



## SALES AND SERVICE TERMS AND CONDITIONS

Unless you the "Customer" have a valid agreement with APC Sales and Service Corporation (APC) which has precedence over this document, the following terms and conditions, including any documents incorporated by reference herein, shall govern all Products and Services delivered by APC.

### DEFINITIONS ARTICLE 1

#### 1.1.1 Certain Definitions.

- A. "Affiliate" means any entity controlling, controlled by or under common control with either party. "Control" shall mean or indirect the direct ownership of more than fifty per cent (50%) of the voting rights or income interest in a company or other business entity or such other relationship as, in fact, constitutes actual control.
- B. "Change" means any alteration or any extra work, delay or other circumstance which results in an adjustment to any of the cost, delivery schedule, and/or any other aspect of the Product or Services.
- C. "Cost" means the charges, prices, and fees for the Product and Services.
- D. "Commissioning" means on site Start-up and testing of the Products, in accordance with APC's standards.
- E. "Documentation" means the APC user guides, operating manuals, education materials, reports generated by the APC Configurator, product descriptions and specifications, technical manuals, supporting materials, and other information relating to the Products or used in conjunction with the Services, whether made available in print, magnetic, electronic, or video format, in effect as of the date (i) the applicable Product is shipped to Customer, or (ii) the applicable Service is provided to Customer.
- F. "Entitlement or Entitlements" means the document that memorializes the scope of the Services.
- G. "End User" means the third party, final user of the Product or Service.
- H. "Equipment" means any and all third party sourced finished goods including spare parts relating thereto. Equipment does not include any APC branded products.
- I. "Products" means (individually or collectively as appropriate) such APC hardware, Software, Documentation, supplies, accessories, and other commodities, that have been provided or will be provided by APC pursuant to this AGREEMENT. "Products" does not include Equipment.
- J. "Purchase Order" means a written or electronic order from Customer for the purchase of Products, Equipment or Services.
- K. "Quotation" means the applicable authorized APC quotation in effect when APC accepts Customer's order.
- L. "Services" means the Start-up, Commissioning, repair, and/or maintenance activities provided by APC.
- M. "Statement of Work or SOW" means the document used by APC to describe customized Services. A SOW may (i) describe the attributes of the customized Services to be provided, and APC's and Customer's responsibilities relating to such Services; (ii) specify the price for such Services; and (iii) include technical and administrative requirements associated with such Services.
- N. "Software" means computer programs and program objects of any kind (including source code and object code), program set-up and customization parameters, tools, and data and the tangible media on which any of the foregoing are recorded (and copies thereof), including middleware and firmware and related updates and upgrades.
- O. "Specifications" means APC's published specifications for the Products or Services.
- P. "Start-up" means installation of the Product at the End User's site and verification by APC that the Product is in substantial conformance with the Specifications.



Q. "Substantial Completion" means the point in time at which the Products have been installed such that Commissioning and Start-up of the Products may thereafter commence, as further defined herein.

R. "Trademarks" means all applicable trademarks, and service marks legally registered to and claimed or used by APC and its Affiliates.

S. "Vendor" means the manufacturer of Equipment.

T. "Version" or "Release" means a release of Software that contains new features, enhancements, and/or maintenance updates, or for certain Software, a collection of revisions packaged into a single entity and, as such, made available by APC to its customers.

## ARTICLE 2. PURCHASE ORDERS

2.1 All Purchase Orders are subject to acceptance by APC. These terms and conditions supersede and replace in their entirety any and all terms and conditions set forth on the face or reverse side of any Purchase Order or other document presented by Customer, except for the specific terms of the Purchase Order setting forth the price, quantity, and delivery location, unless different terms are mutually agreed to between the parties. All Purchase Orders placed with APC for Service(s) shall be subject to availability and Customer's favorable credit status with APC.

2.2 Customer may request a Change to a Product order provided that the request for Change is delivered to APC at least thirty days (30) prior to the scheduled shipping date. Customer shall pay to APC all reasonable costs associated with the Change.

