



## **Products License and Reseller Agreement**

### **1. Parties to this Agreement**

This Agreement is made this \_\_\_<sup>th</sup> day of \_\_\_\_\_ 2015 between **NetGen Communications, Inc.** (hereinafter called "NetGen"), a Georgia (USA) corporation having its principal place of business at 1225 Northmeadow Parkway, Suite 116, Roswell, GA 30076, USA, and **ACME, Inc.** "Acme" or "**Reseller**"), a corporation, with a place of business at \_\_\_\_\_.

#### **WITNESSETH:**

**WHEREAS**, \_\_\_\_\_ desires the right and license to resell certain NetGen hardware and software products, and NetGen is willing to grant such rights and license;

**NOW, THEREFORE**, for and in consideration of the promises and the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

### **2. Agreement Term**

This Agreement shall become effective on the Effective Date and continue in effect for one year. The Agreement shall be automatically extended in one-year increments beyond the termination date, provided neither party notifies the other in writing, within 90 days prior to the termination date that it does not wish for the automatic extension to take effect.

Additionally, this Agreement may be terminated as follows:

- a) Upon written notice from NetGen to Reseller of a violation of all or any part of this Agreement.
- b) In the event Reseller shall be in breach or default of any of the material terms, conditions or covenants of this Agreement or any orders placed against this Agreement, and such breach or default shall continue for a period of 30 days after the giving of written notice by NetGen.
- c) In the event a legal action is filed by either party against the other, either party may terminate this Agreement on one-day's written notice to the other party.

- d) In the event Reseller is the object of a corporate acquisition or similar change in business position.
- e) By mutual agreement between the parties in writing.

### 3. Definitions

For purposes of this Agreement, the following terms shall have the respective meanings indicated below:

**“Confidential Information”** shall mean any data or information, oral or written, treated as confidential that relates to either party’s past, present, or future research, development or business activities, including any unannounced product(s) and service(s), and including any information relating to services, developments, inventions, processes, plans, financial information, customer and supplier lists, forecasts, and projections. Notwithstanding the foregoing, Confidential Information shall exclude information (i) available to the public other than by a breach of this Agreement; (ii) rightfully received from a third party not in breach of an obligation of confidentiality; (iii) independently developed by the receiving party without access to Confidential Information of the other party; (iv) known to the receiving party at the time of disclosure as evidenced by the written records of the receiving party at the time of disclosure; or (v) produced in compliance with any court order; provided, however, that the disclosing party is given reasonable notice that its Confidential Information is being sought by a third Person, so as to afford the opportunity to limit or prevent such disclosure. Notwithstanding the foregoing, Reseller consents to NetGen disclosure of Reseller’s account information to credit reporting agencies, credit bureaus, private credit reporting associations, or to other providers of communications products or services.

**“Effective Date”** shall mean the latest date listed on the signature page of this Agreement.

**“Intellectual Property Rights”** shall mean the intangible legal rights or interests evidenced by or embodied in (a) any idea, design, concept, technique, invention, discovery, or improvement, regardless of patentability, but including patents, patent applications, trade secrets, and know-how; (b) any work of authorship, regardless of the ability to copyright, but including copyrights and any moral rights recognized by law; (c) any trademark, trade name, trade secret, service mark; and (d) any other similar rights, in each case, on a worldwide basis.

**“Person”** shall mean any individual, partnership (whether general, limited, limited liability or otherwise), limited liability company, corporation, association or other unincorporated association.

**“Products”** shall mean those products itemized in Schedule A.

**“End Users”** shall mean Reseller’s customers that utilize the Products for their intended purpose.

**“Territory”** shall mean that authorized sales territory specified in Schedule XX of this agreement.

**Software Developer's Kit** a licensed software product that enables a software developer to create products based on NetGen's Products.

**Runtime Software** is that licensed software that is required by an End User to utilize a Product for its intended purpose.

#### **4. NetGen Responsibilities**

Consistent with the terms of this Agreement, NetGen agrees it will do the following:

- a) Sell the Products to Reseller at the price specified in Schedule A, subject to the terms and conditions of this Agreement.
- b) Keep Reseller regularly advised of changes to published specifications of the Products.
- c) Offer Reseller technical support for the use of the Products, according to normal NetGen business practice, terms and conditions, as described below.
- d) Provide software updates to Reseller as they become generally available. Should an upgrade include functional enhancements that require new purchasers to pay a higher fee, NetGen shall offer this upgrade to Reseller on terms consistent with those offered other resellers.
- e) Provide product-support training to Reseller.
- f) Provide marketing collateral to Reseller.
- g) Recognize Reseller as an authorized Reseller on NetGen's website upon Reseller's completion of NetGen's on-line training program.

