



Mako Networks Sales & Marketing, Inc.

Terms & Conditions for End User System Access, Use & Service Supply

1. Introduction

- a. **Binding Terms:** These terms and conditions constitute a legally binding agreement between us and you (the "Agreement"), and apply to all System access and use granted by us or our Resellers to you, and the provision of any related Services. By using the System or the Services you confirm that you accept being bound by these terms.
- b. **Defined Terms:** Clause 15 below contains the defined terms used in this Agreement.

2. Agreement

We agree to grant you access to the System, and to provide the Services to you in accordance with the provisions of this Agreement, in return for payment of the Charges by you (whether paid to our Reseller or to us directly if clause 11(b) applies) and the performance of your other obligations as set out in this Agreement.

3. Term

- a. **Duration:** This Agreement commences when the System is first activated via the Connection Device used by you, and continues until either party provides the other party with no less than one (1) month's written notice of termination, except as otherwise provided in this Agreement.
- b. **Fixed Term:** If you have applied for and been granted a fixed term agreement with our Reseller or with us directly, which agreement is attached hereto as Exhibit A and incorporated by reference herein, then neither party can give notice under clause 3(a) until that fixed or minimum term has expired.

4. Access to System and provision of Services

- a. **Our obligations:**
 - i. We will grant you access to the System, and will supply the Services to you (whether directly or via our Reseller), and will perform our other obligations as expressly stated in this Agreement, all in accordance with, and subject to, the provisions of this Agreement.
 - ii. Your access to the System and/or the Services may be amended or limited by further agreement in writing between us (or one of our Resellers) and you, depending on the Services you require.
 - iii. We will use commercially reasonable efforts to try to ensure that your access to the System and the provision of the Services is continuous and as fault free as reasonably possible, but we do not guarantee or warrant that this will be so for reasons including without limitation those outlined in clause 4(b)(iii). You confirm that you have back-up processes in place which will operate to immediately replace the System and the Services should delivery from us not be possible at any time.
- b. **Your obligations:** without limiting your other obligations as stated elsewhere in this Agreement, you:
 - i. will abide by the provisions of our Technical Specifications Manual as displayed on the Website from time to time, and you acknowledge that you have read and accept the contents of that document;
 - ii. will comply with any other reasonable directions which we may provide from time to time in relation to your access to the System or use of the Services;
 - iii. acknowledge and accept that access to the System and provision of the Services is dependent at all times on external factors such as (without limitation) third party networks, network congestion, your own systems and equipment, radio interference, atmospheric conditions, and network or System maintenance or upgrade activities (whether scheduled or urgent), and that any one or more of such factors, or other factors, could cause loss or degradation of the Services or your access to and use of the System at any time;
 - iv. will use the Connection Device, the System and the Services only for the purposes as promoted by us, and not for any other purpose, and in particular, not for any abusive, fraudulent, illegal, or inappropriate purpose;
 - v. will ensure that each of your executives, employees, agents or contractors who use the Services or have access to the System abide by these terms at all times – you are responsible for anyone who accesses the System or uses the Services from your Connection Device or from any of your contact details, whether or not authorised by you;



- vi. must keep all passwords and other access codes we issue to you confidential and secure at all times, free from unauthorised third party access;
- vii. must inform us immediately if any of your passwords, access codes or your Connection Device has been lost, stolen or accessed by unauthorised means, as you will continue to be liable until such time as we receive your notification, and we reconfigure your access to the System and the Services (which we may do at your cost);
- viii. must not resell or sub-License the use of the Connection Device, the System or the Services at any time;
- ix. undertake to back up all of your business data independently daily; and
- x. must keep us fully informed of all changes to your contact details at all times.
- c. **Changes to the Services or your access to the System:** We may suspend, alter, vary, or limit the Services or your access to the System in order to perform maintenance or upgrade work or for other business reasons, at our sole discretion. We will endeavour to give you prior notice of such events to the extent reasonably possible. If any changes under this clause require you to upgrade or change your Connection Device then you will be required to do so at your own cost.
- d. **Support:** If you require technical support at any time, please contact your Reseller or our Customer Service team at support@makonetworks.com. We or our Reseller may charge you reasonable support Charges for your use of our support Services.

