

## PSI Software Support Agreement

This Software Support Agreement (the "Agreement") is made as of \_\_\_\_\_, 2002 (the "Effective Date"), by and between Proactive Systems, Inc., a Minnesota corporation with its principal place of business at 2486 Black Lake Road, Spring Park, Minnesota 55384 ("PSI") and \_\_\_\_\_, a \_\_\_\_\_ corporation with its principal place of business at \_\_\_\_\_ ("Customer").

Customer and PSI hereby agree as follows:

### 1. PSI SOFTWARE PRODUCTS

Pursuant to the License Agreement dated as of \_\_\_\_\_ (the "License Agreement"), Customer has licensed from PSI the right to use the Licensed Software as defined in the License Agreement.

### 2. DEFINITIONS

2.1 **Error** means a reproducible failure of the Licensed Software to perform in substantial conformity with the Licensed Software specifications set forth in the corresponding User's Guide.

2.2 **Initial Support Term** means the one-year period following the Effective Date of this Agreement.

2.3 **Major Enhancement** means any major functional revision to the Licensed Software (designated by a renumbered release number such as 1.1 to 2.0) released by PSI during the Initial Support Term or any Renewal Support Term.

2.4 **Minor Enhancement** means any minor release, update, modification or "bug fix" (designated by a renumbered release number such as 1.1 to 1.2) which does not provide materially new functionality, as determined by PSI in its sole discretion, and made generally available to PSI's customers.

2.5 **Renewal Support Term** means a successive one-year renewal term following the Initial Support Term agreed upon by the parties pursuant to Section 7.1.

2.6 **Support Times** means the hours of each day and the days of each week set forth in Schedule 1 hereto.

### **3. SOFTWARE SUPPORT**

#### **3.1 Software Support Services**

During the Initial Support Term and any Renewal Support Term, PSI shall render the software support services set forth in this section to Customer subject to: (i) Customer's payment of the support fees described in Section 5, and (ii) Customer's compliance with its obligations set forth in Section 4 and elsewhere in this Agreement.

#### **3.2 Services**

The software support services to be provided by PSI pursuant to this Agreement are as follows:

##### **(a) Help Desk**

PSI will provide Customer with reasonable help desk assistance during the Support Times regarding the installation and implementation of the Licensed Software, and the identification, diagnosis and correction of Errors. PSI will attempt to resolve any support questions posed by Customer. If PSI determines that it would be appropriate to do so, PSI may defer resolution of a support question until a later time. At its discretion, PSI may provide Customer with help desk support during times other than the Support Time and/or beyond the maximum number of monthly usage limits at PSI's then standard rates. Customer shall be responsible for paying charges for such additional help desk support.

##### **(b) Home Page**

PSI will provide Customer with access to technical information via PSI's home page on the World Wide Web.

##### **(c) Minor Enhancements**

PSI will provide Customer with copies of all Minor Enhancements at no additional cost to Customer.

##### **(d) Major Enhancements**

Major Enhancements for the Licensed Software are not included under this Agreement. PSI may, but is not obligated to, offer Major Enhancements to Customer at a reduced fee.

#### **3.3 Procedures for Error Correction Services**

##### **(a) Notification**

To obtain Error correction services, Customer must notify PSI immediately of any suspected Error and must provide PSI with reasonable detail of the nature of and circumstances surrounding the Error.

**(b) Remote Diagnostics**

PSI may perform remote diagnostics to determine the existence and nature of an Error.

**(c) Error Correction**

PSI will make reasonable commercial efforts to correct and resolve Errors that Customer reports to PSI and which PSI is able to reproduce. Customer will promptly provide PSI with all information requested by PSI to reproduce such Errors. For each such Error, PSI will use reasonable commercial efforts to provide Customer with a work-around, a software patch or, if PSI is unable to provide Customer with either of the foregoing, a specific action plan for addressing the Error, including a good faith estimate of the time required to correct and resolve such Error.

**(d) Remote Correction**

PSI may perform any Error correction work via remote telecommunications. If such remote support is unavailable, in PSI's opinion, to satisfactorily resolve the Confirmed Error, PSI shall provide such support at Customer's premises. If such unavailability is due to Customer's failure to comply with Section 4 below, then Customer shall reimburse PSI for its reasonable travel expenses, if any.

