

**SCHEDULE 7**

**FORM OF GUARANTEE**

**[Template Note: This Schedule will be used only if the Authority requires a Guarantee in relation to the Contract]**

## VERSION CONTROL

VERSION NUMBER	DATE	COMMENT
0.1	27 July 2016	Preliminary draft template version made available for general comment
0.2	2 September 2016	Uplifted draft, following feedback, made available for final comment
<a href="#">0.3</a>	<a href="#">25 October 2016</a>	<a href="#">Uplifted following local body and supplier feedback</a>

## **SCHEDULE 7 – FORM OF GUARANTEE**

### **1. BACKGROUND**

This Schedule 7 sets out the form of the Guarantee that the Supplier shall procure in accordance with Clause 29.

**APPENDIX – FORM OF GUARANTEE**

***[Insert the name of the Guarantor]***

**in favour of**

***[Insert the name of the Beneficiary]***

**DEED OF GUARANTEE**

## **CONTENTS**

1	DEFINITIONS AND INTERPRETATION	1
2	GUARANTEE AND INDEMNITY	2
3	OBLIGATION TO ENTER INTO A NEW CONTRACT	3
4	DEMANDS AND NOTICES	3
5	BENEFICIARY'S PROTECTIONS	4
6	RIGHTS OF SUBROGATION	6
7	REPRESENTATIONS AND WARRANTIES	6
8	PAYMENTS AND SET-OFF	7
9	GUARANTOR'S ACKNOWLEDGEMENT	7
10	ASSIGNMENT	7
11	SEVERANCE	7
12	THIRD PARTY RIGHTS	8
13	GOVERNING LAW	8

**THIS DEED OF GUARANTEE** is made the                    day of                    201[ ]

BETWEEN:

- (1)        *[Insert the name of the Guarantor]* [a company incorporated in England and Wales with number *[insert number]* whose registered office is at *[insert details of the Guarantor's registered office here]*] [a company incorporated under the laws of *[insert country]*, registered in *[insert country]* with number *[insert number]* at *[insert place of registration]*, whose principal office is at *[insert office details]*] ("**Guarantor**"); in favour of
- (2)        *[Insert the name of the Authority]* ("**Beneficiary**")

WHEREAS:

- (A)        *[Insert the name of the Supplier]* ("**Supplier**") [a company incorporated in England and Wales with number *[insert number]* whose registered office is at *[insert details of the Supplier's registered office here]*] [a company incorporated under the laws of *[insert country]*, registered in *[insert country]* with number *[insert number]* at *[insert place of registration]*, whose principal office is at *[insert office details]*] and the Beneficiary are party to the Guaranteed Agreement.
- (B)        It is a condition of the Beneficiary entering into the Guaranteed Agreement that the Guarantor executes and delivers this Deed of Guarantee to the Beneficiary.
- (C)        The Guarantor has agreed, in consideration of the Beneficiary entering into the Guaranteed Agreement with the Supplier, to guarantee the due performance by the Supplier of all of the Supplier's obligations under the Guaranteed Agreement.
- (D)        It is the intention of the parties that this document be executed and take effect as a deed.

Now in consideration of the Beneficiary entering into the Guaranteed Agreement, the Guarantor hereby agrees with the Beneficiary as follows:

1.        **DEFINITIONS AND INTERPRETATION**

In this Deed of Guarantee:

- 1.1        unless defined elsewhere in this Deed of Guarantee or the context requires otherwise, defined terms shall have the same meaning as they have for the purposes of the Guaranteed Agreement;
- 1.2        the words and phrases below shall have the following meanings:
- 1.2.1        "**Dissolution**" includes the bankruptcy, insolvency, liquidation, amalgamation, reconstruction, reorganisation, administrative or other receivership, administration, voluntary arrangement, informal compromise with creditors or dissolution of that person and any equivalent or analogous proceeding by whatever name known and in whatever jurisdiction;
- 1.2.2        "**Guaranteed Agreement**" means the agreement under which the Supplier will provide to the Beneficiary with broadband and related services made between the Beneficiary and the Supplier on [                    ]; and
- 1.2.3        "**Guaranteed Obligations**" means all obligations of the Supplier to the Beneficiary under the Guaranteed Agreement together with all obligations owed by the Supplier to the Beneficiary that are supplemental to, incurred under, ancillary to or calculated by reference to the Guaranteed Agreement.

