



## Facility Issues Benchmarking Program **TERMS and AGREEMENT**

This AGREEMENT ("Agreement") between you (You or Participant) and RAL Technologies, Inc. dba Facility Issues (We or Us), governs the rights and responsibilities associated with the facility benchmarking program and/or other facility metric services. For the purposes of this Agreement, when the term Party is used, it shall also include all subsidiaries, affiliates, and Representatives of the respective Party, and the term Parties shall mean both You and Us.

### **WITNESSETH:**

WHEREAS, the Parties possess certain trade secrets, technology, know-how, and other confidential and proprietary information ("Confidential Information"); and

WHEREAS, the Parties intend participate in comparisons and discussions regarding attributes and performance of properties/facilities and their operation (collectively "Purpose") that require disclosure of certain information that they wish to keep Confidential; and

WHEREAS, the Parties have entered into this Agreement to assure that all such information, documents, data, and discussions are kept confidential and are not disclosed or used other than as permitted under this Agreement; and

WHEREAS, for the purposes of this Agreement, the term "Representatives" means, with respect to a Party, the directors, officers, employees, agents, managers, partners, potential partners and members of such Party, the program sponsor, the consultants, accountants, financial advisers, legal counsel, contracted service providers and other professional advisers of such Party and the directors, officers, partners, and employees of such advisers.

NOW, THEREFORE, in consideration of the mutual promises and covenants made herein, and with the intent to be legally bound hereby, the Parties agree as follows:

**By accessing the Facility Issues website, you agree to all of the terms and conditions (the 'Terms') in this Agreement, as amended from time to time, and acknowledge that failure to comply with these Terms shall be grounds for terminating access to our website and programs.**

### **1. ENROLLMENT.**

In order to access the Website, you must enter your contact and organization information, and pay the appropriate fees. You must complete and submit all of the required information on our sign-up form accurately and completely, and to notify us when your address, or any other information you have given us, changes. We reserve the right to reject any application for any reason, or terminate accounts without notice upon discovery violation of these terms.

### **2. PAYMENTS.**

Subscription fees entitle Participants to use one valid account for the current year of the benchmarking cycle. Subscription fees are nonrefundable once the Draft Report is published as indicated on the date of the

annual schedule published for the respective program. Until payment is received, rates are subject to change without notice.

### **3. ACCOUNTS, USERNAMES AND PASSWORDS.**

Upon activation of an account, Facility Issues will provide you with a unique site code, username, and password, as Administrator for that account. To access the Website, a user must enter a valid username and password. You may distribute usernames and passwords to others in your organization as needed for the input of data. Only one person at a time may access the Website per username.

You are responsible for maintaining the confidentiality and security of your usernames, and passwords. You agree to be solely responsible for ensuring that any access to our website using your site codes or usernames complies with these Terms. You agree to notify us immediately about any unauthorized use of accounts or any breach of security.

Accounts may be not assigned or otherwise transferred, directly or indirectly, to any person or entity without Facility Issues' prior written consent.

The account administrator is responsible for providing all users within their organization a copy of the code of conduct and confirming that the requirement and understood and the organization is in compliance. A one-page PDF of the Code of Conduct for use of reports/data to share with all users is available at <https://facilityissues.com/link/conduct/>.

### **4. ACCESS TO THE WEBSITE.**

As a Participant, you will have a limited license to access the Facility Issues Website, and to obtain reports from our website, in accordance with these Terms and with rules and instructions set forth on our website. By subscribing, you agree to comply with these Terms and all such rules and instructions, including all amendments we may make from time to time.

We will attempt to make the Website available 24 hours per day, 7 days per week, excepting periods of scheduled maintenance. However, Facility Issues does not warrant that access to the Website will be available, will be uninterrupted or will be error-free, and we may discontinue or suspend operation of the Website, or modify its contents, at any time for any reason, in our sole discretion, with or without notice. We will attempt to post notices of changes on our website but cannot guarantee that we will always be able to do so.

Participants in some programs may also receive account(s) on other websites that provide data reporting services used by Facility Issues as part of our benchmarking programs (collectively the 'Website'). Use of those websites is subject to the conditions of the respective services in addition to these Terms.

You are responsible for any Internet access charges or other telecommunications charges for accessing the Website.

### **5. OWNERSHIP.**

Unless otherwise noted, all materials on our website, including images, illustrations, designs, icons, photographs, audio, video clips, and written and other materials that are part of the Website, the data contained within the Website, and the Website itself (collectively called the 'Facility Issues Content' are

copyrights, trademarks, service marks, trade dress and/or other intellectual properties owned, controlled or licensed by Facility Issues.

No Facility Issues content may be copied, reproduced, framed, hyperlinked, republished, uploaded, posted, transmitted or re-transmitted, or distributed in any way, except to the extent permitted under this Agreement. The Facility Issues Content is the sole property of Facility Issues. Subscriber acquires no right, title, or interest in any Facility Issues Content, except to extent licensed under this Agreement.

