

PRODUCT EVALUATION LICENSE AGREEMENT FOR PACKETGEN

THIS PRODUCT EVALUATION LICENSE AGREEMENT FOR PACKETGEN ("Agreement"), is made and entered into as of the last date executed by the parties below (the, "Effective Date") by and between **WIND RIVER SYSTEMS, INC.**, a Delaware corporation having a principal place of business at 500 Wind River Way, Alameda, CA 94501 ("Wind River"), and _____, a _____ corporation having a principal place of business at _____ ("Company").

1. DEFINITIONS.

1.1 "Approved Host" means the host computer on which Company is authorized to use the Software pursuant to the terms and conditions of this Agreement, as specified in an Exhibit A.

1.2 "Authorized Site" means the specific address of Company's facility consisting of a single building or multiple buildings on a contiguous campus where the Approved Host is physically located and upon which the Software is first installed and put into use where physically located, as specified in an Exhibit A.

1.3 "Confidential Information" means (i) the Software, (ii) the technology, ideas, know-how, documentation, processes, algorithms and trade secrets or associated with the Product (iii) any access keys related to the Product, and (iv) any other information, whether disclosed orally or in written or magnetic media, that is identified as "confidential," "proprietary" or with a similar legend at the time of such disclosure. Confidential Information shall not include any information which is: a) published or otherwise available to the public other than by breach of this Agreement by Company; b) rightfully received by Company from a third party without confidential limitations; c) independently developed by Company as evidenced by appropriate records; d) known to Company prior to its first receipt of same from Wind River as evidenced by appropriate records; e) hereinafter disclosed by Wind River to a third party without restriction on disclosure; or f) approved for public release by written authorization of Wind River. If any Confidential Information must be disclosed to any third party by reason of legal, accounting or regulatory requirements beyond the reasonable control of Company, Company shall promptly notify Wind River of the order or request and permit Wind River (at its own expense) to seek an appropriate protective order.

1.4 "Hardware" means the reference board, microprocessor emulation and any other hardware contained in the Product.

1.5 "Intellectual Property Rights" means all copyrights, trademarks, trade secrets, patents, mask works and other intellectual property rights recognized in any jurisdiction worldwide, including all applications and registrations with respect thereto.

1.6 "Object Code" means computer programming code in the form not readily perceivable by humans and suitable for machine execution without the intervening steps of interpretation or compilation.

1.7 "Product" means the Software (whether in Object or Source Code) and any Hardware provided under this Agreement, as specified in an Exhibit A, including any accompanying documentation and updates thereto, provided by Wind River to Company under this Agreement.

1.8 "Software" means (i) the computer programming code and accompanying documentation, including updates (if any), provided by Wind River under this Agreement, and (ii) all

modifications thereto and full or partial copies thereof, whether such modifications or copies are provided by Wind River or made by Company as permitted under this Agreement, (the "Permitted Modifications"). Permitted Modifications shall include without limitation, any additions, adaptations, modifications, improvements, corrections, variations, enhancements, revisions, or interface elements, in any form or medium whatsoever, that is derived in any manner from the Software. The definition of Software includes without limitation the Object Code, the Source Code, or any combination thereof. The definition of Software excludes all materials provided by Wind River to Company to the extent such materials are subject to any of the following licenses: GNU General Public License, GNU Library General Public License, GNU Lesser Public License.

1.9 "Source Code" means computer programming code in human readable form that is not suitable for machine execution without the intervening steps of interpretation or compilation.

2. EVALUATION AND DEMONSTRATION LICENSE. Subject to Company's compliance with the terms and conditions of this Agreement, Wind River hereby grants to Company a restricted, personal, non-transferable, non-exclusive, non-assignable, non-sublicensable license only: (i) to use the Product solely for internal testing and evaluation purposes solely at the Authorized Site, on the Approved Host, or solely in conjunction with the Hardware, as applicable; (ii) to demonstrate to third parties the Software, as it is used or intended to be used in Companies software application, provided that the Software is demonstrated in object code, and if during Product demonstration, Company runs or operates a graphical user interface or any other display on top of the Product, Wind River's logo shall be prominently displayed at all times during such demonstration; (iii) to modify the Software Source Code solely to the extent necessary to evaluate the use of the Software in the development of prospective Company products; and (iv) to reproduce the Software for archive purposes, consistent with Company's standard archive procedures. Company shall reproduce and include any and all copyright notices and proprietary rights legends, as such notices and legends appear in the original Software, on any copy of the Software, or any portion thereof, and in any Permitted Modifications.

