

Skytap on IBM Cloud Standard Contract

Update Effective April 21, 2025

This Skytap on IBM Cloud Standard Contract (“**Agreement**”) is between you (“**you**” or “**Customer**”) and Kyndryl, Inc. (“**Kyndryl**” or “**Publisher**”) from which you are procuring Services (defined below) and governs your Use of Services purchased through IBM Cloud Catalog (the “**Catalog**”). **Both parties acknowledge that IBM is not a party to this Agreement.**

On December 16, 2024, Kyndryl, Inc. became the Publisher and new your contracting party as successor in interest to Skytap, Inc., assuming all obligations, benefits and burdens hereunder.

This Agreement is the parties’ entire agreement on this subject and merges and supersedes all related prior and contemporaneous agreements. By agreeing to these terms, you represent and warrant that you have the authority to accept this Agreement, and you also agree to be bound by its terms. This Agreement applies to all Orders entered into under this Agreement. Capitalized terms have the meanings given under the “**Definitions**” section herein.

If Customer orders a committed reserved capacity subscription as provided within the Services (“**Reserve Capacity Subscription**”) when initially procuring the Services or subsequently converts its subscription to a Reserve Capacity Subscription, such Services will be subject to the terms set forth in Exhibit A (“**RC Subscription Terms**”).

The terms set forth on Exhibit B are hereby incorporated into this Agreement by this reference.

1. License to Services

1.1 License grant. Services are licensed and not sold. Upon Publisher’s acceptance of an Order, and subject to Customer’s compliance with this Agreement, Publisher grants Customer a nonexclusive and limited license to Use the ordered Services. These licenses are solely for Customer’s own Use and business purposes and are nontransferable except as expressly permitted under this Agreement or applicable law. Services may contain or be provided with components that are subject to open-source software licenses. Any Use of those components may be subject to additional terms and conditions and Customer agrees that any applicable licenses governing the Use of the components will be incorporated by reference in this Agreement.

1.2 Duration of licenses. Licenses granted on a subscription basis expire at the end of the applicable subscription period set forth in the Order, unless renewed. Licenses granted for metered Services billed periodically based on usage continue if Customer continues to pay for its usage of the Services. All other licenses become perpetual upon payment in full.

1.3 End Users. Customer will control access to and Use of the Services by End Users and is responsible for any Use of the Services that does not comply with this Agreement.

1.4 Affiliates. Customer may order Services for use by its Affiliates. If it does, the licenses granted to Customer under this Agreement will apply to such Affiliates, but Customer will have the sole right to

enforce this Agreement against Publisher. Customer will remain responsible for all obligations under this Agreement and for its Affiliates' compliance with this Agreement and any applicable Order(s).

1.5 Reservation of Rights. Publisher reserves all rights not expressly granted in this Agreement. Services are protected by copyright and other intellectual property laws and international treaties. No rights will be granted or implied by waiver or estoppel. Rights to access or Use Services on a device do not give Customer any right to implement Publisher's patents or other intellectual property in the device itself or in any other software or devices.

1.6 Restrictions. Except as expressly permitted in this Agreement, Documentation or an Order, Customer must not (and is not licensed to):

- (a) copy, modify, reverse engineer, decompile, or disassemble any Services, or attempt to do so;
- (b) install or use any third-party software or technology in any way that would subject Publisher's intellectual property or technology to any other license terms;
- (c) work around any technical limitations in a Service or restrictions in Documentation;
- (d) separate and run parts of the Services on more than one device;
- (e) upgrade or downgrade parts of the Services at different times;
- (f) use the Services for unlawful, harmful, obscene, offensive or fraudulent content or activity or purpose (for example, advocating or causing harm, interfering with or violating the integrity or security of a network or system, evading filters, sending unsolicited, abusive or deceptive messages, introducing viruses or harmful code, or violating third party rights);
- (g) transfer parts of the Services separately;
- (h) unless otherwise expressly authorized by Publisher, distribute, transfer, resell, sublicense, rent, lease, or lend any Services, in whole or in part, or use them to offer hosting services to a third party outside of Customer's enterprise, including but not limited to a Customer End User or Customer licensee; or
- (i) combine Services with Customer's value add to create a Customer-branded solution that Customer markets to its End User customers, unless otherwise agreed by Publisher in writing.