2.3 Customer may cancel a Product order provided that such cancellation is delivered in writing to APC at least thirty days (30) prior to the scheduled shipping date. In the event of any cancellation Customer shall pay to APC a restocking fee equal to 25% of the Product order plus costs incurred by APC for manufactured goods, and 100% for Equipment ordered by APC pursuant to the Purchase Order being cancelled.

## ARTICLE 3. PROVISION OF PRODUCTS AND SERVICES

3.1 Transportation of Products. All shipments from APC will be made EXW (Ex Works) as per Incoterms 2000. Customer shall reimburse APC for all costs associated with positioning the Products and Equipment at the Customer's site. Shipment dates shall be estimated after APC receives and approves the applicable Purchase Order.

3.2 Title and Risk of Loss. Title and risk of loss pass to Customer at APC's shipping dock in accordance with the shipping terms set forth in Section 3.1 above.

3.3 Installation of Products. If installation is provided for, APC shall install the Product in good working order at the designated location in accordance with the standards agreed to between the parties. APC shall not be liable for any differing, subsurface, latent or concealed conditions encountered in the performance of any Services. The existence of such differing, subsurface, latent or concealed conditions shall constitute a Change.

3.4 Site Preparation. Any specific environmental conditions which are required for the provision of the Services shall be the responsibility of Customer unless otherwise agreed to in writing by APC. APC shall be entitled to rely on the sufficiency and accuracy of any documentation or data, whether written or oral, provided by Customer to APC regarding site conditions and site preparation requirements.

3.5 Health and Safety. If the Customer is subject to health and safety laws or regulations which are more stringent than the health and safety standards governing APC, or if Customer elects to operate under more stringent health and safety standards than those to which APC is subject, and Customer requires APC to comply with those higher standards, APC shall be entitled to charge the Customer any extra costs incurred in so complying. Furthermore, APC may refuse, without any liability to Customer whatsoever, to perform in whole or in part the Services if the site presents unhealthy or unsafe conditions.

3.6 Relocation. If Customer relocates any of the Products which are subject to the terms of an Entitlement without APC agreeing to perform maintenance work as provided under that Entitlement at the new site, APC shall have the right, without any liability to Customer, to terminate the portion of the Entitlement that relates to the new site without any liability to Customer. Any such termination shall not relieve Customer of any maintenance fees to be paid or invoices due under the Entitlement.

3.7 Information. Information and/or notices given by APC to the Customer shall be deemed to be correctly given if provided to employees or representatives of the Customer. APC shall have reasonable access to the sites and the Products.

3.8 Site Access. APC shall have reasonable access to the sites and the Products. APC will be entitled to charge the Customer at its normal rates for the time lost by APC's employees as a result of delays from the Customer in granting

access to the site. Furthermore, APC will not be required to perform any Service beyond the term of the Entitlement or Entitlement if Customer does not provide reasonable and timely site access.

3.9 Third Party Providers. If a party other than APC services the Products and if in APC's reasonable opinion, corrective action is required to return the affected Products to their normal operating condition, APC will offer to perform such work at the service rates and spare part prices in force at the time of the offer. APC will not be obliged to perform maintenance work until all remedial work has been done.

3.10 Regulatory Requirements. When required by national regulations or safety rules, an employee or representative of the Customer shall be present in the room where the maintenance work takes place. If no employee or representative of the Customer is present, APC shall have the right to stop its work and to invoice the Customer at its normal labor rate.

3.11 By-Pass Switch. If no installation by-pass switch has been installed by Customer prior to the performance of any Service, it may be necessary to power down all equipment which depends on electricity from the circuit on which work is being performed. Customer must make time available during regular business hours for the shut down to take place and for the services to be performed. Customer is reminded that where there is an installation by-pass switch and it is engaged, or where the product is inoperative, the product does not provide any protection against interruptions or irregularities in, or loss of, electrical power.