3. RESTRICTIONS.

3.1 The Product shall be handled, used and stored, solely at the Authorized Site identified in an Exhibit A. Although the Software may be used either from a single machine or a server, there shall be no external network access of the Software (i.e., by any computers or terminals not located at the Authorized Site).

3.2 Access to the Product shall be limited to employees of Company who (i) require access to the Product for the purposes set forth in Section 2, ("License") and (ii) have signed an employee agreement in which such employee agrees to protect third party

confidential information with terms no less stringent than those set forth in this Agreement. Company agrees that any breach by any employee of such employee's obligations under such confidentiality agreements shall also constitute a breach by Company hereunder. For the purposes of this Agreement, the definition of "employee" shall be as defined for purposes of the U.S. Copyright Act and expressly excludes independent contractors. Company shall maintain and, upon Wind River's reasonable request, provide to Wind River, the names of all employees who have had access to the Product.

3.3 Company shall not (i) use the Product, or any portion thereof, for any productive or commercial purpose; (ii) modify, create derivative works of, translate, reverse engineer, decompile, disassemble (except to the extent applicable laws specifically prohibit such restriction) or attempt to derive the Source Code of any Software provided to Company in Object Code; (iii) use the Software in any manner that disrupts or may disrupt intranet or internet services; (iv) market, distribute or otherwise transfer copies of the Software to others; (v) sublicense, rent, lease, loan, timeshare, sell, distribute, disclose, publish, assign or transfer any rights, grant a security interest in, or transfer possession of the Product; (vi) reproduce the Software other than as specified in Section 2; (vii) distribute externally or to any third party any communication that compares the features, functions or performance characteristics of the Product with any other product of Company's or any third party; (viii) leave the Software with third parties after a demonstration.

3.4 Company shall use its best efforts to protect the Product from unauthorized access, reproduction, disclosure or use. In the event Company becomes aware of any unauthorized use or disclosure of Product, Company shall notify Wind River immediately in writing and shall give full cooperation, at Company's expense, to minimize the effects of such unauthorized use or disclosure.

3.5 Company may disclose any results of any evaluation of the PPR Software including, without limitation, Company's opinions, observations, comments, criticisms and suggested improvements, whether in written or oral form (herein, "Feedback") from its evaluations only to Wind River.

3.6 UPON TRANSFER OF ANY COPY OF THE PRODUCT TO ANOTHER PARTY, THIS LICENSE WILL AUTOMATICALLY TERMINATE.

3.7 The Product licensed under this Agreement may contain or be derived from materials of third party licensors. Such third party materials may be subject to restrictions in addition to those listed in this Section 3, which restrictions, if any, are set forth in an exhibit attached hereto.

4. CONFIDENTIAL INFORMATION. Company shall not use or disclose any Confidential Information, except as expressly authorized by this Agreement, and shall protect all such Confidential Information using the same degree of care which Company uses with respect to its own proprietary information, but in no event with safeguards less than a reasonably prudent business would exercise under similar circumstances. Company shall take prompt and appropriate action to prevent unauthorized use or disclosure of the Confidential Information.

5. OWNERSHIP. Wind River and its licensors shall retain exclusive ownership of all worldwide Intellectual Property Rights in and to the Product and any copies and modifications thereof. Company hereby assigns to Wind River any such rights Company may have in and to the foregoing. All rights in and to the Product not

expressly granted to Company in this Agreement are expressly reserved for Wind River and its licensors.