- 1.3 references to this Deed of Guarantee and any provisions of this Deed of Guarantee or to any other document or agreement (including to the Guaranteed Agreement) are to be construed as references to this Deed of Guarantee, those provisions or that document or agreement in force for the time being and as amended, varied, supplemented, substituted or novated from time to time;
- 1.4 unless the context otherwise requires, words importing the singular are to include the plural and vice versa;
- 1.5 references to a person are to be construed to include that person's assignees or transferees or successors in title, whether direct or indirect;
- 1.6 the words "other" and "otherwise" are not to be construed as confining the meaning of any following words to the class of thing previously stated where a wider construction is possible;
- 1.7 unless the context otherwise requires, reference to a gender includes the other gender and the neuter;
- 1.8 unless the context otherwise requires, references to an Act of Parliament, statutory provision or statutory instrument include a reference to that Act of Parliament, statutory provision or statutory instrument as amended, extended or re-enacted from time to time and to any regulations made under it;
- 1.9 unless the context otherwise requires, any phrase introduced by the words "including", "includes", "in particular", "for example" or similar, shall be construed as illustrative and without limitation to the generality of the related general words;
- 1.10 references to clauses and schedules are, unless otherwise provided, references to clauses of and schedules to this Deed of Guarantee; and
- 1.11 references to liability are to include any liability whether actual, contingent, present or future.

**2. GUARANTEE AND INDEMNITY**

- 2.1 The Guarantor irrevocably and unconditionally guarantees and undertakes to the Beneficiary to procure that the Supplier duly and punctually performs all of the Guaranteed Obligations now or hereafter due, owing or incurred by the Supplier to the Beneficiary.
- 2.2 The Guarantor irrevocably and unconditionally undertakes upon demand to pay to the Beneficiary all monies and liabilities which are now or at any time hereafter shall have become payable by the Supplier to the Beneficiary under the Guaranteed Agreement or in respect of the Guaranteed Obligations.
- 2.3 If at any time the Supplier shall fail to perform any of the Guaranteed Obligations, the Guarantor, as primary obligor, irrevocably and unconditionally undertakes to the Beneficiary that immediately, upon first demand by the Beneficiary it shall, at the cost and expense of the Guarantor:
  - 2.3.1 fully, punctually and specifically perform such Guaranteed Obligations as if it were itself a direct and primary obligor to the Beneficiary in respect of the Guaranteed Obligations and liable as if the Guaranteed Agreement had been entered into directly by the Guarantor and the Beneficiary; and
  - 2.3.2 indemnify and keep the Beneficiary indemnified against all losses, damages, costs and expenses (including VAT thereon, and including, without limitation, all court costs and all legal fees together with any disbursements,) of whatever nature which may result or which the Beneficiary may suffer, incur or sustain arising in any way whatsoever out of a failure by the Supplier to perform the Guaranteed Obligations save that, subject to the other provisions of this Deed of Guarantee,

this shall not be construed as imposing greater obligations or liabilities on the Guarantor than are purported to be imposed on the Supplier under the Guaranteed Agreement.

2.4 As a separate and independent obligation, the Guarantor irrevocably and unconditionally undertakes to indemnify and keep the Beneficiary indemnified on demand against all losses, damages, costs and expenses (including VAT thereon, and including, without limitation, all legal costs and expenses), of whatever nature, whether arising under statute, contract or at common law, which the Beneficiary may suffer or incur if any of the Guaranteed Obligations is or becomes void, voidable, ineffective, unenforceable, invalid or illegal as if the obligation guaranteed had not become void, voidable, ineffective, unenforceable, invalid or illegal provided that the Guarantor's liability shall be no greater than the Supplier's liability would have been if the Guaranteed Obligation had not become void, voidable, ineffective, unenforceable, invalid or illegal.

