

General Terms and Conditions

1 DEFINITIONS AND INTERPRETATION

- 1.1 In these Conditions, the following expressions shall, unless the context otherwise requires, have the following meanings:

Account: means the Customer's account with Egenera under which it may create separate User Environments for use by Users subject to the terms of this Agreement.

AUP: means the Acceptable Use Policy as provided in Annex III and amended from time to time by Egenera

Business Day: any day which is not a Saturday, Sunday or public holiday in the country in which the User Environment is physically located.

Confidential Information:

1. all information of any nature whatsoever and in whatever form which has been previously or is after the Effective Date disclosed by or behalf of the Disclosing Party to the Receiving Party which is marked confidential or which ought reasonably be treated as confidential including trade secrets, financial affairs, strategies, customer lists, operations of the Disclosing Party; and
2. all analyses, compilations, notes, reports, memoranda, records and other documents of any nature prepared by or on behalf of the Receiving Party which contain or otherwise reflect or are derived from the information referred to in paragraph 1.

Customer Data: the data inputted by the Customer, or any of its Users, in a User Environment.

Customer Software: any software downloaded by the Customer, or any of its Users, in a User Environment.

Disclosing Party: means a party disclosing Confidential Information under this Agreement;

Documentation: Documentation made available to the Customer by Egenera from time to time which sets out a description of the Services and the instructions for the Services.

Fees: the fees payable by the Customer to Egenera for the User Subscriptions for each User Environment, as indicated online by the Services on a monthly basis, subject to any change in the User Environment and to obvious or manifest error. Fees are calculated using the catalogue per unit price available online by the Services and are not eligible for discount.

Initial Term: the initial term of this Agreement being 1 (one) year from the Effective Date.

Initial Subscription Term: in respect of each User Subscription, a period of 1 (one) month from the creation of the relevant User Environment.

Normal Business Hours: 9.00 am to 5.00 pm in the time zone in which the User Environment is physically located, each Business Day.

Receiving Party: means a party receiving Confidential Information under this Agreement;

Renewal Period: the period described in clause 2.5.

Services: the subscription services provided by Egenera to the Customer under this Agreement or any other website notified to the Customer by Egenera from time to time, as more particularly described in the Documentation.

Software: the software applications available through a catalogue provided by Egenera as part of the Services.

Subscription Term: has the meaning given in clause 2.5.

User: means a customer of the Customer who uses and accesses a User Environment.

User Subscriptions: means the User subscriptions purchased by the Customer pursuant to Clause 9.1 which entitle Users to access and use the Services via a User Environment and the Documentation in accordance with this Agreement.

User Environment: means an IT (hardware and software) environment created by the Customer for a User under the Account using the Services in accordance with the online specification for such environment.

Virus: anything or device (including any software, code, file or program) which may: prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, any telecommunications service, equipment or network or any other service or device; prevent, impair or otherwise adversely affect access to or the operation of any program or data, including the reliability of any program or data (whether by re-arranging, altering or erasing the program or data in whole or part or otherwise); or adversely affect the user experience, including worms, trojan horses, viruses and other similar things or devices.

1.2 In these Conditions:

1.2.1 Any reference to a statute shall, unless the context otherwise requires, be construed as a reference to that statute as from time to time amended, consolidated, modified, extended, replaced or re-enacted together with any secondary legislation made thereunder as from time to time amended, consolidated, modified, extended, replaced or re-enacted;

1.2.2 Words such as "hereunder", "hereinafter", "hereto", "hereof", and "herein" and other words commencing with "here" shall unless the context clearly indicates to the contrary refer to the whole of this Agreement and not to any particular section or clause hereof;

1.2.3 Save as otherwise provided herein, any reference to a section, clause, paragraph or sub-paragraph shall be a reference to a section, clause, paragraph or sub-paragraph (as the case may be) of this Agreement and

any reference in a clause to a paragraph or subparagraph shall be a reference to a paragraph or subparagraph of the clause or paragraph in which the reference is contained unless it appears from the context that a reference to some other provision is intended;

- 1.2.4 The Schedules to this Agreement shall form part of and be deemed to be incorporated in this Agreement and the expressions "this Agreement" and "the Agreement" used in the Schedules shall mean this Agreement and any reference to "this Agreement" shall be deemed to include the Schedules;
- 1.2.5 Any reference to any document includes that document as amended, replaced or supplemented from time to time;
- 1.2.6 Any reference to a "person" includes any person, firm, company, governmental or other legal entity and its successors, personal representatives, heirs and permitted assigns;
- 1.2.7 Unless the context otherwise requires, words importing the singular include the plural and vice versa, words importing the masculine include the feminine and vice versa and words importing persons include corporations and vice versa;
- 1.2.8 The headings in this Agreement are inserted for convenience of reference only and shall not be considered a part of, or affect the construction or interpretation of this Agreement; and
- 1.2.9 The word "including" shall mean including without limitation or prejudice to the generality of any description, definition, term or phrase preceding that word, and the word "include" and its derivatives shall be construed accordingly.
- 1.3 Save as provided for elsewhere in this Agreement, this Agreement including the Schedules represents the entire of the understanding of the parties concerning the subject matter hereof and overrides and supersedes all prior promises, representations, understandings, arrangements, practices, agreements, letters of intent, proposals or heads of agreement concerning the same which are hereby revoked by mutual consent of the parties provided that nothing in this Clause 1.3 shall operate to limit or exclude any liability for fraudulent misrepresentation.

2 THE SERVICES

- 2.1 In consideration of payment of the Fees, and upon commencement of the Services, the Customer shall be given an Account with Egenera under which it may create User Environments for use by Users using the Services.
- 2.2 The Customer shall keep any username and password used to access the Service secret and confidential and the Customer shall be solely responsible and liable for all use of the Account and all User Environments created thereunder.
- 2.3 The Customer acknowledges that the Service permits the creation of unique User Environments by the Customer by reference to pre-defined hardware and Software. Accordingly, each User Environment is subject to availability and therefore subject to confirmation of availability by

Egenera and likewise any requested alterations to the User Environment.

- 2.4 Each User Environment shall be made available by the Customer to one User only.
- 2.5 Each User Environment shall be made available for the Initial Subscription Term. Thereafter, it will automatically renew at the end of the Initial Subscription Term for further terms of 1 (one) month on a rolling basis (each a "Renewal Period") unless or until terminated subsequent Renewal Period. The Initial Subscription Term together with any subsequent Renewal Period shall constitute the Subscription Term for each Environment. A User Environment may be modified or terminated by the Customer prior to end of the Initial Subscription Term or of any Renewal Period.
- 2.6 The Customer may amend or modify any User Environment subject to Clause 2.3 which may result in an increase in the Fees for that User Environment.

3 USER SUBSCRIPTIONS

- 3.1 Subject to the Customer purchasing the User Subscriptions in accordance with Clause 9.1, the restrictions set out in this Clause 3.1 and the other terms and conditions of this Agreement, Egenera hereby grants to the Customer a non-exclusive, non-transferable right to permit Users to use the Services and the Documentation during the Subscription Term solely for the User's internal business operations only.
- 3.2 In relation to the Authorized Users, the Customer undertakes that:
 - 3.2.1 it shall maintain a written, up to date list of current Users and provide such list to Egenera within 5 Business Days of Egenera's written request at any time or times;
 - 3.2.2 The Customer and Users shall not access, store, distribute or transmit any Viruses during the course of its or their use of the Services and shall at all times comply with the Acceptable Use Policy and Egenera reserves the right, without liability to the Customer or Users, to disable the Customer's or a User's access to any material that breaches the provisions of this Clause.
- 3.3 The rights provided under this Clause 3 are granted to the Customer only, and shall not be considered granted to any subsidiary or holding company of the Customer.

4 SERVICE LEVELS

- 4.1 Egenera shall, during the Subscription Term, provide the Services and make available the Documentation to the Customer on and subject to the terms of this Agreement and the annexed Service Level Agreement, which may be updated from time to time.
- 4.2 Egenera shall use commercially reasonable endeavours to make the Services available in accordance with the SLA, except for:
 - 4.2.1 planned maintenance carried out during the maintenance window of 10.00 pm to 2.00 am in the time zone where the User Environment is physically located; and
 - 4.2.2 unscheduled maintenance performed outside Normal Business Hours, provided that Egenera has used

reasonable endeavours to give the Customer at least 6 Normal Business Hours' notice in advance.

- 4.3 The Customer acknowledges that once a User Environment is made available by Egenera, Egenera is no longer responsible for any future patches, fixes, updates, maintenance, performance, optimization, troubleshooting, security or other amendments to the Software and this shall be the sole responsibility of the Customer.

