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1.1 Documentation means the technical specifications contained in the user and system documentation that Turbonomic generally makes available to its licensees for use with the Software.

1.2 Evaluation Period means 30 days, which may be extended by Turbonomic, in its sole discretion, for additional terms of 30 days each, subject to termination (x) upon execution and delivery by Licensee of an Order Schedule or (y) otherwise in accordance with Section 10.

1.3 Maintenance and Support Services mean those maintenance and support services provided by Turbonomic pursuant to Section 3.1 below.

1.4 Order Schedule means each Turbonomic ordering document signed by the duly authorized representative of Licensee (or referenced by a duly issued purchase order of Licensee) that identifies the Software and Maintenance and Support Services ordered by Licensee from Turbonomic and that incorporates the terms and conditions of this Agreement by reference.

1.5 Software means each software program (solely in object code form) of Turbonomic and its suppliers (where applicable) licensed by Licensee and governed by this Agreement, including any Updates/Upgrades or copies provided hereunder, and the related Documentation.

1.6 Subsidiary means an entity in which Licensee owns more than fifty percent (50%) of such entity’s voting securities.

1.7 Trial Software means any Software available for download by Licensee without requiring Licensee to execute and deliver an Order Schedule either to Turbonomic or to a third party, it being understood that upon Licensee’s execution and delivery of an Order Schedule, any Trial Software licensed hereunder shall immediately and with no action on the part of Turbonomic or Licensee cease being Trial Software hereunder and shall instead be considered Software for all purposes and subject to the terms hereof.

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2.6. **Product Diagnostic Reporting.** Licensee acknowledges that the Software will store certain diagnostic information about the routine operations of the Software (including, without limitation, its performance, Licensee infrastructure topology, configuration data, and Software faults) and may periodically transmit this diagnostic information to Turbonomic. For clarity, no actual user data of Licensee will be accessed, transmitted or provided to Turbonomic as part of this process (other than related to infrastructure topology), and no interruption of service is required to gather such detailed diagnostics. Licensee hereby grants to Turbonomic a perpetual, irrevocable, sublicenseable, and royalty-free right to use this diagnostic information in any manner (provided that information does not identify Licensee as the source of such information), and Licensee will not interfere with the collection or transmission of such information to Turbonomic.

3. **SERVICES**

3.1. **Maintenance and Support.** During the Term, Turbonomic will (a) provide Licensee with maintenance and support services in accordance with Turbonomic’s then-current Maintenance and Support Policy as published from time to time on the product documentation section of Turbonomic’s website (https://greencircle.wmturbo.com/docs/DOC-1773) (“Maintenance and Support Policy”) and (b) make all Updates/Upgrades available for Licensee’s download. Turbonomic makes no representation or warranty that all bugs will be fixed or all Software will be updated.

3.2. **Separately Available Services.** If Turbonomic provides services or deliverables other than as described in the Maintenance and Support Policy, such services or deliverables will be treated, billed, and paid for as other professional services in accordance with Turbonomic’s then current rates for such professional services and, in the absence of a signed services agreement between the parties, shall be governed by the Turbonomic Standard Terms and Conditions for Services, located at https://cdn.turbonomic.com/Turbonomic_Standard_Service_Terms.

4. **FEES AND PAYMENT TERMS**

Licensee shall pay Turbonomic or its authorized reseller the fees, charges and other amounts specified in an Order Schedule within thirty (30) days of the date of invoice. Turbonomic and its authorized reseller are authorized by Licensee to issue an initial invoice upon delivery of the Software unless otherwise set forth in the applicable Order Schedule. Licensee shall provide a purchase order or notice (email to suffice) that a purchase order is not required for purchase or payment prior to the shipment of any Software or the provision of any Maintenance and Support Services. Overdue balances are subject to a service charge equal to the lesser of 1.5% per month or the maximum legal interest rate allowed by law. Licensee shall be responsible for taxes levied on any transaction under this Agreement, including all federal, state, and local taxes, levies and assessments, excluding any tax based on Turbonomic’s income.

5. **CONFIDENTIALITY**

5.1. **Confidential Information.** Each party will regard any information provided to it by the other party and designated in writing as proprietary or confidential to be confidential (“Confidential Information”). Confidential Information shall also include information which, to a reasonable person familiar with the disclosing party’s business and the industry in which it operates, is of a confidential or proprietary nature. A party will not disclose the other party’s Confidential Information to any third party without the prior written consent of the other party, nor make use of any of the other party’s Confidential Information except in its performance under this Agreement. Each party accepts responsibility for the actions of its agents or
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5.2. Exclusions. Information will not be deemed Confidential Information hereunder if such information: (a) is known to the disclosing party prior to receipt from the disclosing party; (b) becomes known to the receiving party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party; (c) becomes publicly known or otherwise publicly available, except through a breach of this Agreement; or (d) is independently developed by the receiving party. The receiving party may disclose Confidential Information pursuant to the requirements of applicable law, legal process or government regulation, provided that it gives the disclosing party reasonable prior written notice to permit the disclosing party to contest such disclosure, and such disclosure is otherwise limited to the required disclosure.

6. LIMITED WARRANTY

6.1. Warranty. Turbonomic warrants that, other than with respect to Trial Software: (a) it has the right to grant the license to use the Software as set out in this Agreement; and (b) for a period of thirty (30) days following the initial delivery of the Software to Licensee the Software will perform in substantial conformity with its Documentation.