5. **Charges and Billing**

- a. **Invoices:** Subject to clause 11(b), our Reseller will send you invoices from time to time containing Charges payable by you in relation to this Agreement. You will pay all Charges to our Reseller (or to us if clause 11(b) applies) as contained in any invoice within the time, and in the manner, stated in the relevant invoice and without set-off, counterclaim or any deduction whatsoever. Unless clause 11(b) applies, payment of the Charges to our Reseller is a valid discharge of your obligation to pay us. Nothing in this Agreement is intended to result in you paying duplicated fees or charges to our Reseller and to us.
- b. **Default Interest:** If clause 11(b) applies, and if you fail to make any payment in full to us directly as may be required by clause 5(a) we may impose interest at the Default Rate, from the time the amount was due until the time it is paid in full. We may also require you to pay all reasonable recovery costs associated with the non-payment of your Charge including our debt recovery and legal costs.
- c. **Early Termination Charge:** If the term of this agreement is for a fixed or minimum term, and if you terminate this Agreement before the expiry of that fixed or minimum term for reasons other than breach of these terms by us, or we terminate due to your breach, then you will be liable to pay our Reseller (or us if clause 11(b) applies) the Early Termination Charge which you accept is not a penalty but rather a genuine pre-estimate of our loss in relation to the revenue we would otherwise have received.
- d. **Security:** If clause 11(b) applies at any time, we may at any time:
 - i. Require you to pay us a reasonable security deposit to mitigate against the effect of any non-payment by you (if that occurs). That deposit will be held in a non-interest bearing account and will be repaid to you following termination of this Agreement, provided you are not in breach. Holding that security deposit does not limit any other rights or remedies we may have.
 - ii. Require you to set up a direct debit or other similar authority in our favor to ensure the timely payment of our Charges.
 - iii. Impose a credit limit on your account along with any related restriction on the Services you may receive, and you must adhere to those restrictions, provided you will remain liable for any Charges incurred in excess of that credit limit if that occurs.
 - iv. Apply any credit balance you may have with us, to pay any sums you may owe us.
- e. **Disputes:** If you wish to dispute any Charges, you must send written notice to our Reseller (or to us if clause 11(b) applies) before the due date for payment detailing that dispute. Such disputes will be in accordance with Clause 14(c).

6. **Connection Device and other Hardware**

- a. **Approved Devices:** You must only use a Connection Device that is approved for use by us or our Reseller. Your purchase or lease of the Connection Device from us or our Reseller is subject to separate contract terms between you and us or our Reseller, as the case may be.
- b. **Disposal:** When you have finished with any Connection Device or any other hardware supplied by us or our Reseller then if the law requires us to specify an environmentally friendly method for disposal or recycling then you must adhere to that method to the extent you (or we) are required to by law.



- c. **Risk:** The Connection Device and any other hardware that may have been supplied by us or our Reseller is held and used by you at your risk.
- d. **Other Hardware:** If you require other hardware, software or services to enable you to access the System and use the Services in accordance with this Agreement then that is your responsibility and cost.

7. Data Protection / Privacy

- a. **Credit Checks:** By requesting access to the System or our Services, you authorize us or our Reseller to conduct such credit checks on you as we believe are reasonably necessary for the purposes of this Agreement. We or our Reseller can decline your application for Services for any reason, including if we are not satisfied with any credit report we receive about you.
- b. **Policy:** Our receipt, storage and use of any personal information relating to you or any personnel within your organization are governed by the terms of our privacy policy which is published on our Website. You agree that you have read and accept those policy terms, including any variation to those terms. You confirm that you either have checked, or will check, with our Reseller, as to its privacy or data protection policy and related terms which may be different to ours in respect of its business. That is not our responsibility.
- c. **Your Network:** You accept that in order to improve the Services, our System can monitor your network and related systems and store information from them to the extent supplied. You warrant that you have all required consents to lawfully enable us to do this.

8. Intellectual Property

- a. **Ownership:** All Intellectual Property forming part of or relating to the Software, the System, the Connection Device, the Services, any documentation (whether electronic or otherwise), or any other product or service we supply to you is and remains owned by us or our licensors (as the case may be) at all times. At no time will you gain any ownership or proprietary right or interest in any Intellectual Property. You are only granted the limited license to access and use the Intellectual Property as set out in clause 8(b). You must not use any Intellectual Property in any way other than as expressly permitted by clause 8(b).
- b. **License:** We hereby grant you a limited, non-exclusive, non-assignable and non-sublicensable License to access the System and to use the Software for the sole purpose of using the Services for the benefit of your business only, as promoted by us or our Resellers, and in accordance with the provisions of this Agreement. This License does not extend to any other items of our Intellectual Property.
- c. **Obligations:** You must not at any time attempt to copy, reverse engineer, decompile or damage the Software, System, or the Connection Device in any way, or copy, modify, reverse engineer, creative derivative works of or otherwise use any of our Intellectual Property, other than as expressly permitted in this Agreement.