#### **5. Reseller Responsibilities**

Consistent with the terms of this Agreement, Reseller agrees it will do the following:

- a) Orders. Submit firm purchase orders for Products.
- b) Forecast. On a quarterly basis, provide NetGen with a rolling 12-month forecast of Product needs.
- c) Product Knowledge. Reseller must have and maintain a good, fundamental understanding of NetGen's products and related software and hardware operation. Reseller must also have and maintain a good, fundamental understanding of relevant voice/fax-over-IP technologies. Reseller agrees to take NetGen's Web-based reseller training.
- d) Promotional Efforts. Reseller shall use its best efforts to market the Products to End-Users. Specifically, Reseller agrees to promote the Products on Reseller's website. Reseller and its employees or other representatives shall not make any representation or warranty regarding the Product on behalf of NetGen and shall not assume or create any obligation or responsibility, express or implied, on behalf of or in the name of NetGen, except as expressly permitted under this Agreement.

- e) **Technical Assistance.** Reseller shall be responsible for providing all tier I technical support to its End-Users. Any failure of Reseller to provide appropriate technical support to its End-Users may be deemed by NetGen be a material breach for which this Agreement may be terminated by NetGen pursuant to Section 2.b, above. Reseller may contact NetGen directly from time to time for assistance with tier II type technical issues; provided, however, that under no circumstances shall any End-User contact NetGen directly for support.
- f) **Payments to NetGen.** NetGen will invoice Reseller for the applicable purchase promptly upon shipment of each Order and each such invoice will be due and payable in full within thirty (30) days after invoice date.
- g) **Taxes.** The prices in Exhibit A do not include sales, use, excise, income, or similar taxes. Consequently, in addition to the prices in effect at the time of sale, NetGen shall invoice and Buyer specifically agrees to pay any sales, use, excise, income or similar tax applicable to the price, sale, or furnishing of any services or Products hereunder. For the avoidance of doubt, Buyer agrees that NetGen will increase the amount of such invoice to cover any such taxes levied by Buyer's government authorities that require that Buyer deduct the amount of any such tax from Buyer's payment.
- h) NetGen may modify the prices in Exhibit A after the first anniversary of the Effective Date and not more than once each calendar year thereafter after 60 days written notice.

## **6. Warranties**

Software is provided "as is" without any warranty of any kind, either expressed or implied, including but not limited to the implied warranties of merchantability and fitness for a particular purpose.

Should a hardware product be found defective within 36-months of its original shipment from NetGen, a "Returned Material Authorization" (RMA) should be obtained from NetGen support. The Product should then be returned for replacement by NetGen with the RMA number indicated on or in the package. RMA requests and shipments may be submitted no more often than once per month.

NetGen does not warrant that the functions contained in the Products will meet Reseller's requirements, or will operate in the hardware or software combinations that Reseller may select, or that the operation of the Products will be uninterrupted or error free, or that the operation of the Products will be corrected.

These stated express warranties are in lieu of all obligations or liabilities on the part of NetGen for damages, including, but not limited to special, indirect or consequential damages arising out of or in connection with, the use or performance of the Products.

## **7. License**

Effective upon the date of this Agreement, Commetrex grants Reseller a non-transferable, non-exclusive license to resell the Products to End Users in the Territory, subject to the terms and conditions of this Agreement.

Reseller agrees that Commetrex owns all right, title and interest in the Products now, or hereafter, subject to this Agreement and in all of Commetrex' patents, trademarks, trade names, inventions, copyrights, know-how and trade secrets relating to the design, manufacture, operation or service of the Products. The use by Reseller of any of these property rights is authorized only for the purpose herein set forth.

The Products are licensed to Reseller for internal use and resale to End Users and are licensed by Commetrex subject to, in every case, the condition that such license does not convey any license, expressly or by implication, to manufacture, duplicate or otherwise copy or reproduce any of the Products, except as permitted by this Agreement. Reseller may reproduce Software for distribution provided the Commetrex copyright notice is clearly displayed on the distribution media, and that Reseller places an order with Commetrex for the items to be distributed prior to shipment to Customers.