1.7 License transfers. Customer may only transfer fully-paid, perpetual licenses to (a) an Affiliate or (b) a third party solely in connection with the transfer of hardware to which, or employees to whom, the licenses have been assigned as part of (1) a divestiture of all or part of an Affiliate or (2) a merger involving Customer or an Affiliate. Upon such transfer, Customer must uninstall and discontinue using the licensed Services and render any copies unusable. Customer must notify Publisher of a License transfer and provide the transferee a copy of this Agreement and any other documents necessary to show the scope, purpose, and limitations of the licenses transferred. Attempted license transfers that

do not comply with this section are void.

1.8 Feedback. Any Feedback is given voluntarily, and the provider grants to the recipient, without charge, a non-exclusive license under provider's owned or controlled non-patent intellectual property rights to make, use, modify, distribute, and commercialize the Feedback as part of any of recipient's products and services, in whole or in part and without regard to whether such Feedback is marked or otherwise designated by the provider as confidential. The provider retains all other rights in any Feedback and limits the rights granted under this section to licenses under its owned or controlled non-patent intellectual property rights in the Feedback (which do not extend to any technologies that may be necessary to make or use any product or service that incorporates, but are not expressly part of, the Feedback, such as enabling technologies).

2. Privacy

2.1 Standard Contractual Clauses. All transfers of Customer Personal Data to a Non-Adequate Country will be governed by the Kyndryl Data Privacy Addendum ("DPA") and DPA Exhibit available at <https://www.kyndryl.com/us/en/privacy/terms>. Customer will ensure that any other requirements under applicable Data Protection are met including, if required, obtaining consent from data subjects for such transfer.

2.2 Personal Data. Customer consents to the processing of Personal Data by Publisher and its Affiliates, and their respective agents and Subcontractors, as provided in this Agreement. Without prejudice to the right of Customer to opt out at any time under applicable privacy and Data Protection Laws, Customer also consents to the processing of Personal Data by Publisher and its Affiliates for account and new opportunities/marketing communications. Before providing Personal Data to Publisher, Customer will obtain all required consents from third parties (including Customer's contacts, partners, distributors, administrators, and employees) under applicable privacy and Data Protection Laws. Customer and Publisher agree that Publisher will be the data controller for the processing of Personal Data for new opportunities/marketing communications and, in case of transfer of business, the new contracting entity and assignee of this Agreement will be the data controller.

2.3 Processing of Personal Data. To the extent Publisher is a processor or subprocessor of Personal Data (or similar terms found under applicable Data Protection Laws), the parties agree to the terms of the Data Processing Addendum and the DPA Exhibit referenced in Section 2.1, above.

2.4 Security. Publisher will take appropriate security measures that are required by Data Protection Laws applicable to Publisher and in accordance with the Data Security and Privacy Principles located at <https://www.kyndryl.com/us/en/privacy/terms>.

2.5 Support Data. Publisher may collect and use Support Data to provide technical support for the Services and to otherwise improve Publisher's Services.

3. Confidentiality.

3.1 Confidential Information. "Confidential Information" is non-public information that is designated "confidential" or that a reasonable person should understand is confidential, including, but not limited to, Customer Data, the terms of this Agreement, and Customer's account authentication credentials. Confidential Information does not include information that: (a) becomes

publicly available without a breach of a confidentiality obligation; (b) the receiving party received lawfully from another source without a confidentiality obligation; (c) is independently developed; or (d) is a comment or suggestion volunteered about the other party's business, products or services.

3.2 Protection of Confidential Information. Each party will take reasonable steps to protect the other's Confidential Information and will use the other party's Confidential Information only for purposes of the parties' business relationship. Neither party will disclose Confidential Information to third parties, except to its Representatives, and then only on a need-to-know basis under nondisclosure obligations at least as protective as this Agreement. Each party remains responsible for the use of Confidential Information by its Representatives and, in the event of discovery of any unauthorized use or disclosure, must promptly notify the other party.

3.3 Disclosure required by law. A party may disclose the other's Confidential Information if required by law, but only after it notifies the other party (if legally permissible) to enable the other party to seek a protective order.

3.4 Duration of Confidentiality obligation. These obligations apply: (a) for Customer Data, until it is deleted by Publisher; and (b) for all other Confidential Information, for a period of five years after a party receives the Confidential Information.

