

## SECTION 35 ORDER

**Order No. 1/08 – Batelco's obligation to provide Customer Access Tail Service**

### **Section 35 Order No. 1/08 Batelco's obligation to provide Customer Access Tail Service**

An Order issued by the Telecommunications  
Regulatory Authority under section 35 of the  
Telecommunications Law

30 March 2008

LAU/0308/100



هيئة  
تنظيم  
الاتصالات  
Telecommunications  
Regulatory  
Authority

# SECTION 35 ORDER

## Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service

### CONTENTS

<b>ORDER .....</b>	<b>1</b>
<b>LEGAL BASIS AND REASONING FOR ORDER NO 1 OF 2008.....</b>	<b>3</b>
<b>2    FACTUAL BACKGROUND .....</b>	<b>4</b>
<b>3    LEGAL OBLIGATION FOR BATELCO TO PROVIDE CAT SERVICES .....</b>	<b>5</b>
<b>3(A)    2CONNECT’S ALLEGED FAILURE TO COMPLY WITH THE FORECASTING PROVISIONS.....</b>	<b>6</b>
<b>3(B)    INSUFFICIENT CAPACITY TO PROVIDE THE REQUESTED SERVICES .....</b>	<b>7</b>
<b>3(B)(I)    WACC DETERMINATION.....</b>	<b>10</b>
<b>3(B)(II)    STRANDED ASSETS .....</b>	<b>11</b>
<b>3(B)(II)(A)    INVESTMENT REQUIRED IN THE EXISTING NETWORK.....</b>	<b>12</b>
<b>3(B)(II)(B)    TRANSITION TO THE NEXT GENERATION NETWORK.....</b>	<b>13</b>
<b>3(B)(II)(C)    DEMAND FOR CAPACITY IN THE RELEVANT AREAS.....</b>	<b>13</b>
<b>3(B)(II)(D)    BATELCO’S OPPORTUNITY TO SEEK AMENDMENTS TO REFERENCE OFFER PROVISIONS ON CAT SERVICES.....</b>	<b>14</b>
<b>3(B)(II)(E)    TECHNOLOGY NEUTRALITY.....</b>	<b>16</b>
<b>4.    SPECIFICITY OF ORDER .....</b>	<b>17</b>
<b>5.    TRA’S RIGHT TO INTERVENE.....</b>	<b>17</b>
<b>6.    ESTABLISHMENT OF AN INFRINGEMENT .....</b>	<b>17</b>
<b>7.    BATELCO’S BREACH AND REQUIRED REMEDIAL ACTION .....</b>	<b>18</b>
<b>8.    ISSUANCE OF ORDER.....</b>	<b>18</b>
<b>9.    DETERMINATION OF FINE .....</b>	<b>19</b>
<b>10.    CONFIDENTIALITY .....</b>	<b>21</b>

## SECTION 35 ORDER

### **Order No. 1/08 – Batelco's obligation to provide Customer Access Tail Service**

#### **ORDER**

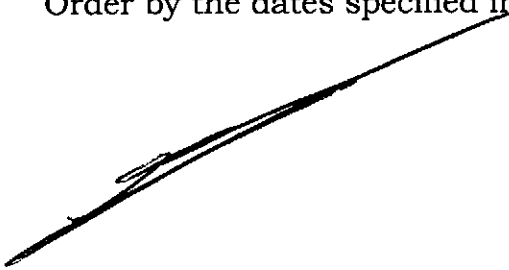
- 1 Pursuant to section 35 of the Telecommunications Law, TRA provided Batelco with written notice on 11 February 2008 (ref.: TRA/LAU/0208/048) of its intention to issue an Order under section 35 for failure to provide wholesale leased line services under s.57(e) of the Telecommunications Law, Articles 3.2 and 5.4 of the Access Regulation, Section 13.1 of its National Fixed Services License and clause 3.2(b) of Schedule 1, Service Description 2-6 and clause 3.3 of Schedule 5 of the Reference Offer, and as outlined in the reasoning attached to this Order.
- 2 As required by section 35(b) of the Telecommunications Law TRA notified Batelco of:
  - i. the Order to be issued and its effect;
  - ii. aspects of the breach of the Law and the Licenses; and
  - iii. a notice period of 30 days to respond to the Letter.
- 3 For failing to provide the wholesale leased line services under s.57(e) of the Telecommunications Law, Articles 3.2 and 5.4 of the Access Regulation, Section 13.1 of its National Fixed Services License and clause 3.2(b) of Schedule 1, Service Description 2-6 and clause 3.3 of Schedule 5 of the Reference Offer, TRA orders Batelco to:
  - I. provide by 1 May 2008 all remaining outstanding orders from 2Connect for CAT Services (whether provided upon UMUX or SDH equipment or other technology) from those listed on the attachment of Batelco's letter dated 23 September 2007 under Schedule 1, Service Description 2-6, of Batelco's approved Reference Offer at the prices established by Order No. 1 of 2007 on the Reference Access Offer, issued on 23 May 2007.; and
  - II. pay a fine of BD100,000 no later than 30 Calendar Days from the date of this Order.
- 4 TRA will continue to monitor Batelco's compliance with the provisions referred to in this Order and reserves its right to issue further fines for continued or repeated breaches.
5. The fine should be transferred to the TRA's account:

