

# NECare SERVICE AGREEMENT

## TERMS AND CONDITIONS

### JANUARY 2011

NEC Australia Pty Ltd of 649-655 Springvale Road Mulgrave, Victoria 3170 ABN 86 001 217 527 ("NEC") agrees to provide ..... of ..... ABN ..... ("the Customer") agrees to accept Maintenance Services provided by NEC for the Equipment or Software described in the Schedule on the terms and conditions contained in this Agreement.

## 1 DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

In this Agreement unless otherwise indicated by the context or subject matter the following terms have the following meanings:

**"Bug Fix"** means the implementation by NEC of a third party software provider's software patch which is designed to correct known faults;

**"Commencement Date"** means the date of execution of the Agreement by NEC as inserted in the Schedule;

**"Customer"** means the party described as the Customer in the Schedule;

**"Equipment"** means the equipment described in the Schedule;

**"Equipped Ends"** means any communication port of a voice system that is available for external termination. Such ports would be capable of supporting extensions, exchange lines, data services, tie lines, operator/agent position or peripheral equipment. Note: Communication ports not accessible externally which support integral services such as tone generators/receivers, conference bridges, etc are not defined as equipped ends. Communication ports capable of supporting multiple simultaneous paths, e.g. 32 channel PCM links are to be counted as 30 equipped ends.

**"Maintenance Period"** means the period specified in the Schedule during which Maintenance Services will be provided;

**"Maintenance Services"** means the provision of either On Site Maintenance or Remote Maintenance but excludes the provision of Preventative Maintenance unless the parties specifically agree otherwise ;

**"On-Site Maintenance"** means maintenance of either Equipment or Software that is provided by NEC at the Customer's Site as fully described in clause 3;

**"On- Site Response Time"** means the time within which NEC shall respond on-site to a Customer's notification of a fault condition, provided the Site is situated not more than 40 kilometres from the nearest State Capital GPO or the nearest NEC Customer Service Centre. During the Maintenance Period Response Times are as specified for the selected NECare package;

**"NEC"** means NEC Australia Pty Ltd

**"NECare package"** means the table of NECare packages contained in this Agreement;

**"Network Operations Centre or NOC"** means NEC's centre which provides Remote Maintenance to Customers;

**"Original Equipment Manufacturer (OEM)"** Maintenance" means maintenance of either hardware or software which is provided by an OEM to the Customer;

**"Preventative Maintenance"** means maintenance carried out at scheduled intervals in order to ensure that the Equipment remains in working order.

**"Remote Maintenance"** means maintenance of Equipment or Software provided by the NOC as fully described in clause 4;

**"Remote Response Time"** means the time between:  
(a) a Customer logging a fault with the NOC; or  
(b) NEC detecting a fault  
and the time when NEC remotely accesses a Customer's network;

**"Schedule"** means the Schedule to this Agreement;

**"Software"** means those software programs specified in the Schedule and includes third party software;

**"Site"** means the location of the Equipment or Software as specified in the Schedule.

**"Transition In Services"** means the collection by NEC of data and information about the Customer's Equipment and Site(s) necessary for NEC to provide Maintenance Services to the Customer.

**"Transition Out Services"** means the return by NEC of all data, information and passwords to the Customer upon the conclusion of the Maintenance Services.

### 1.2 Interpretation

In this Agreement except to the extent that the context otherwise requires;

1.2.1 words importing the singular include the plural and vice versa and words importing a gender include other genders;

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- 1.2.2 where a word or phrase is given a particular meaning, other parts of speech or grammatical forms of that word or phrase have corresponding meanings;
- 1.2.3 a reference to a party to this Agreement or any other document or agreement includes its successor and permitted assigns;
- 1.2.4 paragraph headings are for reference purposes only and shall not affect the interpretation of this Agreement.

