

nAPPLIANCE APPLIANCE PRODUCT END USER AGREEMENT

CAREFULLY READ THE FOLLOWING TERMS AND CONDITIONS. BY INSTALLING AND USING SOFTWARE AND HARDWARE INCLUDED WITH THE NAPPLIANCE PRODUCT, YOU (THE 'END USER') ARE AGREEING TO BE BOUND BY THESE TERMS AND CONDITIONS. IF YOU DO NOT AGREE TO THESE TERMS AND CONDITIONS, IMMEDIATELY RETURN THE PRODUCT TO nAPPLIANCE NETWORKS, INC.

1. DEFINITIONS

nAppliance means the nAppliance Networks Inc.

nAppliance Appliance means the nAppliance hardware and software that includes, without limitation: licensed software, hardware, support, and professional services.

Open Source Software means software included in the nAppliance Appliance which is licensed and made available under the terms and conditions of the GNU General Public License version 2.

Licensed Software means nAppliance Proprietary Software, Third-Party Licensed Software and Open Source Software together.

nAppliance Proprietary Software means nAppliance proprietary software that may be included in the nAppliance Appliance, including enhancements, updates, bug fixes and upgrades thereto that may be provided to the End User from time to time.

End User means the customer, customer representative, agent or a third-party involved with installation or maintenance of the nAppliance Appliance

Covered Products means those nAppliance products that include both Software and Hardware as specified in one of the following documents: (a) invoice from nAppliance to Customer, or (b) executed sales quotation between Customer and nAppliance, or (c) a purchase order from nAppliance to Customer

Third Party Product means a hardware device or software product produced by a company other than nAppliance

nAppliance Support Services Licensing Agreement is the support agreement purchased by the Customer providing hardware repair, replacement, software maintenance and technical support for the Covered Products

2. LICENSE

- a) License Grant. Subject to full payment of all applicable fees and to the terms of this End User agreement (the "Agreement"), nAppliance hereby grants to End User, a non-transferable, non-exclusive license to use the Covered Products and related product documentation (the "Documentation") with the nAppliance Appliance for the duration of the Agreement. This license allows the End User to install the nAppliance Appliance on a network supporting the number of active nodes specified by the nAppliance Covered Products agreement. nAppliance shall have the right to conduct audits periodically upon advance notice to verify compliance with the terms of this Agreement.
- b) License Restrictions. End User may use the Licensed Software solely with the nAppliance Appliance. Except as otherwise permitted by the GNU General Public License version 2, End User agrees not to modify, translate, reverse engineer, de-compile or disassemble the Licensed Software; or to create derivative works based on the Licensed Software.
- c) Other Restrictions. End User agrees to safeguard copies of the Licensed Software against disclosure, copying or use by unauthorized persons. End User agrees that it will not use, or allow use of, the nAppliance Appliance for any improper purpose (including without limitation, testing the integrity of any network other than those it is authorized to test). End User agrees that it will not, and will not allow, reverse engineering of the hardware or

software included in the nAppliance Appliance. End User shall ensure that the provisions of this Agreement are not violated by End User's employees, contractors or agents. End User agrees to indemnify nAppliance for any third party claims related to the breach of this or any other provision of this Agreement by End User, its agents, contractors, or employees.

- d) Open Source Software. The use distribution and modification of Open Source Software is governed by the terms and conditions of the GNU General Public License version 2 which can be viewed at <http://gnu.org> and which is hereby incorporated by reference. Copies of the source code for Open Source Software may be obtained by contacting nAppliance via email at source@nAppliance.com. nAppliance may charge the End User a fee equal to its cost for copying and distributing such source code. Nothing in this Agreement is meant to modify or supercede any terms and conditions of the GNU General Public License version 2 and if there is a conflict between the Agreement and the GNU General Public License version 2, the terms of the GNU General Public License version 2 shall control.

3. TITLE

End User acknowledges and agrees that all right, title and interest in the Licensed Software and Documentation, including all intellectual property rights therein, is retained by nAppliance or its suppliers, subject only to the license granted to End User hereunder. This license is not a sale and does not transfer to End User any title or ownership in or to the Licensed Software or the Documentation.

4. MAINTENANCE

End User shall have the option of purchasing maintenance services from nAppliance for a fee. Maintenance may include the following:

- a) Software Updates. Software updates will be provided by nAppliance at its sole discretion to End User from time to time. Updates may include software enhancements, upgrades, minor updates, and bug fixes.
- b) Hardware Repair or Replacement. For End Users purchasing maintenance services, nAppliance will use commercially reasonable efforts to repair or replace defective hardware within the terms of the purchased nAppliance Support Services Licensing Agreement, such charges to be invoiced by nAppliance to End User in accordance with Section 7.
- c) Support. nAppliance will provide phone and email support to End Users with purchased maintenance agreement (nAppliance Support Services Licensing Agreement). The hours of support and service levels of support are defined in the specific agreement purchased for each product. nAppliance will use commercially reasonable efforts to reply to support incidents.
- d) Technical Support Incidents. End Users who purchase maintenance are entitled to twelve (6) technical support incidents per year. Support for technical support incidents above twelve (6) per year will be provided on a time and materials basis.
- e) Bug Fixes. The discovery of errors in the nAppliance Appliance ("Bugs") by End User shall not be deemed a technical support incident. Bugs should be promptly reported via email by End User to nAppliance support. nAppliance will use commercially reasonable efforts to fix Bugs in a timely manner.
- f) Other Technical Support and Professional Services. Additional technical support services are available, at nAppliance's discretion, on a time and materials basis.