4. SLAs.

Publisher will provide "Standard Support" as described on Publisher's support web page located here: <https://www.skytap.com/support-offerings/>. Publisher's SLA for the Services is provided as described on Publisher's website located here: <https://www.skytap.com/terms/service-level-agreement/>.

5. Verifying compliance.

5.1 Customer must keep records relating to Services it and its Affiliates Use or distribute. At Publisher's expense, Publisher may verify Customer's and its Affiliates' compliance with this Agreement at any time upon 30 days' notice. To do so, Publisher may engage an independent auditor (under nondisclosure obligations) or ask Customer to complete a self-audit process. Customer must promptly provide any information and documents that Publisher or the auditor reasonably requests related to the verification and access to systems running the Services. If verification or self-audit reveals any unlicensed Use, Customer must, within 30 days, order sufficient licenses to cover the period of its unlicensed Use. Without limiting Publisher's other remedies, if unlicensed Use is 5% or more of Customer's total Use of all Services, Customer must reimburse Publisher for its costs incurred in verification and acquire sufficient licenses to cover its unlicensed Use at 125% of the then-current Customer price or the maximum allowed under applicable law, if less. All information and reports related to the verification process will be Confidential Information and used solely to verify compliance.

5.2 Upon request, Publisher will make available to Customer information necessary to conduct an audit and demonstrate compliance under GDPR provisions for the processing of Personal Data provided such information does not include proprietary information of the Publisher. Customer may request information

through a security questionnaire or self-attestation

6. Representation and warranties.

6.1 By Publisher. Publisher continuously represents and warrants that:

- (a) it has full rights and authority to enter into, perform under, and grant the rights in, this Agreement;
- (b) its performance will not violate any agreement or obligation between it and any third party;
- (c) the Service will substantially conform to the Documentation;
- (d) the Services will not:
 - i. to the best of Publisher's knowledge, infringe or violate any third party patent, copyright or trademark; or
 - ii. intentionally contain viruses or other malicious code that will degrade or infect any products, services, software, or Customer's network or systems,
- (e) while performing under this Agreement, Publisher will comply with law applicable to it, including Data Protection Laws and Anti-Corruption Laws, and will provide training to its employees regarding Anti-Corruption Laws.

6.2 Disclaimer. Except as expressly stated in this Agreement, the Services are provided as is. To the maximum extent permitted by law, Publisher disclaims any and all other warranties (express, implied or statutory, or otherwise) including of merchantability or fitness for a particular purpose, whether arising by a course of dealing, usage or trade practice, or course of performance. Publisher does not warrant uninterrupted or error-free operation of the Services or that Publisher will correct all defects. While Publisher endeavors to provide security measures to keep all data secure, Publisher does not warrant Publisher can prevent third party disruptions or unauthorized third party access to the Services.

7. Defense of third-party claims.

7.1 By Customer and Publisher. Each party ("Indemnifying Party") will defend the other party ("Indemnified Party") from and against any and all third party claims, actions, suits, proceedings, and demands to the extent each party as an Indemnifying Party caused a breach and illegal access by third parties of Customer Data and any related violation of Data Protection Law applicable to the Indemnifying Party resulting from such the unauthorized access to and use of Personal Data by third parties ("Data Breach Claim"), and will indemnify the Indemnified Party for all reasonable attorney's fees incurred and damages and other costs finally awarded by a court against the Indemnified Party in connection with, or as a result of, and for amounts paid by the Indemnified Party under a settlement the Indemnifying Party approves of in connection with a Data Breach Claim; provided, however, that the Indemnifying Party has no liability to the extent that the Indemnified Party caused the Claim and b) the amounts paid by the Indemnifying Party shall not exceed the amounts in section 8a. Each

Indemnified Party must provide the Indemnifying Party with prompt written notice of any Data Breach Claim and allow the Indemnifying Party the right to assume the exclusive defense and control, and cooperate with any reasonable requests assisting the Indemnifying Party's defense and settlement of such matter. This section states an Indemnifying Party's sole liability with respect to, and the Indemnified Party's exclusive remedy against, the Indemnifying Party for, any Data Breach Claim.