Account Name: Telecommunications Regulatory Authority  
Account Number: 1-0000005433-4  
Bank Name: BBK

## SECTION 35 ORDER

<b>Order No. 1/08 – Batelco's obligation to provide Customer Access Tail Service</b>
--

6. Batelco is formally warned pursuant to the requirements of section 35(d)(3) of the Telecommunications Law that its Licenses may be revoked if the Licensee fails to comply with the directions of this Order by the dates specified in paragraphs 3(I) to 3(II) above.



For the Telecommunications Regulatory Authority  
Alan Horne  
General Director  
30 March 2008

## SECTION 35 ORDER

### Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service

#### Legal Basis and Reasoning for Order No 1 of 2008

##### 1 Whereas:

- 1.1 Bahrain Telecommunications Company B.S.C., a company incorporated in the Kingdom of Bahrain with commercial registration number 11700, (“**Batelco**”) provides services pursuant to section 80 of the Telecommunications Law of the Kingdom of Bahrain, Legislative Decree No. 48 of 2002 (the “**Telecommunications Law**”), and various licences granted to Batelco by the Telecommunications Regulatory Authority of the Kingdom of Bahrain (“**TRA**”) on 21 June 2003, which were reissued on 14 June 2005, including a national fixed services licence (the “**Licence**”);
- 1.2 pursuant to its powers under section 3(c)(1) of the Telecommunications Law to issue regulations as may be necessary for the implementation of provisions of the Telecommunications Law and its powers under section 57(e) of the Telecommunications Law to issue a regulation with regard to access, on 30 April 2005 TRA issued Regulation No. 1 of 2005 on Access Regulation (the “**Access Regulation**”);
- 1.3 Batelco’s weighted average cost of capital (“**WACC**”) was determined in Determination No. 3 of 2005 on Batelco’s Cost of Capital, which was issued by TRA on 20 November 2005 (the “**WACC Determination**”);
- 1.4 pursuant to the requirement set out at Article 2.1 of the Access Regulation, TRA issued Determination No. 1 of 2006 on dominance in wholesale markets by Batelco on 22 January 2006 (the “**Dominance Determination**”) and determined Batelco to be dominant in, *inter alia*, the wholesale market for fixed access to customer premises (including high-bandwidth, broadband and narrowband access);
- 1.5 pursuant to Article 5.3 of the Access Regulation, which provides that where TRA determines that any of the terms and conditions or tariffs contained in a reference access offer submitted to it are not fair, reasonable and non-discriminatory, it will issue an order specifying the terms and conditions that it does not approve and shall state the terms and conditions that shall apply in a notice stating in writing the order to be issued, on 23 May 2007, TRA issued Order No. 1 of 2007 on the reference access offer (the “**RAO Order**”);
- 1.6 pursuant to article 5.5 of the Access Regulation Batelco published a reference offer on its website, which at the date of this Order is

## SECTION 35 ORDER

### Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service

available online at <http://www.batelco.bh/reference.asp> (the “**Reference Offer**”);

- 1.7 pursuant to Section 35 of the Telecommunications Law, TRA issued a Draft Order regarding Batelco’s obligation to provide Customer Access Tail Service (the “**Draft Order**”) on 11 February 2008; and
- 1.8 Batelco replied to this Draft Section 35 Order on 13 March 2008 by a letter of reply to the Draft Order (“**Batelco’s Reply Letter to the Draft Order**”), including an Annex containing further legal argument against the Draft Orders, (“**Batelco’s Reply Annex to the Draft Order**”)<sup>1</sup>;

for the reasons set out below, TRA orders Batelco to comply with the obligations set out in this Order.