5. LIMITED WARRANTY

- a) **Software.** nAppliance warrants to End User only that the media on which the Licensed Software is recorded shall be free from defects in materials and workmanship under normal use for a period of ninety (90) days from the date of shipment by nAppliance. End User's sole and exclusive remedy, and nAppliance's sole and exclusive liability, shall be replacement of the media in accordance with this limited warranty.
- b) **Hardware.**
- (i) **Limited Warranty.** nAppliance warrants only to the End User that hardware furnished to the End User under this Agreement will be free from defects in materials and workmanship for a period of ninety (90) days following shipment by nAppliance. nAppliance's sole and exclusive liability and End User's sole and exclusive remedy under this section 5(b) is to, at nAppliance's sole discretion, repair or replace without charge any non-conforming hardware. nAppliance shall repair or replace such hardware within a reasonable time period. Returned hardware and parts shall become nAppliance's property. End User agrees to assist nAppliance in identifying the circumstances under which the hardware failed.
 - (ii) **Warranty Exclusions.** The warranty under this section 5(b) does not apply to any hardware that has been subjected by the End User or a third party to: (a) operating or environmental conditions contrary to nAppliance's specifications, (b) damage, misuse or neglect, (c) improper installation, repair or alteration, (d) modifications, other than by nAppliance, or (e) third party software, firmware or hardware that interferes with operation of such hardware. This warranty also excludes expendable items, such as fuses or other similar parts that fail from normal use.

c) WARRANTY DISCLAIMER.

- (i) The licensed software and documentation is provided "as is." except for the limited warranties granted in sections 5 (a) and (b), nAppliance expressly disclaims and negates all warranties for the nAppliance appliance, whether expressed, implied, statutory or otherwise, and nAppliance specifically disclaims any implied warranties of merchantability, fitness for a particular purpose, non-infringement of intellectual property or other violation of rights. nAppliance does not warrant that the nAppliance appliance will meet End User's requirements or that the operation of the licensed software will be uninterrupted or error free.
- (ii) Some states or countries do not allow exclusion or limitation of incidental or consequential damages or limitation on how long an implied warranty lasts, so the above limitations or exclusions may not apply to End User. This warranty gives End User specific legal rights and End User may also have other rights, which vary from state to state or country to country.

6. LIMITATION OF LIABILITY AND DAMAGES

- (a) In no event shall nAppliance, its suppliers or its distributors be liable for any indirect, special, incidental or consequential damage, including without limitation, loss of data, lost profits or cost of cover arising from the use of the nAppliance appliance, or any defect in the nAppliance appliance, however caused and on any theory of liability. This limitation shall apply even if nAppliance, its suppliers or its distributor shall have been advised of the possibility of any such damage. In particular, but without limitation, nAppliance, its suppliers and its distributors shall have no liability for the loss of any information stored or communicated or attempted to be stored or communicated within any system using the licensed software.
- (b) The maximum aggregate liability of nAppliance and its suppliers for any claim arising out of use of the nAppliance appliance, or any defect in the nAppliance appliance, on any and all theories of liability, including without limitation negligence by nAppliance, shall in all events be limited to return of the amounts actually paid to nAppliance for the defective licensed software or hardware, less depreciation of such amounts linearly over a three-year period, which the parties agree constitutes a reasonable rate of depreciation.

7. FEES

End User shall pay to nAppliance the fees for the nAppliance Appliance in effect at the applicable delivery date requested by End User in accordance with the nAppliance Appliance Purchase Agreement, and nAppliance shall invoice End User for all such fees. nAppliance may increase fees at its discretion, provided that fee increases will not be effective until 30 days after notice to End User. All payments due hereunder to nAppliance shall be paid to nAppliance not later than thirty (30) days following the date of the applicable invoice. In addition to the fees, End User will pay all charges, including without limitation transportation charges, insurance premiums, and shall be responsible for all taxes (except nAppliance's U.S. income taxes), duties, costs of compliance with export and import controls and regulations, and other governmental assessments.

8. TERMINATION

This agreement shall continue in effect until terminated hereunder. This Agreement may be terminated by nAppliance upon 30 days notice to End User. This Agreement shall terminate automatically if End User fails to pay fees when due and such failure is not remedied within fifteen days of the original payment due date. In addition, this agreement shall terminate automatically on End User's failure to comply with any of the restrictions and provisions herein, including without limitation any attempt to transfer this license. Upon any termination of this agreement, End User agrees promptly to destroy or return to nAppliance all copies of the Licensed Software and Documentation, including without limitation all original and archival copies thereof. No refunds shall be given for such returned materials. Notwithstanding any termination of this License, the rights and obligations set forth in section 3 (Title), section 5 (Limited Warranty), section 6 (Limitation of Liability and Damages), section 7 (Fees), section 8 (Termination) and section 9 (Miscellaneous) shall survive such termination.

9. MISCELLANEOUS

End User may not assign this Agreement without the consent of nAppliance. Any attempted assignment by End User shall be null and void. nAppliance may freely assign this Agreement. No delay, failure or waiver by either party to exercise any right or remedy under this Agreement shall operate to limit, preclude, cancel or waive any exercise of such right or remedy or the exercise of any other right or remedy. This Agreement shall be governed by and construed in accordance with the laws of the State of California without regard to conflict of laws principles or the United Nations 1980 Convention on Contracts for the International Sale of Goods. The federal and state courts of California shall have exclusive jurisdiction and venue to adjudicate any dispute arising out of this Agreement, and End User expressly consents to the personal jurisdiction of the state and federal courts of California. If any provision in this Agreement shall be found or be held to be invalid or unenforceable in any jurisdiction in which this Agreement is being performed, it shall not affect the validity of the remaining portions of the Agreement. This Agreement constitutes the entire agreement between the parties and supercedes any prior agreement, whether written or oral, relating to the subject matter of this Agreement.