5 CUSTOMER DATA

- 5.1 The Customer shall own all rights, title and interest in and to all of the Customer Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the Customer Data.
- 5.2 Egenera shall not be responsible for any loss, destruction, alteration or disclosure of Customer Data caused by any third party or any failure of the Service and so the Customer and Users should have in place their own usual disaster recovery measures (including where relevant, insurance for the loss of such data) to secure their own back-ups of data, which are not the responsibility of Egenera.
- 5.3 If Egenera processes any personal data on the Customer's behalf when performing its obligations under this Agreement, the parties record their intention that the Customer shall be the data controller and Egenera shall be a data processor and in any such case:
- 5.3.1 the Customer Data shall be located in such jurisdictions as selected by the Customer for each User Environment and Egenera shall not transfer personal data to a jurisdiction which is not recognized as providing adequate levels of data protection without the Customer's prior written consent;
- 5.3.2 the Customer shall ensure that the Customer is entitled to transfer the relevant personal data to Egenera so that Egenera may lawfully use, process and transfer the personal data in accordance with this agreement on the Customer's behalf;
- 5.3.3 the Customer shall ensure that the relevant third parties have been informed of, and have given their consent to, such use, processing, and transfer as required by all applicable data protection legislation;
- 5.3.4 Egenera shall process the personal data only in accordance with the terms of this Agreement and any lawful instructions reasonably given by the Customer from time to time; and
- 5.3.5 each party shall take appropriate technical and organizational measures against unauthorized or unlawful processing of the personal data or its accidental loss, destruction or damage;
- 5.3.6 the Customer shall be entitled, at reasonable times and on reasonable notice, to audit the technical and organizational security measures that are directly applicable to the service Egenera delivers to the Customer to ensure that such measures comply with data security obligations and in particular that the Customer Data is protected;

- 5.3.7 Egenera shall report any incident which is identified as increasing the risk of unauthorized disclosure, loss, destruction or alteration of such personal data to the Customer immediately upon becoming aware of such an incident and shall provide all reasonable cooperation and assistance as may be necessary for the Customer to comply with its obligations;

- 5.3.8 Egenera shall provide the Customer with all reasonable cooperation and assistance as may be necessary to deal with any request for access to such personal data which is received by Customer; and shall report any incident which gives rise to a risk of unauthorized disclosure, loss, destruction or alteration of such personal data to the Customer immediately upon becoming aware of such an incident and shall provide all reasonable cooperation and assistance as may be necessary for the Customer to comply with its obligations in respect thereof.

6 THIRD PARTY PROVIDERS

- 6.1 The Customer and Users acknowledges that the Services may enable or assist it to access the website content of, correspond with, and purchase products and services from, third parties via third-party websites and that it does so solely at its own risk. Egenera makes no representation or commitment and shall have no liability or obligation whatsoever in relation to the content or use of, or correspondence with, any such third-party website, or any transactions completed, and any contract entered into by the Customer or any User, with any such third party. Any contract entered into and any transaction completed via any third-party website is between the Customer, or User, and the relevant third party, and not with Egenera. Egenera recommends that the Customer and Users refer to the third party's website terms and conditions and privacy policy prior to using the relevant third-party website. Egenera does not endorse or approve any third-party website nor the content of any of the third-party website made available via the Services.
- 6.2 The Customer and Users acknowledge that all patches, fixes, updates or other amendments to the Software shall be the sole responsibility of the Customer or User and Egenera shall have no responsibility for any Customer Software.
- 6.3 The Customer and Users acknowledge that availability and use of the Software by the Customer and Users is necessarily subject to the then current terms and conditions of the relevant third party licensor or reseller. The Customer and Users each agree to comply with the said terms and conditions, as may be amended from time to time.

7 EGENERA'S OBLIGATIONS

- 7.1 Egenera undertakes that the Services will be performed substantially in accordance with the Documentation and with reasonable skill and care.
- 7.2 The undertaking at Clause 7.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to Egenera's instructions, or modification or alteration of the Services by any party other than Egenera or Egenera's duly authorized contractors or agents. If the Services do not conform with the foregoing undertaking,

Egenera will, at its expense, use all reasonable commercial endeavours to correct any such non-conformance promptly, or provide the Customer with an alternative means of accomplishing the desired performance. Such correction or substitution constitutes the Customer's sole and exclusive remedy for any breach of the undertaking set out in Clause 7.1. Notwithstanding the foregoing, Egenera:

- 7.2.1 does not warrant that the Customer's or a User's use of the Services will be uninterrupted or error-free; nor that the Services, Documentation and/or the information obtained by the Customer or a User through the Services will meet the Customer's or User's requirements; and
- 7.2.2 is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities, including the internet, and the Customer and User's acknowledge that the Services and Documentation may be subject to limitations, delays and other problems inherent in the use of such communications facilities.
- 7.3 This Agreement shall not prevent Egenera from entering into similar agreements with third parties, or from independently developing, using, selling or licensing documentation, products and/or services which are similar to those provided under this agreement.

8 CUSTOMER'S OBLIGATIONS

8.1 The Customer and each User shall:

- 8.1.1 provide Egenera with:
 - 8.1.1.1 all necessary co-operation in relation to this Agreement;
 - 8.1.1.2 all necessary observance of the terms of the Acceptable Use Policy; and
 - 8.1.1.3 all necessary access to such information as may be required by Egenera;
- in order to render the Services.

9 CHARGES AND PAYMENT

- 9.1 The Customer shall pay the Fees to Egenera for the User Subscriptions in accordance with this Clause 9.
- 9.2 The Customer shall on the Effective Date provide to Egenera valid, up-to-date and complete credit card details or approved purchase order information acceptable to Egenera and any other relevant valid, up-to-date and complete contact and billing details and, if the Customer provides its credit card details to Egenera, the Customer hereby authorizes Egenera to bill such credit card:
 - 9.2.1 on the Effective Date for the Fees payable in respect of the Initial Subscription Term; and
 - 9.2.2 thereafter monthly for the Fees payable in respect of the next Renewal Period;
- 9.3 If Egenera has not received payment within 30 days after the due date, and without prejudice to any other rights and remedies of Egenera:
 - 9.3.1 Egenera may, without liability to the Customer or any User, disable the Customer's password, account and

access to all or part of the Services and Egenera shall be under no obligation to provide any or all of the Services while the payment concerned remains unpaid; and

- 9.3.2 interest shall accrue on such due amounts at an annual rate equal to 3% over the then current base lending rate of Egenera's bankers in the United States at the date the relevant payment became due, commencing on the due date and continuing until fully paid, whether before or after judgment.
- 9.4 All amounts and fees stated or referred to in this agreement:
 - 9.4.1 shall be payable in the currency included in the catalogue which is available online by the Services;
 - 9.4.2 are non-cancellable and non-refundable;
 - 9.4.3 are exclusive of any sales tax, which shall be added to Egenera's invoice(s) at the appropriate rate.
- 9.5 If, at any time while using the Services, the Customer exceeds the amount of disk storage space specified in the Documentation, Egenera shall charge the Customer, and the Customer shall pay, Egenera's then current excess data storage fees.
- 9.6 Egenera shall be entitled to increase the Fees and/or the excess storage fees payable pursuant to Clause 9.5 upon 60 days prior notice.

10 PROPRIETARY RIGHTS

- 10.1 The Customer acknowledges and agrees that Egenera and/or its licensors own all intellectual property rights in the Services and the Documentation. Except as expressly stated herein, this Agreement does not grant the Customer or any User any rights to, or in, patents, copyrights, database rights, trade secrets, trade names, trade marks (whether registered or unregistered), or any other rights or licences in respect of the Services or the Documentation.
- 10.2 During the term of this Agreement, Customer is granted a non-exclusive license to use Egenera's trademarks, service marks, trade names, logos and other designations (collectively "Licensed Mark(s)") to indicate that Customer is an authorized reseller of the Services and to advertise and promote the Services. Customer shall not alter, erase, deface or overprint any Licensed Mark or other Egenera notices or labels on anything supplied by Egenera. All use of Licensed Marks will be subject to the prior review and approval of Egenera.

11 CONFIDENTIALITY

- 11.1 In consideration of the provision of the Confidential Information, the Receiving Party hereby agrees, acknowledges and undertakes to the Disclosing Party:
 - 11.1.1 to use the Confidential Information strictly and solely for the performance of its obligations under this Agreement and for no other purpose of any nature whatsoever;
 - 11.1.2 to treat and safeguard as private and confidential all Confidential Information received at any time;
 - 11.1.3 not at any time to disclose or otherwise disseminate the Confidential Information to any person or party whatsoever except to the Receiving Party's officers,

management, employees and advisors who require access to the Confidential Information for the purposes of this Agreement;

11.1.4 to keep the Confidential Information secure and in strict confidence with the same care as the Receiving Party uses or would use to protect its own Confidential Information and in any event with reasonable care;

11.1.5 not to copy, take or produce samples from, or make or compose models, drawings, designs, diagrams, lists, computer programs, analyses, algorithms, data, formula, standards, plans, programs or specifications or any other matter in any way based on or howsoever derived from the Confidential Information without the consent of the Disclosing Party;

11.2 The provisions of this Clause 11 shall not apply to Confidential Information which:

11.2.1 is on the Effective Date or thereafter becomes publicly available other than in breach of any of the undertakings or obligations of confidentiality contained in this Agreement or in any other agreement or any other equitable obligation;

11.2.2 has been independently developed by the Receiving Party without knowledge of the Confidential Information as evidenced by its written records;

11.2.3 is lawfully obtained by the Receiving Party from a third party as evidenced by the written records of the Receiving Party provided that the source of such information was not bound by any of the undertakings or obligations of confidentiality contained in this Agreement or in any other agreement or any other equitable obligation; or,

11.2.4 was lawfully within the possession of the Receiving Party prior to its being furnished to the Receiving Party as evidenced by the written records of the Receiving Party provided that the source of such information was not bound by a confidentiality agreement or other obligation of secrecy or confidentiality in respect thereof.

11.3 The provisions of this Clause 11 shall survive termination of this Agreement.

12 INDEMNITY

12.1 The Customer shall defend, indemnify and hold harmless Egenera against claims, actions, proceedings, losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees) arising out of or in connection with the Customer's and every User's use of the Services and/or Documentation, provided that:

12.1.1 the Customer is given prompt notice of any such claim;

12.1.2 Egenera provides reasonable co-operation to the Customer in the defence and settlement of such claim, at the Customer's expense; and

12.1.3 the Customer is given sole authority to defend or settle the claim.