Reseller agrees that it will not reverse compile, reverse engineer or reverse assemble the Products.

Reseller agrees that unauthorized distribution, copying, duplicating or otherwise reproducing all or part of the Products will materially damage Commetrex.

This Agreement extends to and includes any improvements, changes, alterations, or amendments to the Products that may be supplied by Commetrex.

### **a) Software Developer's Kit License**

Commetrex grants Reseller a license to resell Software Developer's Kits (as specified in Schedule A), subject to the terms of this Agreement and payment of the applicable Software Developer's Kit license fees, provided Reseller insures it instructs customers to meet the following license provisions:

A Software Developer's Kit license is only for the specific development organization to which it is sold and which is specifically identified as the licensee. Licensee must agree that the Products licensed or sold herein may not be sold, leased, assigned, or otherwise released or distributed in any form to any other division, subsidiary, or group within the licensee's organization, or any organizational parent, individual, business entity, academic institution or governmental body whatsoever.

Licensee may make copies of the Software Developer's Kit software for use by its employees, and non-employee contractors or agents, in the reasonable performance of licensee's normal business. Employees of licensee may make use of the Software Developer's Kit software on a computer at their home or on a portable computer. Non-employee contractors or agents of licensee may use the Software Developer's Kit software only on the licensee's premises. Non-employee contractors or agents of

licensee may not make copies, or have copies, or have access to copies of the Software Developer's Kit software, away from the licensee's premises.

## **b) Runtime Software License**

Commetrex grants Reseller a license, subject to the terms of this Agreement and payment of the applicable Runtime Software license fees, to sublicense Runtime Software to its customers for use as an integral part of its customer's products or service offering. Reseller agrees that it will not remove any of Commetrex' copyright or trademark notices from runtime versions of the Software.

## **c) License to Translate**

Commetrex hereby grants to Reseller a non-exclusive, non-transferable license, subject to the terms and conditions of this Agreement, to prepare, reproduce, and distribute translations of documentation, user manuals, promotional, and other supporting materials relating to Products. Reseller is not permitted to reproduce the items set forth above in quantities beyond those reasonably necessary for the distribution of the Products in accordance with this Agreement, and for Reseller's internal use in furtherance of such distribution. Such translations will include Commetrex' copyright notice.

Reseller hereby grants to Commetrex a non-exclusive license, effective upon termination of this Agreement for any reason, to modify, reproduce and distribute copies of any and all such translated materials.

## **8. Promotional Rights and Obligations**

During the term of this Agreement, Reseller shall have the right to advertise such Products under the trademarks, marks, and trade names that NetGen may adopt from time to time ("NetGen Trademarks"). Reseller agrees to promote selected NetGen products on Reseller's Website.

Nothing herein shall grant to Reseller any right, title or interest in NetGen's Trademarks. Reseller shall not attempt to register any NetGen Trademark or trade name confusingly similar to those of NetGen. If not exact copies, all representations of NetGen' Trademarks that Reseller intends to use shall first be submitted to NetGen for approval (which shall not be unreasonably withheld) of design, color, and other details. If any NetGen Trademarks are to be used in conjunction with another trademark, then the NetGen Trademark shall be presented equally legibly and equally prominently as the other, but nevertheless separated from the other so that each appears to be a mark in its own right, distinct from the other mark.

## **9. Confidentiality**

Each party acknowledges that it or its personnel may, in the course of this Agreement, be exposed to or otherwise acquire **Confidential Information**. Such Confidential

Information shall include, but not be limited to, information relating to each party's employees or contractors, trade secrets, technology, techniques, proprietary information, customers, vendors, finances and other business information. Each party agrees to hold the Confidential Information of the other party in strict confidence and not to disclose such Confidential Information to third parties or use such Confidential Information in any way for any purpose whatsoever other than as may be (a) required by this Agreement, (b) consented to by the disclosing party, or (c) as may be required by law, in accordance with this Agreement.