**2 TERM OF AGREEMENT**

- 2.1 This Agreement comes into effect on the Commencement Date and shall continue for the Maintenance Period ("Initial Term"). For the avoidance of doubt, the Customer is not permitted during the Initial Term, to terminate this Agreement for its convenience.
- 2.2 At the expiration of the Initial Term, this Agreement will continue for further successive terms of 12 months ("Successive Term") subject to these terms and conditions.
- 2.3 During a Successive Term, one party may give sixty (60) days written notice to the other party of its intention and desire to terminate the Agreement, with the termination to take effect from the end of that Successive Term.

**3 ON-SITE MAINTENANCE SERVICES**

- 3.1 Subject to the Customer selecting the NECare package that it requires from NECare packages A to J inclusive and in consideration for the payment of the maintenance fee set out in the Schedule, NEC will, during the Maintenance Period, provide On-Site Maintenance Service.
- 3.2 NEC's minimum maintenance service pursuant to this clause 3 is as follows:
- 3.2.1 NEC shall supply parts, materials and service necessary to maintain the Equipment or Software according to its specifications;
- 3.3 Where On-Site attendance is required, NEC will despatch service personnel to the Site in a timely manner so as to allow the service personnel to arrive at the site within the On-Site Response Time.
- 3.4 Maintenance services provided under this Agreement will only be performed at the Site addresses shown in the Schedule.
- 3.5 Where required, NEC will implement a Bug Fix on behalf of the OEM or third party software provider.

- 3.6 Unless the Equipment or Software is the subject of an OEM's "end-of-life" policy, NEC will provide Maintenance Services for the Equipment and Software in accordance with the NECare package selected by the Customer.

**4 REMOTE MAINTENANCE SERVICES**

- 4.1 Subject to the Customer selecting the NECare package that it requires from NECare packages K to P inclusive and in consideration for the payment of the maintenance fee specified in the Schedule, NEC will during the Maintenance Period, provide Remote Maintenance Services.
- 4.2 Remote Maintenance Services include the following types of maintenance:
- (a) Remote Management means the fault and configuration management services provided remotely by the NOC;
  - (b) NOC Services means either Standard or Premium NOC services provided by NEC to Customers;
  - (c) Premium NOC Services means the provision of remote monitoring and remote management services to Customers; or
  - (d) Standard NOC Services means the provision of remote monitoring services to Customers;
- 4.3 NEC will use its best endeavours to ensure that it meets the Remote Response Time applicable to the NECare package selected by the Customer.

**5 EXCLUDED ITEMS**

**5.1 On-Site Maintenance**

- NEC's On-Site Maintenance Services do not include:
- 5.1.1 services connected with relocation of the Equipment, the addition or removal of accessories, attachments and other devices;
  - 5.1.2 repair of any Equipment or Software not specified in the Schedule;
  - 5.1.3 repair of any third party software not specified in the Schedule;
  - 5.1.4 repair or replacement of any battery back-up associated with the Equipment;
  - 5.1.5 repair of any malfunction or damage whatsoever caused, in NEC's opinion, by incorrect operation of the Equipment or Software or from the Customer's (or its servants or agents) misuse of the Equipment or Software in accordance with NEC's or an OEM's published written instructions, or by the Customer's failure to perform its obligations pursuant to Clause 7 hereof;
  - 5.1.6 repair of any malfunction or damage whatsoever caused by lightning, electrostatic interference, electromagnetic interference or power surges of any type howsoever caused;