12.2 Egenera shall, subject to Clause 12.5, defend the Customer, its officers, directors and employees against any claim that the Services or Documentation infringes copyright, trade

mark, database right or right of confidentiality, and shall indemnify the Customer for any amounts awarded against the Customer in judgment or settlement of such claims, provided that:

12.2.1 Egenera is given prompt notice of any such claim;

12.2.2 the Customer provides reasonable co-operation to Egenera in the defence and settlement of such claim, at Egenera's expense; and

12.2.3 Egenera is given sole authority to defend or settle the claim.

12.3 In the defence or settlement of any claim, Egenera may procure the right for the Customer and Users to continue using the Services, replace or modify the Services so that they become non-infringing or, if such remedies are not reasonably available, terminate this agreement on 2 Business Days' notice to the Customer without any additional liability or obligation to pay liquidated damages or other additional costs to the Customer.

12.4 In no event shall Egenera, its employees, agents and sub-contractors be liable to the Customer to the extent that the alleged infringement is based on:

12.4.1 a modification of the Services or Documentation by anyone other than Egenera; or

12.4.2 the Customer's use of the Services or Documentation in a manner contrary to the instructions given to the Customer by Egenera; or

12.4.3 the Customer's use of the Services or Documentation after notice of the alleged or actual infringement from Egenera or any appropriate authority.

12.5 The foregoing states the Customer's sole and exclusive rights and remedies, and Egenera's (including Egenera's employees', agents' and sub-contractors') entire obligations and liability, for infringement of any patent, copyright, trade mark, database right or right of confidentiality.

13 LIMITATION OF LIABILITY

13.1 This Clause 13 sets out the entire financial liability of Egenera (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer in respect of:

13.1.1 any breach of this Agreement;

13.1.2 any use made by the Customer of the Software, Services and Documentation or any part of them; and

13.1.3 any representation, statement or tortious act or omission (including negligence) arising under or in connection with this Agreement.

13.2 Except as expressly and specifically provided in this agreement:

13.2.1 the Customer assumes sole responsibility for results obtained from the use of the Software, Services and the Documentation by the Customer, and for conclusions drawn from such use. Egenera shall have no liability for any damage caused by errors or omissions in any information, instructions or scripts provided to Egenera

by the Customer in connection with the Services, or any actions taken by Egenera at the Customer's direction;

13.2.2 all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from this agreement; and

13.2.3 the Services and the Documentation are provided to the Customer on an "as is" basis.

13.3 Egenera does not warrant non-Egenera products. If any, they are provided by Egenera on an "AS IS" basis. Any warranty service for non-Egenera products will be provided by the manufacturer of the products in accordance with the applicable manufacturer's warranty.

13.4 Customer is not authorized to make any warranty commitment on Egenera's behalf, whether written or oral.

13.5 EGENERA ON BEHALF OF ITSELF AND ITS THIRD PARTY SUPPLIERS MAKES NO AND DISCLAIMS ALL WARRANTIES, EXPRESS AND IMPLIED, ABOUT THE SOFTWARE AND SERVICES PROVIDED HEREUNDER. THIRD PARTY SOFTWARE IS PROVIDED ON AN AS-IS BASIS AND WITHOUT WARRANTY OF ANY KIND. ALL OTHER WARRANTIES ARE SPECIFICALLY EXCLUDED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT AND ANY WARRANTY ARISING BY STATUTE, OPERATION OF LAW, COURSE OF DEALING OR PERFORMANCE, OR USAGE OF TRADE. No representation or other affirmation of fact, including, but not limited to, statements regarding capacity, suitability for use or performance of the Software, whether made by Egenera employees or otherwise, shall be deemed to be a warranty of any purpose or give rise to any liability of Egenera whatsoever unless contained in this Agreement.

13.6 TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW AND EXCEPT TO THE EXTENT OF LIABILITY ARISING FROM DEATH, PERSONAL INJURY, DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY OR FRAUD, (A) IN NO EVENT SHALL EGENERA OR ITS THIRD PARTY SUPPLIERS BE LIABLE FOR ANY DAMAGES RESULTING FROM LOSS OF USE, DATA, PROFIT, SOFTWARE OR BUSINESS, OR FOR ANY SPECIAL, EXEMPLARY, INDIRECT, PUNITIVE, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, WHETHER ARISING IN CONTRACT, TORT OR UNDER OTHER LEGAL THEORY, EVEN IF EGENERA OR SUCH SUPPLIER KNEW OR SHOULD HAVE KNOWN ABOUT THE POSSIBILITY OR EXISTENCE OF SUCH DAMAGE OR LOSS; AND (B) THE AGGREGATE LIABILITY OF EGENERA AND ITS THIRD PARTY SUPPLIERS FOR DAMAGES FOR ANY CAUSE WHATSOEVER, AND REGARDLESS OF THE FORM OF ACTION (IN CONTRACT, IN TORT OR OTHERWISE), SHALL BE LIMITED TO CUSTOMERS PROVEN DIRECT DAMAGES IN AN AMOUNT NOT TO EXCEED THE NET AMOUNT CUSTOMER PAID EGENERA IN THE PRIOR TWELVE (12) MONTHS FOR THE SOFTWARE OR SERVICE(S) THAT CAUSED THE DAMAGES OR ARE THE SUBJECT MATTER OF THE CAUSE OF ACTION. No action arising

out of or in connection with this Agreement or any transaction hereunder may be brought by either party more than eighteen (18) months after the cause of action has arisen, except for an action for non-payment. These limitations shall apply to all causes of action under or relating to this Agreement, including any claim against any subsidiary, stockholder, Affiliate, officer or director of Egenera or employee or agent of Egenera within the scope of his or her employment or engagement.

14 TERM AND TERMINATION

14.1 This Agreement shall, unless otherwise terminated as provided in this Clause 14, commence on the Effective Date and shall continue for the Initial Term and, thereafter, this Agreement shall be automatically renewed for successive periods of 12 months (each an "**Extension Period**"), unless:

14.1.1 either party notifies the other party of termination, in writing, at least 90 days before the end of the Initial Term or any Extension Period, in which case this Agreement shall terminate upon the expiry of the applicable Initial Term or Extension Period; or

14.1.2 otherwise terminated in accordance with the provisions of this agreement;

and the Initial Term together with any subsequent Extension Periods shall constitute the "**Term**".

14.2 Without prejudice to any other rights or remedies to which the parties may be entitled, either party may terminate this Agreement without liability to the other if:

14.2.1 a party commits a material breach of any of the provisions of this Agreement and in the case of such a material breach which is capable of remedy, fails to remedy the same within 30 days after notice from the non-defaulting party giving particulars of the material breach and requiring it to be remedied;

14.2.2 a party is unable to pay its debts as they fall due; or

14.2.3 a party ceases, or threatens to cease, to carry on business.

14.3 On termination (or expiry) of this Agreement for any reason:

14.3.1 all licences granted under this Agreement shall immediately terminate;

14.3.2 each party shall return and make no further use of any equipment, property, Documentation and other items (and all copies of them) belonging to the other party;

14.3.3 Egenera may destroy or otherwise dispose of any of the Customer Data in its possession; and

14.3.4 the accrued rights of the parties as at termination (or expiry), or the continuation after termination of any provision expressly stated to survive or implicitly surviving termination, shall not be affected or prejudiced

14.3.5 Following receipt of all outstanding account balances Egenera will cooperate fully and use all reasonable endeavours to ensure the seamless transition of services and transfer of Customer data.

15 FORCE MAJEURE

If either party is prevented from performing any portion of this Agreement (except the payment of money for Software or Services ordered hereunder) by causes beyond its control, including labor disputes, delays by suppliers, manufacturing delays, civil commotion, war, governmental regulations or controls, casualty, inability to obtain materials or services, reasonable disputes over the interpretation of mutually agreed upon design specifications, or acts of God, such defaulting party will be excused from performance for the period of the delay and for a reasonable time thereafter.

16 WAIVER

16.1 A waiver of any right under this Agreement is only effective if it is in writing and it applies only to the party to whom the waiver is addressed and to the circumstances for which it is given.

16.2 Unless specifically provided otherwise, rights arising under this agreement are cumulative and do not exclude rights provided by law.

17 SEVERANCE

17.1 If any provision (or part of a provision) of this Agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.

17.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the parties.

18 ENTIRE AGREEMENT

18.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the parties and supersede any previous arrangement, understanding or agreement between them relating to the subject matter they cover.

18.2 Each of the parties acknowledges and agrees that in entering into this Agreement it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this Agreement or not) relating to the subject matter of this agreement, other than as expressly set out in this Agreement.

19 ASSIGNMENT

19.1 The Customer shall not, without the prior written consent of Egenera, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.

19.2 Egenera may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this agreement.

20 NO PARTNERSHIP OR AGENCY

Nothing in this Agreement is intended to or shall operate to create a partnership between the parties, or authorize either party to act as agent for the other, and neither party shall have the authority

to act in the name or on behalf of or otherwise to bind the other in any way (including, but not limited to, the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

21 NOTICES

21.1 All notices, demands, requests or other communications that may be or are required to be given, served or sent by any party pursuant to this Agreement will be in writing (and shall be deemed to have been duly given upon receipt), will reference this Agreement and shall be sent by mail, express courier, hand delivery or facsimile transmission, addressed as specified in the addresses above. Each party may designate by notice in writing a new address to which any notice, demand, request or communication may thereafter be so given, served or sent. Each notice shall be deemed sufficiently given, served, sent and received for all purposes at such time as it is delivered to the addressee (with the return receipt, the delivery receipt or the affidavit of messenger being deemed conclusive evidence of such delivery) or at such time as delivery is refused by the addressee upon presentation.

