ParaView LTS Terms and Conditions

Any purchase of ParaView LTS Services from Kitware, Inc. ("Kitware") by any individual or entity ("Customer") is subject to the terms and conditions described herein, as updated from time to time ("Terms and Conditions"). The accompanying Order Confirmation Form and these Terms and Conditions (collectively, this "Agreement") comprise the entire agreement between the parties with respect to these services, and supersede all prior or contemporaneous understandings, agreements, negotiations, representations and warranties, and communications, both written and oral. In the event of any conflict between these Terms and Conditions and the Order Confirmation, these Terms and Conditions shall govern, unless the Order Confirmation expressly states that the terms and conditions of the Order Confirmation shall control. Kitware and Customer may be referred to herein collectively as the "Parties" or individually as a "Party."

This Agreement prevails over any Customer terms and conditions regardless whether or when Customer submitted their request for proposal, order, or such terms. Provision of Services to Customer does not constitute acceptance of any of Customer's terms and conditions and does not serve to modify or amend this Agreement.

1. <u>Software License.</u> Customer agrees that its use of the ParaView software, including all updates, is subject to the ParaView Open Source Software License Agreement which can be found at https://www.paraview.org/license/.
2. <u>Services.</u> Subject to the terms and conditions of this Agreement, and conditioned on Customer's compliance therewith, during the Term, Kitware will provide and Customer will receive access to a private repository containing all ParaView LTS Releases ("Services").
3. <u>Limitations.</u> Issue resolution occurs independent of this Agreement, and this Agreement does not obligate Kitware to resolve any issues. It is at Kitware's sole discretion to decide which bug fixes and modifications meet the criteria for inclusion in a version of ParaView that is part of the ParaView LTS repository.
4. <u>Term and Termination.</u> This Agreement shall remain in effect for the term set forth on the Order Confirmation Form or until terminated as set forth herein (the "**Term**").
   a. Kitware may terminate this Agreement, effective upon written notice to Customer, if Customer breaches this Agreement and such breach remains uncured for twenty (20) days after Kitware provides written notice thereof.
   b. No expiration or termination shall affect Customer's obligation to pay all Fees that may have become due before such expiration or termination of Agreement, or entitle Customer to any refund, in each case except as set forth herein.
5. <u>Limited Warranty.</u> Subject to the Limitation of Liability, Kitware warrants to Customer that it shall perform the Services using personnel of required skill, experience and qualifications and in a professional and workmanlike manner in accordance with commercially reasonable industry standards for similar services and shall devote adequate resources to meet its obligations under this Agreement. KITWARE MAKES NO WARRANTY AS TO RESULTS TO BE ATTAINED. EXCEPT FOR THE EXPRESS WARRANTY SET FORTH HEREIN, KITWARE MAKES NO WARRANTY WHATSOEVER REGARDING THE SERVICES, INCLUDING ANY (a) WARRANTY OF MERCHANTABILITY; [(b) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; OR (c) WARRANTY AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY; WHETHER ARISING BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE, OR OTHERWISE.

6. <u>Limitation of Liability</u>. IN NO EVENT SHALL KITWARE BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, OR PUNITIVE DAMAGES, LOST PROFITS OR REVENUES OR DIMINUTION IN VALUE, ARISING OUT OF, RELATING TO, AND/OR IN CONNECTION WITH ANY BREACH OF THIS AGREEMENT, REGARDLESS OF (A) WHETHER SUCH DAMAGES WERE FORESEEABLE, (B) WHETHER OR NOT KITWARE WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND (C) THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT OR OTHERWISE) UPON WHICH THE CLAIM IS BASED. IN NO EVENT SHALL KITWARE'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT (INCLUDING BREACH OF WARRANTY), TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, EXCEED THE TOTAL OF THE AMOUNTS PAID TO KITWARE FOR THE CORRESPONDING SERVICES SOLD HEREUNDER OR $10,000, WHICHEVER IS LESS.

7. <u>Payment Terms</u>. The payment schedule shall be set forth in the Order Confirmation Form. All payments hereunder shall be in US dollars and must be paid pursuant to the terms of the Order Confirmation Form. Services will not commence until all upfront payments due have been received by Kitware. Payments that are more than 10 days late will incur a 1.5% monthly penalty. Customer shall also reimburse Kitware for all costs incurred in collecting any late payments, including, without limitation, attorneys' fees. Customer shall not withhold payment of any amounts due and payable under this Agreement by reason of any set-off of any claim or dispute with Kitware.

8. <u>Miscellaneous</u>.
   a. All matters arising out of or relating to this Agreement shall be governed by and construed in accordance with the internal laws of the State of New York without giving effect to any choice or conflict of law provision or rule. Any legal suit, action, or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby shall be instituted in the federal courts of the United States of America or the courts of the State of New York in each case located in County of New York, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such legal suit, action, or proceeding.
   b. No party shall be liable or responsible to the other party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement (except for any obligations of Customer to make payments to Service Provider hereunder), when and to the extent such failure or delay is caused by or results from acts beyond the impacted party's ("Impacted Party") control, including, without limitation, the following force majeure events ("Force Majeure Event(s)"): (a) acts of God; (b) flood, fire, earthquake, or other Potential disasters such as epidemics, pandemics, or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order, law, or action; (e) embargoes or blockades in effect on or after the date of this Agreement; and (f) national or regional emergency; and [(g) strikes, labor stoppages or slowdowns or other industrial disturbances; and [(h) shortage of adequate power or transportation facilities; and (i) other similar events beyond the reasonable control of the Impacted Party.
   c. All notices, requests, consents, claims, demands, waivers, and other communications hereunder shall be in writing and shall be deemed to have been given: (i) when delivered by hand (with written confirmation of receipt); (ii) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (iii) on the date sent by or email (with confirmation of transmission) if sent during normal business hours of the recipient, and on the next business day if sent after normal business hours of the recipient; or (iv) on the [third] day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the respective parties at the addresses set forth on the Order Confirmation Form.
   d. Customer shall not assign or otherwise transfer any of its rights, or delegate or otherwise transfer any of its obligations or performance, under this Agreement, in each case whether voluntarily, involuntarily, by operation of

law, or otherwise, without Kitware's prior written consent, which consent Kitware may give or withhold in its sole discretion.

e. This Agreement may only be amended, modified, or supplemented by an agreement in writing signed by each party hereto. No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any right, remedy, power, or privilege arising from this Agreement shall operate or be construed as a waiver thereof.

f. If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.

g. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The Confirmation Order Form referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

h. The headings in this Agreement are for reference only and do not affect the interpretation of this Agreement.

9. <u>Definitions.</u>

a. **Order Confirmation Form** means the order confirmation form signed by or on behalf of Customer for Customer's purchase of the Services under this Agreement.

b. **ParaView LTS Releases** means patched versions of all major releases, except the most current, of the ParaView Open Source platform within the past three years, placed in a private repository accessible to those with a ParaView LTS Agreement with Kitware. The current status of the ParaView LTS repository, including the major releases and the bug fixes that have been backported to each release is provided on this website: https://www.kitware.eu/paraview-lts-status/.