**3.4 Response Times**

PSI will use reasonable commercial efforts to communicate with Customer, by telephone or e-mail, within the following targeted response times, regarding Errors that Customer reports to PSI during the Support Times; for purposes of this Agreement, a "response" means PSI's acknowledgment of an Error, and does not necessarily mean that a resolution will be achieved.

**ERROR PRIORITIES AND RESPONSE TIMES:**

<b>Priority</b>	<b>Failure Description</b>	<b>Response Time</b>
1	<b>Fatal:</b> Licensed Software not operational.	1 working day
2	<b>Severe Impact</b> (functionality disabled): Errors that result in a lack of Licensed Software functionality or that cause intermittent system failure.	1 working day
3	<b>Degraded Operations:</b> Errors that cause non-critical Licensed Software features consistently to malfunction.	3 working days
4	<b>Minimal Impact:</b> Errors that cause attributes and/or options of utility programs not to operate in accordance with specifications.	Next Licensed Software release

### **3.5 Limitations on PSI's Support Obligations**

Notwithstanding anything to the contrary elsewhere in this Agreement, PSI will have no obligation to provide any support services to Customer if:

- (a) Such support relates to or involves any products, data, features, devices or equipment not provided by PSI;
- (b) Customer or a third party has altered or modified any portion of the Licensed Software in any manner without the prior written consent of PSI;
- (c) Customer has not installed or used the Licensed Software in accordance with instructions provided by PSI;
- (d) Customer has failed to replace earlier versions of the Licensed Software with Enhancements provided to Customer;
- (e) A party other than PSI (or a party authorized by PSI) has serviced the Licensed Software and the Licensed Software no longer conforms to its specifications; or
- (f) Customer is not in full compliance with the other terms of this Agreement, the terms of the License Agreement, or any other agreement between PSI and Customer.

### **3.6 Hardware**

PSI's support obligations under this Agreement shall not include hardware, electrical work, telephone line work, interconnection work, or the installation or repair of accessories, alterations, parts or devices not furnished by PSI.

### **3.7 Additional Services**

In its discretion, PSI may provide Customer with additional support services for the Licensed Software not otherwise covered under this section or specifically excluded pursuant to Section 3.4 above, provided that Customer pays PSI for such service at PSI's then standard hourly and expense reimbursement rates. Except to the extent specifically otherwise provided in this Agreement, such support service is not included within the terms of this Agreement.

## 4. CUSTOMER'S OBLIGATIONS

### 4.1 Access

During the Initial Support Term or any Renewal Support Term, Customer will provide PSI with reasonable access (via remote telecommunications or on-site access at Customer's premises) to Customer's copies of the Licensed Software to the extent necessary, in PSI's discretion, to enable PSI to meet its support obligations as set forth in this Agreement.

### 4.2 Communications Link

During the Agreement, Customer, at its sole expense, will provide access via the Internet. PSI shall be entitled to use this Internet connection in discharging its responsibilities under this Agreement. PSI shall have no liability to Customer if PSI's ability to render support is impaired by Customer's inability to provide telecommunications functionality required for remote support.

### 4.3 Support Contact

Customer shall designate one employee and one alternate as its "**Support Contacts**" to be generally available during the Support Times to confer with PSI regarding Errors and other support-related issues. Customer's Support Contacts are identified in Schedule 1. Customer shall notify PSI immediately of any changes in the persons designated as Support Contacts. PSI will provide technical support only to Customer's Support Contacts.

## **5. FEES AND CHARGES**

### **5.1 General Fees and Charges**

Customer shall pay PSI the fees and charges set forth in Schedule 2. PSI may make reasonable adjustments to fees and charges at the beginning of any Renewal Support Term.

### **5.2 Miscellaneous Items**

Customer shall bear all costs associated with procuring, installing, and maintaining all equipment, telephone lines and communications interfaces necessary for Customer to obtain PSI support services.

### **5.3 Payment Procedures**

On an annual basis at the start of the Initial Support Term and any Renewal Support Term, PSI will invoice Customer for all fees and charges incurred by Customer pursuant to this Agreement. Customer shall pay all invoiced amounts in U.S. dollars within thirty (30) days of the date of invoice.