3.12 Replacement Parts. If an APC authorized engineer installs a replacement part, the removed part becomes property of APC as soon as it is detached from the Customer product. APC authorized engineers are authorized to install only replacement parts specified by APC. APC will take possession of defective parts (excluding batteries) for which it has provided replacements and will properly dispose of them at no additional cost to Customer.

#### ARTICLE 4. PAYMENT

4.1 Payment. Customer agrees to pay, without offset, all invoiced amounts within thirty (30) days of APC's invoice date. Payment by Customer shall not be contingent upon payment by a third party. If APC places Customer's account in the hands of an agency or a law firm for collection by legal action, Customer will pay an additional charge equal to the costs of collection including agency and attorneys' fees and court costs incurred to the extent permitted by laws governing these transactions. In case any invoice is not paid when due, APC shall be entitled to discontinue any maintenance works with fifteen (15) days' prior notice. Discontinuation of Services does not relieve the Customer of its obligation to pay for the Services previously rendered and to pay the yearly fee in whole for the current year.

4.2 Prices for Services, Additional Services, Contract Renewal and Multi-year Contracts. If the term of a service Entitlement is for more than one year, yearly invoices will be issued by APC at each anniversary date and shall be paid by the Customer in accordance with the payment terms below. Pricing may be adjusted each year at the anniversary date of an Entitlement. Payment for any additional work not quoted by APC which goes beyond the scope of this Agreement which is approved by Customer will be paid within ten (10) days of the date of the invoice unless otherwise stated on the invoice.

4.3 Taxes. Unless Customer provides acceptable evidence of exemption, Customer shall pay or reimburse APC for all taxes which are imposed upon Customer's acquisition of Products or Services. Customer shall not be obligated to pay or reimburse APC for any taxes attributable to the sale of any Products or Services which are imposed on or measured by net or gross income, capital, net worth, franchise, privilege, any other taxes, or assessments, nor any of the foregoing imposed on or payable by APC.

#### ARTICLE 5. WARRANTIES

5.1 Limited Hardware Warranty. APC warrants that the APC hardware Products delivered to Customer will be free from defects in workmanship and materials under normal use for the length of time outlined in the hardware Product manual for the relevant hardware Product, current as of the date on which the Product is ordered.

5.2 Limited Software Warranty. APC warrants that during the Software Warranty Period (i) the Software licensed hereunder will perform in substantial conformance to the program specifications; and (ii) the magnetic media on which the Software is furnished will be free from defects in material and workmanship when given normal, proper and intended usage. The warranty period applicable to the Software is sixty (60) days ("Software Warranty Period"). The Software Warranty Period commences on the date of shipment of such Software by APC. No Software updates are provided under this Agreement. Licensor does not warrant that the operation of the Software will be uninterrupted or error-free, or that Software will operate in hardware and software combinations other than as expressly provided for in the Product Specifications or that Software will meet requirements specified by Customer.

5.3 Equipment Warranties. No warranty is made with respect to Equipment, and no recommendation of such Equipment shall imply or constitute any warranty with respect thereto. Warranties associated with Equipment are passed "as is" from the applicable vendors, and any enforcement of such Equipment warranties shall be between Customer and Vendor.

5.4 Service Warranties. APC warrants that the Services to be performed hereunder shall be performed in accordance with recognized professional standards customary in the industry in which the Services are being performed. Should the Services fail to comply with such standards, APC agrees to re-perform such deficient Services at no cost to Customer provided that APC has received written notification within thirty (30) days following the completion of the specific Services giving rise to the claim. FURTHERMORE, CUSTOMER AGREES TO HOLD APC HARMLESS FROM ANY DAMAGES THAT ARISE FROM SERVICES PERFORMED IN STRICT ACCORDANCE WITH THE CUSTOMER'S SPECIFICATIONS OR DIRECTIONS WHICH ARE CONTRARY TO THE APC'S STANDARD PRACTICES.

