

DATED \_\_\_\_\_

**NBI DEPLOYMENT DESIGNATED ACTIVITY COMPANY**

**AS GUARANTOR**

**THE MINISTER FOR COMMUNICATIONS, CLIMATE ACTION & ENVIRONMENT**

**THE MINISTER, AS BENEFICIARY**

**GUARANTEE AND INDEMNITY**

This Guarantee and Indemnity is dated \_\_\_\_\_

## PARTIES

- (1) **NBI DEPLOYMENT DESIGNATED ACTIVITY COMPANY**, a company registered in Ireland with company number 631657 and having its registered office at 10 Earlsfort Terrace, Dublin 2 (the "**Guarantor**" which expression shall include its successors and assigns); and
- (2) **THE MINISTER FOR COMMUNICATIONS, CLIMATE ACTION & ENVIRONMENT** of 29 Adelaide Road, Dublin 2, Ireland (the "**Minister**" which expression shall include its successors and assigns).

## BACKGROUND

- (A) By an agreement dated \_\_\_\_\_ 2019 (the "**Project Agreement**") the Minister has appointed NBI Infrastructure Designated Activity Company ("**NBI DAC**") to provide and perform the Services, Network, Wholesale Products and the Project as defined in the Project Agreement.
- (B) It is a condition of the Minister entering into the Project Agreement that the Guarantor has agreed to enter into this Guarantee and Indemnity in favour of the Minister in respect of the Guaranteed Obligations.

## THE PARTIES AGREE

### 1. SECURITY

In consideration of the Minister's entering into the Project Agreement with NBI DAC and NBI DAC entering into the Buildco Key Subcontract with the Guarantor and the payment of €10 (the receipt and sufficiency of which is confirmed by the Guarantor) the Guarantor:-

#### Guarantee

- (a) hereby irrevocably and unconditionally GUARANTEES to the Minister upon written demand being made by the Minister in accordance with clause 5(2) hereof, the due and punctual, payment, observance, performance and discharge of, and undertakes to pay or discharge, all of the Guaranteed Obligations.

#### Indemnity

- (b) in addition to the guarantee in paragraph (a) and separate therefrom hereby irrevocably AGREES TO INDEMNIFY and keep the Minister fully and effectively indemnified from and against all actions and proceedings costs damages expenses claims and demands and losses whatsoever properly arising as a result of any one or more of the following:-
  - (i) any failure by the Guarantor to, make any payment, observe, perform or otherwise discharge the Guaranteed Obligations (or any of them) and to pay or discharge the Guaranteed Obligations upon written demand received from the Minister;
  - (ii) the guarantee in paragraph being or becoming illegal or unenforceable, irrecoverable, void or being avoided for any reason whatsoever;
  - (iii) all or any part of the Guaranteed Obligations becoming illegal or unenforceable;

and hereby COVENANTS to pay or discharge the same to the Minister following demand, provided that the amount to be paid or discharged by the Guarantor under this paragraph (b) shall not be greater than the amount of the Guaranteed Obligations then outstanding;

#### **Continuance of Guarantee and Indemnity**

- (c) hereby ACKNOWLEDGES that the guarantee (in paragraph (a)) and indemnity (in paragraph (b)) shall continue in full force and effect until (i) the Guaranteed Obligations have been repaid, performed and discharged in full or (ii) the Contract Term has expired, and that the Guarantor shall not be released from its obligations or liability hereunder by any intermediate payment, satisfaction, partial performance or partial discharge of all or any part of the Guaranteed Obligations but rather that this Guarantee and Indemnity shall continue and be binding as a continuing security on the Guarantor until otherwise discharged in accordance with the foregoing provisions of this paragraph (c);

PROVIDED THAT if this Guarantee and Indemnity ceases from any cause whatsoever to be binding as a continuing security on the Guarantor, all liabilities and other outstanding obligations of the Guarantor to the Minister on or before the date when the guarantee or, as the case may be, the indemnity, ceased to be a continuing security, whether certain or contingent or whether payable forthwith or at some future time or times and also all credits then established by the Minister for the Guarantor shall remain payable and outstanding by the Guarantor under this Guarantee and Indemnity notwithstanding that the guarantee or, as the case may be, the indemnity, shall have ceased to be binding as a continuing security;