22 CHOICE OF LAW, ARBITRATION AND JURISDICTION, IMPORT AND EXPORT COMPLIANCE

22.1 This Agreement and its validity, interpretation, construction and performance shall be governed by the laws of the United States and the Commonwealth of Massachusetts, exclusive of any conflicts with law principals. The parties expressly agree that the U.N. Convention in Contracts for the International Sale of Goods does not apply to this Agreement. Except for the right of any party to apply to a court of competent jurisdiction for a temporary restraining order, preliminary injunction, or other equitable relief to preserve the status quo or prevent irreparable harm, any dispute under this Agreement shall be determined by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association, in Boston, Massachusetts, before a single arbitrator, who will be a highly regarded commercial trial attorney specializing in the IT industry, and conducted in the English language. The resulting arbitration award may be enforced in any court of competent jurisdiction. The parties expressly agree that the Superior Court for the County of Suffolk, Massachusetts, or the United States District Court for the District of Massachusetts are courts of competent jurisdiction for this purpose.

22.2 If Customer chooses to use these Services, Customer does so on its own initiative and is responsible for compliance with applicable laws. Customer agrees to comply with all restrictions and regulations of the U.S. Department of Commerce and any other United States or foreign agencies and authorities in connection with Customer's and Customer Users' use of these Services and to not, in violation of any laws, transfer, or authorize the transfer, of any Services (a) into or for the benefit of an entity located in any U.S. and/or U.N. embargoed countries or (b) to anyone on the U.S. Treasury Department's List of Specially Designated Nationals or the U.S. Commerce Department's Table of Denial Orders or Entity List of proliferation concern, or the U.S. State Department's Debarred Parties List. By using these Services, Customer represents and warrants that

Customer and Customer's Users are not located in, under the control of, or a national or resident of any such country on any such list. In addition, Customer and Customer's Users may not use the Services for the development, design, manufacture, production, stockpiling, or use of nuclear, chemical or biological weapons, weapons of mass destruction, or missiles, in a country listed in Country Groups D: 4 and D: 3, as set forth in Supplement No. 1 to the Part 740 of the United States Export Administration Regulations. Customer assumes responsibility for compliance with laws and regulations applicable to export, re-export or import of products, technology or technical data provided hereunder and for obtaining required export and import authorizations. Customer and Customer's Users will not transfer to or through the Services any data, materials or other items controlled for export under the International Traffic in Arms Regulations ("ITAR Data") or other applicable laws unless Egenera has agreed to the transfer and (i) Customer has

provided Egenera not less than 10 days' prior written notice that ITAR Data will be transferred to or through the Services, (ii) Customer and/or Customer's User has received prior written authorization from the U.S. Government to transfer the ITAR Data to Egenera, and (iii) Customer agrees to provide Egenera with all necessary assistance to enable Egenera to obtain such U.S. Government permission. Customer is responsible, and will reimburse Egenera, for all costs, expenses or damages incurred by Egenera in connection with Customer and Customer's User transfer of ITAR Data.

22.3 Customer is responsible for compliance related to the manner in which Customer and Customer's Users choose to use the Services, including Customer or Customer's Users transfer and processing of data, and the region in which any of the foregoing occurs.

ANNEX 2

Service Level Agreement

1. General

1.1 This Annex contains a service level agreement (“SLA”) setting out the levels of services to be provided by Egenera to the Customer under this Agreement and compensation (as a genuine pre-estimate of loss) for failure to meet those service levels.

1.2 In this SLA a reference to a paragraph, unless stated otherwise is a reference to a paragraph of this SLA.

1.3 In this SLA words, abbreviations and expressions have the meanings given in the Conditions except as set out below:

“Availability” means all the time in any calendar month for which the customer is capable of accessing a login prompt and the Services are not subject to any Service Affecting Faults, and “Available” shall be construed accordingly;

“Business Day” means every day excluding Saturdays and Sunday and public holidays in the United States;

“Service Affecting Fault” means an event which causes loss of external connectivity for the Services; and

“Third Party System” means a telecommunication system, network, indirect network carriers, exchange or any other equipment that is neither owned nor operated on behalf of Egenera.

1.4 This SLA only applies to the Services to the extent they are owned or operated by or on behalf of Egenera.

1.5 Egenera shall not be liable to pay compensation under this SLA where its failure to meet any of its obligations under this SLA is caused by:

- (a) a Force Majeure Event;
- (b) a failure in the Customer or User equipment;
- (c) a failure of any Third Party System;
- (d) any act or omission of the Customer or User or third party acting on its or their behalf;
- (e) failure of the Customer to connect to the Services;
- (f) failure of the Customer to follow published processes;
- (g) failure of the customer to optimize, maintain, secure, configure, or troubleshoot the operating system or the software contained within.

1.6 The maximum monthly credit available under this SLA is limited to an amount equal to the monthly Fee for the specific Customer or User Environment.

1.7 Credits or other compensation under this SLA shall only be payable where

- (a) the Customer notified Egenera at the time of the event by submitting a ticket in a timely manner,
- (b) the Customer has submitted to Egenera a claim in writing identifying the circumstances in which the Customer claims that the credit or compensation arose, and
- (c) Egenera has agreed in writing to that claim. Egenera shall not unreasonably withhold or delay such agreement.

All credits so payable shall be applied to the Customer's next monthly bill for Service following Egenera' agreement to the claim. All claims for credits or compensation must be submitted promptly and in any event within 10 Business Days, after the occurrence of the circumstances giving rise to the claim.

1.8 The parties acknowledge that the service credits and compensation set out in this SLA are reasonable pre-estimates of the Customer's loss and are not penalties.

1.9 Egenera reserves the right to amend the SLA from time to time. If the amendment results in a material reduction in the service levels provided or the size or nature of the compensation payments Egenera is liable to make, the Customer shall have the right to terminate the Service on 30 days notice.

2. Service Levels applicable to Service Availability

2.1 Egenera guarantees that the Service shall have 99.99% Availability, not including maintenance periods or periods caused by the events described in section 1.5.

2.2 If the Availability falls below 99.99% in any month, Egenera will credit the Customer with one days' free service.

2.3 Egenera shall not be obliged to pay compensation in accordance with paragraph 2.2 where Availability falls below 99.99% because of routine or emergency maintenance of the Services pursuant to Paragraph 4.

3. Service Levels applicable to Fault handling

- 3.1 The Customer shall report all Service Affecting Faults in the Service to Egenera on **the Egenera ticketing system** or such phone number as Egenera may notify to the Customer from time to time.
- 3.2 Egenera shall raise a trouble ticket and issue a reference number to the Customer and shall repair the Service Affecting Fault within the timescales for repair as set out in Table 1 below. If Egenera fails to repair a Service Affecting Fault within the relevant timescale, the Customer may claim the compensation set out in Table 1.
- 3.3 Timing starts when a trouble ticket is raised and a reference number is issued to the Customer.
- 3.4 The Customer may obtain updates on the status of tickets by checking the Egenera ticketing system and under the ticket number assigned to the matter or such number as Egenera may notify to the Customer from time to time.
- 3.5 Egenera shall notify the Customer by telephone or e-mail when the Service Affecting Fault has been repaired and the Service has been successfully restored. The trouble ticket will then be closed.

Table 1

| Event | Time to restore ("TTR") | Hours past TTR | Number of free days service for which the Customer will be credited |
|-------------------------|---|----------------|---|
| Service Affecting Fault | 4 hours from determination that the Service Affecting Fault is a result of lost external connectivity | 0-4 | 1 |
| | | 4-9 | 2 |
| | | 9-14 | 3 |
| | | 14-19 | 4 |
| | | 19+ | 5 |
| | | | |

4. Service Levels applicable to Network and Service Equipment Maintenance

- 4.1 Egenera may suspend the Services to carry out periodic maintenance or upgrade work on the Services. The parties agree that this planned suspension or diminution of the Service shall not be included in any calculation for compensation under Paragraph 3 above and will not be included as part of any service level calculations.
- 4.2 Except in the case of an emergency, Egenera shall use reasonable endeavours to provide the Customer with notice of any suspension of the Service under Paragraph 4.1. If it fails to provide the appropriate notice, the Customer shall be entitled to a credit of one day's free Service. The Customer notes and agrees that this Paragraph 4.2 is appropriate notice of the suspension of the Service under the terms of this Agreement.
- 4.3 Egenera shall use reasonable endeavours to ensure that any disruption or interruption to the Services is kept to a minimum. Egenera shall use reasonable endeavours not to suspend the Service for planned maintenance or upgrade work more than 12 times in any calendar year.

Acceptable Use Policy (add on)

23 THE CUSTOMER AND EACH USER SHALL:

- 23.1 comply with all applicable laws and regulations with respect to its activities under this Agreement;
- 23.2 carry out all other Customer or User responsibilities set out in this Agreement in a timely and efficient manner. In the event of any delays in the Customer's or User's provision of such assistance as agreed by the parties, Egenera may adjust any agreed timetable or delivery schedule as reasonably necessary;
- 23.3 procure that the Users use the Services and the Documentation in accordance with and subject to the terms and conditions of this Agreement and shall be responsible for any User's breach of this Agreement and hereby agrees to indemnify, keep fully and effectively indemnified and hold harmless Egenera from and against all costs, claims, damages, demands, losses, liabilities, fines, awards and expenses, howsoever suffered or incurred by Egenera arising, from any User's breach of this Agreement;
- 23.4 obtain and shall maintain all necessary licences, consents, and permissions necessary for Egenera, its contractors and agents to perform their obligations under this Agreement, including, without limitation, the Services;
- 23.5 ensure that its network and systems comply with the relevant specifications provided by Egenera from time to time; and
- 23.6 be solely responsible for procuring and maintaining its network connections and telecommunications links from its systems to Egenera's data centers, and all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to the Customer's or a User's network connections or telecommunications links or caused by the internet.