6. TERM AND TERMINATION. This Agreement shall commence on the Effective Date and continue until terminated by either party by 90 days prior written notice. The term of an individual evaluation shall be for a period of 30 days beginning from the last date an Exhibit A is signed between parties, unless otherwise specified in such Exhibit A. This Agreement will immediately terminate upon Company's breach of this Agreement. Upon termination, Company shall (i) not use the Product for any purpose whatsoever, (ii) immediately return to Wind River all material belonging to Wind River or its licensors, including without limitation all copies of the Product and Wind River Confidential Information then in Company's possession or control, and (iii) to certify to Wind River in writing that it has done so. These remedies shall be cumulative and in addition to any other remedies available to Wind River. The provisions in Sections 1, 4, 5, 6, 9, 10, and 11 shall survive any termination of this Agreement.

7. KEYS AND ACCESS. Wind River agrees to provide to Company those Product access keys (the "Keys") which are reasonably necessary to permit Company to gain access to the Software contained on media shipped to Company and which Software has been properly licensed to Company pursuant to a license agreement. All such Keys shall be considered the Confidential Information of Wind River. Notwithstanding anything to the contrary in this Agreement, Company hereby acknowledges that Company shall have no right or license to any software shipped to Company on media as provided above which software is not properly licensed pursuant to a license agreement, that any such software is included therein solely as a matter of administrative convenience, and Company further agrees not to attempt to gain access to, or permit any third party to attempt to gain access to, such software.

8. AUDIT. Company agrees to maintain accurate written records of the location and use of each copy of the Product in Company's possession. To ensure compliance with the terms of this Agreement, Wind River shall have the right, during the term of this Agreement and for six (6) months thereafter, exercisable upon reasonable notice, to conduct an inspection and audit of such records and to obtain true and correct photocopies of such records, during Company's regular business hours at Company's offices, and in such a manner as not to interfere unreasonably with Company's normal business activities.

9. WARRANTY DISCLAIMER. THE PRODUCT IS LICENSED FOR COMPANY'S TEMPORARY EVALUATION "AS IS" AND WIND RIVER AND ITS LICENSORS DISCLAIM ALL WARRANTIES, EXPRESS, IMPLIED AND STATUTORY INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NONINFRINGEMENT OF THIRD PARTY RIGHTS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY WIND RIVER, ITS DEALERS, DISTRIBUTORS, AGENTS OR EMPLOYEES SHALL IN ANY WAY INCREASE THE SCOPE OF THIS WARRANTY.

10. LIMITATION OF LIABILITY. WIND RIVER AND ITS LICENSORS SHALL NOT BE LIABLE FOR ANY INCIDENTAL, SPECIAL, CONSEQUENTIAL OR INDIRECT DAMAGES OF ANY KIND (INCLUDING DAMAGES FOR INTERRUPTION OF BUSINESS, INCLUDING LOSS OR DATA OR INTERRUPTION OF INTRANET OR INTERNET SERVICES, PROCUREMENT OF SUBSTITUTE GOODS, LOSS OF PROFITS, OR THE LIKE) REGARDLESS OF THE FORM OF ACTION WHETHER IN

CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT PRODUCT LIABILITY OR ANY OTHER LEGAL OR EQUITABLE THEORY EVEN IF WIND RIVER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT WILL WIND RIVER'S AGGREGATE CUMULATIVE LIABILITY FOR ANY CLAIMS ARISING OUT OF OR RELATED TO THIS AGREEMENT EXCEED U.S.\$50.00 OR THE AMOUNT (IF ANY) COMPANY ACTUALLY PAID TO WIND RIVER UNDER THIS AGREEMENT.

THE WARRANTY DISCLAIMER AND LIMITED LIABILITY ARE FUNDAMENTAL ELEMENTS OF THE BASIS OF THE BARGAIN BETWEEN WIND RIVER AND COMPANY. WIND RIVER WOULD NOT BE ABLE TO PROVIDE THE PRODUCT WITHOUT SUCH LIMITATIONS.

11. GENERAL.

11.1 GOVERNING LAW AND FORUM. This Agreement shall be governed in all respects by the laws of the United States of America and the State of California without regard to conflicts of law principles. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods is specifically excluded from application to this Agreement.