5.5 Exclusive Warranties. **THE FOREGOING WARRANTIES AND REMEDIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, REPRESENTATIONS, OR CONDITIONS, EXPRESS OR IMPLIED, EITHER IN FACT OR BY OPERATION OF LAW, STATUTORY OR OTHERWISE, INCLUDING WARRANTIES OR CONDITIONS OF MERCHANTABILITY, TITLE, NON-INFRINGEMENT AND FITNESS FOR A PARTICULAR PURPOSE. APC'S WARRANTIES CONTAINED HEREIN RUN ONLY TO CUSTOMER, AND ARE NOT EXTENDED TO ANY THIRD PARTIES.**

5.6 Exclusions. APC shall not warrant, nor is APC required to provide, any Service on any Product defects (i) resulting from (a) the Product being modified by any person other than APC, (b) incorrect use of the Product (c) unsuitable environmental conditions, or (d) causes not attributable to the Product; or (ii) which were not apparent at the time of the Service visit. APC will submit to the Customer an estimate of the additional repair work required to correct any such defects. Said estimate will be based on APC labour and spare parts price list in force when the estimate is issued. APC will not perform any additional Services without having obtained the Customer's written approval. The opinion of APC as to whether or not the work is additional maintenance work and therefore not covered under an Entitlement shall be conclusive. Furthermore, APC is not responsible for any software, firmware, information or memory data of Customer or End Users contained in, stored on, or integrated with any Products returned to APC for repair, whether under warranty or not. APC also makes no warranty or representation that its Software will work in combination with any hardware or applications software products provided by third parties, that the operation of the Software will be uninterrupted or error-free, or that all defects in the Software will be corrected.

## ARTICLE 6. TERM

6.1 Termination for Non-Payment. APC may terminate any Entitlement, or any portion thereof, if Customer fails to pay when due any amounts due pursuant to any Purchase Order and such failure continues for a period of thirty (30) days after written notice is given to Customer.

6.2 Immediate Termination. APC may terminate a Service obligation immediately if Customer engages a third party to perform emergency or corrective maintenance on equipment which is covered by an Entitlement. In the event of said termination all obligations hereunder shall be terminated and APC shall have no liability for the termination or any damages caused as a result of the third party's actions or inaction.

6.3 Termination of Entitlements. Entitlements are non-cancellable by Customer.

## ARTICLE 7. LIABILITIES

7.1 Limitation of Liability. APC'S MAXIMUM LIABILITY TO CUSTOMER FOR DIRECT DAMAGES WILL BE LIMITED TO THE AMOUNT PAID BY CUSTOMER FOR THE PRODUCT OR SERVICES WHICH IS THE SUBJECT OF THE CLAIM. THE FOREGOING LIMITATION WILL NOT REDUCE APC'S OBLIGATIONS UNDER THE INTELLECTUAL PROPERTY INDEMNIFICATION SECTION OF THIS AGREEMENT, OR APC'S LIABILITY FOR BODILY INJURY CAUSED BY APC'S NEGLIGENCE. **NOTWITHSTANDING ANY PROVISION IN THESE TERMS AND CONDITIONS TO THE CONTRARY, IN NO EVENT SHALL EITHER PARTY, ITS OFFICERS, DIRECTORS, AFFILIATES OR EMPLOYEES BE LIABLE FOR ANY FORM OF INDIRECT, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, WHETHER SUCH DAMAGES ARISE IN CONTRACT OR TORT, IRRESPECTIVE OF FAULT, NEGLIGENCE OR STRICT LIABILITY, OR WHETHER SUCH PARTY HAS BEEN ADVISED IN ADVANCE OF THE POSSIBILITY OF SUCH DAMAGES.**

7.2 Applicability of Limitations of Liability. The limitation of liability in Section 7.1 shall apply to the full extent permitted by law, and shall apply whether liability is grounded in contract, tort, or otherwise, and shall extend to each party and their respective Affiliates, directors, officers, and employees.



