Eastwind Communications, Inc.

Terms and Conditions of Sale and Licensing

IMPORTANT – READ CAREFULLY: These Eastwind Communications, Inc. Terms and Conditions of Sale and Licensing (this “Agreement”) constitute a legal agreement between you (on behalf of yourself or the entity which you represent – hereinafter referred to as “Customer”) and Eastwind Communications, Inc. (“Eastwind”) with respect to the sale or licensing of the Products (as defined below) identified on the Eastwind Sales Acknowledgement (the “Acknowledgement”) attached hereto or enclosed herewith. By placing an order for the Products, you agree to be bound by the terms of this Agreement. Eastwind’s agreement to the sale or licensing of any Products, is expressly conditioned upon Customer’s assent to the terms and conditions contained herein. If these terms and conditions are not acceptable to Customer, Customer must notify Eastwind at once by specific written objection. No waiver, alteration or modification of this Agreement shall be binding on Eastwind unless in writing and signed by a duly authorized officer of Eastwind.

1. **Definitions.**
   1. “Equipment” shall mean any hardware or other equipment and parts thereof, but shall not include any Software whether or not such Software is part of Firmware.
   2. “Firmware” shall mean a combination of (i) hardware and (ii) Software represented by a pattern of bits contained in such hardware.
   3. “Products” shall mean the Equipment and the Software described in the Acknowledgement.
   4. “Software” shall mean the executable object code version (but not the source code version) of the computer software (including without limitation any media or printed, electronic or “online” materials and documentation associated therewith) provided by Eastwind (including any Firmware) and any updates thereto that Eastwind may provide hereunder from time to time.
2. **Prices.** All prices are to subject to a valid quote from Eastwind. All prices expressed and all payments made must be in U.S. dollars. The prices shown are Ex Works Eastwind’s or vendor’s facility. Prices are exclusive of all federal, state, local, municipal, value added tax (“VAT”) or other excise, sales, use, occupation, or similar taxes now in force or enacted in the future, all of which shall be paid by Customer. It is the sole responsibility of Customer (in the importing country) to pay all related VAT charges, import fees, duties & taxes on Products purchased or shipped to Customer. Eastwind may invoice Customer for any such taxes and remit any payments made on such invoice directly to the appropriate taxing authorities. It shall be Customer’s responsibility to provide written proof, satisfactory to Eastwind, of any applicable tax exemptions.
3. **Payment.** Unless otherwise superceded by a valid Eastwind quote or agreed to in writing by Eastwind, payment for Products is due by wire transfer in advance of shipment
4. **Delivery.** Unless otherwise superseded by a valid Eastwind quote or agreed to in writing by Eastwind, Eastwind’s default delivery interval is sixty (60) days after customer issuance of a purchase order. Should Customer desire to shorten or lengthen, said delivery schedule, Eastwind will use reasonable efforts to comply with Customer’s request. Eastwind will, within ten (10) days of such request, notify Customer if additional charges are required to facilitate such expedited delivery. Customer shall have three (3) business days from said notification to elect to proceed with expedited delivery at the specified additional cost or to proceed under the normal delivery schedule at the original price. Eastwind intends to meet acknowledged delivery dates, but does not represent or warrant that it will, in fact, meet all such dates, as all shipments are made subject to the availability of Products. Eastwind agrees that it shall notify Customer as soon as practicable of any delay in expected delivery schedules.
5. **Shipment, Risk of Loss and Title.** All Products shall be packaged, marked and otherwise prepared for shipment by Eastwind or vendor in suitable containers in accordance with sound commercial practices. Eastwind shall mark on such containers all necessary handling, loading and shipping instructions. An itemized packing list shall be included with each shipment. Customer agrees to assume any additional packaging costs incurred by Eastwind in complying with Customer’s packaging specifications.  All Products under this Agreement shall be delivered to Customer Ex Works and delivery of Products to a common carrier or a licensed trucker shall constitute delivery to Customer. Title and risk of loss for the Product shall pass to Customer upon delivery to a common carrier or licensed trucker. All Products shall be shipped freight prepaid and charges will be added to Customer’s invoice for such Products. Eastwind will not assume any liability in connection with shipment for any loss or damage caused by delay in shipping the Products nor constitute any carrier as its agent. Upon request, shipments will be insured at Customer’s expense, and Customer shall be responsible for making claims with carriers, insurers, warehousemen, and others for mis-delivery, non-delivery, loss, damage or delay. The Customer shall pay all transportation, rigging, duties, and import/export fees, taxes and similar costs and charges. Eastwind may, however, invoice Customer for any such charges and remit payments directly to the shipper.
