

**RoseASP.com Hosting and Services Agreement**

This RoseASP.com Hosting and Services Agreement (this “Agreement”) is entered into as of \_\_\_\_\_\_\_\_**,** 2016 by and between RoseASP.Com, Inc. (“RoseASP”), a California corporation having its principal place of business at 11512 El Camino Real, Ste. 310, San Diego, California 92130, and Kentucky Minicipal Energy Agency (“Customer”), having its principal place of business at 450 S 3rd Street, Louisville, KY 40202.

RECITALS

A. RoseASP is an application service provider which provides its customers with access through contractual rental arrangements to a product (as more specifically defined below, the “ASP Product”) combining hardware, software, and related implementation, maintenance and other services for various business applications hosted at locations owned or controlled by RoseASP.

B. Customer desires access to the ASP Product described on Schedule A from RoseASP.

C. RoseASP is willing to provide Customer with the access to the ASP Product subject to the terms and conditions set forth in this Agreement and the Schedules attached hereto.

NOW THEREFORE, in consideration of the mutual promises and covenants set forth in this Agreement, the parties agree as follows:

AGREEMENT

# Definitions. In addition to the terms defined below and elsewhere in this Agreement, certain terms are defined in the Schedules attached hereto.

“Termination Date” has the meaning specified on Schedule C; provided that in no event shall the Termination Date be later than the first anniversary of the date of this Agreement.

“ASP Product” means a customized combination of hardware, software, and Applications Support designed to accomplish the Application Specifications.

“Application Specifications” means the functionality for which the software was designed to perform by the third party software licensor (Microsoft or other third party vendor, “ISV”).

### “Application Support” means those implementations, maintenance, and consulting services described in Schedule B.

 “Authorized Users” means persons authorized by Customer (and who have been allocated passwords designated by Customer) to access the ASP Product through the Internet on personal computers or other terminals in the possession or control of such persons.

“Available” or “Availability” means a user being able to establish a TCP connection to the appropriate server at the Hosting Facility and that access to the functional ASP Product is available.

“Backups” means data, databases, applications, and all configuration pieces required to restore the Customer’s installation, but excluding the SQL transactions logs. SQL transaction logs are captured at a point in time, once daily, M-F, when the daily backup process is completed.

“Business Day” means any day in the United States which includes all weekdays (Monday through Friday) except U.S. federal holidays that always or may fall on a Monday through Friday, including but not limited to New Year’s Day, Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas, etc.

 “Completion Date” means the date that installation and configuration of the Software and the Hardware are completed and the Partner of Record has access to the ASP Product.

“Customer Data” means the data, information, and protocols provided by Customer to be loaded on the Servers, initially and on an on-going basis.

“Customer Material” means Customer Data, customer confidential information, customer data in RoseASP servers, including, but not limited to, Microsoft SQL Server database files, and database schema, Microsoft Word files and Excel files, and all backup files related thereto.

“Effective Date” means the date when each of the conditions precedent set forth in Section Q.1 has been satisfied.

“Force Majeure” means an event outside the defaulting party’s reasonable control, including without limitation, acts of God, earthquake, labor disputes, shortages of supplies, riots, war, fire, epidemic, business interruption or insolvency of key providers of goods or services or licensors (or sub-licensors) of technology, or delays of common carriers or other circumstances beyond its reasonable control.

“Hardware” means the hardware type (dedicated or shared) listed on Schedule B.

“Hosting Facility” means the facility currently located in San Diego, California, or Scottsdale, AZ, where RoseASP maintains computer hardware servers on which RoseASP hosts third-party application software, including the Software designated to perform the Application Specifications for the Customer. RoseASP warrants that its current facilities are redundant, linked by private fiber, and have a diesel-backed Uninterruptible Power Supply. RoseASP may change the location of the Hosting Facility at any time during the Term with the Customer’s consent, which will not be unreasonably withheld.

“Monthly Contract Fee” means the Monthly Contract Fee calculated in accordance with Schedule C.

 “Normal Business Hours” means the hours of 8:30 a.m. to 5:30 p.m., Pacific time, on a Business Day.

“Partner of Record” means the service provider, authorized by Microsoft, that will assist Customer with the Dynamics ERP/CRM application.

“Rose Affiliate” means Rose Business Solutions, Inc., a California corporation.

“Scheduled Available Time” means twenty-four hours a day, seven days a week, commencing as of the Completion Date, and thereafter during the Term excluding: (1) scheduled maintenance downtime of 2 hours per week, plus 12 hours per quarter for maintenance updates, etc; (2) maintenance downtime for specific critical Software issues; and (3) any downtime due to software defects or due to circumstances caused by Customer, or due to events or interruptions caused by other forces beyond the immediate control of RoseASP.

“Security Deposit” means the amount equal to two times the first Monthly Contract Fee. This payment is applied to Customer’s first Monthly Contract Fee and to Customer’s last Monthly Contract Fee. At the time of contract renewal the amount remaining after applying a portion to Customer’s first Monthly Contract Fee, may be adjusted to reflect Customer’s current Monthly Contract Fee.

“Server” has the meaning specified in Section C.1.

“Software” means the third-party application software listed on Schedule B.