## 2 **Factual background**

- 2.1 Batelco offers public telecommunications operators with individual telecommunications licences (referred to in the Reference Offer and herein as “**access seekers**”) wholesale dedicated private leased circuit services, including Customer Access Tail (“**CAT**”) services. The terms of the offer are set out in the Reference Offer; in particular in Schedule 1, Service Description 2-6 (the “**CAT Service Description**”), Schedule 5 of the Reference Offer on Ordering and Provisioning and Schedule 9 of the Reference Offer on Supply Terms.
- 2.2 Batelco wrote to TRA on 23 September 2007 (ref.: WS/024/07) (“**Batelco’s 23 September Letter**”) stating that due to insufficient capacity on the UMUX nodes that connect the Manama, Seef and Diplomatic Area districts (“**the Relevant Areas**”) to Batelco’s UMUX core network it was unable to fulfil certain requests for CAT Services from 2Connect WLL, a company incorporated in the Kingdom of Bahrain with commercial registration number 53801 (“**2Connect**”) which was issued with an individual licence for the provision of national fixed services on 1 August 2005, unless Batelco and 2Connect are allowed to enter into a commercial agreement outside the Reference Offer for the provision of such services.
- 2.3 TRA responded to Batelco’s initial letter on 4 October 2007 (ref.: GDO/1007/072) requesting further information from Batelco (“**TRA’s 4 October Letter**”).

---

<sup>1</sup> The text of the Order explicitly responds to the main relevant arguments raised by Batelco in its response to the Draft Order. With regard to other relevant arguments that are not covered explicitly, TRA considers that the text of the Order (including the original text of the Draft Order) is sufficient clear with regard to TRA’s view towards them.

## SECTION 35 ORDER

### **Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service**

- 2.4 Batelco responded to TRA’s 4 October Letter on 22 October 2007 (ref.: CL/426/2007) regarding 2Connect’s requests for CAT services (“**Batelco’s 22 October Letter**”) and on 4 November 2007 (ref.: CL/436/07) regarding its wishes to enter into commercial agreements outside the terms of the Reference Offer (“**Batelco’s 4 November Letter**”).
- 2.5 After due consideration of Batelco’s 23 September Letter, 22 October Letter and 4 November Letter and pursuant to its powers under Section 35 of the Telecommunications Law, TRA issued a Draft Order on 11 February 2008 (“**the Draft Order**”);
- 2.6 On 13 March 2008, TRA received Batelco’s Batelco’s Reply Letter to the Draft Order and Batelco’s Reply Annex to the Draft Order;
- 2.7 TRA has duly considered Batelco’s 23 September, 22 October and 4 November Letters and Batelco’s Reply Letter and Annex to the Draft Order and hereby issues this final Order;

### **3 Legal obligation for Batelco to provide CAT services**

- 3.1 As noted above, under paragraph III of the Dominance Determination, Batelco holds a dominant position in the wholesale market for fixed access to customer premises (including high-bandwidth, broadband and narrowband access) in the Kingdom of Bahrain, with the exception of the Amwaj Island area. According to section 3.2 of the explanatory part of the Dominance Determination, one of the relevant inputs into this market is wholesale leased lines.
- 3.2 Pursuant to paragraph 1 of section 57(e) of the Telecommunications Law, Batelco, as a public telecommunications operator that is in a dominant position, must offer upon request access to its telecommunications network on fair and reasonable terms to any Licensed Operator upon request. This obligation is reiterated in condition 13.1 of Batelco’s Licence
- 3.3 The obligation for Batelco to provide access to wholesale leased lines upon request by access seekers is set out in the CAT Service Description, which describes the CAT service as, “*a wholesale dedicated private leased circuit service for carrying Access Seeker’s traffic within Bahrain between an End User premises and an Access Seeker’s Point of Presence*”<sup>2</sup>. The CAT Service Description does not

---

<sup>2</sup> “CAT Service” is further defined in the CAT Service Description to mean dedicated local private leased circuit transmission capacity for digital point-to-point communications within Bahrain between an End User Premises and an Access Seeker’s Point of Presence

## SECTION 35 ORDER

<b>Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service</b>
--

specify the use of any particular technology for the provision of such services.