7.2 By Customer. Customer will defend Publisher and its Affiliates from and against any and all third party claims, actions, suits, proceedings arising from or related to Customer's or any authorized user's violation of this Agreement or user terms ("**Claims Against Publisher**"), and will indemnify Publisher and its Affiliates for all reasonable attorney's fees incurred and damages and other costs finally awarded against Publisher or its Affiliates in connection with or as a result of, and for amounts paid by Publisher or its Affiliates under a settlement Customer approves of in connection with a Claim Against Publisher. Publisher must provide Customer with prompt written notice of any Claims Against Publishers and allow Customer the right to assume the exclusive defense and control of the claim, and cooperate with any reasonable requests assisting Customer's defense and settlement of such matter.

7.3 By Publisher. Publisher will defend Customer from and against any and all third party claims, actions, suits, proceedings, and demands alleging that the Use of the Services as permitted under the Contract infringes or misappropriates a third party's patent, copyright or trademark rights ("**Claim Against Customer**"), and will indemnify Customer for all reasonable attorney's fees incurred and damages and other costs finally awarded against Customer in connection with or as a result of, and for amounts paid by Customer under a settlement Publisher approve of in connection with a Claim Against Customer; provided, however, that the Publisher has no liability if a Claim Against Customer arises from Customer Data or non-Publisher products, including third-party software; or any modification, combination or development of the Services that is not performed or authorized in writing by Publisher, including in the Use of any application programming interface (API). Customer must provide Publisher with prompt written notice of any Claim Against Customer and allow Publisher the right to assume the exclusive defense and control and cooperate with any reasonable requests assisting Publisher's defense and settlement of such matter. This section states Publisher sole liability with respect to, and Customer's exclusive remedy against Publisher for, any Claim Against Customer.

7.4 Notwithstanding anything contained in the above Sections 7.1., 7.2. and 7.3, (a) an Indemnified Party will always be free to choose its own counsel if it pays for the cost of such counsel; and (b) no settlement may be entered into by an Indemnifying Party, without the express written consent of the Indemnified Parties (such consent not to be unreasonably withheld), if: (1) the third party asserting the claim is a government agency; (2) the settlement arguably involves the making of admissions by the indemnified parties; (3) the settlement does not include a full release of liability for the indemnified parties; or (4) the settlement includes terms other than a full release of liability for the indemnified parties and the payment of money.

8. Limitation of liability.

For each Service, each party's maximum, aggregate liability to the other under this Agreement is limited to direct damages finally awarded in an amount not to exceed the amounts Customer was required to pay for such Service during the term of the applicable licenses, subject to the following:

- (a) Subscriptions. For each Service ordered on a subscription basis, Publisher's maximum liability to Customer in the aggregate for all claims will not exceed the amount Customer paid for such Service during the 12 months before the first claim giving rise to such liability or \$500,000, whichever is greater.

For each Service ordered on a subscription basis, Publisher's maximum liability to Customer for any unauthorized access, use, or disclosure of Customer Data due to a breach of Publisher's obligations under Section 2.4 (Security), Publisher's maximum liability, in the aggregate, to Customer will not exceed two times (2x) the amount Customer paid for such Service during the 12 months before the first claim giving rise to such liability or \$2,000,000, whichever is greater.

- (b) Free Services and distributable code. For Services provided free of charge and code that Customer is authorized to redistribute to third parties without separate payment to Publisher, Publisher's liability is limited to direct damages finally awarded up to US\$5,000.
- (c) Exclusions. In no event will either party be liable for indirect, incidental, special, punitive, or consequential damages, or loss of use, loss of profits, or interruption of business, however caused or on any theory of liability.
- (d) Exceptions. No limitation or exclusions will apply to liability arising out of either party's: (1) Publisher's misuse, misappropriation or wrongful disclosure of the Customer's Confidential Information in violation of Section 3 herein (except for liability related to Customer Data, which will remain subject to the limitations and exclusions above); (2) defense obligation under Section 7; (3) damages that cannot be limited under applicable law.

9. Pricing and payment.

Customer's pricing and payment terms for a given order are set forth in this Agreement and the applicable Order form.

10. Term and termination.

10.1 Term. This Agreement is effective until terminated by a party, as described below. The term for each Order will be set forth therein.

10.2 Termination without cause. Unless otherwise set forth in an Order, either party may terminate this Agreement or any Order without cause on 60 days' notice. Termination without cause will not affect Customer's perpetual licenses, and licenses granted on a subscription basis will continue for the duration of the subscription period(s), subject to the terms of this Agreement. Publisher will not provide refunds or credits for any partial subscription period(s) if the Agreement or an Order is terminated without cause.