6. **Export Controls.** Customer warrants to Eastwind that none of the Products obtained from Eastwind under this Agreement will be resold, transferred, or used in any way in violation of any laws, regulations, transaction or export controls, or economic sanctions imposed by the U.S. government with regard to any other state, government or political entity. In the event that Customer should need any additional information from Eastwind in order to re-export product, Customer shall notify Eastwind in writing, and Eastwind agrees to furnish said information upon satisfactory proof of a legitimate need. Customer agrees that it shall protect all such information and hold such information so provided in accordance with the provisions of the section entitled “Proprietary Information” hereunder.
7. **Proprietary Controls.** Customer acknowledges that it may receive certain proprietary information from Eastwind from time to time. In the event Customer and Eastwind shall have entered into a separate confidentiality and non-disclosure agreement, the terms of such agreement shall apply to the extent the terms of such agreement conflict with the provisions of this Section 7.
   1. *Proprietary Information.* Eastwind and Customer agree that, in addition to the Software, certain information supplied by each to the other during the course of this Agreement may be proprietary. All such information shall be marked as proprietary, shall be held in confidence by the receiving party for a period of five (5) years following the date of disclosure and shall be used only for the purpose of this Agreement.
   2. *Documentation.* All documentation with respect to the Products, including operating or maintenance manuals and drawings, are solely for Customer’s internal use. The Customer may make copies of such documentation only to satisfy its internal requirements, provided that all such copies include copyright and proprietary information notices. No other copies or use of such documentation, or any portion thereof, shall be made without the prior written consent of Eastwind. All such documentation, and copies thereof, shall be maintained in secure premises by Customer, and Customer shall take appropriate measures to prevent the unauthorized disclosure thereof.
   3. *Return of Information.*  Upon the termination or cancellation of this Agreement, each party shall promptly cease using and shall return or destroy and certify destruction of all Proprietary Information which it receives from the other party along with all tangible copies which it may have made, and all copies stored in any computer memory or storage medium.
8. **Software Licenses.** 
   1. *Licenses.* All Software provided by Eastwind to Customer shall be by way of a license. Depending upon the Product purchased, Software will either be (i) licensed to Customer directly by the manufacturer of such Software by way of a “click-through”, “shrink-wrap”, or other valid license agreement or (ii) sublicensed to Customer by Eastwind pursuant to the terms of the vendor-specific End-User License Agreement found at <http://www.eastwindcom.com/contract--licensing-information.html>. Customer agrees that it will not copy, install or use any Software without first accepting the appropriate license therefore. Please contact Eastwind for any questions regarding the applicability of any Software license.
   2. *Open Source Software.* Certain Products may contain Open Source Software, the use of which is at Customer’s sole risk. SUCH SOFTWARE IS PROVIDED “AS-IS” AND EASTWIND MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT THERETO. For purposes of this Agreement, “Open Source Software” means any Software which is freely available without charge; any Software that refers to, or is based upon, a any form of software license from or substantially similar to any software license provided by the Free Software Foundation, including without limitation the GNU General Public License, the GNU Lesser General Public License or the GNU Free Documentation License; or any software that is “copylefted.”
   3. *Intellectual Property.* All title and copyrights in and to the Software and any copies of the Software are owned by Eastwind’s suppliers and licensors. All title and intellectual property rights in and to the content which may be accessed through use of the Software are the property of the respective owner of such content and may be protected by applicable copyright or other intellectual property laws and treaties. No ownership of or any right to use any part of such content is transferred to Customer under this Agreement.
9. **Program Updates and Changes In Product Specifications.**  Unless the customer maintains an active Support Plan for the hardware and software, Eastwind shall not be obligated to issue to Customer updates, improvements or Software revisions. Eastwind may, in its sole and absolute discretion, issue notice of such updates for informational purposes and may make any and all changes to the specifications for the Products whether such notice is or is not provided.
10. **Notices.** All notices required under this Agreement shall be in writing and personally delivered or sent by a recognized overnight carrier or by registered mail, return receipt requested:

If to Customer: At its address set forth in the Acknowledgement.

