY'S SOLE REMEDY, AND HIGHWINDS ENTIRE LIABILITY FOR HIGHWINDS' BREACH OF THE FOREGOING OR FAILURE OR INABILITY TO CORRECT OR RESOLVE ANY SERVICE PERFORMANCE ISSUE SHALL BE TO STOP USING THE SERVICES AND TERMINATE THIS AGREEMENT. Company agrees and acknowledges that this limitation is reasonable given the beta-use, trial nature of the Services included in TAP.

### 4. Limited License.

(a) Subject to the terms and conditions of this Agreement, Highwinds hereby grants to Company a limited, nonexclusive, nontransferable, revocable license during the term of this Agreement to use the Software solely to support Company's limited use of the Services as described in Section 3.

(b) Highwinds and its suppliers expressly retain, and Company hereby waives any claim that it may have had or has to, title and ownership in and to all worldwide intellectual property rights in and to the Services, the Software, any documentation related to or provided with the Software and Services and any modifications, adaptations, derivative works, and enhancements made thereto. Except as expressly set forth in this Agreement, no express or implied license, moral rights, or other rights of any kind are granted to Company regarding the Software, Services or the Highwinds Technology. Company shall not, without the prior written consent of Highwinds: (i) reverse engineer, disassemble, decompile, recompile, update or modify the Software, or any part

thereof; (ii) create derivative works based on the Software; (iii) reproduce or make copies of the Software or any portion thereof; (iv) sublicense, provide access to, distribute or otherwise transfer the Software to any other person or entity; (v) remove any identification or notices of any proprietary or copyright restrictions from any Software, related documentation or support or training material; or (vi) compile or use the Software or any part thereof for the purpose of any activities that violate any laws or regulations, including, without limitation, any anti-spamming laws and regulations. Company agrees that Highwinds may crawl or otherwise monitor the external interfaces of the Software for the purpose of verifying Company's compliance with this Agreement. Company may not attempt to block or otherwise interfere with such crawling or monitoring.

(c) Unless otherwise agreed to in writing by Highwinds, Company may not use the name, logo, trademarks, service marks or other proprietary indicia of Highwinds (the "Marks") without Highwinds' prior written approval, including, without limitation, using the Marks (or any of them) to identify Highwinds as the supplier or source of the Services provided to Company hereunder.

5. **Company Feedback.** In connection with its evaluation of the Services licensed hereunder, Company agrees to provide Highwinds with reports from time to time at mutually agreeable times and in a format requested by Highwinds which details (i) the results of Company's use and evaluation of the Services, including any defects found in the Services and information reasonably necessary for Highwinds to evaluate such defects, and, if applicable, (ii) recommendations for changes or modifications to the Services (all of the foregoing, the "Feedback"). Both parties acknowledge that any and all such Feedback as well as any other communications between the parties pursuant to this Section shall be treated as Highwinds' Confidential Information as described in and subject to the restrictions set forth in Section 6 of this Agreement. All Feedback shall be owned by Highwinds and Company hereby assigns and agrees to assign any and all rights, title and interest in and to the Feedback to Highwinds. Without limiting Highwinds' rights to use the Feedback, Company expressly understands that Highwinds' may use Feedback in its sales and marketing efforts. Company further agrees that as the Feedback is Highwinds' Confidential Information, it shall not make any such Feedback, positive or negative, publically available in any form or fashion without the prior written consent of Highwinds. Company further agrees not to disparage TAP or the Services in any public forum or to any third party.

6. **Confidentiality.**

(a) Company acknowledges that it will have access to certain confidential information of Highwinds concerning the Highwinds' business, plans, vendors, employees, customers, technology, products, and other information held in confidence by Highwinds (collectively, "Confidential Information"). Confidential Information will include all information about the Services including without limitation, the features of such Services (including, screenshots of aspects of the Services, features included in the Services and functionality of the Services) and all other information that, under the circumstances of its disclosure, should be considered confidential. Company agrees that it will not use in any way, for its own account or the account of any third party, except as expressly permitted by, or to the limited extent required to achieve the purposes of, this Agreement, nor disclose to any third party (except as required by law or to such party's employees, attorneys, accountants and other advisors as reasonably necessary), any Confidential

Information. Company will protect the confidentiality of the Confidential Information by employing the same measures (but in no event less than reasonable measures) as it takes to protect its own proprietary information. The obligations of this Section shall last during and after the term of this Agreement.