24 THE CUSTOMER AND USERS SHALL NOT:

- 24.1 except to the extent expressly permitted under this agreement, attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software and/or Documentation (as applicable) in any form or media or by any means; or
- 24.2 attempt to reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or
- 24.3 access all or any part of the Services and Documentation in order to build a product or service which competes with the Services and/or the Documentation; or
- 24.4 use the Services and/or Documentation to provide services to third parties; or
- 24.5 subject to Clause 19.1 of the Agreement, license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services and/or Documentation available to any third party except Users, or
- 24.6 attempt to obtain, or assist third parties in obtaining, access to the Services and/or Documentation, other than as provided under this Agreement.

25 THE CUSTOMER SHALL USE ALL REASONABLE ENDEAVOURS TO PREVENT ANY UNAUTHORISED ACCESS TO, OR USE OF, THE SERVICES AND/OR THE DOCUMENTATION AND, IN THE EVENT OF ANY SUCH UNAUTHORISED ACCESS OR USE, PROMPTLY NOTIFY EGENERA.



MICROSOFT PRODUCTS RESELLER AGREEMENT

Egenera, Inc., a Delaware corporation with a principal place of business at 80 Central St., Boxborough, MA 01719 ("Egenera"), and _____ with a principal place of business at _____ ("Reseller"), agree that the terms and conditions of this Microsoft Products Reseller Agreement (this "Agreement") shall govern Reseller's acquisition of Microsoft Products, which Reseller may from time to time acquire for internal use or resale, in conjunction with the delivery of Software Services as defined below, to any End User hereto. The effective date of this Agreement is the date of the last signature below (the "Effective Date").

By its signature below, each party agrees that this Agreement, including any Exhibit or attachment or any document referenced by it, constitutes its legal, valid and binding agreement enforceable in accordance with its terms. Once signed, any reproduction of this Agreement or any Exhibit or attachment to it made by reliable means (for example, photocopy or facsimile) will be considered an original, and all Products ordered under this Agreement are subject to it.

EGENERA, INC.

RESELLER: _____

By: _____

By: _____

Print Name:

Print Name:

Print Title:

Print Title:

Date: _____

Date: _____

1. DEFINITIONS

"**Affiliate**" means any legal entity that a party owns, that owns a party, or that is under common ownership with a party.

"**Ownership**" means, for purpose of this definition, control of more than a 50% interest in an entity.

"**End User**" means either the Reseller or any individual or legal entity that acquires the Software Services through the Reseller.

"**Outsourcing Company**" means a third party that performs data center management services or installation services for Reseller.

"**Prices**" means Egenera's then-current standard prices for the Products according to the Product Price List at Exhibit C.

"**Software Services**" means services that Reseller provides to End Users that make available, display, run, access, or otherwise interact, directly or indirectly, with the Products. Reseller must provide these services from data center(s) through the Internet, a telephone network or a private network, on a rental, subscription or service basis, whether or not Reseller receives a fee. Software Services exclude any services involving installations of a Product directly on any End User device to permit an End User to interact with the Product.

"**SPUR**" means the Microsoft Services Provider Use Rights document as updated by Microsoft from time to time and found at <http://www.microsoftvolumeicensing.com/>

"**Product**" means any Microsoft software acquired by Reseller by way of a Service Provider License Agreement (SPLA) between Egenera, Inc. and Microsoft or Microsoft's distributor. Product includes, but is not limited to, any Microsoft software products acquired by Reseller for internal use or for sale to End Users by way of Egenera's SPLA agreement with Insight Direct USA, Inc., Microsoft's distributor.

1. APPOINTMENT

1.1. Appointment. Egenera grants Reseller a non-perpetual, non-exclusive, terminable, non-transferable limited right during the term of this Agreement to copy, install, access, display, run, distribute, make available or otherwise interact with the Products in

order to provide Software Services. These rights extend to the latest version of any Products (or any prior version) as permitted in the SPUR. Reseller's rights under this agreement will automatically terminate upon expiration or termination of this Agreement.

1.2. Internal Use. Reseller may use Products for its internal use, so long as:

1.2.1. Reseller reports use in the monthly use report compiled by Egenera and pays for this use; and

1.2.2. The SPUR does not restrict internal use for the Product at issue.

1.3. Software License. Reseller's distribution and sale of the Products shall be subject to and in accordance with the End User License Terms (EULA) provided with the Products or otherwise by the developer of the Products. The Microsoft Products EULA is attached as Exhibit A.

1.4. Copying and Distribution of Products and Software Documentation. Reseller may not make any copies of the original media or software except as permitted in this Agreement. Reseller may make one backup copy of the original media or software containing the Products for each of its data centers. Reseller must include on any copies all copyright, trademark and proprietary notices contained in or on the Products.

Reseller may distribute original media or software containing Products only to its Affiliates, End Users or an Outsourcing Company.

Reseller may not copy any Software Documentation for the Products.

1.5. End User Facility Installations. Reseller may locate servers ("Servers") containing Products in an End User's premises ("End User Facility") solely to provide Software Services to the End User, provided that the Servers remain under the day to day management and control of Reseller or Egenera. Upon request, Reseller will promptly identify the number of Servers located at each End User Facility and the Products installed on said Servers. Reseller shall not permit End User (or any third party providing services to the End User) to access, maintain, or otherwise use the Products, except for the sole purpose of accessing the functionality of the Products in the form of Software Services in accordance with the terms of this Agreement. Reseller is responsible for all of its obligations under this Agreement regardless of the physical location of the servers. Reseller will be responsible for any unauthorized installation, use, copying, access or distribution of the products by the End User.

2. ORDERING AND PAYMENT. Egenera will determine the amount of Products acquired at the end of each month. Reseller will corporate, as necessary, with the compilation of the amount of Products acquired during the month. Egenera will invoice Reseller for the products acquired using prices established in the Product Price List attached as Exhibit C. All amounts owed related to Microsoft Products resold are due in United States currency and in full thirty (30) days after the last day of the month of such usage, with interest accruing at the lesser of one and one-half percent (1.5%) per month and the maximum legal fee rate in effect, whichever is less, thereafter. Any use of Products shall be invoiced by Egenera at the amounts on the Product Price List and will not be split in accordance with any other agreement, including but not limited to a joint venture agreement. Reseller shall pay Egenera the price stated on an invoice plus (a) all applicable sales, use, consumption, ad valorem and like taxes (except for those based on Egenera's net income), and (b) if applicable, all duties, tariffs and other import- and customs-related charges, and shall promptly reimburse Egenera for the same if Egenera incurs such expenses on Reseller's behalf. All payments by Reseller shall be made free and clear of, and without reduction for, any withholding taxes.

2.1. Price Revisions. Egenera shall provide Reseller written notice by electronic or other means of any revisions to the Product Price List. Any revision will be effective on the thirtieth calendar day after notification date.

3. EGENERA AUDIT RIGHTS

3.1. Audit Rights. Egenera reserves the right to use PCD to quantify the usage of Products and to conduct an audit of the Reseller's and End User's use of the software. Egenera or its designee shall have the right, upon reasonable written notice to the Reseller or End User, to conduct an audit and inspection. Any such audit shall be conducted during regular business hours at the Reseller's or End User's office and in such a manner as to not unreasonably interfere with the Reseller's or End User's normal business. In no event shall audits be conducted more frequently than once in any twelve (12) month period, unless such an audit reveals a material non-compliance with the Software License. Audits shall be conducted at Egenera's expense; provided, however, that if an audit reveals underpayment exceeding 5% the Reseller shall pay all reasonable costs and expenses incurred by Egenera in conducting such audit.

3.2. If Microsoft or its distributor audits the monthly use reports compiled by Egenera with the assistance of the Reseller and a loss is identified due to a failure to cooperate with Egenera or to report usage by the Reseller or its End Users, then Reseller will reimburse Egenera for any amounts owed as a result of the Resellers failure to accurately report usage.

4. MICROSOFT AUDIT RIGHTS. In an effort to verify compliance with this Agreement, Microsoft may conduct a reasonable inspection of all servers that contain the Products licensed under this Agreement, during regular business hours, and with at

least ten (10) business days' prior notice. Reseller will remove all copies of the Products on the Data Center Provider's servers at the termination of use of Data Center Provider's software services, or when this Agreement terminates or expires.