“Term” means the period commencing on the Effective Date and terminating at 11:59 p.m., Pacific time, on the Termination Date, unless earlier terminated in accordance with this Agreement.

“Update(s)” shall mean subsequent releases and modifications of the Software, but shall not include any releases, options, or future applications that RoseASP offers separately to its customers.

“Usage Minimum” means that minimum number of users and/or hours of usage set forth on Schedule C.

# Grant of Access to ASP Product.

## Agreement of RoseASP. Subject to the satisfaction of the conditions precedent set forth in Section Q, RoseASP agrees to provide Customer with the services comprising the ASP Product for the Term. The Software will be installed and configured as described below in order to execute the Application Specifications, and RoseASP will operate and maintain the Hardware and the Software as part of the services provided to Customer hereunder.

## Payment Obligations of Customer. Customer agrees to pay for access to the ASP Product described herein in accordance with the pricing terms set forth on Schedule C, and agrees that it is obligated to pay the Up Front Fees, consisting of the Security Deposit and Set up fee, and the Installation Fees, and each Monthly Contract Fee during the Term, each as described in Schedule C, together with any applicable termination fees or other payment obligations described in this Agreement. In addition, Customer agrees that to the extent pricing is based on the number of users for purposes of calculating the sums payable to RoseASP, the number of users and the hours of usage shall be deemed to be not less than the Usage Minimum as set forth on Schedule C. Customer also agrees that it shall pay (and reimburse RoseASP for) all United States and foreign sales, use, value added and other taxes and duties (exclusive of income taxes) as may become payable to any government or agency in connection with this Agreement and/or the services provided hereunder. The Monthly Contract Fee shall be due and payable by Customer in advance on or before the first day of each calendar month during the Term, and all other payments owed by Customer hereunder shall be paid within the terms stated on RoseASP’s invoice to Customer therefore.

# Configuration and Hosting Services.

## Access. During the Term, RoseASP will provide Customer with non-exclusive electronic access to a dedicated digital information processing, transmission and storage system located at the Hosting Facility (“Server”) during Scheduled Available Time during the Term to (1) store the Customer Material, and (2) make the data and the Software that is hosted on the Servers available on demand to Authorized Users through the Internet. RoseASP agrees that it shall be responsible during the Term for maintaining access by Authorized Users to the Servers from the Internet. However, RoseASP is not responsible for the inability of the Customer or any Authorized User to connect to the Internet or for the availability of the Internet or the Customer’s private network and any lack of access due to such failures shall not affect Customer’s payment obligations hereunder, nor the calculation of “Availability.”

## Facility. During the Term, RoseASP will maintain a Hosting Facility where the Servers (and the other Hardware) and the Software are located, which will supply the ASP Product. RoseASP will use commercially reasonable efforts to provide performance analysis, tuning services, hardware preventative maintenance, and regular back-up services at the Hosting Facility. In addition, RoseASP will provide such application management consulting services, if any, that it will directly perform as are specified on Schedule B.

## Configuration. RoseASP agrees in consideration of the fees, payments, and other obligations of Customer set forth in this Agreement to provide, install, and configure at the Hosting Facility the Hardware and the Software designed to meet the Application Specifications. RoseASP will be responsible for installing and configuring the Software on the Server(s) located at the Hosting Facility.

## Maintenance. During the Term, RoseASP shall, at its own expense, operate, repair, replace and maintain the Hardware, the Software and the ASP Product as part of the Applications Support provided under this Agreement; that in the event that a test upgrade is needed for a software upgrade prior to an upgrade to production, RoseASP may bill Customer for the test upgrade, and provided that RoseASP may bill for any ISV upgrades that it has to pay ISV vendor for. However, in no event shall RoseASP have any obligation or responsibility with regard to any hardware or software provided by Customer.

## Scheduled Downtime. RoseASP shall contact Customer at least 24 hours in advance of the need for any planned downtime, to schedule a mutually agreeable time to perform maintenance and related functions. Providing Customer with a schedule of maintenance downtime by e-mail shall satisfy this requirement so long as Customer receives such schedule at least 24 hours before the scheduled maintenance begins. RoseASP will perform any scheduled downtime outside of Normal Business Hours when possible.

## Service Level Agreement (“SLA”) Availability. As of the Completion Date and for the remainder of the Term, the ASP Product will be Available to Customer for at least ninety-nine and nine-tenths of a percent (99.9%) of the Scheduled Available Time during any given calendar month after the Completion Date for those components of the service within RoseASP’s direct control. In the event RoseASP is unable to provide Customer with access to an appropriate server at the Hosting Facility in order to deliver the ASP Product with at least 99.9% Availability during the Scheduled Available Time in any given calendar month, Customer shall receive a credit to its next Monthly Contract Fee then due equal to 15% of the Monthly Contract Fee due for the month in which at least 99.9% Availability was not achieved, excluding rebilled circuit charges. If RoseASP is unable to provide at least 99% Availability during the Scheduled Available Time in any given calendar month, Customer shall receive an aggregate credit to its next Monthly Contract Fee then due equal to 25% of the Monthly Contract Fee due for the month in which at least 99% Availability was not achieved, excluding rebilled circuit charges. If RoseASP is unable to provide at least 98% Availability during the Scheduled Available Time in any given calendar month, Customer shall receive an aggregate credit to its next Monthly Contract Fee then due equal to 35% of the Monthly Contract Fee due for the month in which at least 98% Availability was not achieved, excluding rebilled circuit charges. The foregoing credits for any given calendar month are not cumulative.