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- 5.1.7 repair of any malfunction or damage whatsoever caused by the failure or fluctuation of electrical power, air-conditioning or humidity control;
- 5.1.8 repair of any malfunction or damage whatsoever caused to the Equipment by war, fire, flood or any Act of God;
- 5.1.9 (a) rectification or correction of errors, defects or faults caused by:  
(i) the installation or operation of the Software by the Customer in a manner other than that expressly authorised by NEC or the third party software provider;  
(ii) misuse or incorrect use or changes or amendments made to the Software by the Customer; or  
(b) the Customer installing or using software that has not been authorised by NEC, an OEM or third party software provider.
- 5.1.10 Maintenance of Equipment or Software that is subject to an OEM's "end-of life" policy".
- 5.2 Correction of a fault within a telecommunications and/or transmission network such as, but not limited to, a private customer's network, including LAN / WAN which is not maintained by NEC, Telstra, AAPT, Optus, or any other carrier network.
- 5.2.1 NEC's ability to provide replacement parts for Equipment no longer in production will be subject to the availability of the individual replacement parts. NEC will use all reasonable efforts to supply replacement parts for such Equipment where possible to do so. Equipment subject to restricted parts availability are identified by the symbol [R] in the schedule or notified in writing.
- 5.2.2 Provision of Preventative Maintenance, unless it has been specifically agreed by the parties that NEC will provide such maintenance and all details (including the fees) are specified in the Schedule.
- 5.3 Remote Maintenance**  
NEC's Remote Maintenance Services do not include:
- 5.3.1 The supply of spare parts;
- 5.3.2 Software updates to provide new features or enhancements;
- 5.3.3 Rectification of errors caused by security breaches such as a computer virus, worm, threat, vulnerability or attack.
- 6 FEES**
- 6.1 In consideration for the Maintenance Service provided pursuant to this Agreement, the Customer shall pay to NEC the maintenance fee specified in the Schedule, and as varied from time to time, in advance, on the billing cycle as specified in Schedule.
- 6.2 The Customer agrees to pay to NEC any additional fees as specified in the Schedule and as varied from time to time, for any Maintenance Service provided outside the Maintenance Period.
- 6.3 On the Commencement Date the Customer will be invoiced based on the billing cycle selected. Thereafter, if selected the Customer will be invoiced for annual fees on each anniversary of the Commencement Date during the term of the Agreement. If the billing cycle is quarterly, quarterly fees will be invoiced on the first day of each successive quarter during the term of the Agreement. If the billing cycle is monthly, monthly fees will be collected via direct debit on each monthly anniversary of the commencement date during the term of the agreement.
- Pro rata fees are payable where Maintenance Service is provided for only part of a year or quarter or month as the case may be.
- 6.4 All fees payable to NEC by the Customer pursuant to this Agreement shall be paid within 30 days of the date of NEC's invoice ("the due date") or immediately if via direct debit. If the Customer defaults in payment by the due date, NEC shall have the right to suspend its obligations to provide Maintenance Service pursuant to this Agreement and charge a late payment fee at a rate per annum being 3% in excess of the then current interest rate charged by the National Australia Bank on overdraft accounts of its corporate customers in excess of \$100,000.00 (which rate is known as the Bench Mark Rate) on the unpaid balance from the due date until payment is received by NEC and the Customer agrees to pay to NEC such late payment fee.
- 6.5 The Customer acknowledges that NEC shall be entitled to vary the fees for Maintenance Service upon the following basis;
- 6.5.1 annual fees – by giving the Customer 30 days prior written notice of the proposed increase, which increase will then apply from the next due date for payment of the annual fees;
- 6.5.2 quarterly fees – by giving the Customer 30 days prior written notice of the proposed increase, which increase will then apply from the next due date for payment of the quarterly fees.
- 6.5.3 monthly fees – by giving the customer 30 days prior written notice of the proposed increase, which increase will then apply from the next due date for payment of the monthly fees.
- 6.6 NEC undertakes not to increase any quarterly or monthly fees until after the expiration of 12 months from the Commencement Date.