10.3 Termination for cause. Without limiting other remedies it may have, either party may terminate this Agreement or any Order immediately on notice if (i) the other party materially

breaches the Agreement or an Order, and fails to cure the breach within 30 days after receipt of notice of the breach; or (ii) the other party becomes Insolvent. Upon such termination, the following will apply:

- (a) All licenses granted under this Agreement will terminate immediately except for fully-paid, perpetual licenses.
- (b) All amounts due under any unpaid invoices will become due and payable immediately. For metered Services billed periodically based on usage, Customer must immediately pay for unpaid usage as of the termination date.
- (c) If Publisher is in breach, Customer will receive a credit for any subscription fees, including amounts paid in advance for unused consumption for any usage period after the termination date.

10.4 Suspension. Publisher may suspend Use of the Service without terminating this Agreement during any period of material breach. Publisher will give Customer reasonable notice before suspending the Service. Suspension will only be to the extent reasonably necessary.

10.5 Refund. For Services ordered on a subscription basis that are \$100,000 or more, if Publisher breaches any of the foregoing warranties and those breaches remain uncured for 30 days, Customer may terminate this Agreement and Publisher will provide Customer refund of up to twelve (12) months in the aggregate of fees paid to Publisher for the Service prior to such incident giving rise to a breach of warranty not to exceed \$500,000.

10.6 Survival. The terms of this Agreement, including the applicable Order, that are likely to require performance, or have application to events that may occur, after the termination or expiration of this Agreement or any Order, will survive termination or expiration, including all indemnity obligations and procedures.

11. Miscellaneous.

11.1 Entire Agreement. This Agreement supersedes all prior and contemporaneous communications, whether written or oral, regarding the subject matter covered in this Agreement. If there is a conflict between any parts of this Agreement, the following order of precedence will apply:

- (a) Order;
- (b) the applicable DPA Exhibit;
- (c) this Agreement and any addendums and amendments thereto;
- (d) Service Level Agreement (SLA); and
- (e) Documentation.

11.2 Independent contractors. The parties are independent contractors. Customer and Publisher each may develop products independently without using the other's Confidential Information.

11.3 Agreement not exclusive. Customer is free to enter into agreements to license, use, and promote the services of others.

11.4 Amendments. Publisher may make updates to this Agreement and pricing that it deems commercially reasonable or necessary from time to time at its sole discretion. Changes to this Agreement will become effective immediately unless otherwise noted by Publisher. If Customer does not agree to the updated Agreement, Customer may stop using the Services or terminate this Agreement under Section 10.2 (Termination without cause). Customer's continued Use of the Services after an update to this Agreement will constitute consent to such changes.

11.5 Assignment. Publisher may assign this Agreement and any rights and obligations Publisher has under this Agreement to any third party without Customer's consent. Customer may assign this Agreement with notice but without the consent of Publisher in connection with a merger, reorganization, acquisition, or other transfer of all or substantially all of Customer's assets. Any other proposed assignment of this Agreement must be approved by Publisher in writing. Assignment will not relieve the assigning party of its obligations under the assigned Agreement. Any attempted assignment without required approval will be void.

11.6 Severability. If any part of this Agreement is held to be unenforceable, the rest of the Agreement will remain in full force and effect.

11.7 Waiver. Failure to enforce any provision of this Agreement will not constitute a waiver. Any waiver must be in writing and signed by the waiving party.

11.8 No third-party beneficiaries. This Agreement does not create any third-party beneficiary rights except as expressly provided by its terms.

11.9 Notices. Notices must be in writing and will be treated as delivered on the date received at the address, date shown on the return receipt, email transmission date, or date on the courier or fax confirmation of delivery. Notices to Publisher must be sent to the address stated in the Order. Notices to Customer will be sent to the individual at the address Customer identifies on its account as its contact for notices. Publisher may send notices and other information to Customer by email or other electronic form.

11.10 Applicable law.

The laws of the state of New York, in the United States, shall govern the terms of this Agreement, without regard to its conflict of law principles. The rights and obligations of each party are valid only in the country where the Services are performed (or for Services performed remotely, the country of Customer's business address) or, if Publisher agrees, the country where the Services are placed in productive use, except all licenses are valid as specifically granted. Nothing in this Agreement affects statutory rights of consumers that cannot be waived or limited by contract. The United Nations Convention on Contracts for the International Sale of Goods does not apply to transactions under this Agreement.