3. **OBLIGATION TO ENTER INTO A NEW CONTRACT**

If the Guaranteed Agreement is terminated for any reason, whether by the Beneficiary or the Supplier, or if the Guaranteed Agreement is disclaimed by a liquidator (or an analogous event in any other jurisdiction) of the Supplier or the obligations of the Supplier are declared to be void or voidable for any reason, then the Guarantor will, at the request of the Beneficiary, enter into a contract with the Beneficiary in terms mutatis mutandis the same as the Guaranteed Agreement and the obligations of the Guarantor under such substitute agreement shall be the same as if the Guarantor had been original obligor under the Guaranteed Agreement or under an agreement entered into on the same terms and at the same time as the Guaranteed Agreement with the Beneficiary.

4. **DEMANDS AND NOTICES**

4.1 Any demand or notice served by the Beneficiary on the Guarantor under this Deed of Guarantee shall be in writing, addressed to:

<b>Guarantor</b>	<b>Beneficiary</b>
[Address of the Guarantor in England and Wales]	[Address of the Beneficiary in England and Wales]
[Facsimile Number]	[Facsimile Number]
[E-mail]	[E-mail]
[For the Attention of]	[For the Attention of]

or such other address in England and Wales or facsimile number as either party has from time to time notified to the other in writing in accordance with the terms of this Deed of Guarantee as being an address or facsimile number for the receipt of such demands or notices.

4.2 Any notice or demand served on the Guarantor or the Beneficiary under this Deed of Guarantee shall be deemed to have been served:

- 4.2.1 if delivered by hand, at the time of delivery; or
- 4.2.2 if posted, at 10.00 a.m. on the second Working Day after it was put into the post; or
- 4.2.3 if sent by facsimile, at the time of despatch, if despatched before 5.00 p.m. on any Working Day, and in any other case at 10.00 a.m. on the next Working Day; or



4.2.4 if sent by e-mail, at the time that the e-mail enters the information system of the intended recipient provided that no error message indicating failure to deliver has been received by the sender and provided further that within twenty four (24) hours of transmission a hard copy of the e-mail is sent by one of the means contemplated under Clauses 4.2.1, 4.2.2, or 4.2.3 to the other party.

4.3 In proving service of a notice or demand on the Guarantor or the Beneficiary it shall be sufficient to prove that delivery was made, or that the envelope containing the notice or demand was properly addressed and posted as a prepaid first class recorded delivery letter to the address previously notified, or that the facsimile or e-mail message was properly addressed and sent to the fax number or e-mail address previously notified, as the case may be.

4.4 Any notice purported to be served on the Beneficiary under this Deed of Guarantee shall only be valid when received in writing by the Beneficiary.

## 5. **BENEFICIARY'S PROTECTIONS**

5.1 The Guarantor shall not be discharged or released from this Deed of Guarantee by any arrangement made between the Supplier and the Beneficiary (whether or not such arrangement is made with or without the assent of the Guarantor) or by any amendment to or termination of the Guaranteed Agreement or by any forbearance or indulgence whether as to payment, time, performance or otherwise granted by the Beneficiary in relation thereto (whether or not such amendment, termination, forbearance or indulgence is made with or without the assent of the Guarantor) or by the Beneficiary doing (or omitting to do) any other matter or thing which but for this provision might exonerate the Guarantor.