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- 6.7 NEC will charge, and the Customer agrees to pay, reasonable travel and living expenses for Maintenance Service carried out on Equipment installed at a Site more than 40 kilometres from the nearest State Capital GPO or the nearest NEC Customer Service Centre.
- 6.8 Any other costs, charges or fees payable to NEC by the Customer pursuant to this Agreement shall be invoiced by NEC to the Customer and the Customer shall pay within 30 days of the date of NEC's invoice otherwise a late payment charge will apply in accordance with the provisions of Clause 6.4 hereof.
- 6.9 The obligations of the Customer pursuant to this Clause 6 shall remain in full force and effect after the termination of this Agreement and shall not be deemed to have been waived, merged or extinguished upon such termination.
- 6.10 The fees and charges payable under this Agreement are exclusive of all Government sales tax, goods and services tax, or other Impost or duties. Should such tax be or become applicable to the services provided, such fees and charges shall be adjusted to include all Government introduced sales tax, goods and services taxes, and Impost or duties.
- 6.11 NEC will charge the Customer on a time and materials basis to correct errors, defects or faults referred to in clause 5.19.
- 6.12 NEC may charge the Customer additional fees for:
- 6.12.1 Transition In or Out services;
- 6.12.2 Conducting an annual audit of the Customer's network;
- 6.12.3 Providing the Customer with training about user administration features or functions.
- 7 CUSTOMER RESPONSIBILITIES**
- During this Agreement, the Customer shall:
- 7.1 allow NEC, its servants and agents, full, free and safe access to the Equipment and all relevant documentation to permit NEC to fulfil its obligations pursuant to this Agreement;
- 7.2 immediately notify NEC of any malfunction of the Equipment;
- 7.3 operate the Equipment in the manner for which it is designed and maintain, to the best of its ability, the appropriate operational conditions as specified by NEC for the Equipment;
- 7.4 provide adequate on-Site facilities and assistance to enable NEC to fulfil its obligations pursuant to this Agreement;
- 7.5 not, without the prior written consent of NEC, allow any adjustments, modifications, alterations, repairs or servicing to the Equipment to be carried out by persons other than authorised NEC personnel;
- 7.6 not, without the prior written consent of NEC, move, alter, modify, add to, detach from or attach to the Equipment any other items. The Customer acknowledges that if NEC's consent is given pursuant to this sub-clause, NEC is entitled to revise the maintenance fee as a pre-requisite of giving its consent;
- 7.7 establish, provide and maintain the necessary carriage and other infrastructure to allow NEC to provide Remote Maintenance Services;
- 7.8 provide NEC's staff (at no cost) with the necessary site and OH&S induction training to allow such staff to attend Site to provide On-Site Maintenance.
- 8 NEC EQUIPMENT**
- 8.1 In order to fulfil its obligations pursuant to this Agreement NEC will, from time to time, leave at the Site tools, test equipment, remote diagnostic equipment, spare parts and various other items and pieces of equipment ("the NEC property"). The Customer acknowledges that it has no right, title or interest in the NEC property.
- 8.2 The Customer, its servants and agents, shall exercise all due care and take all necessary precautions to ensure that the NEC property is not damaged in any way.
- 8.3 The Customer shall be responsible for, and shall immediately make good at its cost, any damage to the NEC property howsoever caused due to the negligence of the Customer, its servants or agents.
- 9 TERMINATION**
- 9.1 If either party ceases to perform or fails to comply with any of the terms and conditions of this Agreement and such failure is not remedied within 30 days of receipt of written notice thereof then the other party shall have the right to terminate this Agreement without further liability to the defaulting party.
- 9.2 NEC may terminate this Agreement at any time upon giving the Customer 3 months written notice if NEC is of the opinion that the Equipment cannot be maintained in proper working order and has so advised the Customer in writing.
- 9.3 The Customer is not permitted during the Initial Term, to terminate this Agreement for its convenience.

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**10 CUSTOMERS WARRANTY**

The Customer warrants that as at the Commencement Date the Equipment described in the Schedule is in good working condition and fully operational. The Customer acknowledges that this warranty extends to any other additional equipment items added to the Schedule during the term of this Agreement.

**11 NEC'S WARRANTY**

NEC warrants that it will perform its obligations pursuant to this Agreement in a proper and workmanlike manner to a standard generally acceptable within the industry.