11.11 Government procurement rules. By accepting this Agreement, Customer represents and warrants that: (1) it has complied and will comply with all applicable government procurement laws and regulations; (2) it is authorized to enter into this Agreement; and (3) this Agreement satisfies all applicable procurement requirements.

11.12 Compliance with laws. Publisher will comply with all laws and regulations applicable to its provision of the Services. Publisher will obtain and maintain any approvals, licenses, filings, or registrations necessary to its performance, and will comply with all law (including law related to export, corruption, money laundering, or any combination of these). Customer must also comply with laws applicable to their Use of the Services.

11.13 Construction. Neither party has entered this Agreement in reliance on anything not contained or incorporated in it. This Agreement is in English only. Any translation of this Agreement into another language is for reference only and without legal effect. If a court of competent jurisdiction finds any term of the Agreement unenforceable, the Agreement will be deemed modified as necessary to make it enforceable, and the rest of the Agreement will be fully enforced to effect the parties' intent. Lists of examples following "including", "e.g.", "for example", or the like are interpreted to include "without limitation," unless qualified by words such as "only" or "solely." This Agreement will be interpreted according to its plain meaning without presuming that it should favor either party. Unless stated or context requires otherwise:

- (a) all internal references are to this Agreement and its parties;
- (b) all monetary amounts are expressed and, if applicable, payable, in U.S. dollars;
- (c) URLs are understood to also refer to successors, localizations, and information or resources linked from within websites at those URLs;
- (d) a party's choices under this Agreement are in its sole discretion, subject to any implied duty of good faith;
- (e) "written" or "in writing" means a paper document only, except where email is expressly authorized;
- (f) "days" means calendar days;
- (g) "may" means that the applicable party has a right, but not a concomitant duty,
- (h) "partner," if used in this Agreement or related documents, is used in its common, marketing sense and does not imply a partnership;
- (i) "current" or "currently" means "as of the Effective Date" but "then-current" means the present time when the applicable right is exercised or performance rendered or measured;
- (j) "notify" means to give notice under subsection (i) above; and
- (k) a writing is "signed" when it has been hand-signed (i.e., with a pen) or signed via an electronic signature service by a duly authorized representative of the signing party.

11.14 No Individual Consumers or Government Agency Use. The Services are not intended for or made available to (i) individual consumers, or (ii) U.S. government entities and their affiliates

that are subject to public procurement requirements or non-U.S. government entities that are in any way precluded from entering this agreement under applicable procurement laws and regulations (collectively, “**Precluded Government Entities**”). The determination of whether a government entity is a Precluded Government Entity shall be the sole responsibility of said entity. By agreeing to these terms, you represent and warrant that you have the legal capacity to enter agreements on behalf of the entity you represent and that the procurement process followed conforms to any applicable legal and regulatory requirements. If the Publisher has reasonable grounds to suspect that You are purchasing or using the Services as a consumer or Precluded Government Entity, other than for any claims Publisher may have because of a possible violation of the above representation and warranty, Publisher may terminate this Agreement for cause with immediate effect. Precluded Government Entities may contact Publisher directly for private offer terms.

11.15 No Re-export to Russia.

- (a) Customer shall not sell, export or re-export, directly or indirectly, to the Russian Federation or for use in the Russian Federation the Services under or in connection with this Agreement that fall under the scope of Article 12g;
- (b) Customer shall undertake its best efforts to ensure of Council Regulation (EU) No 833/2014; that the purpose of Section 11.15(a) is not frustrated by any third parties further down the commercial chain, including by possible resellers;
- (c) Customer shall set up and maintain an adequate monitoring mechanism to detect conduct by any third parties further down the commercial chain, including by possible resellers, that would frustrate the purpose of paragraph 11.15(a);
- (d) Any violation of Sections 11.15(a), 11.15(b) or 11.15(c) shall constitute a material breach of an essential element of this Agreement, and the Publisher shall be entitled to seek appropriate remedies, including, but not limited to: (i) termination of this Agreement; and (ii) a penalty of 100% of the total value of this Agreement or price of the Services exported, whichever is higher; and
- (e) Customer shall immediately inform the Publisher about any problems in applying paragraphs 11.15(a), 11.15(b) or 11.15(c) including any relevant activities by third parties that could frustrate the purpose of paragraph 11.15(a). Customer shall make available to the Publisher information concerning compliance with the obligations under paragraphs 11.15(a), 11.15(b) and 11.15(c) within two weeks of the simple request of such information.