* + - 1. The above SLA Availability applies to the following:
				1. Dynamics solutions systems including Dynamics SQL databases, Citrix and associated authentication services
				2. Infrastructure Power
				3. Network services
				4. MS-Word
				5. MS-Excel.

## Lack of Access Due to Force Majeure. Should a Force Majeure event occur which prevents Availability during Scheduled Available Time by greater than 14 consecutive days (or 336 consecutive hours), Customer shall, as its exclusive remedy for such event, have the option of terminating the Term in accordance with Section L upon prior written notice to RoseASP, in which case RoseASP shall cease to be obligated to supply the ASP Product to Customer as of the date notice of termination is received by RoseASP. The termination provisions in Section L will not apply in the event of a termination under this Section C.7.

# Support Services.

## Support. RoseASP will provide application connectivity support during Normal Business Hours during the Term. Communications with RoseASP for support only should be as follows:

| **Business Hours** | Phone: (858) 794-9403Email: Support@roseasp.com |  |
| --- | --- | --- |
| **Non-Business Hours** | Phone: (858) 605-6433 Emergencies only | RoseASP reserves the right to charge a min. 1hr fee in the event that this number is used for non emergency issues |

## Additional Services. Customer may request additional services, hardware or software to be added to its configuration for an additional, mutually agreed price and subject to a further or supplemental mutually agreed contract or amendment hereto.

## Regulatory Compliance and Reporting. Customer may at various intervals request information from RoseASP to support Customer’s regulatory compliance requirements. RoseASP will make every reasonable effort to provide the requested information within a reasonable period of time. Examples of such information include, but are not limited to, a list of Customer users with access to the RoseASP network, a list of system or backup failures during the relevant period, and a summary of changes and maintenance activity performed during the relevant period.

## Regulatory Inspections. If any governmental or regulatory authority of appropriate jurisdiction conducts, or gives notice of intent to conduct, an inspection at a Hosting Facility that could impact or relate to the services under this Agreement, RoseASP will promptly give Customer notice of the pending inspection, and RoseASP shall cooperate fully with such inspection. To the extent permitted under applicable law, Customer or its designee shall have the opportunity (a) to have a representative present during any such inspection and (b) to review and comment on responses given to the inspecting authority prior to RoseASP’s making such responses. RoseASP will notify Customer of any significant inspection findings within twenty (20) days of receipt of such findings, including RoseASP’s response or corrective actions to such findings.

## Customer Audits. Customer may visit and/or meet with RoseASP and its employees and agents at reasonable times as mutually agreed during Normal Business Hours during the Term to observe the process of the services under this Agreement, audit those portions of the records of RoseASP which are maintained in connection with the services under this Agreement, and review work product in process. Customer shall have the right to conduct, at no charge to Customer, one (1) such visit annually, and more frequently if necessary to ensure that services under this Agreement are being conducted in accordance with the terms of this Agreement and applicable law; for other additional audits, RoseASP shall charge reasonable fees, relative to the time expended by its team with respect to such audits. For all audits, including any annual visits, Customer shall reimburse RoseASP for any travel expenses incurred by RoseASP that are approved in advance by Customer. Both parties agree that eight (8) hours of RoseASP effort should be sufficient for most regulatory and annual audit requests and RoseASP will provide eight (8) hours of combined regulatory support and audit support annually as part of the monthly hosting fee. Estimated time to be incurred by RoseASP in excess of eight (8) hours combined regulatory and audit support will be billed at the standard hourly technical support rate in the agreement.

# Backup Systems.

## Scope. RoseASP will be responsible for performing the following types and frequency of Backups during the Term:

| **Description** | **Timing** | **Device** |
| --- | --- | --- |
| Baseline | Immediately before system goes live, Entire System – database and Software | Local raid storage disks |
| Daily | Full data backup; database backup is on a schema basis to allow for recovery of individual company schemas, data is kept for one week locally. SQL transaction logs are captured at a point in time, once daily, M-F, when the daily backup process is completed. | Backup server local disk |
| Weekly | Each Friday night a full data base backup is taken | Backup server local disk for ONE week & removable disk rotated offsite on a FIVE (5) week rotation |
| Monthly | On the 10th day of every month a full data base backup is taken to capture prior month end data | Backup server local disk for ONE month & removable disk rotated offsite on a TWELVE (12) month rotation |
| Annual | On the 20th of January each year a year end full data base backup is taken to capture prior yr data | Backup server local disk for ONE year & removable disk rotated offsite on a SEVEN (7) year rotation |
| As Needed | At the request of Customer | Removable media – CD, DVD, customer furnished external hard drive, etc. |

Removable Backups of Customer Material shall be maintained by RoseASP in a secure, off-site storage location during the Term. Copies of the backup data shall be made available to Customer. Costs for nonscheduled back-ups and for copies of off-site backups are listed in Schedule C.

## Scheduling. Backups for which RoseASP is responsible that are not completed successfully will be rescheduled for the earliest available time outside of Customer’s primary hours of operation.