9. Suspension and Termination

- a. **Suspension:** If we have reasonable grounds to terminate this Agreement under clause 9(b), at our sole discretion we may instead elect to suspend your entire access to the System or the Services immediately, indefinitely and without prior notice, but subject to clause 9(c). You will continue to pay the Charges during the period of any suspension given you have defaulted. We will inform you when the suspension has been lifted, subject to our rights under clauses 9(b) and 9(c).
- b. **Termination:** If you breach this Agreement at any time, we will be entitled to terminate this agreement by giving you fourteen (14) days advance written notice of termination. If you have not remedied any notified breach (if remediable) within that fourteen (14) day period to our reasonable satisfaction, then termination will occur on expiry of that fourteen (14) day period. This Agreement shall terminate immediately, without notice upon (i) the institution by or against you of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of your debts, that, in the case of involuntary proceedings, are not dismissed within sixty (60) days of institution, (ii) your making an assignment for the benefit of creditors, or (iii) your dissolution or ceasing to do business.
- c. **Further Election:** If we elect to suspend under clause 9(a) we may still at any time issue notice and terminate under clause 9(b) if we wish (provided the grounds for termination remain).
- d. **Consequences:** Upon termination for any reason, you must immediately pay all outstanding Charges and any other Charges due as at termination, and immediately cease accessing the System, the Services and the Intellectual Property. You must, at your cost, also return all property belonging to us or our Reseller immediately.
- e. **Surviving Terms:** The terms of this Agreement continue after termination to the extent required for us to enforce those terms as at termination.



10. Liability

- a. **Limitation of Liability:** Subject to clause 10(b):
- Our liability to you, whether in contract, tort, equity or on any basis, is at all times limited to the Charges you have paid to us or our Reseller in respect of this Agreement only, in the two (2) month period preceding the date of any written claim made by you (or if that claim is made post termination, then the last two months of the Agreement). We are not liable, whether in tort (including for negligence, gross negligence or breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or loss of revenue or profits, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising, under this Agreement.
 - Any warranties or other terms that might otherwise be implied into this Agreement by law for your benefit are excluded to the fullest extent permitted by law, including any warranties of merchantability or fitness for a particular purpose. In particular, we do not warrant that the System, the Services or the Connection Device will perform to any standard or expectation you may have or will achieve any particular outcome you might desire.
 - You acknowledge that your use of the System and the Services is solely for your business purposes, and as a result, if any applicable law entitles us to exclude or limit our liability to you because you are entering into this Agreement solely for business purposes, then you accept that we exclude (or if not possible then limit) our liability to you to the fullest extent permitted by that law.
 - You agree to fully defend, indemnify and hold us harmless for any loss, damage, claim, cost or expense we incur as a result of any breach of this Agreement by you or any of the third parties described in clause 4(b)(v) of these terms.
- b. **Exceptions:** Nothing in clause 10(a) is intended in any way to negate or limit any rights which you may have by law which we are not legally permitted to exclude or limit. You retain those rights to the extent we are not permitted by law to exclude or limit those rights. Nothing in this Agreement is intended to limit our liability for death or personal injury caused by our negligence or for fraud or fraudulent misrepresentations.
- c. **Force Majeure:** We will not be liable for any breach or loss caused by any event which is beyond our reasonable control including without limitation third party network outage or disruption, Acts of God, riots, strikes, shortage of material, equipment or energy.

11. Transferring Responsibilities

- By Us:** We may transfer or assign the whole or any part of this Agreement, or any interest in the System, Services or any Intellectual Property, to any third party for any reason at any time.
- From our Reseller to Us:** We may give you written notice at any time stating that our agreement with our Reseller to you has ended (if that occurs) and that you must from that point deal with us directly, or our nominee, with respect to the performance of this Agreement (including payment of the Charges by you). You will abide by any such notice from us.
- Subcontracting:** We may subcontract the whole or any part of our obligations under this Agreement to one or more Resellers or to any other party.
- By You:** Your interests in this Agreement are personal to you and you may not transfer any of your rights or obligations to any other party without our prior written consent, not to be unreasonably withheld.

12. Third Parties

- Resellers:** Our Resellers are independent contractors operating under separate contract terms with us. They are authorised to sell the Services and Connection Devices to you in accordance with the terms we have agreed with them. Your contract terms with the Reseller are separate and apply only between you and the Reseller acting on its own behalf. In the event of any conflict, this Agreement prevails. Resellers only have authority to supply Connection Devices, Services and access to the System in accordance with this Agreement and our agreement with our Reseller, and to conclude these Agreement terms with you on our behalf. Resellers do not have any other authority to bind us or make any other representations on our behalf.
- Rights:** Our Resellers and any of our group companies (i.e., companies owned or controlled by us or under common ownership or control with us including all parent entities) are entitled to gain the benefit of these terms and conditions and are entitled to enforce them against you if we so direct. Other than as expressly stated in clause 11 or this clause 12, no other third parties are intended or permitted to be able to enforce these terms or gain any right or benefit under them.