12. Definitions.

“**Affiliate**” means any legal entity that controls, is controlled by, or is under common control with a party.

“**Anti-Corruption Laws**” means all laws against fraud, bribery, corruption, inaccurate books and records, inadequate internal controls, money-laundering, and illegal software, including the U.S. Foreign Corrupt Practices Act.

“**Control**” means ownership of more than a 50% interest of voting securities in an entity or the power to direct the management and policies of an entity.

“Customer Data” means all data, including all text, sound, software, image or video files that are provided to Publisher or its Affiliates by, or on behalf of, Customer and its Affiliates through Use of the Services. Customer Data does not include Support Data.

“Data Protection Law” means any data protection law applicable to Publisher as a provider of information technology services in the processing of Personal Data under this Agreement.

“Documentation” means all user manuals, handbooks, training material, requirements, and other written or electronic materials Publisher makes available for, or that result from Use of, the Services.

“End User” means any person Customer permits to Use a Service or access Customer Data.

“Feedback” means ideas, suggestions, comments, input, or know-how, in any form, that one party provides to the other in relation to recipient’s Confidential Information, products, or services. Feedback does not include sales forecasts, future release schedules, marketing plans, financial results, and high-level plans (e.g., feature lists) for future products.

“Insolvent” means admitting in writing the inability to pay debts as they mature; making a general assignment for the benefit of creditors; suffering or permitting the appointment of a trustee or receiver for all or any of its (i.e., the non-terminating party’s) assets, unless such appointment is vacated or dismissed within 60 days from the date of appointment; filing (or having filed) any petition as a debtor under any provision of law relating to insolvency, unless such petition and all related proceedings are dismissed within 60 days of such filing; being adjudicated insolvent or bankrupt; having wound up or liquidated; or ceasing to carry on business.

“Order” means an ordering document used to specify the Services customer will procure via the Catalog.

“Personal Data” means any information relating to an identified or identifiable natural person that is within Customer Data.

“Representatives” means a party’s employees, Affiliates, contractors, advisors and consultants.

“Services” means all services, websites (including hosting), solutions, platforms, and products identified in an Order and that Publisher makes available under or in relation to this Agreement, including the software, equipment, technology, and services necessary for Publisher to provide the foregoing. Availability of Services may vary by region.

“Standard Contractual Clauses” means the standard data protection clauses for the transfer of personal data to processors established in third countries which do not ensure an adequate level of data protection, as described in Article 46 of the GDPR.

“Subcontractor” means any third party: (a) to whom Publisher delegates its obligations under this Agreement, including a Publisher Affiliate not contracting directly with Customer through an Order; or (b) who, in performing under a contract between it and Publisher or a Publisher Affiliate, stores, collects, transfers or otherwise processes Personal Data (obtained or accessed in connection with

performing under this Agreement) or other Customer Confidential Information.

“Support Data” means all data provided to Publisher by or on behalf of Customer (or that Customer authorizes Publisher to obtain from the Services) through an engagement with Publisher to obtain technical support for the Services covered under this Agreement. Such data may include information required to enable, provide, manage, support, administer, and improve Publisher’s Services, for example, information related to diagnostics, configurations, capacities, components, system health and performance, and digital information gathered using tracking technologies, such as cookies and web beacons.

“Use” means to copy, download, install, run, access, display, use or otherwise interact with.