## **10. Maintenance**

NetGen will provide the Product support services set forth in Exhibit D (the "Support Services") for the prices set forth in Exhibit A. Support Services are available at different levels with different pricing for each level. If Reseller does not check the box on the signature of this Agreement for one of the Support Service levels, Reseller will be deemed to check the box for "Hourly Support." Once selected or deemed selected, Support Service is in place for a one-year term and the same level of Support Service will automatically renew unless Reseller provides written notice of change or termination at least thirty (30) days before the end of the one year term. Fees for Support Services are due annually in advance, are fully earned when due and non-refundable when paid.

## **11. Indemnification**

Intellectual Property. NetGen will defend and settle at its own expense, and will indemnify Reseller against any damages and costs (including reasonable legal fees) awarded against Reseller resulting from any suit instituted against Reseller to the extent that it is based on a claim that a Product infringes any U.S. patent, infringes any copyright or trademark, or misappropriates any trade secret ("Infringement Claim") of a third party; provided that (i) Reseller notifies NetGen in writing within twenty (20) days of Reseller's receipt of the Infringement Claim, (ii) Reseller grants NetGen sole control of the defense and any settlement negotiations, provided that any settlement or other resolution is not adverse to Reseller's interests, and (iii) Reseller provides NetGen with all reasonable assistance, information, and authority necessary to perform the above at NetGen' sole expense.

IP Indemnity Procedure. Should Reseller receive a threat of infringement (and provide reasonable notice to NetGen of such threat) or should all or any part of the Product become, or in NetGen' opinion be likely to become, the subject of a claim of infringement, then Reseller will permit NetGen, at NetGen's option and expense, to either: (i) procure for Reseller the right to continue using the Product; (ii) replace or modify the Product so that its use becomes non-infringing, without materially impairing the functionality of the Product; or (iii) terminate the Agreement or Reseller's use of the Product and refund the fees paid by Reseller to NetGen in the previous twelve (12) months.

IP Indemnity Exclusions. NetGen's obligations set forth in this Section 11(a) shall not apply with respect to a claim to the extent it arises from any of the following (each an



"Excluded Claim"): (i) the use of the Product in a manner other than as permitted under the Agreement; (ii) use of the Product in a manner other than as specified in the documentation provided by NetGen; (iii) any unauthorized modification of the Product or any connection to the Product through a means other than as provided (e.g., APIs); (iv) the use, operation, or combination of the Product with software, data, equipment, or materials not provided or authorized in writing by NetGen, except as provided in accordance with the documentation provided by NetGen; (v) Reseller's continuance of allegedly infringing activity after being informed of the infringement and provided with modifications that would avoid the alleged infringement; or (vi) materials, data, information, directions or specifications provided by or on behalf of Reseller to NetGen.

Sole Remedy. The remedies provided in Sections 9(a)-(d) are Reseller's sole remedy and NetGen' sole liability, under this Agreement for any claim or allegation that any Product or Software infringes the intellectual property rights of any party.

General Indemnity. Each party to this Agreement (as applicable, the "Indemnitor") agrees that it will, at its own expense, defend any claims or suit instituted against the other party to this Agreement (as applicable, the "Indemnitee") and indemnify Indemnitee against any award of damages and costs (including legal fees) made against Indemnitee by a final judgment of a Court of competent jurisdiction or settlement in any such suit insofar as the same are based on a third-party claim (excepting an Infringement Claim) arising out of: (a) Indemnitor's negligent or intentional acts or omissions, or (b) Indemnitor's breach of this Agreement (except to the extent any such breach is subject to indemnification under Section 9(a) of this Agreement). Indemnitee will give Indemnitor notice in writing of the institution of such claim or suit and permit Indemnitor through its counsel to defend the same and give Indemnitor all reasonably available information, assistance and authority to enable Indemnitor to do so. NetGen shall have control of the defense of any such claim or suit including appeals, and of all negotiations thereof, including the right to effect settlement or compromise.

Limitations. Except for indemnity obligations under Section 11, in no event will either party be liable to the other party for any damages, including any lost profits, lost savings, procurement of substitute goods or services, or other incidental or consequential damages, even if the responsible party has been advised of the possibility of such damages.