## Customer Obligation Regarding Backups. Customer shall be responsible for providing alternative or back-up means of obtaining telecommunications access to the ASP Product.

## Backup storage space. Customer shall be entitled to backup storage included with their standard monthly hosting fee as set forth in Schedule C. Per Schedule C, Customer shall be responsible to pay monthly as set forth in Schedule C for each additional GB or portion thereof used in the backup of its data as measured on the last Friday of each month when that weekly backup is performed.

# Customer Material.

## Content. Customer shall be solely responsible for providing, verifying, updating, and uploading/downloading Customer Material to the Servers, and any and all files, pages, data, works, information and/or materials transmitted to and from the Servers. Such sole responsibility of the Customer for Customer Material shall extend to the accuracy, integrity and completeness of the data, as well as to the maintenance of backup data. RoseASP is not responsible for any corruption of the Customer Material that may occur as a result of transmission, or due to Software or Hardware or other system malfunction.

## Ownership. The Customer Material is the property of the Customer.

## Security. Customer is solely responsible for maintaining the security features built into the ASP Product, including without limitation, the protection, confidentiality, and use of access codes and passwords and access control lists to system resources. Customer agrees, and covenants on behalf of all Authorized Users, not to compromise the security or integrity of the system either intentionally or through negligence. RoseASP agrees to undertake commercially reasonable measures to ensure the security, confidentiality, and integrity of the Customer Material and other proprietary information of Customer transmitted through or stored on the Server, including (i) firewall protection, (ii) maintenance of independent archival and backup copies of the Customer Material and applications; and (iii) reasonable protection from any network attack and other malicious harmful or disabling data, work, code or program.

## Confidentiality. RoseASP acknowledges and agrees that all of the Customer Material is confidential information of Customer. Accordingly, RoseASP shall hold all such Customer Material in confidence and not disclose any of the Customer Material to any third party without the prior written consent of Customer, shall use the Customer Material solely for purposes of performing the services hereunder, and shall not copy any of the Customer Material except as contemplated by this Agreement. The restrictions set forth in this paragraph shall not apply to Customer Material which:

 a. is at the time of disclosure by RoseASP a part of the public domain or thereafter becomes a part of the public domain through no violation of this Agreement;

b. as shown by written records, is in RoseASP’s possession prior to the time of disclosure or is acquired through a third party under no obligation of confidence to the Customer; or

 c. RoseASP is required to disclose by law; provided, however, if RoseASP is requested or required (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process) at any time to disclose any Customer Material to any third party, RoseASP shall provide the Customer with prompt written notice of such request(s) so that the Customer may seek an appropriate protective order and/or take whatever steps as may be reasonably necessary to resist or narrow such request, and, if, in the absence of a protective order RoseASP is nonetheless compelled to disclose any Customer Material to any governmental tribunal or other person or entity, RoseASP will cooperate with the Customer in any attempt that the Customer may make to obtain an order or other reliable assurance that confidential treatment will be provided by such tribunal, person or entity for all or designated portions of the Customer Material.

## Internal Operation of Software. RoseASP is not responsible for the use or operation of any software other than the Software by Customer, and its authorized employees, agents, consultants, and other users.

# License.

## Customer to RoseASP. During the Term, Customer grants to RoseASP a non-exclusive, worldwide, royalty free license, to copy, display, use and transmit the Customer Material for the sole purposes of maintaining RoseASP’s system and the ASP Product, making backup copies thereof, and granting access to the ASP Product and the Customer Material to the Customer and all Authorized Users.

## RoseASP to Customer. During the Term, RoseASP grants to Customer a limited, nontransferable, non-exclusive license for Customer (and Authorized Users) to use the ASP Product to perform the Application Specifications. Neither Customer nor any Authorized User is licensed or authorized to (and Customer covenants not to) copy, transfer, recreate, reverse engineer, disassemble or decompile any applications residing on the Server without the prior written consent of RoseASP. Customer agrees to indemnify and hold RoseASP harmless from any loss or damage sustained by RoseASP due to any breach of this Section G.2 by Customer, by any Authorized User, or by any other person who gains access to the Server or the ASP Product due to Customer’s negligence (or that of any employee, agent or consultant of Customer).

# Proprietary Rights of RoseASP.

## Hardware and Software. RoseASP shall retain all right, title and interest (including copyright and other proprietary or intellectual property rights) in the Software, all derivatives thereof, and in all Hardware, configurations or protocols related to the ASP Product.

## Rights Relating to Data Generated by Verification Procedures. Customer acknowledges and agrees that RoseASP is authorized to devise and run verification and testing protocols concerning the ASP Product and the Availability thereof, and that all data generated or accumulated pursuant to such verification and testing protocols (the “Captured Data”) shall be and remain the property of RoseASP. Furthermore, to the extent any Customer Material may be imbedded in some form in the Captured Data, Customer grants to RoseASP a perpetual, world-wide, royalty free, non-exclusive license to use such data solely in connection with enforcing, monitoring, and performing this Agreement and for no other purpose whatsoever.