5.2 This Deed of Guarantee shall be a continuing security for the Guaranteed Obligations and accordingly:

5.2.1 it shall not be discharged by any partial performance (except to the extent of such partial performance) by the Supplier of the Guaranteed Obligations or by any omission or delay on the part of the Beneficiary in exercising its rights under this Deed of Guarantee;

5.2.2 it shall not be affected by any Dissolution, change in status, function, control or ownership, or other incapacity, of the Supplier, the Beneficiary, the Guarantor or any other person;

5.2.3 if, for any reason, any of the Guaranteed Obligations shall prove to have been or shall become invalid, void, voidable, ineffective or unenforceable against the Supplier for any reason whatsoever, the Guarantor shall nevertheless be liable in respect of such Guaranteed Obligation or liability as if the same were fully valid and enforceable and the Guarantor were principal debtor in respect thereof;

5.2.4 it shall not be discharged by:

(a) the taking, holding, failure to take or hold, varying, realisation, non-enforcement, non-perfection or release by the Beneficiary or any other person of any other guarantee and/or indemnity or any security for any of the Guaranteed Obligations; or

(b) any lack of or limitation on the borrowing or other powers of the Supplier or the absence of authority of any person purporting to act on behalf of the Supplier in respect of the Guaranteed Obligations; or

(c) any change in the constitution of the Supplier; or

(d) any amalgamation, merger or reconstruction that may be effected by the Beneficiary with any other person or any sale or transfer of the whole or

any part of the undertaking and assets of the Beneficiary to any other person; or

- (e) the existence of any claim, set-off or other rights which the Guarantor may have at any time against the Supplier, or the Beneficiary, whether in connection with the Guaranteed Agreement or otherwise; or
- (f) the granting by the Beneficiary to the Supplier of any other financial accommodation or the withdrawal or restriction by the Supplier of any financial accommodation, or the absence of any notice to the Guarantor of any such granting, withdrawal or restriction; or
- (g) any arrangement or compromise entered into by the Beneficiary with the Supplier or any other person; or
- (h) any other thing done or omitted or neglected to be done by the Beneficiary or any other dealing, fact, matter or thing which, but for this provision, might operate to exonerate or discharge the Guarantor from, or otherwise prejudice or affect, any of the Guarantor's obligations under this Deed of Guarantee.

5.2.5 the rights of the Beneficiary against the Guarantor under this Deed of Guarantee are in addition to, shall not be affected by and shall not prejudice, any other security, guarantee, indemnity or other rights or remedies available to the Beneficiary.

5.3 The Beneficiary shall be entitled to exercise its rights and to make demands on the Guarantor under this Deed of Guarantee as often as it wishes and the making of a demand (whether effective, partial or defective) in respect of the breach or non performance by the Supplier of any Guaranteed Obligation shall not preclude the Beneficiary from making a further demand in respect of the same or some other default in respect of the same Guaranteed Obligation.

5.4 The Beneficiary shall not be obliged before taking steps to enforce this Deed of Guarantee against the Guarantor to obtain judgment against the Supplier or the Guarantor or any third party in any court, or to make or file any claim in a bankruptcy, liquidation or administration of the Supplier or any third party, or to take any action whatsoever against the Supplier or the Guarantor or any third party or to resort to any other security or guarantee or other means of payment. No action (or inaction) by the Beneficiary in respect of any such security, guarantee or other means of payment shall prejudice or affect the liability of the Guarantor hereunder.

5.5 The Beneficiary's rights under this Deed of Guarantee are cumulative and not exclusive of any rights provided by law and may be exercised from time to time and as often as the Beneficiary deems expedient.

5.6 Any waiver by the Beneficiary of any terms of this Deed of Guarantee, or of any Guaranteed Obligations shall only be effective if given in writing and then only for the purpose and upon the terms and conditions, if any, on which it is given.

5.7 Any release, discharge or settlement between the Guarantor and the Beneficiary shall be conditional upon no security, disposition or payment to the Beneficiary by the Guarantor or any other person being void, set aside or ordered to be refunded pursuant to any enactment or law relating to liquidation, administration or insolvency or for any other reason whatsoever and if such condition shall not be fulfilled the Beneficiary shall be entitled to enforce this Deed of Guarantee subsequently as if such release, discharge or settlement had not occurred and any such payment had not been made. The Beneficiary shall be entitled to retain this security after as well as before the payment, discharge or satisfaction of all monies, obligations and liabilities that are or may become due owing or incurred to the Beneficiary from the Guarantor for such period as the Beneficiary may determine.