(b) Notwithstanding anything contained to the contrary herein, information will not be deemed Confidential Information if such information: (i) is known to Company prior to receipt from Highwinds directly or indirectly from a source other than one having an obligation of confidentiality to Highwinds; (ii) becomes known (independently of disclosure by the disclosing party) to Company directly or indirectly from a source other than one having an obligation of confidentiality to Highwinds; or (iii) becomes publicly known or otherwise ceases to be secret or confidential, except through Company's breach of this Agreement. Company may disclose Confidential Information pursuant to the requirements of a validly issued subpoena, governmental agency or by operation of law, provided that it gives Highwinds, when practical and permitted, reasonable prior written notice sufficient to permit Highwinds to contest such disclosure.

(c) In the event of a violation or threat of violation by a party, directly or indirectly, of the terms of Section 6, Highwinds will have the right, and in addition to all other remedies available to it at law, in equity or under this Agreement, to affirmative or negative injunctive relief from a court of competent jurisdiction. Company acknowledges that a violation of this section would cause irreparable harm and that all other remedies are inadequate.

7. Warranties. Company warrants and represents that: (a) it has the legal right to enter into this Agreement and perform its obligations hereunder; and (b) the performance of its obligations hereunder or use of the Services will not violate any applicable laws or regulations or the AUP or cause a breach of any agreements with any third parties. COMPANY AGREES AND ACKNOWLEDGES THAT THE SERVICES ARE PROVIDED HEREUNDER EXCLUSIVELY ON AN "AS IS," BETA TESTING BASIS, AND COMPANY'S USE AND PERFORMANCE OF THE SERVICES IS AT COMPANY'S SOLE RISK. HIGHWINDS, ITS AFFILIATES AND SUPPLIERS HEREBY DISCLAIM ANY AND ALL EXPRESS, IMPLIED AND STATUTORY WARRANTIES, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, QUALITY, PERFORMANCE, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, TITLE, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE. HIGHWINDS DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED, ERROR-FREE, ACCESSIBLE, MAINTAINED OR COMPLETELY SECURE. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, COMPANY ALSO ACKNOWLEDGES THAT, WITHOUT LIABILITY TO HIGHWINDS: (I) HIGHWINDS MAY TERMINATE THE SERVICES IMMEDIATELY AND WITHOUT NOTICE; (II) MAY CHANGE ALL OR SOME OF THE FEATURES OF THE SERVICE, INCLUDING API'S, WITHOUT NOTICE TO COMPANY; (III) COMPANY'S DATA MAY BE CORRUPTED AND/OR LOST; AND (IV) HIGHWINDS MAKES NO WARRANTIES, REPRESENTATIONS OR GUARANTEES AS TO WHETHER COMPANY WILL BE ABLE TO MIGRATE DATA, CUSTOMIZATIONS, APIs, OR OTHER FEATURES OF THE SERVICES IF AND WHEN SOME OR ALL OF THE SERVICES MOVE FROM A TEST TO PRODUCTION MODE ON HIGHWINDS' SYSTEMS (COMPANY'S USE OF SERVICES IN A PRODUCTION MODE FULLY SUPPORTED BY

HIGHWINDS WILL BE SUBJECT TO ONE OR MORE ADDITIONAL WRITTEN AGREEMENT(S)).

8. **Limitation of Liability.** HIGHWINDS IS PROVIDING THE SERVICES FREE OF CHARGE OR AT A NOMINAL COST. IN NO EVENT WILL HIGHWINDS, ITS AFFILIATES OR SUPPLIERS BE LIABLE TO COMPANY FOR ANY CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, OR INDIRECT DAMAGES OR COSTS, INCLUDING WITHOUT LIMITATION, LOSS OF GOODWILL, PROFITS, LOSS OF DATA, DOWNTIME OR PROPERTY DAMAGE ARISING FROM ANY CLAIMS, WHETHER BASED IN WARRANTY, CONTRACT, TORT (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE AND STRICT TORT), OR OTHERWISE IN CONNECTION WITH THE SUPPLY, USE OR PERFORMANCE OF OR INABILITY TO USE THE SERVICES OR IN CONNECTION WITH ANY CLAIM ARISING FROM THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR COSTS. IN NO EVENT WILL HIGHWINDS BE LIABLE FOR ANY DIRECT DAMAGES IN EXCESS OF THE ACTUAL AMOUNTS PAID (IF ANY) BY COMPANY TO HIGHWINDS HEREUNDER AND, AS THIS IS AN AGREEMENT SOLELY TO TEST THE SERVICES, COMPANY UNDERSTANDS THAT THIS AMOUNT MAY BE NOTHING.