11.1.1 If Company's principal place of business is in North America, all disputes arising under this Agreement shall be brought exclusively in Superior Court of the State of California in Santa Clara County or the U.S. District Court for the Northern District of California in San Francisco, California, as permitted by law. Company consents to the personal jurisdiction of the above courts.

11.1.2 If Company's principal place of business is outside North America, all disputes arising under this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) by three (3) arbitrators. Each party shall appoint one (1) neutral arbitrator. The two arbitrators so appointed shall appoint the presiding arbitrator, who also shall be neutral, from a roster of arbitrators familiar with intellectual property disputes. If the two arbitrators to be appointed by the parties fail to agree upon a third arbitrator within fourteen (14) days of the appointment of the second arbitrator, the third arbitrator shall be appointed by the ICC from a roster of arbitrators familiar with intellectual property disputes. The arbitration procedures shall be conducted in the English language. Unless otherwise directed by the Arbitrators, the parties are limited to a single discovery request and response and may notice no more than five (5) depositions per party. Hearings shall be scheduled not later than sixty (60) days after receipt of the complainant and respondent's materials. Any such hearing shall be conducted, and a final award rendered, within (90) days from the commencement of the hearing.

11.1.3 The arbitration proceeding set forth in Section 11.1.2 shall be conducted in London, United Kingdom, if Company's principal place of business is in Europe, the Middle East, or Africa, and in Honolulu, Hawaii, if Company's principal place of business is elsewhere outside North America.

11.2 ATTORNEYS' FEES. In the event any proceeding or lawsuit is brought by Wind River or Company in connection with this Agreement, the prevailing party in such proceeding shall be entitled to receive its costs, expert witness fees and reasonable attorneys' fees, including costs and fees on appeal.

11.3 INJUNCTIVE RELIEF. It is understood and agreed that, notwithstanding any other provisions of this Agreement, breach of the provisions of this Agreement by Company will cause Wind River irreparable damage for which recovery of money damages would be inadequate, and that Wind River shall therefore be entitled to obtain

timely injunctive relief to protect Wind River's rights under this Agreement in addition to any and all remedies available at law.

11.4 NOTICES. All notices or reports permitted or required under this Agreement shall be in writing and shall be delivered by personal delivery or by certified or registered mail, return receipt requested, and shall be deemed given upon personal delivery or five (5) days after deposit in the mail. Notices shall be sent to the parties at the addresses described on the Signature Page or such other address as either party may designate for itself in writing. If the notice is to Wind River, a copy shall also be sent to the attention of its General Counsel at the Wind River address.

11.5 NO AGENCY. Nothing contained herein shall be construed as creating any agency, employment relationship, partnership, principal-agent or other form of joint enterprise between the parties.

11.6 FORCE MAJEURE. Neither party shall be liable hereunder by reason of any failure or delay in the performance of its obligations hereunder (except for the payment of money) on account of strikes, shortages, riots, insurrection, fires, flood, storm, explosions, acts of God, war, governmental action, labor conditions, earthquakes, material shortages or any other cause which is beyond the reasonable control of such party.

11.7 WAIVER. The failure of either party to require performance by the other party of any provision hereof shall not affect the full right to require such performance at any time thereafter; nor shall the waiver by either party of a breach of any provision hereof be taken or held to be a waiver of the provision itself.

11.8 SEVERABILITY. In the event that any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole, and, in such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law or applicable court decisions.

11.9 USE OF COMPANY'S NAME. Company agrees that Wind River may use Company's name and may disclose that Company is a licensee of Wind River products or services in Wind River advertising, press, promotion and similar public disclosures with respect to the Software and professional services; provided, however, that such advertising, promotion or similar public disclosures shall not indicate that Company in any way endorses any Wind River products, without prior written permission from Company. Company agrees that, upon Company's public announcement of product designed with or containing Wind River products or services, Wind River may publicly disclose the nature of the Wind River involvement in said product.

11.10 HEADINGS. The section headings appearing in this Agreement are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or extent of such section or in any way affect this Agreement.