- 5.8 The Guarantor hereby:
- 5.8.1 unconditionally consents and agrees that, without notice to or further assent from the Guarantor, the time for the Supplier's performance of or compliance with any term, covenant or agreement on its part to be performed or observed under the Guaranteed Agreement may be extended, or such performance or compliance consented to, all in such manner and upon such terms as the Beneficiary and Supplier may agree to in writing; and
  - 5.8.2 authorises the Supplier and the Beneficiary to make any written addendum, amendment or variation to the Guaranteed Agreement, the due and punctual performance of which addendum, amendment or variation shall be likewise guaranteed by the Guarantor in accordance with the terms of this Deed of Guarantee. In all other respects the obligations of the Guarantor hereby shall not be affected by any such addendum, amendment or variation to the Guaranteed Agreement.

6. **RIGHTS OF SUBROGATION**

6.1 The Guarantor shall, at any time when there is any default in the performance of any of the Guaranteed Obligations by the Supplier and/or any default by the Guarantor in the performance of any of its obligations under this Deed of Guarantee, exercise any rights it may have:

- 6.1.1 of subrogation and indemnity;
- 6.1.2 to take the benefit of, share in or enforce any security or other guarantee or indemnity for the Supplier's obligations;
- 6.1.3 of counterclaim, set-off, lien or otherwise; and/or
- 6.1.4 to prove in the liquidation or insolvency of the Supplier,

only in accordance with the Beneficiary's written instructions and shall hold any amount recovered as a result of the exercise of such rights on trust for the Beneficiary and pay the same to the Beneficiary on first demand. The Guarantor hereby acknowledges that it has not taken any security from the Supplier and agrees not to do so until Beneficiary receives all moneys payable hereunder and will hold any security taken in breach of this clause on trust for the Beneficiary.

7. **REPRESENTATIONS AND WARRANTIES**

The Guarantor hereby represents and warrants to the Beneficiary that:

- 7.1 the Guarantor is duly incorporated and is a validly existing company under the laws of its place of incorporation, has the capacity to sue or be sued in its own name and has power to carry on its business as now being conducted and to own its property and other assets;
- 7.2 the Guarantor has full power and authority to execute, deliver and perform its obligations under this Deed of Guarantee and no limitation on the powers of the Guarantor will be exceeded as a result of the Guarantor entering into this Deed of Guarantee;
- 7.3 the execution and delivery by the Guarantor of this Deed of Guarantee and the performance by the Guarantor of its obligations under this Deed of Guarantee including, without limitation entry into and performance of a contract pursuant to clause 3 have been duly authorised by all necessary corporate action and do not contravene or conflict with:
  - 7.3.1 the Guarantor's memorandum and articles of association or other equivalent constitutional documents;

- 7.3.2 any existing law, statute, rule or regulation or any judgment, decree or permit to which the Guarantor is subject; or
- 7.3.3 the terms of any agreement or other document to which the Guarantor is a party or which is binding upon it or any of its assets;
- 7.4 all governmental and other authorisations, approvals, licences and consents, required or desirable, to enable it lawfully to enter into, exercise its rights and comply with its obligations under this Deed of Guarantee, and to make this Deed of Guarantee admissible in evidence in its jurisdiction of incorporation, have been obtained or effected and are in full force and effect;
- 7.5 this Deed of Guarantee is the legal valid and binding obligation of the Guarantor and is enforceable against the Guarantor in accordance with its terms; and
- 7.6 no Dissolution applies to it or has been undertaken or threatened in relation to it.