## ARTICLE 8. SUBSTANTIAL COMPLETION

- 8.1 Substantial Completion. When Installation is included in the Services, APC shall provide written notice to Customer when APC deems such installation to be Substantially Complete and ready for Commissioning and Start-up. Within five (5) days after receiving notice of Substantial Completion, Customer shall advise APC in writing of any known defects or deficiencies in the Services. Upon receipt of such notice Company shall then take appropriate corrective action. The installation shall be deemed to have achieved Substantial Completion should Customer fail to reply to APC's written notice within said five (5) day time period.

## ARTICLE 9. ACCEPTANCE

- 9.1 All Products delivered pursuant to this Agreement will be deemed accepted upon delivery.

## ARTICLE 10. INTELLECTUAL PROPERTY INFRINGEMENT

10.1 Third-Party Claims. APC will defend or settle any claim against Customer alleging that a Product provided under these terms and conditions infringes a third party's U.S. intellectual property right, if Customer:

1. promptly notifies APC of the claim in writing;
2. cooperates with APC in the defense of the claim; and
3. grants APC sole control of the defense or settlement of the claim.

APC will pay infringement claim defense costs, APC negotiated settlement amounts, and court-awarded damages with respect to any such claim.

10.2. Remedies. If such a claim appears likely, then APC may modify the APC Products or Services, procure any necessary license, or replace the affected Product with one that is functionally equivalent. If APC determines that none of these alternatives is reasonably available, then APC will issue Customer a refund equal to the depreciated value of the affected Product.

10.3. Exclusions. APC has no obligation for any claim of infringement arising from:

1. APC compliance with Customer or third party designs, specifications, instructions, or technical information;
2. modifications made by Customer or a third party;
3. Customer non-compliance with the Documentation; or
4. Customer use with non-APC products, software, or services.

## 11. LICENSE AND RESTRICTIONS

11.1 Software License Grant. Subject to these terms and conditions and the payment of all applicable license fees, APC grants Customer a limited, personal, non-exclusive, non-transferable, non-assignable license to "Use", in object code form, the Version or Release of the APC Software delivered pursuant to this Agreement. For purposes of this Agreement, "Use" means to install, store, load, execute, and/or display one copy of the Software on one device at a time for Customer's internal business purposes, or the act of Using per this definition. Customer's Use of such Software is subject to these license terms and the Use restrictions and authorizations for the Software specified herein or as otherwise made available to Customer with the Software (the "Software License"). Additional Software License terms are contained in Exhibit A, and are hereby incorporated by reference.

11.2 Trademarks. Neither Customer nor its Affiliates have any right to incorporate any Trademark into Customer's or Affiliate's company name or trade name. Neither Customer nor its Affiliates will alter, cover, obfuscate or remove any Trademarks placed by APC on the Products or any material contained therein.

## 12. MISCELLANEOUS

12.1 Relationship of Parties. APC is performing only as an independent contractor. Nothing set forth in this Agreement shall be construed to create the relationship of principal and agent between APC and Customer.

12.2 Intellectual Property Rights. Customer shall not have or obtain title to any tangible or intangible property or materials which APC may supply, and all such items may be used only for the performance of the Services.

12.3 Confidentiality. Each party acknowledges that in the course of performance of its obligations such party may obtain confidential and/or proprietary information of the other party. "Confidential Information" includes: information