## **12. Limitation on Liability**

EXCEPT IN THE INSTANCE OF LIABILITY ARISING FROM SECTION 11, IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, EXEMPLARY, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, DAMAGE TO BUSINESS REPUTATION, LOST BUSINESS OR LOST PROFITS) OF A PARTY, HOWEVER CAUSED, WHETHER BY CONTRACT, TORT, NEGLIGENCE OR OTHERWISE, ARISING FROM OR RELATING TO THE AGREEMENT OR ANY BREACH HEREOF, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OR LIKELIHOOD OF SUCH DAMAGES.



IN NO EVENT SHALL EITHER PARTY TO THIS AGREEMENT HAVE LIABILITY FOR ANY LOSSES, DAMAGES OR OTHER CLAIMS ARISING UNDER THIS AGREEMENT OR IN CONNECTION WITH THE TRANSACTIONS AND MATTERS CONTEMPLATED BY THIS AGREEMENT UNDER ANY LEGAL THEORY OR CIRCUMSTANCE IN EXCESS OF THE GREATER OF: (a) \$1,000,000, or (b) THE AMOUNTS ACTUALLY PAID BY RESELLER TO NETGEN DURING THE TWELVE MONTH PERIOD IMMEDIATELY PRECEDING THE DATE ON WHICH SUCH LIABILITY FIRST AROSE.

### **13. Miscellaneous**

- a) Force Majeure - Neither party shall be liable by reason of any failure or delay in the obligations hereunder on account of strikes, riots, fires, explosions, acts of God, war, government action or any other cause which is beyond the reasonable control of such party.
- b) This Agreement will be construed and enforced in accordance with the laws of the State of Georgia (USA) applicable to contracts made and to be wholly enforced within such State. Each party consents to the jurisdiction of the State courts sitting in Fulton County, Georgia and the U.S. District Court for the Northern District of Georgia in connection with any claim, suit or proceeding arising out of or relating to this Agreement or any act or omission relating to this Agreement and each parties agrees to raise no objection to the laying of venue in any such court.
- c) This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and merges all prior and contemporaneous written or oral communications. This Agreement may not be modified, amended or waived except by a written agreement signed by both parties. If any provision of this Agreement is held to be unenforceable for any reason, it will be adjusted rather than voided (if possible) to achieve the intent of the parties. All other provisions of this Agreement will be deemed valid and enforceable to the extent possible.
- d) Reseller will keep complete and accurate records concerning its purchase and use of the Products and with respect to the number of ports activated through the Products. Reseller will provide NetGen with a written certification as to the number of ports promptly following NetGen' request. NetGen may review and audit Reseller's accounting and other business records, not more than once each calendar year and following reasonable prior notice, to determine the number of ports in use and Reseller's compliance with this Agreement. If any such review or audit determines that Reseller has underpaid amounts due under this Agreement, Reseller will promptly pay the amount underpaid, together with interest at the rate of 18% per annum from the date such amounts were required to be paid and will pay NetGen' costs and expenses in connection with such audit or review.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date first above written.

<b>Reseller</b>	<b>NetGen Communications, Inc.</b>
By:	By:
Name:	Name:
Title:	Title:
Date:	Date:

## Schedule A

### Smart ATA Reseller Pricing

#### Smart ATA Reseller Pricing

Model	Description	List	Qty 25+ 15%	Qty 50+ 20%	Qty 75+ 25%	Qty 100+ 30%	Qty 150+ 35%	Qty 200+ 40%
HX402E	2 FXS ports	98.50	83.73	78.80	73.88	68.95	64.03	59.10
HX422E	2 FXS port and 2 FXO	130.00	110.50	104.00	97.50	91.00	84.50	78.00
HX404E	4 FXS ports	120.00	102.00	96.00	90.00	84.00	78.00	72.00
MX8A- 8S*	8 FXS ports	270.00	229.50	216.00	202.50	189.00	175.00	162.00

**Reseller minimum order quantities:**

For 15% discount, 6 each

For 20% discount, 12 each

For 25%+ discount, 24 each

For 30%+ discount, 36 each

For 35%+ discount, 48 each

For 40%+ discount, 48 each

\*There are no minimum-order quantities for the MX8E to obtain the discount as long as at least one minimum-quantity order for Smart ATAs has been placed for the annual commitment level selected.

**Schedule B**  
**Open-Source Software**

The Smart ACS product (Automatic configuration server (ACS) implementing CPE configuration protocol CWMP as specified in TR-069) provided upon request, is based on the OpenACS open-source project software which is licensed under the GPL license.