# Indemnification; Dispute Resolution.

## Indemnification. Customer agrees to indemnify and hold RoseASP and its officers, directors, agents, and employees harmless from and against any loss or damage sustained by such party due to (i) any breach of any representation or warranty of Customer contained in this Agreement, or (ii) any breach of any covenant of Customer in this Agreement by Customer, by any Authorized User, or by any other person who gains access to the Server or the ASP Product due to Customer’s negligence, willful act or omission (or that of any Authorized User, employee, agent or consultant of such Customer). RoseASP agrees to indemnify and hold Customer and its officers, directors, agents, and employees harmless from and against any loss or damage sustained by such party due to (i) any breach of any representation or warranty of RoseASP contained in this Agreement, or (ii) any breach of any covenant of RoseASP in this Agreement.

* 1. Security of Customer Material in RoseASP servers and backup media.
		1. RoseASP represents and warrants that all Internet connections between Customer locations and RoseASP locations, where Customer Material is conveyed or stored, are SSL certified with a minimum of 256-bit encryption.
		2. RoseASP respresents and warrants that it has liability insurance in force for not less than $2 million per occurrence.

## Arbitration. Except for the right of either party to apply to a court of competent jurisdiction for a temporary restraining order, a preliminary injunction, or other equitable relief to preserve the status quo or prevent irreparable harm, any controversy or claim arising out of or relating to this Agreement (including the Schedules attached hereto) or to its breach shall be resolved by binding arbitration before one arbitrator at the San Diego, California, Regional Office of the American Arbitration Association (“AAA”). The commercial rules of the AAA in effect at the time shall apply, and judgment upon the award rendered in any such arbitration may be entered in any court of competent jurisdiction. Notwithstanding the foregoing, however, either party may bring any claim in the “small claims” courts in San Diego County, subject to the jurisdictional limits of such courts.

## Attorneys’ Fees. In any action, proceeding, or arbitration to enforce rights under this Agreement, the prevailing party shall be entitled to recover reasonable costs and attorneys’ fees. “Prevailing party” within the meaning of this paragraph includes, without limitation, a party who agrees to dismiss an action, proceeding, or arbitration on the other party's payment of the sums allegedly due or performance of the covenants allegedly breached, or who obtains substantially the relief sought by it.

## Limitation on Damages. Notwithstanding any other provision of this Agreement, the aggregate liability of RoseASP for damages arising out of the furnishing of the ASP Product or otherwise arising under this Agreement, including but not limited to mistakes, omissions, interruptions, delays, tortious conduct or errors, or other defects, representations, use of services or arising out of the failure to furnish services, whether caused by acts of commission or omission, shall be limited to the amounts paid by Customer hereunder for the six (6) months prior to the event giving rise to such liability; provided that such limitation shall not apply to willful or intentional misconduct; and provided further that Customer’s exclusive remedy for failure to meet Availability levels shall be as specified in Sections C.6 and L.1. Customer agrees that the foregoing remedy is the exclusive remedy, and that Customer may not bring an action, regardless of form, arising out of this Agreement more than two (2) years after such cause of action has arisen. No liability shall attain against any officer, director, member, agent, or employee of RoseASP; any such liability shall be paid solely from the assets of RoseASP, its insurance provider, and others, at law.

IN NO EVENT SHALL ROSEASP BE LIABLE TO CUSTOMER FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES INCLUDING LOSS OF PROFITS, LOSS OF BUSINESS, LOSS OF DATA, LOSS OF ANTICIPATED SAVINGS OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, ARISING FROM OR RELATED TO A BREACH OF THIS AGREEMENT OR THE OPERATION OR USE OF THE ASP PRODUCT, INCLUDING WITHOUT LIMITATION SUCH DAMAGES ARISING FROM DAMAGE TO CUSTOMER’S EQUIPMENT, EVEN IF ROSEASP HAS NOTICE OF THE POSSIBILITY OF SUCH DAMAGES. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING THE FAILURE OF THE ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. BECAUSE SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES, THE ABOVE LIMITATION MAY NOT APPLY FOR THOSE PARTICULAR DAMAGES IN YOUR JURISDICTION.

# No Solicitation of Personnel.

## Restrictions. Customer and Rose each agrees that in order to prevent disruptive practices which may harm the business of Customer, RoseASP or any Rose Affiliate, during the Term, and for a period of one year thereafter, no person acting on behalf of either party will hire, or solicit or attempt to hire, any employee, independent contractor, agent or consultant who, at the time of such solicitation or hiring, is working for the other party , or who has worked for the other party at any time during the 6-month period preceding any such hiring (each, a “Counterparty Employee”).

## Liquidated Damages Due to Solicitation Breach. Customer and RoseASP each acknowledges and agrees that if it or any person or entity acting on behalf of it hires any Counterparty Employee, hiring party shall within ten (10) days after the date of such hire pay to the non-hiring party the greater of (a) $25,000.00, or (b) 50% of the Counterparty Employee’s gross annual compensation paid by Counterparty during the twelve months preceding the Counterparty Employee’s termination date (or if not employed or retained for an entire 12-month period, then an annualized amount of the compensation actually paid), including salary and bonuses earned or to be earned, regardless of whether paid. Customer and RoseASP each acknowledge and agree that the damages to the non-hiring party as a result of the hiring party’s breach of Section J.1 would be difficult and impracticable to ascertain, and that the foregoing payment obligation constitutes a fair and reasonable estimate of those damages. Customer and RoseASP each waives any right to claim that such amount is not fair and reasonable, and agrees that the recovery of such amount shall constitute its sole right, remedy and recourse against the hiring party for the violation of the prohibitions contained in Section J.1.