### **5.4 Notifications**

As the annual renewal period approaches, PSI will send out a renewal notice 60 days prior to the term expiration date. If, the notice has not been responded to another notice will be issued 30 days prior to the term expiration date, which will serve as a "FINAL" notice. If the PSI license is allowed to lapse, a warning dialog is posted to the users for a 30 day period prior to the cessation of operation. Upon receipt of the renewal of the license and support agreement, PSI issues the new license manager access keys extending the term of the license, support and operation of the software.

## **6. DISCLAIMER OF WARRANTY AND LIMITATION OF LIABILITY**

### **6.1 Warranty**

The support services under this Agreement will be provided in a workman-like manner by individuals who are knowledgeable in the operation of the Licensed Software. All software bug fixes, work-arounds, Error corrections and Enhancements are provided on an "AS IS" basis.

### **6.2 Disclaimer**

Except as provided in Section 6.1, PSI expressly disclaims all other warranties related to the Licensed Software or services provided under this Agreement, whether express or implied, including (without limitation) any warranty of merchantability or fitness for a particular purpose, or noninfringement. PSI does not warrant that all errors will be corrected. PSI shall have no liability to Customer for any liability or damage sustained by Customer as a result of any claim or action brought or asserted against Customer by any third party.

### **6.3 Maximum Liability**

In no event shall PSI's cumulative liability for any claim arising in connection with this Agreement exceed the amount of the total fees and charges paid to PSI by Customer during the twelve (12) months preceding any such claim.

### **6.4 Consequential Damages**

Regardless of whether any remedy set forth in this Agreement fails of its essential purpose, IN NO EVENT SHALL PSI BE LIABLE TO Customer FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, EXEMPLARY, OR INCIDENTAL DAMAGES OF ANY KIND AND HOWEVER CAUSED, EVEN IF PSI KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES and whether or not such damages are foreseeable.

### **6.5 Indemnification**

Customer shall indemnify and hold harmless PSI, its respective employees, officers, directors, shareholders and agents (collectively, the "**Indemnitee**") and hold the Indemnitee harmless against any and all losses, costs (including court costs and reasonable attorneys' fees), damages, settlements, suits, actions, expenses, liabilities, and claims sustained by the Indemnitee arising out of or resulting from any material breach by Customer of the terms and conditions of this Agreement.

## **7. TERM AND TERMINATION**

### **7.1 Term**

This Agreement will commence on the Effective Date and continue in effect during the Initial Support Term. This Agreement will automatically renew for successive, one (1) year Renewal Support Terms unless terminated by either PSI or Customer in accordance with this section, subject to Customer's payment of the applicable fee pursuant to Section 5 above.

### **7.2 Termination for Convenience**

If at any point, either party decides not to renew this Agreement, it shall provide the other party written notice of its intention not to renew at least thirty (30) days prior to the end of the Initial Support Term or the then-current Renewal Support Term, as the case may be.

### **7.3 Additional Termination Rights**

This Agreement may be terminated as follows:

#### **(a) License Agreement**

This Agreement shall immediately and automatically terminate upon the termination of the License Agreement.

#### **(b) For Breach**

Either PSI or Customer may terminate this Agreement immediately upon the occurrence of an uncured breach by the other party of a material provision of this Agreement. An uncured breach is a breach that the breaching party has not corrected to the non-breaching party's reasonable satisfaction within thirty (30) days after the non-breaching party has provided the breaching party with written notice specifying details of the breach.

#### **(c) Financial Condition**

Either party may terminate this Agreement on the occurrence of the filing of a petition or seeking of relief under applicable bankruptcy or insolvency laws by or against the other party.

### **7.4 Post-Termination Responsibilities**

Following termination of this Agreement, PSI shall immediately invoice Customer for all accrued fees and charges and all reimbursable expenses, and Customer shall pay the invoiced amount immediately upon receipt of such invoice.

## 8. NOTICES

### 8.1 Notice

Unless otherwise specified in this Agreement, all notices shall be in writing and shall be mailed (via registered or certified mail, return receipt requested), telecopied, telegraphed, delivered by a nationally recognized express courier service, or personally delivered to the other party at the address set forth below (or at such other address as either party may designate in writing to the other party). All notices will be effective upon receipt.