If to Eastwind: Eastwind Communications, Inc.

75 Perseverance Way

Hyannis, MA 02601

Attn: Sales Administration

The date of personal delivery or the date of mailing, as the case may be, shall be deemed to be the date on which such notice is given.

1. **International Approval or Certification.** Customer shall contact Eastwind with any specific questions regarding certifications or approvals. Unless otherwise agreed, Eastwind reserves to itself the right to refuse to seek certifications for any of the products sold.
2. **U.S. Government Restricted Rights.** The Products being provided by Eastwind to Customer under this Agreement are so provided with restricted rights. If Customer is the U.S. government, it acknowledges that the use, duplication, or disclosure by the U.S. government of such products is subject to restrictions as set forth in subparagraph (c) (1) (11) of the Rights in Technical Data and Computer Software clause at 252.227-7013.
3. **Warranty; Limitation of Liability.** 
   1. Eastwind is a distributor only. Products sold by Eastwind are not manufactured by Eastwind and EASTWIND MAKES NO REPRESENTATION OR WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO ANY PRODUCT EXCEPT THOSE STATED IN THIS DOCUMENT. Certain Products may be covered by the respective manufacturer’s warranty, service plan, and/or support policy, if any. With respect to Products or partial assemblies of Products furnished by Eastwind but not manufactured by Eastwind, Eastwind hereby assigns to Customer, to the extent permitted, the warranties given to Eastwind by its vendors of such items. Customer acknowledges that it shall have recourse only under any such warranties, service plans and support policies, and only as against the manufacturer of the respective Products.
   2. THE FOREGOING WARRANTIES ARE EXCLUSIVE & ARE GRANTED IN LIEU OF ALL OTHER EXPRESS & IMPLIED WARRANTIES (WHETHER WRITTEN, ORAL, STATUTORY OR OTHERWISE), INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT. CUSTOMER’S SOLE AND EXCLUSIVE REMEDY AND EASTWIND’S SOLE OBLIGATION HEREUNDER, SHALL BE TO REPAIR, REPLACE, CREDIT OR REFUND AS SET FORTH ABOVE.
   3. IN NO EVENT SHALL EASTWIND, ITS DIRECTORS, OFFICERS, EMPLOYEES, AGENTS OR AFFILIATES, BE LIABLE FOR ANY COSTS OR DAMAGES ARISING DIRECTLY OR INDIRECTLY FROM YOUR USE OF ANY PRODUCT INCLUDING ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, MULTIPLE, PUNITIVE OR CONSEQUENTIAL DAMAGES, INCLUDING LOST PROFITS, WHETHER BASED ON CONTRACT, TORT (INCLUDING NEGLEGENCE), STRICT LIABILITY OR OTHER LEGAL THEORY, EVEN IF EASTWIND, OR ANY OF ITS DIRECTORS, OFFICERS, EMPLOYEES, AGENTS OR AFFILIATES HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY EVENT, EASTWIND’S CUMULATIVE LIABILITY TO YOU FOR ANY AND ALL CLAIMS RELATING TO THE USE OF ANY PRODUCT SHALL NOT EXCEED THE TOTAL AMOUNT OF THE PURCHASE PRICE OR LICENSE FEES PAID TO EASTWIND FOR SUCH PRODUCT.
   4. IN NO EVENT SHALL EASTWIND, ITS DIRECTORS, OFFICERS, EMPLOYEES, AGENTS OR AFFILIATES, BE LIABLE FOR ANY COSTS OR DAMAGES CAUSED BY REASON OF ANY OCCURRENCE OR CONTINGENCY BEYOND ITS REASONABLE CONTROL, INCLUDING BUT NOT LIMITED TO, ACTS OF GOD, EARTHQUAKE, LABOR DISPUTES AND STRIKES, RIOTS, WAR, NOVELTY OF PRODUCT MANUFACTURE AND GOVERNMENTAL REQUIREMENTS.
4. **Returned Material.**  All sales are final; however, customers experiencing an equipment fault caused by defects in Products during either the duration of the vendor warranty or the term of an applicable Support Plan may request a Return Material Authorization (an “RMA”) number. Eastwind will not accept any Product for return without an RMA number. Upon issuance of an RMA number, Eastwind will assist Customer in obtaining warranty coverage, service or support from the manufacturer of such Product. Customer is responsible for shipping any RMA Product, prepaid, to Eastwind’s (or their vendor’s) facility. Original packaging must be utilized to prevent damage. Customer agrees to use only reputable carriers capable of providing proof of delivery and insurance for the entire value of the shipment. Customer agrees to bear all shipping and insurance charges and all risk of loss for the return product during shipment. Unless otherwise indicated at the time of requesting an RMA number, Customer agrees that all returned products will be 100% complete, in re-saleable condition, and will include the original packaging material, manuals, blank warranty cards, and other accessories provided by the manufacturer. If any component of the returned product is missing, Eastwind may in its sole and absolute discretion reject the entire return or choose to impose additional charges against the Customer for replacement of the missing component(s).  Eastwind or its vendor is responsible for shipping any RMA Product, prepaid, to Customer facility.