#### **Security to be Additional**

- (d) hereby ACKNOWLEDGES that this document shall be in addition to and shall not be in any way affected or prejudiced by any collateral or other security (whether merely personal or involving a mortgage or charge on any property and whether from Guarantor or any other person whatsoever) now or hereafter held by the Minister or any person on behalf of the Minister in respect of all or any part of the Guaranteed Obligations nor shall such collateral or other security or any lien to which the Minister may be otherwise entitled or the liability of any person or persons not parties hereto for all or any part of such moneys be in any way prejudiced or affected by this Guarantee and Indemnity and the Minister may at its discretion give time for payment or make any other arrangement with any other person or persons without prejudice to this document or any liability of the Guarantor hereunder;

#### **Obligation as Primary Obligor**

- (e) hereby ACKNOWLEDGES that the liability of the Guarantor hereunder shall be as a sole or primary obligor and not merely as surety and shall not be impaired or discharged by reason of any matter act or omission whereby the liabilities and obligations of the Guarantor would have been discharged if it had not been a principal debtor and the Guarantor hereby waives all and any of its rights as surety which may at any time be inconsistent with any of the provisions hereof;

#### **Security to Secure present and future Advances**

- (f) hereby ACKNOWLEDGES that its obligations herein shall be deemed to be effective whether or not the moneys or obligations hereby secured or any part thereof have been advanced or assumed before or upon or after the date hereof;

**Costs and Expenses**

- (g) hereby COVENANTS TO PAY to the Minister on demand the proper legal costs and expenses incurred by the Minister in any way in connection with the enforcement or discharge of this Guarantee and Indemnity on an indemnity basis;

**No other security**

- (h) hereby COVENANTS not to permit or suffer to exist any Encumbrance (as defined in the Minister Buildco Debenture) whatsoever over all or any part of the Secured Assets (as defined in the Minister Buildco Debenture whatsoever and wheresoever other than the Permitted Security (as defined in the Minister Subordination Deed));

**Preferential payments**

- (i) hereby COVENANTS to pay and discharge when due all sums which by law have priority in right of payment to the moneys and obligations hereby secured.

**2. RIGHTS OF THE MINISTER****(1) Indulgence and Giving of Time**

The Minister may at any time without in any case affecting the guarantee and indemnity herein in its absolute discretion and with or without the assent or knowledge of the Guarantor:-

- (a) give time to the Guarantor and/or NBI DAC for payment or discharge of any or all of the Guaranteed Obligations or compound with accept compositions from or make any other arrangement with the Guarantor and/or NBI DAC or any other person liable in respect of such Guaranteed Obligations;
- (b) neglect or forbear to enforce repayment of any or all of the Guaranteed Obligations and (without prejudice to the generality of the foregoing) grant any indulgence or forbearance to or fail to assert or delay in asserting any right or remedy against the Guarantor and/or NBI DAC or any other person liable (whether contingently or otherwise) in respect of such moneys or fail or delay in pursuing any rights or remedies against the Guarantor and/or NBI DAC or such other person;
- (c) deal with, accept, vary, exchange, renew, abstain from perfecting or release any security or securities or other guarantees, indemnities or rights now held or to be held by the Guarantor and/or NBI DAC for all or any of the moneys hereby secured; or
- (d) amend add to or vary the terms of any agreement between the Minister and the Guarantor and/or NBI DAC in regard to all or any of the Guaranteed Obligations (including, without limitation, the Project Agreement or any other agreement entered into in relation thereto).