# Remedies for Past Due Payments.

## Nonpayment of Monthly Contract Fee. In addition to all other rights and remedies available to RoseASP under this Agreement or applicable law, should Customer fail to timely pay the Monthly Contract Fee or any other amount owed to Rose ASP or any Rose Affiliate, RoseASP may, with ten (10) days’ prior written notice to Customer, withhold access to the ASP Product until all past due amounts are paid in full.

* 1. Late Fees and Interest  In the event that the Customer’s entire Monthly Contract Fee is not received by RoseASP on or before the first day of each calendar month during the Term, RoseASP may assess a late fee in the amount of Fifty Dollars ($50.00) for each such occurrence. All amounts owed by Customer under this Agreement and remaining unpaid for more than thirty (30) days after the due date therefor shall bear interest at the rate of eighteen percent (18%) per annum on the unpaid amount.

# Termination.

## Termination by Customer. Customer shall be entitled to voluntarily terminate the Term prior to the Termination Date as follows:

### In the event that after the Completion Date, the ASP Product materially fails to perform the Application Specifications and RoseASP fails to correct such performance failures within five (5) Business Days after Customer has provided written notice to RoseASP describing in reasonable detail such performance failures, or if during any consecutive 3 month period during the Term RoseASP is unable to provide Customer with at least 98% Availability, or if RoseASP is in material default hereunder and fails to cure such default within fifteen (15) days after written notice thereof from Customer, Customer may terminate this Agreement by giving 10 days’ prior written notice to RoseASP and will not incur any termination fees, provided the Customer has agreed to and has remained within the originally proposed architecture.

### Upon not less than 90 days’ prior written notice to RoseASP, subject to the payment of all payment obligations of Customer hereunder, including the Installation Fees and each Monthly Contract Fee payable prior to the effective date of the termination.

1.3 In the event that RoseASP fails to generally pay its debts as they become due, makes a general assignment for the benefit of creditors, becomes a debtor in a bankruptcy case, or has a receiver or trustee is appointed for it or a substantial portion of its assets.

## Termination by RoseASP. RoseASP shall be entitled to voluntarily terminate the Term prior to the Termination Date as follows:

### if Customer fails to pay when due a Monthly Contract Fee or any other amount owed by Customer to RoseASP or to any Rose Affiliate, and such fee or amount remains unpaid for more than ten (10) Business Days following written notice to Customer of such nonpayment; or

### upon the tenth calendar day after RoseASP notifies Customer that Customer is in material default of this Agreement if Customer fails to cure the default within such 10-day period.

Upon any termination pursuant to this Section L.2, Customer shall remain liable for each Monthly Contract Fee payable through the effective date of termination by RoseASP, for all remaining monthly contract fees through the lesser of the original Termination Date or 90 days after the effective date of termination by RoseASP, and for all other payment obligations then owing under this Agreement. Except for termination due to Customer’s willful or intentional misconduct, and except as otherwise provided in Sections J and I.1, Customer’s liability as a result of any termination by RoseASP pursuant to this Section L.2 shall be limited to the foregoing amounts. RoseASP may not bring an action, regardless of form, arising out of this Agreement more than two (2) years after such cause of action has arisen. Among the events that shall cause a material default hereunder are the following: (i) Customer becomes insolvent, fails to generally pay its debts as they become due, makes a general assignment for the benefit of creditors, becomes a debtor in a bankruptcy case, or has a receiver or trustee is appointed for it or a substantial portion of its assets; (ii) Customer is more than thirty (30) days late in making payments to RoseASP more than three (3) times in any twelve (12) month period during the Term (any such default shall be non-curable); (iii) any representation or warranty made by Customer in this Agreement fails to have been true when made or later becomes untrue; (iv) Customer or any employee or agent of Customer discloses or threatens to disclose confidential or proprietary information of RoseASP or violates or attempts to violate Section G.2 of this Agreement; or (v) Customer poses a material risk of security breach as to the ASP Product, RoseASP’s systems generally, or any applications provided to other customers of RoseASP.

* 1. Return of Security Deposit. RoseASP will apply any remaining Security Deposit balance to Customer’s final Monthly Contract Fee, and any resulting balance owed by Customer for the final Monthly Contract Fee shall be due and payable on or before the first day of the final calendar month of the Term. After application of Customer’s remaining Security Deposit balance to Customer’s final Monthly Contract Fee, any remaining Security Deposit balance shall be returned to the Customer, less any remaining consulting fees or administrative fees owed to RoseASP or any Rose Affiliate, within 30 days after the end of the Term.
	2. Obligation Concerning Data after Termination. Should this Agreement terminate, or the Term end, then so long as Customer has paid in full all amounts owed by Customer to RoseASP, RoseASP shall return all Customer Data owned by Customer to Customer in a standard Microsoft back-up format, or on CD media. All original data residing on local disk storage is deleted following termination. Offsite data is retained for the duration of Rose ASP’s standard operating rotation policy for offsite storage described in section E.