Participant acknowledges that the Website is a trade secret of Facility Issues, because it derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and because it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Facility data of the Participant entered into our system remains the property of the respective organization and will not be shared by Facility Issues in its original form except as allowed within the respective benchmarking program. By contributing data to Facility Issues' Website, Participant grants Facility Issues an irrevocable, perpetual, worldwide, non-exclusive, royalty-free, license right to use such data as part of the Website, and for such other related purposes as Facility Issues may determine.

## 6. CONFIDENTIALITY.

All benchmarking reports are published using a site code. The code list matching the names of the participants with the codes is provided only to the benchmarking participants in designated programs as noted on the Participant Agreement. Distribution of the code list to non-benchmarking participants or persons outside your organization is prohibited. Participant acknowledges that failure to comply with this restriction shall be grounds for terminating access to the Website and may subject Participant to claims for damages or other legal remedies.

Internal uses: Participant may use the Website, and reports generated from the Website, internally for Participant's own business. If posted to a location accessible over a network within a company or other organization, access must be restricted from general public access by means of a password or similar control system; copyright notices must not be removed, altered or modified; and in addition, the report must state that 'Disclosure of this information outside [name of the subscribing organization] is strictly prohibited, unless permitted by Facility Issues, and indicate that questions about disclosure should be directed to the responsible administrator, who is identified by name, telephone number and/or E-mail address.

External uses: Participant may use the Website, and reports generated from the Website, for Participant's clients or customers, provided that any report furnished to non-benchmarking participant **may only identify properties for which Participant is the administrator**, and Participant agrees to maintain the confidentiality of any data obtained from the Website within its organization, and not to remove, alter or modify copyright notices of Facility Issues or of any third party, in accordance with the terms of this Agreement.

## 7. RESTRICTIONS ON COMMERCIAL USE.

Promotional uses. Participant may reproduce reports, in the form of graphic presentations only, generated in reports from the Website, for promotional or marketing purposes, provided that any such graphic or information (i) is directed to contrasting one or more of Participant's buildings to a metric derived from the Website, (ii) shall display or disclose only mean, median, total or aggregate data, (iii) **shall not display or**

**disclose data that allows identification of another organization or another organization's property,** (iv) address no more than five metrics in total, and (iv) shall display the copyright notices of, and attribute the information to, Facility Issues. Participant acknowledges that failure to comply with this restriction shall be grounds for terminating access to the Website and may subject Participant to claims for damages or other legal remedies. Any exceptions desired by Participant to these restrictions on commercial use must be approved in writing by Facility Issues. Please send any requests by e-mail with examples of your proposed use to [rlambe@facilityissues.com](mailto:rlambe@facilityissues.com).

Posting any of the Facility Issues Content on any other website, or displaying any report generated from the Website on any Internet website (other than as may be permitted by these Terms), is prohibited, and may subject Participant to claims for damages or other legal remedies.

## **8. REMOVING COPYRIGHT NOTICES PROHIBITED.**

Participant may not remove, alter, or modify copyright notices of Facility Issues or of any third party from reports generated from the Website. Participant acknowledges that failure to comply with this restriction shall be grounds for terminating access to the Website.

## **9. OTHER USES PROHIBITED.**

Any use of the Website not expressly authorized in this Agreement is strictly prohibited without Facility Issues' prior written consent, which consent may be withheld in our sole discretion. Without limiting the generality of the foregoing, Licensee is expressly prohibited from (a) sublicensing or reselling the Website, in whole or in part; (b) using or allowing any third parties to use the Website directly for any purpose, including but not limited to compiling, enhancing, verifying, supplementing, adding to any other compilation of information, or reselling access to it or information from it; (c) using the Website in any service or product not specifically authorized in this Agreement or offering it through any third party; (d) disassembling, decompiling, reverse engineering, modifying or otherwise altering the Website or any part thereof, or any software used in the Website; or (e) using information extracted from the Website to compile any similar website.

## **10. DISCLAIMER OF WARRANTIES.**

Facility Issues provides the Website on an "AS IS" basis without guarantee. Facility Issues does not warrant or guarantee the accuracy, completeness, adequacy, or currency of any information contained in or extracted from the Website; nor that the Website will include information or data meeting Participant's requirements, or those of its customers or clients; nor that its operation will be error-free or without interruption.

EXCEPT AS MAY BE SET FORTH IN THIS AGREEMENT, Facility Issues EXPRESSLY DISCLAIMS ALL WARRANTIES OR CONDITIONS OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND INFORMATIONAL CONTENT.

## **11. LIMITATION OF LIABILITY.**

Participants use information from the website at their own risk. Under no circumstances, including but not limited to negligence, shall Facility Issues or its employees, agents, suppliers or contractors be liable for any losses and expenses of whatever nature and howsoever arising, including without limitation any loss of or

damage to property, loss of income or profit, failure to achieve reductions in costs, loss of goodwill, loss of use, loss of data, loss caused by any computer virus or worm, or any indirect, special, consequential, incidental or punitive damages. These exclusions on damages shall be independent of any failure of the limited remedy stated in this section.