**(2) Other Means of Payment**

The Minister may but shall not be obliged to resort for its benefit to any other means of payment or discharge at any time in any other way it thinks fit without thereby diminishing the liability of the Guarantor hereunder and it may enforce this Guarantee and Indemnity either for the payment of the ultimate balance after resorting to other means of payment or for the balance due at any time notwithstanding that other means

of payment have not been resorted to and in the latter case without entitling the Guarantor to any benefit from such other means of payment so long as the Guaranteed Obligations remain due from (or outstanding by) the Guarantor to the Minister.

(3) **Suspense Account**

For the purpose of enabling the Minister to sue the Guarantor and/or NBI DAC or proving in their liquidation receivership, insolvency or examinership for all moneys hereby secured or to preserve intact the liability of any person (including the Guarantor and/or NBI DAC) the Minister may at any time place and keep for such time as it may think prudent any money received recovered or realised hereunder on one or more separate or suspense accounts to the credit of the Guarantor or such other person as it shall think fit without any intermediate obligation on the Minister's part to apply the same or any part thereof in or towards the discharge of the moneys owing and without any intermediate right on the Guarantors part to sue NBI DAC or prove in the liquidation receivership, insolvency or examinership of NBI DAC in competition with the Minister or so as to diminish any dividend or other advantage that would or might come to the Minister or so as to treat the liability of the Guarantor and/or NBI DAC as diminished.

(4) **Application of Moneys**

The Minister may apply moneys received from NBI DAC or the Guarantor in discharge of any particular liability as he deems fit.

(5) **Retention of Security**

The Minister shall be at liberty to retain any security held for the liability of the Guarantor for a period of six months after the repayment of all sums that are or may become due to the Minister from the Guarantor or NBI DAC notwithstanding any release, settlement, discharge or arrangement may have been given or made by the Minister provided that if at any time within the period of six months after such repayment, a petition shall be presented to a competent court for an order for the winding up of the Guarantor and/or NBI DAC or their being put under court protection or the Guarantor and/or NBI DAC shall commence to be wound up voluntarily the Minister shall be at liberty to retain such security as the Minister may determine in which event such security shall be deemed to have continued to have been held by the Minister as security for the payment to the Minister of the Guaranteed Obligations either by virtue of the provisions of this Guarantee and Indemnity or as a consequence of any Order made by a competent court under any provisions of insolvency or company law.

### 3. RESTRICTION ON GUARANTORS RIGHTS

#### **No Counter Security without the Minister's Consent**

- (1) The Guarantor hereby warrants that it has not and covenants that it will not in respect of all or any part of the Guaranteed Obligations take from NBI DAC whether directly or indirectly without the prior written consent of the Minister any promissory note bill of exchange mortgage charge assignment by way of security or any other counter security whether merely personal or involving a charge on any property whatsoever of NBI DAC whether it or any person claiming through it by endorsement, assignment or otherwise would or might on the insolvency or liquidation of NBI DAC and to the prejudice of the Minister increase the proofs in such insolvency or liquidation or diminish the assets distributable amongst the creditors of NBI DAC.

**Hold Counter Security in Trust**

- (2) The Guarantor hereby covenants to hold any such counter security which the Guarantor may have taken or may take with such consent upon trust for the Minister as a security to the Minister were the fulfilment of the obligations of the Guarantor hereunder and forthwith to deposit such counter security with the Minister or any agent nominated by the Minister for such a purpose and the Guarantor shall account to the Minister or such agent (as the case may be) for all monies at any time received by it in respect thereof.

**Counterclaim and Set-Off**

- (3) Unless and until all the Guaranteed Obligations shall have been completely discharged and satisfied and the Guarantor shall have been discharged, the Guarantor shall not be entitled as against the Minister by paying off part only (or performing part only) of the Guaranteed Obligations by any other means or on any other ground to claim any set-off or counterclaim against NBI DAC in respect of any liability whatsoever or claim or prove in competition with the Minister in respect of any payment by it hereunder or be entitled to claim or have the benefit of any set-off counterclaim or proof against or dividend composition or payment by NBI DAC or the benefit of any other security which the Minister may now or hereafter hold for the moneys hereby secured or to have any share therein.