# Renewal: 60 Days prior to the Termination Date, and in the event that neither party has executed a termination of this agreement, RoseASP will issue a (1) year renewal letter. RoseASP reserves the right to make pricing adjustments upon renewal. Pricing adjustments including, but not limited to, required increases in security deposits reflective of increased resources deployed by Customer, will be reflected in this renewal letter. The renewal letter for an additional (1) year extension of the contract must be signed and returned back to RoseASP within 60 days of issuance. In the event that the renewal letter is not signed and returned to RoseASP within the specified 60 day requirement, RoseASP will presume this agreement to have become a month-to-month agreement, and a 5% per month compounded surcharge will be added to the monthly fees in the prior month’s billing beginning the next billing period following the Termination Date and the month-to-month agreement will require 30 days’ prior written notice for termination by either party.

# Warranties.

## RoseASP Warranties. RoseASP represents and warrants to Customer that: (i) RoseASP has the right and authority to enter into and perform its obligations under this Agreement; (ii) RoseASP shall perform any Applications Support directly provided by it in a workmanlike manner and with professional diligence and skill; (iii) the Applications Support provided directly by RoseASP during the Term shall comply with the provisions of this Agreement and the Schedules attached hereto; and (iv) to the best of RoseASP’s knowledge, the ASP Product does not and will not violate any applicable law or regulation or infringe or misappropriate any proprietary or intellectual property right of any person or entity. RoseASP shall indemnify and hold Customer harmless from any and all claims related to such content.

## Customer Warranties. Customer represents and warrants to RoseASP that: (i) Customer has the power and authority to enter into and perform its obligations under this Agreement; (ii) the Customer Material (and any software, hardware or application supplied by Customer) does not and shall not contain any content, data, work, materials, or services that actually or potentially violate any applicable law or regulation or infringe or misappropriate any proprietary, intellectual property, contract right, or tort right of any person or entity; and (iii) Customer owns the Customer Material, and all proprietary or intellectual property rights therein or has express written authorization from the owner to copy, use, and display the Customer Material; and (iv) the Customer Material does not contain any virus or harmful component. Customer shall indemnify and hold RoseASP harmless from any and all claims related to such content.

## Disclaimer of Additional Warranties. OTHER THAN THE WARRANTIES EXPLICITLY AND EXPRESSLY STATED IN SECTION N.1, ROSEASP DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE RELATED TO THE ASP PRODUCT, ITS USE, OR THE RESULTS OF ITS USE.

# Security Interest. SECTION NOT APPLICABLE

# Publicity.

## Press Releases. Upon approval of Customer, RoseASP may issue a press release announcing the relationship contemplated by this Agreement as well as other press releases as may be mutually agreed to from time to time. RoseASP shall have the right to include quotes from Customer in RoseASP press releases upon Customer’s prior approval of such quotes.

## Use of Logo, Etc. Customer agrees that RoseASP may use Customer’s name and logo in press releases, product brochures and similar marketing materials, financial reports, and prospectuses indicating that Customer is a customer of RoseASP upon consent from the Customer, which consent will not be reasonably withheld.

# Conditions Precedent to the Obligations of RoseASP.

## Conditions to All Obligations. It shall be a condition precedent to each and every obligation of RoseASP hereunder that:

### Customer shall have executed and delivered this Agreement to RoseASP;

### Customer shall have paid the Installation Fees to RoseASP;

### Customer shall have paid the initial Monthly Contract Fee;

### Customer shall have paid the Security Deposit;

### Customer shall have executed and delivered each document required under this Agreement and delivered the same to RoseASP.

## Conditions to Obligations After Effective Date. It shall be a condition precedent to the obligations of RoseASP after the Effective Date that Customer shall remain current on its payment obligations to RoseASP.

# Miscellaneous.

## Independent Contractors. The parties and their respective personnel, are and shall be independent contractors and neither party by virtue of this Agreement shall have any right, power or authority to act or create any obligation, express or implied, on behalf of the other party.

## Assignment. Neither party may assign this Agreement or any of its rights, duties or obligations under this Agreement to any person or entity, in whole or in part, whether or not by operation of law, and any attempt to do so shall be deemed void and/or a material breach of this Agreement unless the other party gives its prior written consent, which will not be unreasonably withheld; however, either party may assign its rights and obligations under this Agreement to a successor by way of merger, consolidation, reorganization or acquisition of all or substantially all of its business or assets.

## Waiver. No waiver of any provision hereof or of any right or remedy hereunder shall be effective unless in writing and signed by the party against whom such waiver is sought to be enforced. No delay in exercising, no course of dealing with respect to, or no partial exercise of any right or remedy hereunder shall constitute a waiver of any other right or remedy, or future exercise thereof.

## Severability. If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.

## Notice. All notices required or permitted hereunder shall be in writing and shall be deemed effectively given: (a) upon personal delivery to the party to be notified, (b) three (3 days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (c) one (1) Business Day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt. All communications shall be sent to the following parties:

## To RoseASP:

 11512 El Camino Real, Ste 310

 San Diego, CA 92130

 Attn: Linda Rose, Chief Executive Officer

To Kentucky Municipal Energy Agency, Inc.:

2070 Tamarack Road

P.O. Box 806

Owensboro, KY 42302-0806

 Attn: Terry Naulty

## Amendment. No amendment, change, waiver, or discharge hereof shall be valid unless in writing and signed by both parties.