9. **Indemnification.** Company agrees to indemnify, defend and hold harmless Highwinds, its affiliates and their respective directors, officers, employees, agents, successors and assigns (each a "Highwinds Indemnatee") from and against any and all costs, liabilities, losses and expenses (including, but not limited to, reasonable attorneys' fees) arising out of any claim, suit, action or proceeding brought by a third party against a Highwinds Indemnatee in respect of (a) Company's use of the Services; or (b) Company's breach of this Agreement.

10. **General.** This Agreement and the AUP (which is expressly made a part of this Agreement, and Company agrees is part of this Agreement by this reference) constitute the complete and exclusive statement of all mutual understandings between the parties with respect to Company's use of the Services made available through TAP and Company's participation in TAP. To the extent that Company and Highwinds have other agreements for the provision of services in place, the terms of this Agreement do not modify, supersede or amend in any way the terms of those other agreements, and the terms of such other agreements applicable to such other services do not apply to the Services provided as part of TAP under this Agreement. The parties and their respective personnel are and shall be independent contractors, and neither party by virtue of this Agreement shall be an agent of the other party. No waiver, amendment or modification of any provision of this Agreement will be effective unless it is in writing, refers to this Agreement, and is signed by authorized representatives of both parties. The deemed unenforceability of any part of this Agreement in any circumstance shall not affect the remainder of the Agreement. The parties agree that the Agreement should not be more strictly construed against one party than the other. All notices shall be in writing and shall be deemed to be delivered when received by a nationally recognized overnight courier or when sent by e-mail. All notices to Highwinds shall be directed to 807 West Morse Blvd., Suite 101, Winter Park, FL 32789, Attn: General Counsel. All notices to Company shall be as set forth in its application to be considered for Highwinds' TAP. This Agreement and all obligations of the Parties hereunder shall be governed by the laws of the State of Florida, without regard to any conflict of laws rules or analyses. Any action or proceeding arising

from or relating to this Agreement must be brought in a state or federal court having jurisdiction in Orange County, Florida, and each party irrevocably submits to the jurisdiction and venue of any such court in any such action or proceeding and agrees to waive any defenses to venue and jurisdiction including forum non conveniens. The United Nations Convention on Contracts for the International Sale of Goods is excluded from application to this Agreement. Time is of the essence hereof. Neither this Agreement, nor Company's obligations or rights hereunder, may be transferred or assigned by Company without Highwinds' prior written consent. Highwinds may freely assign this Agreement without consent of Company. This Agreement shall inure to the benefit of and be binding upon the permitted successors, legal representatives and assigns of the parties hereto. There shall be no third party beneficiaries to this Agreement. The terms of Sections 5-10 shall survive the termination of the Services and/or this Agreement. Highwinds reserves the right to change this Agreement at any time. Company's continued use of the Services or participation in TAP following notification of changes to this Agreement shall constitute Company's acceptance of the changed Agreement. Except as otherwise set forth in this Section 10, any other modifications must be made with the written approval of each party. Company and Highwinds are independent contractors, and nothing in this Agreement will create any partnership, joint venture, agency, franchise, sales representative, or employment relationship between the parties. The headings of Sections of this Agreement are for convenience and are not to be used in interpreting this Agreement. As used in this Agreement, the word "including" means "including but not limited to," and the phrase "such as" means "such as but not limited to."

**Consent to Electronic Commerce Transactions.** By accepting this Agreement, Company hereby authorizes and consents to transacting business electronically both for the purposes of this Agreement and for future business transactions with Highwinds.