**Insolvent Company**

- (4) (i) The liquidation, receivership, insolvency of the Guarantor and/or NBI DAC or the appointment of an examiner to the Guarantor and/or NBI DAC shall not affect or terminate the liability of the Guarantor under this Guarantee and Indemnity.
- (ii) All dividends compositions and payments received by the Minister or any trustee or agent of the Minister from the Guarantor and/or NBI DAC or any person or persons or company liable or his or their estates and the proceeds of any securities realised shall be taken and applied as payments in gross without any right on the part of the Guarantor to stand in the place of the Minister in respect of or to claim the benefit of any such dividends compositions or payments or security released received or held by the Minister until such time as the Minister shall have received the full amount of its claim against the Guarantor and/or NBI DAC in respect of the Guaranteed Obligations.
- (iii) No assurance security or payment which may be avoided or disclaimed under any enactment in relation to bankruptcy or under Sections 537, 597, 604 or 615 of the Companies Act 2014 (or any other relevant legislation), or any amendments to such provisions or any analogous legislation and no release settlement or discharge which may be given or may be made on the avoidance or disclaimer of any such assurance security or payment shall prejudice or affect the right of the Minister to recover from the Guarantor to the full extent of this document.

#### **4. REPRESENTATIONS AND WARRANTIES**

##### **Status**

- (1) The Guarantor is a limited liability company, duly incorporated and validly existing under the law of its jurisdiction of incorporation.
- (2) The Guarantor is a body corporate has the power to own its assets and carry on its business as it is being conducted.

##### **Non-conflict with other obligations**

- (3) The entry into and performance by the Guarantor which is a body corporate of, and the transactions contemplated by, this Guarantee and Indemnity and the Minister Buildco Debenture to which it is a party and the granting of the Minister Buildco Debenture, when entered into, do not and will not conflict with:
  - (a) any law or regulation applicable to the Guarantor;
  - (b) the constitutional documents of the Guarantor; or
  - (c) any agreement or instrument binding upon the Guarantor or any of its assets or constitute a default or termination event (however described) under any such agreement or instrument.

##### **Power and authority**

- (4) The Guarantor has the requisite power to enter into, perform and deliver, and has taken or will take all necessary action to authorise its entry into, performance and delivery of the Minister Buildco Debenture and this Guarantee and Indemnity and the transactions contemplated thereby.
- (5) No limit on the Guarantor's powers will be exceeded as a result of the borrowing, grant of security or giving of guarantees or indemnities contemplated by herein.

##### **Validity and admissibility in evidence**

- (6) All Authorisations required:
  - (a) to enable the Guarantor lawfully to enter into, exercise its rights and comply with its obligations in this Guarantee and Indemnity and the Minister Security Documents to which it is or will be a party; and
  - (b) to make this Guarantee and Indemnity and the Minister Security Documents to which it is or will be a party admissible in evidence as evidence in Ireland,have been obtained or effected and are in full force and effect on the date hereof.

##### **Insolvency**

- (7) No corporate action, legal proceeding or other procedure or step in relation to the winding up, liquidation, insolvency, examinership, creditors' process or similar/analogous process has been taken or, to the knowledge of the Guarantor, threatened in relation to it;

##### **No proceedings pending or threatened**

- (8) No litigation, arbitration or administrative proceedings or investigations of, or before, any court, arbitral body or agency have (to the best of the Guarantor's knowledge and belief (having made due and careful enquiry)) been started or threatened against it

which has or is reasonably likely to have a material adverse effect on the financial condition of the Guarantor as the case may be.

## **5. ENFORCEMENT**

### **(1) Payment or Performance on Demand**

Following written demand by the Minister in accordance with clause 5(2) below, the Guarantor shall (without prejudice to the generality of all the provisions hereof) pay, and discharge to or procure the performance for, the Minister of all the Guaranteed Obligations PROVIDED that the Minister may capitalize all moneys the subject of such demand if such moneys are not paid on demand and interest shall accrue on such capitalized sum against the Guarantor at the rate of interest chargeable to NBI DAC pursuant to the Project Agreement.