8. **PAYMENTS AND SET-OFF**

- 8.1 All sums payable by the Guarantor under this Deed of Guarantee shall be paid without any set-off, lien or counterclaim, deduction or withholding, howsoever arising (including, without limitation, any amounts in respect of deduction or withholding in respect of tax), except for those required by law, and if any deduction or withholding must be made by law, the Guarantor will pay that additional amount which is necessary to ensure that the Beneficiary receives a net amount equal to the full amount which it would have received if the payment had been made without the deduction or withholding.
- 8.2 The Guarantor shall pay interest on any amount due under this Deed of Guarantee from the day after the date on which payment was due up to and including the date of payment in full (as well after as before any judgment) calculated from day to day at a rate per annum equal to [4%] above the base rate of the Bank of England from time to time in force.
- 8.3 The Guarantor will reimburse the Beneficiary for all legal and other costs, negotiation, amendment (including VAT or stamp duty, registration or other similar taxes) incurred by the Beneficiary in connection with the preservation of rights under or enforcement of this Deed of Guarantee.
- 8.4 Any amount payable under this Deed of Guarantee is payable in sterling.

9. **GUARANTOR'S ACKNOWLEDGEMENT**

The Guarantor warrants, acknowledges and confirms to the Beneficiary that it has not entered into this Deed of Guarantee in reliance upon, nor has it been induced to enter into this Deed of Guarantee by any representation, warranty or undertaking made by or on behalf of the Beneficiary (whether express or implied and whether pursuant to statute or otherwise) which is not set out in this Deed of Guarantee.

10. **ASSIGNMENT**

The Beneficiary shall be entitled to assign or transfer the benefit of this Deed of Guarantee at any time to any person without the consent of the Guarantor being required and any such assignment or transfer shall not release the Guarantor from its liability under this Guarantee.

11. **SEVERANCE**

If any provision of this Deed of Guarantee is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if this Deed of Guarantee had been executed with the invalid, illegal or unenforceable provision eliminated.

12. **THIRD PARTY RIGHTS**

A person who is not a party to this Deed of Guarantee shall have no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Deed of Guarantee. This clause does not affect any right or remedy of any person which exists or is available otherwise than pursuant to that Act.

13. **GOVERNING LAW**

13.1 This Deed of Guarantee shall be governed by and construed in all respects in accordance with English law.

13.2 The Guarantor irrevocably agrees for the benefit of the Beneficiary that the courts of England shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any dispute which may arise out of or in connection with this Deed of Guarantee and for such purposes hereby irrevocably submits to the jurisdiction of such courts.

13.3 Nothing contained in this clause shall limit the rights of the Beneficiary to take proceedings against the Guarantor in any other court of competent jurisdiction, nor shall the taking of any such proceedings in one or more jurisdictions preclude the taking of proceedings in any other jurisdiction, whether concurrently or not (unless precluded by applicable law).

13.4 The Guarantor irrevocably waives any objection which it may have now or in the future to the courts of England being nominated for the purpose of this clause on the ground of venue or otherwise and agrees not to claim that any such court is not a convenient or appropriate forum.

13.5 ***[Provision dealing with the appointment of English process agent by a non English incorporated Guarantor]*** [The Guarantor hereby irrevocably designates, appoints and empowers [the Supplier] ***[a suitable alternative to be agreed if the Supplier's registered office is not in England or Wales]*** either at its registered office or on facsimile number ***[insert fax no.]*** from time to time to act as its authorised agent to receive notices, demands, service of process and any other legal summons in England and Wales for the purposes of any legal action or proceeding brought or to be brought by the Beneficiary in respect of this Deed of Guarantee. The Guarantor hereby irrevocably consents to the service of notices and demands, service of process or any other legal summons served in such way.]

IN WITNESS whereof the Guarantor has caused this instrument to be executed and delivered as a Deed the day and year first before written.

[EXECUTED as a Deed by )

***Insert name of the Guarantor]*** acting by ***[Insert/print names]***

Director

Director/Secretary]

OR

[SIGNED as a Deed )  
)  
(but not delivered until dated) by )  
)

in the presence of:

Signature of witness:

Name of witness:

Address:

Occupation:]