5. VERIFYING COMPLIANCE

- 5.1. Reseller must keep records relating to the Products it and its Affiliates use or distribution. Microsoft has a right to verify Reseller's and its Affiliates' compliance with the license terms of the Products, at Microsoft's expense.
- 5.2. Microsoft will provide Reseller at least 30 days' notice of its intent to verify compliance. Microsoft will engage an independent auditor, which will be subject to a confidentiality obligation. Verification will take place during normal business hours and in a manner that does not interfere unreasonably with Reseller's operations. Reseller must promptly provide the independent auditor with any information it reasonably requests in furtherance of the verification, including access to systems running the Products and evidence of licenses for Products Reseller hosts, sublicenses, or distributes to third parties. As an alternative, Microsoft may require Reseller to complete Microsoft's self-audit process relating to the Products Reseller and any of its Affiliates use or distribute. Such information will be used solely for purposes of determining compliance.
- 5.3. If verification or self-audit reveals any unlicensed use or distribution, Reseller must within 30 days order sufficient licenses to cover that use or distribution. If unlicensed use is 5% or more, Reseller must reimburse Microsoft for the costs Microsoft has incurred in verification and acquire the necessary additional licenses at 125% then current price list and Reseller price level within 30 days. The unlicensed use percentage is based on the total number of licenses purchased compared to actual install base. If there is no unlicensed use, Microsoft will not undertake another verification of the same Reseller for at least one year. By exercising the rights and procedures above, Microsoft does not waive its rights to enforce this Agreement or to protect its intellectual property by any other means permitted by law.

6. END USER AGREEMENTS. Reseller must maintain End User Agreements with all End Users.

- 6.1. Reseller must ensure that the End User Agreements are effective and binding in all applicable jurisdictions. End User Agreements must, at a minimum:
 - 6.1.1. Prohibit the End User from removing, modifying or obscuring any copyright, trademark or other proprietary rights notices that are contained in or on the Products;
 - 6.1.2. Prohibit the End User from reverse engineering, decompiling, or disassembling the Products, except to the extent that such activity is expressly permitted by applicable law;
 - 6.1.3. Disclaim, to the extent permitted by applicable law, all warranties by Microsoft and any liability by Microsoft or its suppliers for any damages, whether direct, indirect or consequential, arising from the Software Services;
 - 6.1.4. State that Reseller or a third party on Reseller's behalf (and not Microsoft or its suppliers) will provide technical support for the Software Services;
 - 6.1.5. Include terms at least as protective of Microsoft's intellectual property rights as contained in this Agreement;
 - 6.1.6. Permit the disclosures of End User information as required by this Agreement or requested by Microsoft;
 - 6.1.7. Provide that the termination or expiration of this Agreement automatically terminates all rights to use the Products under this Agreement;
 - 6.1.8. Include terms substantially similar to the section of this Agreement entitled "Verifying compliance" and provide Microsoft the right to verify the entities compliance with the Software Services Reseller Agreement;
 - 6.1.9. Include limitations at least as protective as those stipulated in the subsection entitled "No High Risk Use"; and
 - 6.1.10. State that Microsoft will be an intended third party beneficiary of the End User Agreement, with the right to enforce provisions of the End User Agreement and to verify the compliance of the End User.
- 6.2. End User License Terms. If Reseller distributes Products, the End User Agreements must include terms that are substantially similar to, but no less restrictive than, the Microsoft End User License Terms included as Exhibit A. Reseller must ensure that the terms provided by Reseller based on the End User License Terms are effective and binding in all applicable jurisdictions. Reseller is responsible for contracting with its End Users the applicable portions of the End User License Terms with the applicable terms contained in the SPUR regarding the use, modification, copying and/or distribution of such Products.

Reseller is responsible to Microsoft and Egenera for any unauthorized installation, use, copying, access or distribution of Products by an End User if Reseller fails to comply with the terms of this section.

6.3. Compliance. If Microsoft believes in good faith that any End User is not complying with the End User License Terms, Reseller must cooperate in good faith with Microsoft to investigate and remedy the non-compliance.

6.4. Copies of Products. Within thirty (30) days of the termination of an End User Agreement, Reseller shall:

6.4.1. Remove all copies of Products from the End User's devices or otherwise render the Products permanently unusable; and

6.4.2. Require that the End User returns or destroys all copies of Products that it received.

7. ADDITIONAL REQUIREMENTS AND OBLIGATIONS.

7.1. Copyright, trademark, and patent notices. Reseller must not remove any copyright, trademark, or patent notices contained in or on Products. Reseller has no right under this Agreement to use any Microsoft logos in any manner whatsoever. Whenever a Product is first referenced in any written or visual communication, Reseller must use the appropriate trademark, Product descriptor and trademark symbol (either "TM" or "R"), and clearly indicate Microsoft's (or Microsoft's suppliers') ownership of such marks. For information on Microsoft trademarks, including a listing of current trademarks, see <http://www.microsoft.com/trademarks>. Reseller must not undertake any action that will interfere with or diminish Microsoft's (or Microsoft's suppliers') right, title and/or interest in the trademark(s) or trade name(s). At Microsoft's request, Reseller must provide Microsoft with samples of all of Reseller's written or visual materials that use a Product name.

7.2. Anti-piracy. Reseller must not engage in the manufacture, use distribution, or transfer of counterfeit, pirated or illegal software. Reseller may not distribute or transfer Products to any party that Reseller knows is engaged in these activities. Reseller must report to Microsoft and Egenera any suspected counterfeiting, piracy or other intellectual property infringement in computer programs, manuals, marketing materials or other materials owned by Microsoft and/or its licensors as soon as Reseller becomes aware of it. Reseller will cooperate with Microsoft in the investigation of any party suspected of these activities.

7.3. Government approvals. Reseller must exercise its rights under this Agreement with all necessary government approvals. Reseller also must comply with all applicable laws and regulations.

7.4. Indemnity. Reseller must defend, indemnify and hold Microsoft and Egenera harmless from any third party claim arising as a result of (i) Reseller's improper installation of a Product; (ii) any software virus introduced by Reseller; (iii) Reseller's violation of the terms of this Agreement; and (iv) unauthorized installation, use, access, copying, reproduction, and/or distribution of any portion of the Products by an End User (or any third party providing services to the End User). In addition, Reseller is liable to Microsoft for all damages, costs and expenses, including reasonable attorneys' fees, resulting from Reseller's continued distribution of an allegedly infringing Product after the Reseller was provided with notice to stop. The obligations under this section are not subject to the limitation of liability included in section 11 and section 14.

7.5. Anti-Corruption and Anti-Money Laundering Policy.

7.5.1. Compliance with Anti-Corruption Laws. Reseller will comply with all applicable anti-corruption laws, including the United States Foreign Corrupt Practices Act and the Canadian Criminal Code and Corruption of Foreign Public Officials Act. Neither Reseller nor any of its representatives shall, directly or indirectly, offer or pay anything of value (including gifts, travel, entertainment expenses, and charitable donations) to any official or employee of any government, government agency, political party, or public international organization, or any candidate for political office, to (1) improperly influence any act or decision of such official, employee or candidate for the purpose of promoting the business interests of the other party in any respect, or (2) otherwise improperly promote the business interests of the other party in any respect.

7.5.2. Anti-Money Laundering. Neither Reseller nor any of its representatives shall use its relationship with Microsoft to attempt to disguise the sources of illegally obtained funds.

7.5.3. No Retaliation. Reseller will not retaliate against anyone who has, in good faith, reported a possible violation of this section or refused to participate in activities that violate this section.

8. HOW TO KNOW WHAT PRODUCT USE RIGHTS APPLY.

8.1. SPUR availability. The SPUR is published periodically on a Microsoft website.

8.2. Applicable Use Rights. The Product use rights in the SPUR when Reseller first provides Software Services with a version of a Product remain in effect for the term of the SPLA, subject to the following:

8.2.1. If Microsoft introduces a new version of a Product and Reseller uses the new version, Reseller must abide by the use rights for the new version; and

8.2.2. If Reseller provides Software Services with an earlier version of a Product (i.e., a downgrade), the use rights for the version of the Product in the SPUR when Reseller first provides Software Services with the Product under this Agreement will apply, provided that if the Product has components that are not part of the version originally used, any subsequent use rights specific to those components will apply to those components.

Microsoft may revise the SPUR in order to (1) add use rights for new Products or new versions of Products and (2) to make non-substantive changes.

8.3. Removal of Products from the SPUR. Notwithstanding anything to the contrary, if Microsoft notifies Reseller or Egenera of the removal of a Product from the SPUR due to an intellectual property infringement claim or in accordance with a court or other government order, Reseller must immediately cease any use or distribution of the allegedly infringing Product. If a Product is removed from the SPUR for any other reason, Reseller may continue to license the removed Product for the term of the SPLA.

8.4. End User License Agreement applicability. This Agreement supersedes any end user license agreement that may accompany a Product. If an end user license agreement accompanies a fix, the use right contained in that end user license agreement (but not any warranties from Microsoft), which do not conflict with the SPUR, apply.

9. **MONTHLY USE REPORTS.** Egenera must submit a monthly use report to Microsoft or its reseller within ten (10) days after the 1st day of each month or on a date agreed to by Egenera and Microsoft or its reseller. Reseller must cooperate with Egenera in the production of the monthly use report. At a minimum, Reseller must provide the End User name and address for any End User generating more than US\$1,000 per month (or the equivalency in the applicable currency as of the effective date) in usage.

10. **NO HIGH RISK USE.** The Products are not fault-tolerant and are not guaranteed to be error free or to operate uninterrupted. Reseller must not grant any End User the right to use the Products in any application or situation where the Product(s) failure could lead to death or serious bodily injury of any person, or to severe physical or environmental damage ("High Risk Use"). High Risk Use does not include utilization of Products for administrative purposes, to store configuration data, engineering and/or configuration tools, or other non-control applications, the failure of which would not result in death, personal injury, or severe physical or environmental damage. These non-controlling applications may communicate with the applications that perform the control, but must not be directly or indirectly responsible for the control function. Reseller agrees to indemnify and hold harmless Microsoft and Egenera from any third-party claim arising out of End Users' use of the Products in connection with any High Risk Use.