**12 LIABILITY OF NEC**

12.1 Subject to Clauses 12.2 and 12.3, the liability of NEC to the Customer, whether based on contract, tort (including negligence), breach of warranty or any other legal or equitable grounds arising from this Agreement, including liability for sub-contractors or agents or third party claims, is limited to the total of the amounts paid by the Customer to NEC under this Agreement in the 12 month period immediately preceding the date on which the claim arises.

12.2 Despite any other provision of this Agreement, NEC shall not be liable to the Customer for:

- (a) any losses or damages of any kind arising as a result of:
  - (i) any defect or fault in the Equipment or Software arising out of alterations of, or repair or modifications to the Equipment or Software not authorised by NEC;
  - (ii) any defect or fault in the Equipment or Software arising out of the Customer's misuse or neglect of the Equipment or Software or the Customer's failure to maintain the Equipment or Software correctly or in accordance with NEC's instructions;
  - (iii) the Equipment or Software not having been operated by the Customer in accordance with NEC's, the OEM or third party's operating instructions or specifications;
  - (iv) any defect or fault in the Equipment or Software arising out of faulty or defective practices of the Customer; or
  - (v) remote access not being available from the NOC to the Customer's network because of a carrier outage or similar cause;
- (b) any loss of profits or anticipated profits, loss of business opportunity, or any indirect, incidental, special or consequential damages, even if notified of the possibility of that potential loss or damage.

12.3 Clause 12.1 does not apply to:

- (a) any claims based on personal injury, death or breach of intellectual property which is unlimited; or
- (b) liability for payments due under this Agreement.

12.4 Where any Act of Parliament implies in this Agreement any term, condition or warranty and such Act avoids or prohibits provisions in an agreement excluding or modifying the application of, or exercise of, liability under such term, condition or warranty, such term, condition or warranty shall be deemed to be included in this Agreement. However, the liability of NEC for any breach of such term, condition or warranty shall be limited, at the option of NEC, to:

- (a) if the breach relates to goods supplied, the lowest cost of replacing the goods, acquiring equivalent goods and having the goods repaired;
- (b) if the breach relates to services supplied, the lowest of the cost of supplying the services again and having the services supplied again.

**13 ASSIGNMENT**

Neither party shall assign, transfer or otherwise dispose of its rights or obligations under this Agreement to any other person, firm or company other than with the prior written consent of the other party.

**14 WAIVER**

Any failure by NEC to require strict performance by the Customer or any waiver by NEC of any provision herein shall not be construed as a consent or waiver of any other breach of the same or of any other provision.

**15 SEVERABILITY**

If any provision of this Agreement is held invalid, unenforceable or illegal for any reason, but is capable of being read down, it shall be read down to the extent necessary to render it binding and enforceable. If it is not capable of being so read down then such word or words or if required, the whole provision shall thereupon be severed and the remainder of this Agreement shall otherwise remain in full force and effect.

**16 ENTIRE AGREEMENT**

This Agreement and the Schedule incorporated herein constitutes the whole of the Agreement and understanding between NEC and the Customer. Any additions or modifications hereto shall be made in writing and shall only be effective if signed by the duly authorised signatories of the parties.

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**17 VARIATION OF AGREEMENT**

- 17.1 The provisions of this Agreement shall not be varied, except by agreement in writing signed by the parties.
- 17.2 If either party wishes to vary the Agreement, the proposing Party shall submit a copy of the proposed variations to the other party ("the receiving party"), specifying a reasonable period in which the receiving party is to provide written notice of acceptance or rejections of the proposal.
- 17.3 If the receiving party accepts the variations, the Agreement shall be deemed to be so amended from the date of acceptance.
- 17.4 If the receiving party rejects the proposed variations, each party shall perform the Agreement in accordance with the unvaried terms.

**18 EXECUTION OF AGREEMENT**

This Agreement may be executed in counterparts by the respective parties. Each of which when so executed will be deemed to be an original and all of which taken together will constitute one and the same agreement, provided that this Agreement will be of no force and effect until the counterparts are exchanged.