For PSI:

For Customer:

Authorized Representative

\_\_\_\_\_

2486 Black Lake Road

\_\_\_\_\_

Spring Park, MN 55384-9737

\_\_\_\_\_

Tel: 952.471.0875

Tel: \_\_\_\_\_

Fax: 952.471.0893

Fax: \_\_\_\_\_

Email: [support@proactivesys.com](mailto:support@proactivesys.com)

Email: \_\_\_\_\_

## **9. GENERAL**

### **9.1 Amendment**

No amendment of this Agreement shall be effective unless in a writing specifically referencing this Agreement and signed by the duly authorized representative of both parties.

### **9.2 Assignment**

Except as set forth herein, this Agreement shall not be assigned by PSI or Customer without the prior written consent of the other party. Notwithstanding the foregoing, PSI shall be allowed to assign this Agreement to any successor entity by way of merger, acquisition, purchase of all or substantially all of its assets, or operation of law, provided that such successor agrees in writing to be bound by the terms of this Agreement.

### **9.3 Choice of Law**

The validity, construction, and enforcement of this Agreement, and the determination of the rights and duties of the parties, shall be governed by the laws of the State of Minnesota exclusive of any choice of law provisions.

### **9.4 Headings**

The headings in this Agreement are for convenience of reference only and shall not be used for the construction or interpretation of this Agreement.

### **9.5 Entire Agreement**

This Agreement, together with the attached Schedules, constitutes the entire agreement between the parties with respect to the subject matter hereof. All prior or contemporaneous statements or agreements with respect to such subject matter are superseded by this Agreement.

### **9.6 Force Majeure**

Except for making payments, should either party fail to perform or should its performance under this Agreement be delayed by any factor beyond the reasonable control of the delayed party, then the time for performance of the delayed party shall be extended by a period of time equal to the duration of such delay provided that the parties work diligently to minimize any such delay.

### **9.7 Severability**

A holding by a court of competent jurisdiction that one or more of the provisions contained this Agreement is unenforceable in any respect shall have no effect on the validity of any of the remaining provisions of this Agreement.

### **9.8 Time Limitation**

No action arising out of the performance of services by PSI under this

Agreement may be brought by Customer more than one (1) year after such cause of action arose.

**9.9 Waiver**

Waiver by any party of the breach of any provisions of this Agreement by the other party shall not be construed as a continuing waiver of such provision or a waiver of any other breach of any other provision of this Agreement. To be enforceable, a waiver must be in writing and signed by the waiving party.

This Agreement constitutes the sole and entire agreement of the parties as to the subject matter set forth herein and supercedes any previous agreements, understandings, and arrangements between the parties relating to such subject matter. Any modification(s) or amendment(s) to this Agreement must be in writing and signed by an authorized representative of each party.

For: **Proactive System Solutions, Inc.**

By: \_\_\_\_\_ Date: \_\_\_\_\_

Duly Authorized Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

For: \_\_\_\_\_

By: \_\_\_\_\_ Date: \_\_\_\_\_

Duly Authorized Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

## SCHEDULE 1

### Support Times and Support Contact

#### A. Support Times

The Support Times as provided in Section 2.6 are as follows:

Monday through Friday, 09:00 A.M. through 5:00 P.M. (Central Time), excluding the following holidays: New Year's Day; Memorial Day; Independence Day; Labor Day; Thanksgiving Day; and Christmas Day.

#### B. Support Contact

The Customer's Support Contact (as required by Section 4.3), and his/her address, phone number, fax number, and e-mail address at Customer's location are as follows:

Alternate Support Contact:

## SCHEDULE 2

### Fees and Charges for Maintenance Support Service

Annual License and Support Fees are (50% of initial license fees). \$ \_\_\_\_\_

Standard Hourly PSI Support Fees (for services in addition to the standard support agreement) \$200 / hour

The annual support fees are payable in full by Customer upon execution of this Agreement. Any additional fees and charges will be billed by PSI to Customer by invoice. Customer shall pay all such fees and charges within thirty (30) days of invoice.