11. LIMITED WARRANTY ONLY TO RESELLER; LIMITATION OF LIABILITY (EGENERA).

11.1. Egenera does not warrant non-Egenera products. They are provided by Egenera on an "AS IS" basis. Any warranty for non-Egenera products will be provided by the manufacturer of the products in accordance with the applicable manufacturer's warranty or end user license. Reseller is not authorized to make any warranty commitment on Egenera's behalf, whether written or oral, related to non-Egenera products.

11.2. EGENERA MAKES NO AND DISCLAIMS ALL WARRANTIES, EXPRESS AND IMPLIED, ABOUT THE PRODUCTS. MICROSOFT SOFTWARE IS PROVIDED ON AN AS-IS BASIS AND WITHOUT WARRANTY OF ANY KIND. No representation or other affirmation of fact, including, but not limited to, statements regarding capacity, suitability for use or performance of the Products, whether made by Egenera employees or otherwise, shall not be deemed to be a warranty of any purpose or give rise to any liability of Egenera whatsoever unless contained in this Agreement.

11.3. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW AND EXCEPT TO THE EXTENT OF LIABILITY ARISING FROM DEATH, PERSONAL INJURY, DAMAGE TO REAL OR TANGIBLE PERSONAL PROPERTY OR FRAUD, (A) IN NO EVENT SHALL EGENERA BE LIABLE FOR ANY DAMAGES RESULTING FROM LOSS OF USE, DATA, PROFIT, SOFTWARE OR BUSINESS, OR FOR ANY SPECIAL, EXEMPLARY, INDIRECT, PUNITIVE, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, WHETHER ARISING IN OF CONTRACT, TORT OR UNDER OTHER LEGAL THEORY, EVEN IF EGENERA KNEW OR SHOULD HAVE KNOWN ABOUT THE POSSIBILITY OR EXISTENCE OF SUCH DAMAGE OR LOSS; AND (B) THE AGGREGATE LIABILITY OF EGENERA FOR DAMAGES FOR ANY CAUSE WHATSOEVER, AND REGARDLESS OF THE FORM OF ACTION (IN CONTRACT, IN TORT OR OTHERWISE), SHALL BE LIMITED TO RESELLER'S PROVEN DIRECT DAMAGES IN AN AMOUNT NOT TO EXCEED THE NET AMOUNT RESELLER PAID EGENERA FOR THE SOFTWARE OR SERVICE(S) THAT CAUSED THE DAMAGES OR

ARE THE SUBJECT MATTER OF THE CAUSE OF ACTION. No action arising out of or in connection with this Agreement or any transaction hereunder may be brought by either party more than eighteen (18) months after the cause of action has arisen, except for an action for non-payment. These limitations shall apply to all causes of action under or relating to this Agreement, including any claim against any subsidiary, stockholder, Affiliate, officer or director of Egenera or employee or agent of Egenera within the scope of his or her employment or engagement.

12. WARRANTIES (MICROSOFT).

- 12.1. Limited warranty: Microsoft warrants that Product will perform substantially as described in the applicable Microsoft user documentation.
- 12.2. Limited warranty term. The limited warranty for Products is one year from the date Reseller first uses the Product.
- 12.3. Limited warranty exclusions. This limited warranty is subject to the following limitations:
- 12.3.1. The limited warranty does not cover problems caused by accident, abuse or use in a manner inconsistent with this agreement or the Product Use Rights, or results from events beyond Microsoft's reasonable control;
 - 12.3.2. The limited warranty does not apply to components of Products that Reseller is permitted to redistribute;
 - 12.3.3. The limited warranty does not apply to free, trial, pre-release, or beta products; and
 - 12.3.4. The limited warranty does not apply to problems caused by the failure to meet minimum system requirements.
- 12.4. Remedies for breach of limited warranty. If Microsoft fails to meet any of the above limited warranties and Reseller notifies Microsoft within the warranty term, then Microsoft will at its option either (1) return the price paid or (2) repair or replace the Product.

These are Reseller's only remedies for breach of a limited warranty other than remedies required to be provided under applicable law.

- 12.5. **DISCLAIMER OF OTHER WARRANTIES**. OTHER THAN THIS LIMITED WARRANTY, MICROSOFT PROVIDES NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS, MICROSOFT DISCLAIMS ANY IMPLIED REPRESENTATIONS, WARRANTIES, OR CONDITIONS, INCLUDING WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, SATISFACTORY QUALITY, TITLE OR NON-INFRINGEMENT. THESE DISCLAIMERS APPLY UNLESS APPLICABLE LAW DOES NOT PERMIT THEM. Any warranties, guarantees, or conditions that cannot be disclaimed as a matter of law last for one year from the start of the limited warranty.

13. DEFENSE OF INFRINGEMENT, MISAPPROPRIATION AND THIRD PARTY CLAIMS (MICROSOFT).

- 13.1. Microsoft will defend Reseller against any claims made by an unaffiliated third party that (i) a Product, Fix or Services Deliverable made available by Microsoft for a fee infringes that party's patent, copyright or trademark or makes unlawful use of its Trade Secret, or (ii) arising from Microsoft's provision of an Online Service in violation of laws applicable to Microsoft as a service provider. Clause (ii) will not apply to (A) any laws or regulations applicable to Reseller or Reseller's industry that are not also generally applicable to information technology security providers, and (B) any violations of laws or regulations related to a claim covered under clause (i). Microsoft will also pay the amount of any resulting adverse final judgment (or settlement to which Microsoft consents). This Section 5 provides Reseller's exclusive remedy for these claims.
- 13.2. Microsoft's obligations (13.1) above will not apply to the extent that the claim or action is based on:
- 13.2.1. Reseller Data, non-Microsoft software, modifications Reseller makes to, or any specifications or materials Reseller provides or makes available for, a Product, Fix or Service Deliverable;
 - 13.2.2. Reseller's combination of a Product, Fix or Service Deliverable with a non-Microsoft product, data, or business process or the use of a non-Microsoft product, data, or business process;
 - 13.2.3. Reseller's use of either Microsoft's trademarks or the use or redistribution of a Product, Fix, or Services Deliverable in violation of this agreement or any agreement incorporating its terms; or
 - 13.2.4. Reseller's use of a Product, Fix or Services Deliverable after Reseller was notified to discontinue that use due to a third party claim.

Reseller will reimburse Microsoft for any costs or damages that result from any of the above actions.

13.3. Reseller's agreement to protect. Reseller will defend Microsoft against any claims made by an unaffiliated third party that:

13.3.1. Any Reseller Data or non-Microsoft software Microsoft hosts on Reseller's behalf infringes the third party's patent, copyright, or trademark or makes unlawful use of its Trade Secret; or

13.3.2. Arises from violation of the Acceptable Use Policy, which is described in the Product Use Rights.

Reseller must pay the amount of any resulting adverse final judgment (or settlement to which Reseller consents). This section provides Reseller's exclusive remedy for these claims.

13.4. Rights and remedies in case of possible infringement or misappropriation. If Microsoft reasonably believes that a Product, Fix, or Services Deliverable may infringe or misappropriate a third-party's intellectual property rights, Microsoft will seek to: (1) procure for Reseller the right to continue to use the Product, Fix or Services Deliverable; or (2) modify or replace it with a functional equivalent to make it non-infringing and notify Reseller to discontinue use of the prior version, which Reseller must do immediately. If the foregoing options are not commercially reasonable for Microsoft, or if required by a valid judicial or government order, Microsoft may terminate Reseller's license or access rights (or for certain Services Deliverables, Reseller's ownership rights) in the Product, Fix, or Services Deliverable. In such a case, Microsoft will notify Reseller and refund any amounts Reseller has paid for those rights to the Product, Fix or Service Deliverable.

13.5. Obligations of protected party. Reseller must notify Microsoft promptly in writing of any new claim. The Reseller must (1) give Microsoft sole control over the defense or settlement; and (2) provide reasonable assistance in defending the claim. Microsoft will reimburse the Reseller for reasonable out of pocket expenses that it incurs in providing assistance.

14. LIMITATION OF LIABILITY (MICROSOFT)

14.1. To the extent permitted by applicable law, the total liability, including for its Affiliates and its Contractors, for all claims arising under this Agreement is limited to direct damages up to the amount Reseller paid for the Products or services during the 12 months before the cause of action arose; provided that in no event will a party's aggregate liability for any Product or service exceed the amount paid for that Product or service under the applicable Agreement. In the case of Products or services provided free of charge, or code that Reseller is authorized to redistribute to third parties without separate payment to Reseller, Egenera or Microsoft, Microsoft's liability is limited to direct damages up to U.S. \$5,000. These limitations apply regardless of whether the asserted liability is based on breach of contract, tort (including negligence), strict liability, breach of warranties, or any other legal theory. However, the limitation in this section will not apply to:

14.1.1. Microsoft's and Reseller's obligations under the section titled "Defense of infringement, misappropriation, and third party claims";

14.1.2. Liabilities arising out of any breach by either party of its obligations under the section entitled "Confidentiality", except that Microsoft's liability arising out of or in relation to Reseller Data shall in all cases be limited as provided above for the applicable Product or service; and

14.1.3. Violation by either party of the other party's intellectual property rights.

14.2. TO THE EXTENT PERMITTED BY APPLICABLE LAW, WHATEVER THE LEGAL BASIS FOR THE CLAIM, NEITHER PARTY, NOR ANY OF ITS AFFILIATES OR CONTRACTORS, WILL BE LIABLE FOR ANY INDIRECT, CONSEQUENTIAL, SPECIAL, OR INCIDENTAL DAMAGES, OR DAMAGES FOR LOST PROFITS, REVENUES, BUSINESS INTERRUPTION, OR LOSS OF BUSINESS INFORMATION ARISING IN CONNECTION WITH THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR IF SUCH POSSIBILITY WAS REASONABLY FORESEEABLE. HOWEVER, THIS EXCLUSION DOES NOT APPLY TO EITHER PARTY'S LIABILITY TO THE OTHER FOR VIOLATION OF (1) IT CONFIDENTIALITY OBLIGATIONS (EXCEPT TO THE EXTENT THAT SUCH VIOLATION RELATES TO RESELLER DATA), (2) THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS, OR (3) OBLIGATIONS IN THE SECTION TITLED "DEFENSE OF INFRINGEMENT, MISAPPROPRIATION, AND THIRD PARTY CLAIMS."