**19 GOVERNING LAW**

This Agreement is to be governed by, and construed in accordance with, the laws of the State of Victoria.

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### TABLE OF NECARE PACKAGES

<u>CONTRACT TYPE</u> <u>ON-SITE MAINTENANCE</u>	<u>MAINTENANCE COVERAGE</u>	<u>RESPONSE TIME</u>
<b>NECARE A</b>	8.00am to 6.00pm Monday to Friday excl. Public Holidays	2 hours for urgent faults 4 hours for minor faults 8 hours for routine faults
<b>NECARE B</b>	8.00am to 5.00pm Monday to Friday incl. Public Holidays	1 hour for all faults
<b>NECARE C</b>	8.00am to 5.00pm Monday to Friday excl. Public Holidays	8 hours for all faults
<b>NECARE D</b>	Coverage for urgent faults is 24 Hours 7 days per week incl. Public Holidays Coverage for minor and routine	2 hours for urgent faults 4 hours for minor faults (during business hours) 8 hours for routine faults (during
<b>NECARE E</b>	7.00am to 9.00pm Monday to Saturday incl. Public Holidays	2 hours for urgent faults 4 hours for minor faults 8 hours for routine faults
<b>NECARE F</b>	8.00am to 5.00pm Monday to Saturday excl. Public Holidays	2 hours for urgent faults 4 hours for minor faults 8 hours for routine faults
<b>NECARE G</b>	8.00am to 5.00pm Monday to Saturday incl. Public Holidays	2 hours for urgent faults 4 hours for minor faults 8 hours for routine faults
<b>NECARE H</b>	8.00am to 5.00pm Monday to Friday excl. Public Holidays	2 hours for urgent faults 4 hours for minor faults 8 hours for routine faults
<b>NECARE J</b>	24 Hours 7 Days per week incl. Public Holidays	1 hr for urgent faults 2 hours for urgent faults after hours 4 hours for minor faults 8 hours for routine faults
<b>NECARE Essentials</b> (Online fault reporting only)	8.00am to 6.00pm Monday to Friday excl. Public Holidays	4 hours for urgent faults 24 hours for all other faults
<u>CONTRACT TYPE</u> <u>NOC MONITORING &amp;</u> <u>MAINTENANCE</u>	<u>MAINTENANCE COVERAGE</u>	<u>RESPONSE TIME</u>
<b>NECARE K</b> <b>(NOC Standard)</b>	24 Hours 7 Days per week incl. Public Holidays	15 minute remote (24x7) No onsite
<b>NECARE L</b> <b>(NOC Premium)</b>	24 Hours 7 Days per week incl. Public Holidays	15 minute remote (24x7) 2 hour onsite

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**EXECUTED** as an Agreement

**SIGNED** by..... )  
..... )  
as an authorised representative for )  
..... )  
**NEC AUSTRALIA PTY LTD** )  
..... )  
(ABN 86 001 217 527) in the presence of: )  
..... )  
Signature of witness )  
..... )  
Name of witness (block letters) )  
..... )  
Address of witness )  
..... )  
Occupation of witness )  
..... )  
Date )

.....  
By executing this agreement the signatory warrants that the signatory is duly authorised to execute this agreement on behalf of

**NEC AUSTRALIA PTY LTD**  
(ABN 86 001 217 527)

**SIGNED** by..... )  
..... )  
as an authorised representative for )  
..... )  
**THE CUSTOMER** )  
(ABN ..... ) in the presence of: )  
..... )  
Signature of witness )  
..... )  
Name of witness (block letters) )  
..... )  
Address of witness )  
..... )  
Occupation of witness )  
..... )  
Date )

.....  
By executing this agreement the signatory warrants that the signatory is duly authorised to execute this agreement on behalf of

**THE CUSTOMER**  
(ABN .....)