relating to development plans, costs, finances, marketing plans, equipment configurations, data, access or security codes or procedures utilized or acquired, business opportunities, names of customers, research, and development; the terms, conditions and existence of this Agreement; any information designated as confidential in writing or identified as confidential at the time of disclosure if such disclosure is verbal or visual; and any copies of the prior categories or excerpts included in other materials created by the recipient party. Each party agrees that, for a period of two (2) years following its receipt of Confidential Information from the other party, whether before or after the effective date of this Agreement, such recipient party shall use the same means it uses to protect its own confidential and proprietary information, but in any event not less than reasonable means to prevent the disclosure and to protect the confidentiality of the Confidential Information. Further, the recipient party shall only use the Confidential Information for the purposes of this Agreement, and shall not disclose the Confidential Information without the prior written consent of the other party. This provision shall not apply to Confidential Information which is (i) already known by the recipient party without an obligation of confidentiality, (ii) publicly known or becomes publicly known through no unauthorized act of the recipient party, (iii) rightfully received from a third party (other than an Affiliate or customer of the party owning the Confidential Information) without an obligation of confidentiality, (iv) disclosed without similar restrictions by the Party owning the Confidential Information to a third party (other than an Affiliate or customer of the party owning the Confidential Information), (v) approved by the party owning the Confidential Information, in writing, for disclosure, or (vi) required to be disclosed pursuant to a requirement of a governmental agency or law so long as the recipient party provides the other party with timely prior written notice of such requirement.

12.4 Force Majeure. Neither party will be liable for performance delays nor for non-performance due to causes beyond its reasonable control; however, this provision shall not apply to Customer's payment obligations.

12.5 Severability. If for any reason a court of competent jurisdiction finds any provision of these Terms and Conditions, or portion thereof, to be unenforceable, that provision of the Agreement shall be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of this Agreement shall continue in full force and effect.

12.6 Waiver. Any waiver of any covenant, condition, or agreement to be performed by a party under this Agreement shall (i) only be valid if the waiver is in writing and signed by an authorized representative of the party against which such waiver is sought to be enforced, and (ii) apply only to the specific covenant, condition or agreement to be performed, the specific instance or specific breach thereof and not to any other instance or breach thereof or subsequent instance or breach.

12.7 Electronic Communications. If APC and Customer mutually agree, business communications between the parties, including, but not limited to, Purchase Orders, invoices, and payment, may be submitted electronically. In such case, the parties shall mutually agree in writing upon supplemental terms and conditions, including technical standards, for the electronic exchange of such items including refresh frequency.

12.8 Remedies. The remedies set forth in Terms and Conditions shall be the exclusive remedies of the parties.

12.9 Export Control. Customer acknowledges and agrees that the commodities, software, and/or technology herein are subject to the export control laws and regulations of the United States and/or other national governments. These regulations include, but are not limited to, the U.S. Export Administration Regulations (US EAR), the U.S. State Department's International Traffic in Arms Regulations (ITAR), sanction regimes of the U.S. Department of Treasury Office of Foreign Assets Controls (OFAC) and export laws and regulations of the European Union (EU) and/or any of its member states. Buyer will comply with these laws and regulations. Customer shall not, without prior U.S. Government authorization, export, re-export, or transfer any commodities, software, or technology, either directly or indirectly, to any country subject to a U.S. trade embargo or sanction or to any resident or national of said countries, or to any person, organization, or entity on any of the restricted parties lists maintained by the U.S. Departments of State, Treasury, or Commerce. In addition, any commodities, software, or technology herein may not be exported, re-exported, or transferred to any end-user engaged in activities, or for any end-use, directly or indirectly related to the design, development, production, use, or stockpiling of weapons of mass destruction (e.g. nuclear, chemical, or biological weapons, and the missile technology to deliver them). APC may suspend performance if Customer is in violation of any applicable laws or regulations.

12.10 Dispute Resolution. THE RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THIS AGREEMENT SHALL NOT BE GOVERNED BY THE PROVISIONS OF THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS. RATHER THESE RIGHTS AND OBLIGATIONS SHALL BE GOVERNED BY THE LAWS, OTHER THAN CHOICE OF LAW RULES, OF THE COMMONWEALTH OF MASSACHUSETTS.

12.11 Data Protection. (a) In this Section "the Directive" means Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and where appropriate, terms used in this clause shall have meanings ascribed to them in the Directive. (b) The Customer acknowledges and agrees that all personal data provided by it or on its behalf will be processed by and on behalf of the Company in connection with the Services. Each party shall comply with the Directive as regards all such processing.