### **(2) Demand for Payment**

The demand herein referred to shall mean a demand for payment, discharge or performance of the Guaranteed Obligations made by the Minister or on behalf of the Minister by any law agent or solicitor, secretary, agent, manager, clerical officer, employee or other officer or servant of the Minister upon the Guarantor by notice in writing and such demand may in the case of money owing or obligations breached or outstanding or otherwise only be made on and at any time after the occurrence of an Enforcement Event (as defined in the Minister NBPco Debenture) and separate demands may be made in respect of separate outstanding Guaranteed Obligations at different times.

### **(3) Certificates**

A certificate in writing signed by any duly authorised officer or officers of the Minister stating (i) the amount at any particular time due and payable or (ii) the obligation remaining outstanding or undischarged by the Guarantor or NBI DAC to the Minister shall (save in the case of manifest error) be conclusive evidence as against the Guarantor.

### **(4) No Withholding**

- (a) The Guarantor shall pay all moneys in full without any deduction set-off counterclaim or withholding whatsoever.
- (b) If the Guarantor shall be required by law to make any deduction or withholding from any payment then the Guarantor shall ensure that such deduction or withholding will not exceed the minimum legal liability therefor and shall forthwith pay to the Minister such additional amount as will result in the receipt by the Minister of a net amount equal to the amount it would have received had no such deduction or withholding been required to be made PROVIDED that if the Minister receives a credit against, relief or remission for a repayment of taxes as a result of any such deduction made by the Guarantor that credit, relief or remission shall be passed back to the Guarantor.

### **(5) Statute of Limitations**

Neither the Statute of Limitations nor any other prescriptive legislation shall commence to run in favour of the Guarantor until demand for payment as herein mentioned shall have been made upon the Guarantor under this document.



(6) **Notices**

Such demand shall be deemed to be made when written notice of such demand is delivered by hand or sent by prepaid post to the Guarantor at the address of the Guarantor set out in page 1 hereof or such other address as is believed by the Minister to be a business address of the Guarantor and if posted by prepaid post, such demand shall be deemed to be made twenty-four hours after such demand is put in the post.

**6. INTERPRETATION**

In this Guarantee and Indemnity the definitions and interpretation provisions set out in Clause 1.2 of the Project Agreement shall apply in the interpretation of this Guarantee and Indemnity and in addition:-

(1) **"guarantee"**

In this document the expression "guarantee" shall mean the obligations of the Guarantor specified in paragraph (a) of clause 1.

(2) **"Guaranteed Obligations"** means all present and future monies, obligations and liabilities due by NBI DAC to the Minister, whether actual or contingent, as principal, guarantor, surety, indemnifier or otherwise and all other covenants, representations, warranties, undertakings and performance obligations undertaken by NBI DAC to the Minister pursuant to the Minister Security Documents, Project Agreement and the Minister Subordination Deed or pursuant to any other contract, document or agreement of any sort entered into by NBI DAC with the Minister in connection with the Project Agreement, in each case falling due during the Contract Term. Any reference to the **"Guaranteed Obligations"** includes a reference to any of them.(3) **"here-"**

The words such as "hereunder", "hereto", "hereof" and "herein" and other words commencing with "here" shall refer to the whole of this document and not to any particular section or clause hereof.

(4) **"indemnity"**

In this document the expression "indemnity" shall mean the obligations of the Guarantor specified in paragraph (b) of clause 1.

(5) **"Minister Buildco Debenture"** means the debenture between the Minister and the Guarantor dated on or about the date of this Guarantee and Indemnity.(6) **"The Minister"**

The expression "the Minister" shall include its nominee, successors and assigns and the holders for the time being of this Guarantee and Indemnity.

(7) **Persons**

Any reference herein to a person shall if the context so requires apply to a company, an individual, partnership or unincorporated association.