11.11 GOVERNMENT END USERS. The Software and any related Documentation are each a "commercial item," as that term is defined at 48 C.F.R. §2.101 (Oct 1995), consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R. §12.212 (Sep 1995) and are provided to U.S. Government end users with only those rights set forth herein.

11.12 ASSIGNMENT. Company may not delegate, assign or transfer this Agreement, the license(s) granted or any of Company's rights or duties hereunder, including by way of merger (regardless of

whether Company is the surviving entity) or acquisition, and any attempt to do so, without Wind River's express prior written consent, shall be void. Wind River may assign this Agreement, and its rights and obligations hereunder, in its sole discretion.

11.13 COUNTERPARTS. This Agreement may be executed simultaneously in two or more counterparts, each of which will be considered an original, but all of which together will constitute one and the same instrument.

11.14 EXPORT CONTROL. All software and technical information delivered under this Agreement are subject to U.S. Export Administration Regulations (the "EAR") and may be subject to export, re-export or import regulations in other countries. Company agrees to strictly comply with all such laws and regulations. Company will not export or re-export the software and technical information, directly or indirectly, to: (1) any countries that are subject to US export restrictions (currently including, but not necessarily limited to, Cuba, Iran, North Korea, Sudan, and Syria); (2) any end user who Company knows or has reason to know will utilize them in the design, development or production of nuclear, chemical or biological weapons, or rocket systems, space launch vehicles, and sounding rockets, or unmanned air vehicle systems; or (3) any end user who has been prohibited from participating in US export transactions by any federal agency of the US government. Some of Wind River's

products are classified as "restricted" encryption products under Section 740.17(b)(2) of the EAR and may not be exported or re-exported to government end-users (as defined in Section 772 of the EAR) outside the countries listed in Supplement No. 3 to Part 740 of the EAR without authorization from the U.S. government.

11.15 LANGUAGE. This Agreement is in the English language only, which language shall be controlling in all respects, and all versions of this Agreement in any other language shall be for accommodation only and shall not be binding on the parties to this Agreement. All communications and notices made or given pursuant to this Agreement, and all documentation and support to be provided, unless otherwise noted, shall be in the English language.

11.16 ENTIRE AGREEMENT; MODIFICATION. This Agreement constitutes the entire agreement between Company and Wind River and supersedes in their entirety any and all oral or written agreements previously existing between Company and Wind River with respect to the subject matter hereof. The terms and conditions of any purchase order or other instrument issued by Company in connection with this Agreement which add to or differ from the terms and conditions of this Agreement shall be of no force or effect. This Agreement may only be amended or supplemented by a writing that refers explicitly to this Agreement and that is signed by duly authorized representatives of Company and Wind River.

IN WITNESS WHEREOF, the parties authorized representatives have executed this Agreement as of the Effective Date.

AGREED TO:

WIND RIVER SYSTEMS, INC.

By: _____
Name: _____
Title: _____
Date: _____

COMPANY

By: _____
Name: _____
Title: _____
Date: _____

PRODUCT EVALUATION AGREEMENT - EXHIBIT A

License Number:

1. **EVALUATION TERM** (if other than default): ☐

2. **COMPANY INFORMATION: (AUTHORIZED SITE)**

Name of Company:	
Shipping Address:	
City, State, Zip:	
Phone:	Fax:

3. **TECHNICAL CONTACT INFORMATION:**

Name:
Email Address:
Phone:
Fax:

ALTERNATE TECHNICAL CONTACT

Name:
Email Address:
Phone:
Fax:

4. **PRODUCT(S) FOR EVALUATION:**

Product Name:
Quantity:
Serial Number (if any):
Approved Host:
Target Arch/Processor:

5. **PROJECT NAME:** ☐

PROJECT DESCRIPTION: ☐

IN WITNESS WHEREOF, the parties hereto have caused this Exhibit A to be executed by their duly authorized representatives.

AGREED TO:

WIND RIVER SYSTEMS, INC.

By: _____
Name: _____
Title: _____
Date: _____

COMPANY

By: _____
Name: _____
Title: _____
Date: _____