Facility Issues shall not be responsible for any decision made by you or action taken by you in reliance upon any content, nor for any claims by third parties, nor for any other losses of any kind or character, that result from the use of, or the inability to use, the website, even if facility issues or an authorized representative has been advised of the possibility of such damages.

In no event shall our total liability to you for all damages, losses, and causes of action, whether in contract, tort (including but not limited to negligence), or otherwise, exceed the amount paid by you, if any, to facility issues for accessing the website.

## **12. PRIVACY.**

Facility Issues reserves the right to disclose any information necessary to satisfy any law, regulation, or other governmental request; to operate its website; or to protect itself or other participants. Enrollment data and certain other demographic information about you are subject to our privacy policy.

## **13. TERMINATION.**

These Terms, and your account with Facility Issues, are effective until terminated by either party. You may terminate your account at any time by sending an e-mail to us at [rlambe@facilityissues.com](mailto:rlambe@facilityissues.com)

Facility Issues may terminate or temporarily suspend your access to the Website, immediately and without notice, for conduct that it determines, in its sole discretion, to violate these Terms or the Access Rules, or is harmful to Facility Issues or to other participants.

Upon termination, you may no longer access the Website. In addition, we may take such further action as we determine to be appropriate under the circumstances to eliminate or preclude repeat violations, and we shall not be liable for any damages of any nature suffered by any participant or by any third party resulting in whole or in part from our exercise of our rights under these Terms.

If your account is cancelled, you agree not to sign up with Facility Issues again, under the same or different names or e-mail addresses, unless you receive express written permission from Facility Issues.

## **14. INDEMNITY.**

You agree to indemnify and hold Facility Issues and its respective directors, officers, employees, and agents harmless from any and all liabilities, claims, damages, settlements and expenses, including reasonable attorneys' fees, arising from breach of these Terms, of the Access Rules, or from any act or omission relating to use of or access to the Website by you. Facility Issues will promptly give you notice of any claim, or of the commencement of any legal proceedings, for which we recovery under this indemnity may be sought; but if we fail to give timely notice, that will not affect our right to indemnification, except to the extent that you are actually damaged or prejudiced by our delay.

## **15. GOVERNING LAW; REMEDIES.**

These Terms shall be governed by and construed in accordance with the laws of the State of New York, United States of America.

You agree that except as is provided in the next paragraph, any action at law or in equity arising out of or relating to these Terms or to the use of the Website shall exclusively be resolved by arbitration in Oneida County, New York, USA, under the rules of an independent arbitration services provider to be designated by Facility Issues, before a single arbitrator possessing expertise in computer website or software licensing contracts. The arbitrator shall have the discretion to award Facility Issues, if the substantially prevailing party, recovery of its expenses of arbitration, including reasonable attorneys' fees, from any substantially non-prevailing party. The arbitration award shall be final and binding upon the parties, and judgment upon the award may be entered in any court having jurisdiction.

Participant acknowledges that any unauthorized use of the Website will cause irreparable harm and injury to Facility Issues for which there is no adequate remedy at law. In addition to all other remedies available under this Agreement, at law or in equity, Participant further agrees that in the event Participant uses the Website in violation of this Agreement, Facility Issues shall be entitled to appropriate equitable relief, without necessity of posting bond, from a court of competent jurisdiction in the State of New York, the courts of which shall have exclusive jurisdiction over such actions and to the jurisdiction of which the parties irrevocably submit. In any such proceeding, Facility Issues, if the substantially prevailing party, shall be entitled to recover its expenses, including its reasonable attorneys' fees, from any substantially non-prevailing party.

## **16. CHANGES TO TERMS OR ACCESS RULES.**

Facility Issues reserves the right to change these Terms, or the Access Rules, or to add or delete Terms or Access Rules at our discretion, by posting them on our website. We will notify you by E-mail of any changes, but changes to the Terms or Access Rules will become effective upon posting. (Last update March 31, 2022)

## **17. SURVIVAL OF OBLIGATIONS**

Upon termination of the Participant's subscription, the obligations and commitments established by this Agreement with respect to ownership, confidentiality, and use of the data and resources continues for a period of ten (10) years from the end of the subscription, and all other conditions remain in effect for a period of two (2) years following the end of the subscription.

## **18. SEVERABILITY.**

If any provision of these Terms shall be unlawful, void, or for any reason unenforceable, then that provision shall be deemed severable from these Terms and shall not affect the validity and enforceability of any remaining provisions. You agree that regardless of any law or statute to the contrary, any claim or cause of action arising out of or relating to use of the Website and/or these Terms must be filed within one (1) year of the date the claim or cause of action arose or be barred as untimely. The failure to insist upon or enforce strict performance of any provision of these Terms shall not be construed as a waiver of any provision or right. This is the entire agreement between us relating to its subject matter and shall not be modified except as provided in these Terms or in a writing signed by an authorized representative of Facility Issues.