5. **General.**
   1. The Customer’s insolvency, adjudication or filing of a petition in bankruptcy under the bankruptcy laws or similar proceedings shall, at Eastwind’s election, constitute default under this Agreement, entitling Eastwind to cancel without recourse to Customer.
   2. This contract shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods.
   3. The validity, construction and interpretation of this Agreement and the rights and duties of the parties hereto shall be governed by the laws of the Commonwealth of Massachusetts.
   4. Customer specifically and irrevocably consents to the personal and subject matter jurisdiction and venue of the federal and state courts of the commonwealth of massachusetts and such courts shall have exclusive jurisdiction with respect to all matters concerning this agreement or the enforcement of any of the foregoing.
   5. Customer and Eastwind hereby waive their right to trial by jury to the fullest extent permitted by law in connection with all claims arising out of or related to this agreement, the products covered hereby or the performance of any party hereunder. This agreement gives customer specific legal rights. Customer may also have other rights which vary from jurisdiction to jurisdiction.
   6. This Agreement and the EULA, if applicable, are the complete and exclusive statement of the Agreement between the parties. Eastwind makes no representations to Customer except as expressly set forth herein or therein. The terms of this Agreement shall apply and govern the parties’dealings.
   7. This Agreement may not be modified, amended or waived in whole or in part, except by written agreement of the parties hereto. No Eastwind employee other than a duly authorized representative of Eastwind at its principal offices shall have any actual or apparent authority to modify the terms of this Agreement in any way. Any authorized modifications shall be in writing and signed by such an authorized representative of Eastwind. Any item or service furnished by Eastwind in furtherance of this Agreement, although not specifically identified herein, shall nevertheless be covered and governed by this Agreement unless specifically covered by some other written agreement executed by Customer and an authorized representative of Eastwind.
   8. Customer certifies that the Products acquired hereunder are intended for Customer’s own use in the ordinary course of business and not for the purpose of resale. Customer may not assign this Agreement, or any of its rights or obligations hereunder, without the prior written consent of Eastwind, which shall not be unreasonably withheld.
   9. Eastwind shall have a purchase money security interest in the Products to secure Customer’s payment obligations hereunder. Customer shall execute when appropriate and hereby authorizes Eastwind to file all documents required to maintain such security interest.
   10. Each party shall reimburse the other for reasonable attorneys’ fees and other costs associated with a breach of this Agreement, including without limitation the collection of any amounts due from Customer under this Agreement.
   11. Section headings are for descriptive purposes only and shall not control or alter the meaning of this Agreement.
   12. All rights and remedies of either party shall be cumulative and may be exercised singularly or concurrently. The failure of either party, in any one or more instances, to enforce any of the terms of this Agreement shall not be construed as a waiver of future enforcement of that or any other term.
   13. If any provisions of this Agreement shall for any reason be held illegal or unenforceable, such provisions shall be deemed separable from the remaining provisions of this Agreement and shall in no way affect or impair the validity or enforceability of the remaining provisions from this agreement.
   14. In the event either party is unable, in its reasonable judgment to perform in accordance with this Agreement, due in whole or in part to any cause beyond the party's control, including without limitation, acts of god, acts of the enemy, events of war, embargo, strike or lockout dispute with workers, accidental delay in transportation, shortage of fuel, excessive demand for products over available supply, inability to obtain material, unusually severe weather conditions, fires, floods, earthquakes, and unreasonably dangerous situations, the affected party shall promptly notify the other party in writing and the date of performance shall be extended for a period equal to the period of such delay.

**[END OF DOCUMENT]**