Exhibit A
Reserved Capacity Subscription Terms

1. **Commitment.** A Reserved Capacity (“RC”) Subscription allows Customer to reserve a fixed amount of capacity within the Services at a discounted price in comparison to Publisher’s pricing based on consumption (“Pay-As-You-Go”). Details of a RC Subscription are selected by Customer through the Catalog using Publisher’s New Capacity Reservation order form (“RC Order”). With a RC Subscription, Customer commits to pay in advance the amount of the discounted subscription fee as set forth in the Services in accordance with Section 3 (Billing and Payment Terms) of these Supplement Terms for the duration of the RC Term (defined below).
2. **RC Term.** The term (“RC Term”) of a RC Subscription commences on the Effective Date selected by Customer in the submitted RC Order and ends on the last day of the Commitment Term selected in the RC Order. Partial month deployment/usage will be pro-rated. Notwithstanding Section 10.2 (Termination without cause) of the Agreement, Customer may not terminate the RC Order before expiration of the RC Term. After the expiration of the RC Term, if Customer continues to Use the Services without submitting another RC Order or renewing the then-current RC Order, the RC Subscription will continue on a month-to-month basis and the subscription fee will be Publisher’s then-current standard Pay-As-You-Go monthly pricing.
3. **Billing and Payment Terms.** Each payment of Offering subscription fees will be due annually in advance unless Customer has requested a monthly billing arrangement. RC subscription fees will be invoiced by, and paid to, IBM pursuant to Customer’s subscription agreement with IBM applicable to the Catalog.
4. **Excess Usage.** If during the RC Term, Customer’s Use of the Services exceeds the fixed amount of reserved capacity as detailed in the RC Order, Customer will be invoiced monthly in arrears for such excess usage at Publisher’s then-current standard Pay-As-You-Go prices.
5. **Full Force and Effect.** Except as modified and amended by these RC Subscription Terms, the terms of the Agreement shall remain in full force and effect.
6. **Conflicting Terms.** If any terms of this Exhibit A conflict with the terms of the Agreement, the terms of this Exhibit A will take precedence and govern in all cases.
7. **Standard Support.** Skytap Standard Customer Support is included in Services that include an RC Subscription during the RC Term.
8. **Definitions.**

“GB” means one (1) gigabyte of computer storage space or compute RAM memory within your services constituting the Services environment.

“GB Hour” and “GB RAM Hour” means your Use of one (1) GB of the services constituting the Services for one (1) hour.

“Reserve Capacity” means this resource will be measured and billed at the concurrent RAM quantity reserved. This resource will be metered and billed on an average monthly rate of 730 hours for the full 12- or 36-month term.

“Region” means an individual datacenter where you Use services constituting the Services.

“Provisioning” means Publisher giving you access to the services constituting the Services in quantities and the regions your authorized user and representative selected within the Services and in accordance with the terms of this Exhibit A.

Exhibit B
Skytap on IBM Cloud

1. Cloud Service

1.1 Services

Skytap on IBM Cloud is a Cloud Service which provides the ability to create virtual server application environments that can be replicated, shared and modified. Client can interactively create, manage, and network multiple x86 and/or IBM Power virtual machines (VM's) and associated storage using the self service web application, or programmatically using the REST-based API. Offerings are entitled on either a pay-as-you-go basis or a reserved capacity committed term subscription.

2. Data Processing and Protection Terms

The data processing and protection terms set forth in this Agreement apply to this service.

3. Service Levels and Technical Support

3.1 Service Level Agreement

The service level agreement set forth in this Agreement applies to this service.

3.2 Technical Support

This service is supported by Skytap. To request support <https://www.skytap.com/support/>

4. Charges

4.1 Charge Metrics

The following charge metrics apply to this Cloud Service:

- Instance is each access to specific configuration of the Cloud Services.
- Gigabyte (GB)-Hour is each hour a GB (2 to the 30th power bytes) is analyzed, used, stored, or configured in the Cloud Service.
- Instance-Hour is each hour of access to a specific configuration of the Cloud Service.
- Item is an occurrence of a specific item that is managed by, processed by, or related to the Use of the Cloud Service. For this Cloud Service, an Item is a unique public IP address.
- Virtual Server-Hour is each hour a Virtual Server is made available or managed by the Cloud Service. A Virtual Server is comprised of processing units, memory and input/output capabilities that executes requested procedures, commands or applications.

4.2 Pay-as-you-go Use

The Client incurs charges for monthly pay-as-you-go subscriptions to the Skytap on IBM Cloud Service on

a calendar monthly basis at the applicable rates, and based on the Client's actual measured usage of the Skytap on IBM Cloud Service during the calendar month or portion thereof.

4.3 Reserved Capacity Committed Term Subscriptions

Additional terms applicable to reserved capacity subscriptions to the Skytap on IBM Cloud Service are set forth in Exhibit A.