- (8) **Singular etc**  
Words importing the singular shall where the context so requires or admits include the plural and vice versa and reference to the masculine, feminine or neuter genders shall include references to the other genders.
- (9) **Sections etc**  
Any reference to a clause sub-clause paragraph or sub-paragraph shall be reference to a clause sub-clause paragraph or sub-paragraph (as the case may be) hereof and any reference in a clause to a sub-clause paragraph or sub-paragraph shall be reference to a sub-clause paragraph or sub-paragraph of the clause sub-clause or paragraph in which the reference is contained.
- (10) **Headings**  
The headings and captions to the clauses herein and the numbering are inserted for convenience of reference only and shall not be considered a part of or affect the construction or interpretation of this document.
- (11) **Legislation**  
Any reference herein to any legislation shall be deemed to include reference to such legislation as amended, extended or otherwise modified by any subsequent legislation and shall also be deemed to include reference to all regulations made or taking effect as if made thereunder as from time to time amended or re-enacted by subsequent legislation or regulations.
- (12) **Successors**  
This Guarantee and Indemnity shall enure to the benefit of and be binding upon the respective parties hereto and their respective successors and permitted assigns.
- (13) **Severability**
- (a) If at any time any one or more of the provisions of this document is or becomes invalid illegal or unenforceable in any jurisdiction in any respect under any law the validity legality and enforceability of the remaining provisions hereof shall not in any way be affected or impaired thereby;
  - (b) If at any time the guarantee and/or indemnity herein is or becomes invalid or unenforceable in whole or in part against the Guarantor or the guarantee and/or the indemnity (as the case may be) shall be deemed to continue in full force and effect save to the extent that the guarantee and/or the indemnity has become invalid or unenforceable.
- (14) **Waivers**  
No delays by the Minister in exercising or the omission by the Minister to exercise any right power or privilege hereunder shall impair such right power or privilege or be construed as a waiver of such right or power or privilege nor shall any singular or partial exercise of any right power or privilege preclude any further exercise thereof or the exercise of any other right power or privilege.
- (15) **Exercise of Rights**  
The rights and remedies herein provided are cumulative and not exclusive of any rights and remedies provided by law or otherwise.

(16) **Amendments**  
No modification of any provision of this document shall be binding unless the same shall be evidenced in writing duly executed under seal.

(17) **Proper Law**  
All disputes between the parties arising out of or in any way relating to the Guarantee and Indemnity or any other disputes between the parties in any way connected with the subject matter of the Guarantee and Indemnity shall be governed by the laws of Ireland.

Each of the parties hereby submits to the exclusive jurisdiction of the Irish courts for the purpose of any proceedings arising out of or in any way relating to this Guarantee and Indemnity or any other proceedings in any way connected with the subject matter of this Guarantee and Indemnity.

## **7. ASSIGNMENT**

(a) The Guarantor shall not, without prior written consent of the Minister, assign any of its rights, benefits or obligations contained in this Guarantee and Indemnity.

(b) The Minister may assign or transfer all or any of its rights, benefits or obligations contained herein to any party to whom the Project Agreement is transferred by the Minister in accordance with its terms, but not otherwise without the prior written consent of the Guarantor.

**IN WITNESS** of which the Guarantor and the Minister have executed and delivered this document as a deed on the date first written above.

**EXECUTION PAGES**

**THE GUARANTOR**

GIVEN under the common seal of  
**NBI DEPLOYMENT DAC**  
and delivered as a deed:-

{COMMON SEAL}

\_\_\_\_\_  
Signature of Director

\_\_\_\_\_  
Print Name

**THE MINISTER**

GIVEN under the common seal of

**THE MINISTER FOR  
COMMUNICATIONS, CLIMATE  
ACTION AND ENVIRONMENT**  
(acting by Ciarán Ó hÓbáin, a person  
duly authorised pursuant to section  
15(4) of the Ministers and Secretaries  
Act 1924) and delivered as a deed

{COMMON SEAL}

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Signature of Ciarán Ó hÓbáin

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Print Address

\_\_\_\_\_  
Witness Occupation