14.3. Neither Microsoft nor Reseller shall bring any action against the other's Affiliates or Contractors in respect of any matter disclaimed on their behalf in this agreement. Each party will indemnify the other in the event of any such breach of this provision.

15. **CONFIDENTIALITY.** Each party agrees that it shall not disclose, use, modify, copy, reproduce or otherwise divulge any Confidential Information of the other party other than to those of its subsidiaries and its and its subsidiaries' employees, agents and contractors who have a bona fide need to know for the purposes of fulfilling such party's obligations hereunder and are under a duty of non-disclosure with respect to such information at least as protective of the disclosing party's information as those set forth herein. Confidential Information means information in any form disclosed or made available by the disclosing

party to the receiving party in the course of performing obligations under this Agreement that a reasonable person would consider to be confidential or proprietary in nature. The Products, and all pricing described hereunder shall be considered Confidential Information. The receiving party shall use the same degree of care to prevent the unauthorized disclosure of the other party's Confidential Information as the receiving party uses to safeguard its most valuable proprietary information, but in no event less than a reasonable degree of care. The prohibitions contained in this Section 15 shall not apply to information (a) already lawfully known to the receiving party free of any restriction or obligation to keep it confidential, (b) independently developed by the receiving party without reference to the disclosing party's Confidential Information, (c) that is or becomes generally known to the public through no fault of the receiving party, or (d) subsequently disclosed to the receiving party by a third party who rightfully discloses such information without restriction and free of any obligation to keep it confidential. The receiving party may disclose the disclosing party's Confidential Information when required law or the valid order or regulatory or other requirement of a governmental entity or court of competent jurisdiction. In such cases the receiving party must give the disclosing party prompt prior notice, disclose only that portion of the Confidential Information that is legally required to be furnished, and reasonably cooperate with the disclosing party in its efforts to obtain a protective order or assurances of confidential treatment thereof

- 16. TERM AND TERMINATION.** The term of this Agreement shall commence on the Effective Date and shall remain in effect until terminated as provided herein. Either party may terminate this Agreement for any reason on thirty (30) days' prior written notice to the other. **NEITHER EGENERA NOR RESELLER WILL BE LIABLE TO THE OTHER FOR DAMAGE OF ANY KIND, INCLUDING BUT NOT LIMITED TO INCIDENTAL OR CONSEQUENTIAL DAMAGES, ON ACCOUNT OF THE TERMINATION OR THE EXPIRATION OF THIS AGREEMENT IN ACCORDANCE WITH THIS SECTION.** Neither Egenera nor Reseller will be liable to the other on account of termination or expiration of this Agreement for reimbursement or damages for the loss of goodwill, prospective profits or anticipated income, or on account of any expenditures, investments, leases or commitments made by either Reseller or for any other reason whatsoever based upon or arising out of such termination or expiration. **THE PARTIES ACKNOWLEDGE THAT THIS SECTION HAS BEEN INCLUDED AS A MATERIAL INDUCEMENT FOR EGENERA TO ENTER INTO THIS AGREEMENT AND THAT EGENERA WOULD NOT HAVE ENTERED INTO THIS AGREEMENT BUT FOR THE LIMITATIONS OF LIABILITY AS SET FORTH HEREIN.**

Termination or expiration shall not, however, relieve Reseller of any payment obligations incurred prior to the termination or expiration and Sections 1, 7, and 10 through 16 shall survive any termination hereunder.

- 17. INDEPENDENT PARTIES.** Reseller acknowledges that the relationship between the parties hereunder is non-exclusive, that Reseller and Egenera are independent companies from each other and that Reseller will, on its own behalf, solicit orders for Products only as an independent company. Reseller shall arrange the terms and conditions of sale and licensing of the Products, including price, between itself and the Resellers, independent of Egenera, except for the terms and conditions described in the Microsoft EULA, which Reseller shall deliver to and make binding upon the End Users. Reseller shall not represent itself as a partner, joint venturer, agent, employee or representative of Egenera. Reseller acknowledges that it shall have no right, power or authority to in any way obligate Egenera to enter into any contract or other obligation.
- 18. FORCE MAJEURE.** If either party is prevented from performing any portion of this Agreement (except the payment of money for Products ordered hereunder) by causes beyond its control, including labor disputes, delays by suppliers, manufacturing delays, civil commotion, war, governmental regulations or controls, casualty, inability to obtain materials or services, reasonable disputes over the interpretation of mutually agreed upon design specifications, or acts of God, such defaulting party will be excused from performance for the period of the delay and for a reasonable time thereafter.
- 19. CHOICE OF LAW; ARBITRATION.** This Agreement and its validity, interpretation, construction and performance shall be governed by the laws of the United States and the Commonwealth of Massachusetts, exclusive of any conflicts of law principles. The parties expressly agree that The U.N. Convention in Contracts for the International Sale of Goods does not apply to this Agreement. Except for the right of any party to apply to a court of competent jurisdiction for a temporary restraining order, preliminary injunction, or other equitable relief to preserve the status quo or prevent irreparable harm, any dispute under this Agreement shall be determined by binding arbitration in accordance with the commercial arbitration rules of the American Arbitration Association, in Boston, Massachusetts, before a single arbitrator, who will be a highly regarded commercial trial attorney specializing in the IT industry, and conducted in the English language. The resulting arbitration award may be enforced in any court of competent jurisdiction. The parties expressly agree that the Superior Court for the County of Suffolk, Massachusetts, or the United States District Court for the District of Massachusetts are courts of competent jurisdiction for this purpose.
- 20. U.S. GOVERNMENT CUSTOMERS.** The Products are a "commercial item," as that term is defined and used in 48 C.F.R. 2.101 and 12.101 (Oct. 1995), consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R. 12.212 (Sept. 1995). Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4 (June 1995), all U.S. Government Customers acquire the Products with only those rights set forth herein.
- 21. EXPORT CONTROL.** Products are subject to laws and regulations of the United States Government and other applicable countries that prohibit export or diversion of certain technical products to certain countries and individuals. Reseller is solely responsible, at its own expense, for obtaining all necessary import permits and certificates; shall not directly or indirectly sell or otherwise transfer any Products or related technical information to any person or entity listed on a denial order published by the U.S. Government or other applicable government; shall comply in all respects with all applicable import, export and re-export laws and regulations and shall defend and indemnify Egenera against any claim that such regulations were not complied with, including indenification of all damages or expense Egenera suffers as a result. Egenera reserves the right to refuse to authorize the licensing or distribution of Products to the extent destined for import or distribution by Reseller in countries having

standards of intellectual property protection that are not fully satisfactory to Egenera. The inclusion of any country in the Territory shall not limit Egenera's rights hereunder.

- 22. MISCELLANEOUS.** This Agreement (a) is the final, exclusive, complete and entire statement of the agreement of the parties and supersedes all previous and contemporaneous written and oral representations, proposals, negotiations, and communications between the parties with regard to the subject matter hereof; (b) may be modified only by a writing that expressly refers to this Agreement and is signed by an authorized representative of each party; and (c) shall control in case of any inconsistent or conflicting term set forth on the face or reverse side of any document, acknowledgment, confirmation or other writing that are different from or in addition to those specified herein, which inconsistent or conflicting terms shall not be binding on the parties even if reflected in an accepted agreement unless both parties have expressly agreed to be bound by such terms and conditions in a writing signed by an authorized representative of each that references this Agreement. Reseller shall not assign or otherwise transfer this Agreement or any right or obligation hereunder without Egenera's prior written consent. No decision, action or inaction by Egenera shall be construed to be a waiver of any rights or remedies available to it. The fact that one of the parties may have drafted this Agreement or any of its provisions shall not be given any weight or relevancy in interpreting it. If any part of this Agreement is unenforceable, the validity of the remaining provisions shall not be affected. Facsimile signatures shall be deemed to be equivalent to original signatures for purposes of this Agreement.
- 23. NOTICES.** All notices, demands, requests or other communications that may be or are required to be given, served or sent by any party pursuant to this Agreement will be in writing (and shall be deemed to have been duly given upon receipt), will reference this Agreement and shall be sent by mail, express courier, hand delivery or facsimile transmission, addressed as specified in the addresses above the signatures to this Agreement. Each party may designate by notice in writing a new address to which any notice, demand, request or communication may thereafter be so given, served or sent. Each notice shall be deemed sufficiently given, served, sent and received for all purposes at such time as it is delivered to the addressee (with the return receipt, the delivery receipt or the affidavit of messenger being deemed conclusive evidence of such delivery) or at such time as delivery is refused by the addressee upon presentation.

EXHIBIT A

Microsoft End User License Terms

EXHIBIT B

SPUR (Services Provider Use Rights)

EXHIBIT C

Product Price List