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10. TERMINATION

This Agreement or an Order Schedule hereunder may be terminated (a) by mutual agreement of Turbonomic and Licensee, (b) by either party if the other party is adjudicated as bankrupt, or if a petition in bankruptcy is filed against the other party and such petition is not discharged within sixty (60) days of such filing, (c) by either party if the other party materially breaches this Agreement and fails to cure such breach to such party’s reasonable satisfaction within thirty (30) days following receipt of written notice thereof, or (d) by Turbonomic pursuant to the terms of Section 8.1 item (t). Upon any termination of this Agreement or an Order Schedule, all applicable licenses are also terminated, and Licensee shall immediately cease use of the applicable Software and certify in writing to Turbonomic within thirty (30) days after termination that Licensee has destroyed or returned to Turbonomic such Software and all copies thereof. However, if this Agreement is terminated, but not outstanding Order Schedule(s), the terms and conditions of this Agreement shall continue to govern such Order Schedules. Termination of this Agreement or an Order Schedule shall not limit either party from pursuing any remedies available to it, including injunctive relief, or relieve Licensee of its obligation to pay all fees that have accrued, have been paid, or have become payable by Licensee hereunder. All provisions of this Agreement which by their nature are intended to survive the termination of this Agreement (including, without limitation, the provisions of Sections 4, 5, 6, 7, 8, 9, 10 and 11) shall survive such termination.

11. GENERAL PROVISIONS

11.1. Entire Agreement and Controlling Documents. This Agreement, including any Order Schedules, contains the entire agreement between the parties with respect to the subject matter hereof, and supersedes all proposals, understandings, representations, warranties, covenants, and any other communications (whether written or oral) between the parties relating thereto and is binding upon the parties and their permitted successors and assigns. Only a written instrument that refers to this Agreement or the applicable Order Schedule and is duly signed by the authorized representatives of both parties may amend this Agreement or such Order Schedule. The terms and conditions contained in any purchase order issued by Licensee shall be of no force or effect, even if the order is accepted by Turbonomic. In the event of a conflict in terms among the Agreement and an Order Schedule, the Agreement shall control unless the Order Schedule expressly states the provision that it intends to amend. This Agreement shall apply to all Software and the Maintenance and Support Services ordered by Licensee or delivered to Licensee by Turbonomic.

11.2. Assignment. This Agreement shall be binding upon and for the benefit of Turbonomic, Licensee and their permitted successors and assigns. Licensee may not assign its rights under this Agreement either in whole or in part without the prior written consent of Turbonomic. Turbonomic shall have the right to assign this Agreement in whole as part of a corporate reorganization, consolidation, merger, or sale of all or substantially all of the assets to which this Agreement relates. Any attempted assignment or delegation without such consent will be void.

11.3. Export. Licensee acknowledges that the export of software is subject to export or import control and Licensee agrees that the Software or the direct or indirect product thereof will not be exported (or re-exported from a country of installation) directly or indirectly, unless Licensee obtains all
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11.5. **Governing Law; Jurisdiction.** This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts, without regard to its conflict of law provisions. The United Nations Convention on Contracts for the International Sale of Goods is specifically excluded from application to this Agreement. Each party consents to, and agrees that each party is subject to, the exclusive jurisdiction of the District Court of Massachusetts or the Suffolk Superior Court of the Commonwealth of Massachusetts with respect to any actions for enforcement of or breach of this Agreement.

11.6. **Headings; Counterparts.** The headings to the sections of this Agreement are for ease of reference only and shall not affect the interpretation or construction of this Agreement. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original and all of which shall be deemed to be an original instrument. Once signed, any reproduction of this Agreement made by reliable means (e.g., photocopy, facsimile) shall be considered an original.

11.7. **Relationship of the Parties.** Turbonomic and Licensee are independent contractors, and nothing in this Agreement shall be construed as making them partners or creating the relationships of employer and employee, or principal and agent between them, for any purpose whatsoever. Neither party shall make any contracts, warranties or representations or assume or create any obligations, express or implied, in the other party's name or on its behalf.

11.8. **Force Majeure.** Except for the obligation to make payments, nonperformance of either party shall be excused to the extent that performance is rendered impossible by strike, fire, flood, governmental acts or orders or restrictions, failure of suppliers, or any other reason where failure to perform is beyond the reasonable control of the non-performing party.

11.9. **Notices.** Any demand, notice, consent, or other communication required by this Agreement must be given in writing and shall be deemed delivered upon receipt when delivered personally or upon confirmation of receipt following delivery by internationally recognized overnight courier service, in each case addressed to the receiving party at its address set forth on an Order Schedule, with a copy to the Legal Department at the address first listed above for each party. Either party may change its address by giving written notice of such change to the other party.

11.10. **Waiver and Severability.** Performance of any obligation required by a party hereunder may be waived only by a written waiver signed by an authorized representative of the other party, which waiver shall be effective only with respect to the specific obligation described therein. The failure of either party to exercise any of its rights under this Agreement will not be deemed a waiver or forfeiture of such rights. The invalidity or unenforceability of one or more provisions of this Agreement will not affect the validity or enforceability of any of the other provisions hereof, and this Agreement will be construed in all respects as if such invalid or unenforceable provision(s) were omitted.

11.11. **Publicity.** Either party shall obtain the prior written approval of the other for any press release or media advertisement that concern the transactions contemplated by this Agreement.