## Governing Law; Venue. This Agreement shall be governed in all respects by the laws of the State of California without regard to its conflict of law provisions.

## Survival. The definitions herein and the respective rights and obligations of the parties under Sections F.2, F.4, H.1, I, J, N, and R shall survive any termination or expiration hereof.

## Time. The parties agree that time is of the essence in the performance of the respective obligations under this Agreement.

## Entire Agreement. This Agreement, together with the Schedules attached hereto, which are incorporated herein by reference, constitutes the complete and exclusive statement of all mutual understandings between the parties with respect to the subject matter hereof, superseding all prior or contemporaneous proposals, communications and understandings, oral or written.

## No Third Parties Benefited. There are no third party beneficiaries of this Agreement other than the Rose Affiliates.

## Binding Agreement. This Agreement is binding upon and shall inure to the benefit of RoseASP and its successors and assigns. This Agreement is binding upon and shall inure to the benefit of Customer and its permitted successors and assigns.

## Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

*This Section intentionally left blank.*

*Signatures on the following page.*

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the last date of signature below.

ROSEASP.COM

By\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**KENTUCKY MUNICIPAL ENERGY AGENCY, INC.**

By\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Schedule A

ASP Product Description

* Accounting Software Hosting Services
* RoseASP.com will provide the Customer access to the Microsoft Dynamics GP 2013R2 using Microsoft SQL 2014 financial management system including the following modules.
* Microsoft Dynamics GP 2013 Starter Pack – (2) Full Users; (0) Named User
* Third Party Applications: None identified

**Schedule B**

Hardware, Software and Consulting Services

* Hardware
* Server Type – Shared SQL Server Model with Shared Front-end access
* Webservices – (0)
* Telecommunications - None
* Software
* Microsoft Dynamics GP 2013R2 – 2 Full Users
* Microsoft SQL Server Standard 2012/2014
* Microsoft Word 2016 and Excel 2016
* Application support will be provided directly by the Partner of Record – Bond Consulting.
* **Schedule C**

**Dates, Usage and Fees**

**SECTION 1:**

**Hosting fee schedule for Kentucky Municipal Energy Agency Hosting Services Agreement**

* Effective Date – April \_ , 2016
* Termination Date – April 30, 2017

Usage Minimum:

* number of Microsoft Dynamics GP Full/Concurrent Users – 2
* number of Microsoft Dynamics GP Named –0
* monthly webservices - 0
* **UPFRONT FEES Total - $2,700.00**
* **Security Deposit** - **$1,200.00**  (equal to 2 times Monthly Contract Fee)
* **Set up fees: - $1,500.00**
* **Monthly Contract Fee**: **$600.00** calculated as follows:
* Microsoft Dynamics GP Full Users – 2 x $300.00 = **$600.00**
* Monthly Excess Storage Fees beyond 10GB (GB billed as incurred)
* Termination Fees – See Section L
* Miscellaneous Fees – Billed Monthly, as incurred

**SECTION 2: MISCELLANEOUS FEES**

**General Hosting fee schedule for RoseASP services – if needed**

|  |  |  |  |
| --- | --- | --- | --- |
| **Installation Fees** |  |  |  |
| Dedicated Server | $1,500 |  | Initial Installation – generic list price |
|  |  |  |  |
| Additional Applications |  $ 500  |  | Initial Installation  |
|  |  |  |  |
| **Standard Monthly Fees** |  |  |  |
| Server or device management fee | $750 |  | Additional dedicated customer server/device over Usage Minimum |
| Microsoft Dynamics GP user fees | $285 |  | Per additional named user over Usage Minimum |
| Microsoft Dynamics CRM user fees | $85 |  | Per additional user/per application over Usage Minimum |
| Add’l GP light login ID’s | $35/50 |  | Per additional named user over Usage Minimum |
|  |  |  |  |
| **Third Party Application and Non-Certified Application Testing Fees** |  |  |  |
| Certification  |  $2,500  |  | Per Release/per installation |
| Installation  |  $1,500  |  | Per Release/per installation |
| Additional Application Hosting Charge | $35  |  | Per Add-on/Per User/month |
|  |  |  |  |
| **Administration Charges** |  |  |  |
| Additional 1Gig Space  |  $10  |  | Per Month |
| Database Creation  |  $500  |  | Per Incident  |
| Database Reorganization  |  250  |  | Per Incident  |
| Non-scheduled Backup  |  100  |  | Per Incident  |
| Data Restoration  |  250  |  | Per Incident/Per Application  |
| Non-scheduled Data Imports Backup Burned to CD and shipment to Customer |  250125  |  | Per Incident Per Incident |
| Network/Security Administration\* | 0 |  | 1-5 Incidents/month |
| Network/Security Administration | 25 |  | 6+ Incident/month |
| Additional users beyond concurrent count | 25 |  | Per each named user |
|  |  |  |  |
| **Technical Support** |  |  |  |
| Technical Support – Hosting |  $185  |  | Per Hour  |
| On-site Technical Support |  185  |  | Per Hour |

\*Network/Security Administration includes, but is not limited to, add/change/delete/unlocking of user accounts.