- c. **Network Operators:** We have certain obligations towards other Network Operators and our suppliers. Those persons (and their officers, employees, contractors and agents) will not be liable to you or anyone else for any claims, costs, damages, losses or other liabilities of any kind whatsoever from the Services we provide or from your use of those Services or our network, including (without limitation) your access to use of any Network Operator's networks. This paragraph creates an obligation that other Network Operators and/or the suppliers can enforce against you, whether as a defence or otherwise.

13. Variations

We may vary these terms and conditions, including the Charges, at any time by sending you advance notice or by publishing the changes on our Website. You confirm that you have access to the Internet and will check our Website at regular intervals to gain notice of any changes to these terms.

14. General

- a. **Notices:** We will send any notices to you by either sending them to your Reseller or by publishing them on the Website. Notice will be deemed to be given once sent or published in this manner. You can email us via the Contact section on our Website and that will be deemed to be received if we respond to your email.
- b. **Entire Agreement:** This Agreement constitutes the entire agreement between us and supersedes all prior agreements, arrangements, understandings or representations between you and us. Subject to clause 12(a), nothing in this Agreement is intended to in any way affect any contract terms between you and our Reseller.
- c. **Disputes:** You must refer any dispute in the first instance to our Reseller or our customer service team at support@makonetworks.com. If the dispute cannot be resolved between both parties within ten (10) Business Days, it may then be referred to mediation by either party, and if unresolved after that, it must be referred to arbitration by a single arbitrator whose decision will be final and binding. Any mediation or arbitration will be pursuant to the Commercial Arbitration Rules of the American Arbitration Association and will be conducted in San Francisco, California, and in English. Each party will bear its own costs as well as a half share of the mediation or arbitration specific costs.. Neither party will commence any other form of legal proceedings in relation to this Agreement unless for seeking urgent interlocutory relief or for the recovery of any Charges due to us.
- d. **Waiver:** No failure or delay to exercise our rights under this agreement will amount to a waiver of our rights.
- e. **Governing Law and Forum:** This agreement is governed by the laws of the State of California, United States of America provided that if the laws of another jurisdiction apply to this agreement, and we are not permitted under that law to negate or limit the application of a particular law, then that particular law will apply to this agreement but to the narrowest extent legally possible. The forum jurisdiction for the resolution of any disputes will be California, and all disputes will be governed by the non-exclusive jurisdiction of the California courts, subject to clause 14(c).

15. Interpretation

In this agreement, unless the context otherwise requires, the following terms have the following meanings:

Charges means the charges for your access to our System and your use of our Services or for the supply of Connection Devices as you have agreed to pay to our Reseller, or as we notify to you from time to time if there is no Reseller (or as displayed on our Website), including any Early Termination Charge, together with all taxes, duties or other such items which any government authority validly imposes and requires us or our Resellers to charge to you as a result of this agreement;

Connection Device means the hardware device (or Devices) supplied to you by us or one of our Resellers, and which enables you to access the System and the Services;

Default Rate means the lesser of (i) one and a half percent (1.5%) per month calculated daily, calculated on the full balance due and payable to us or (ii) the maximum rate allowed by law;

Early Termination Charge means an amount calculated as follows: $A \times B = \$C$ where A is the greater of the agreed monthly Charge (if agreed) and the average of all monthly Charges payable during the term up to termination; and B is the number of months remaining in the agreed fixed or minimum term following termination occurring; and \$C is the Early Termination Charge;

Intellectual Property means all intellectual property anywhere in the world relating to the System, the Services, the Software or any other aspect of our business, and includes without limitation all patents, patents pending, trademarks, copyright, design rights, database rights, trade secrets, know how, confidential information and any other intellectual property whatsoever;



Network Operators means any third party telecommunications operators with whom you and/or we have entered into a connection agreement with;

Reseller means any distributor, reseller or third party appointed by us in writing from time to time to sell the Services and / or Connection Devices to end users such as you;

Services means the network, applications, reporting, support or other services you have requested to use under license from us and which we agree to supply via the Connection Device and the System and any other means we make available to enable the provision of those services to you via our Reseller as the case may be;

Software means any software which is comprised within the System or is embedded in the Connection Device;

System means the hardware and network infrastructure and Software applications developed or otherwise used by us or our Resellers to deliver the Services to you;

Technical Specifications Manual means the manual(s) prepared by our technical personnel which details the technical environment you need to have in place in order to be able to effectively use the Services, and also describes those technical and other requirements which you are required to abide by at all times during the term of this agreement, and includes any installation manual(s);

Website means our website at www.makonetworks.com or any other website as lawfully promoted by any of our Resellers and which enables you to gain access to the System or Services;

We, us, and our means Mako Networks Sales & Marketing, Inc, being a California registered company based in San Francisco; and

You and your means you, the person or other legal entity accessing our System, being a person or other legal entity engaged by one of our Resellers or by us directly.