- 3.4 Under clause 3.2(b) of the CAT Service Description, subject to the access seeker fulfilling its obligations under Schedule 9 of the Reference Offer, Batelco shall provide the CAT Service.
- 3.5 In Batelco’s 23 September Letter, Batelco’s 22 October Letter, Batelco’s 4 November Letter and Batelco’s Reply Letter and Annex to the Draft Order, Batelco submitted two reasons for its failure to supply the CAT service to 2Connect. First, Batelco claims that 2Connect did not comply with the forecasting obligations set out in the Reference Offer. Second, Batelco asserts that it does not have an obligation to provide CAT services where it does not have sufficient capacity. In addition, in its Reply Annex to the Draft Order, Batelco comments on the alleged breaches and the legal provisions relied on by TRA. These reasons and comments are considered below.

**3(A) 2Connect’s alleged failure to comply with the forecasting provisions**

- 3.6 Access seekers have an obligation to forecast their expected requirements over the following twelve month period. Specifically, under paragraph 3.1 of the CAT Service Description, access seekers should provide:

*“... a forecast of the CAT Services the Access Seeker will require, reasonably broken down by location and by capacity, in the form required by the Access Provider from time to time, or if Access Provider has not provided any form, then in a reasonable format devised by the Access Seeker”.*

- 3.7 In its 23 September Letter, Batelco stated that 2Connect had provided sufficiently detailed forecasts. Batelco noted that:

*“... 2Connect complied with its obligations in respect of forecasts of CATs orders, but the process does not oblige 2Connect to specify the areas in which the circuits are to be provided on the customer end”.*

- 3.8 Mr. Simon Topping, who at the time was Head of Legal and Regulatory Affairs at Batelco, and Mr. John Ford, Head of Wholesale and Carrier Relations at Batelco, further confirmed Batelco’s satisfaction with 2Connect’s CAT forecast at a meeting with TRA on 25 September 2007.

- 3.9 Batelco subsequently recanted its satisfaction with 2Connect’s forecast. In its 22 October Letter, just under a month after its first two confirmations that 2Connect submitted a reasonable request



## SECTION 35 ORDER

### Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service

and complied with Batelco’s own forecasting requirements, Batelco claimed that 2Connect failed to comply with this forecasting obligation as it did not precisely specify “A” and “B” locations for the CAT service, but stated the location as “various” in a number of forecasts.

- 3.10 In Sections 7 and 9 of its Reply Letter to the Draft Order, Batelco’s position changes again, and it now submits the argument that 2Connect has not complied with its forecasting requirement at all, and in fact submitted only one flawed forecast in November 2006. Batelco states in Paragraph 3.C.2 of the Reply Annex to the Draft Order that *“it [Batelco] was not at any time legally obliged to supply any circuits ordered because 2Connect had failed to comply with its forecasting obligations”*. In reply to TRA’s argument that certain Batelco representatives have confirmed compliance, Batelco states that *“what Batelco may have thought at any particular time concerning the compliance or non-compliance does not alter the fact that legal obligation existed and 2Connect failed to comply”*.
- 3.11 TRA does not accept Batelco’s submission that 2Connect failed to meet its forecasting requirements. The assertion that 2Connect failed to comply with the forecasting obligations was only first raised by Batelco in its 22 October Letter and then only to the extent that 2Connect allegedly failed to provide A end and B end locations. Batelco then changed its position again to state that in fact no eligible forecast was received at all. As confirmed by Batelco’s statements referred to paragraphs 3.7 and 3.8 above, at the time when 2Connect submitted its orders Batelco was satisfied that these orders were reasonable requests and complied with forecasting requirements. Therefore, having regard to paragraph 3.1 of the CAT Service Description, 2Connect should reasonably be considered as having complied with forecasting requirements, applied in practice by Batelco, as they were at the time of 2Connect submitting its orders.
- 3.12 In any event Batelco’s arguments regarding 2Connect’s allegedly flawed forecasting are irrelevant for the purposes of this Order. In spite of any alleged flaw in 2Connect’s forecasting from Batelco’s 23 September and 22 October Letters it can reasonably be inferred that Batelco did not reject the Orders submitted by 2Connect in accordance with the provisions of Schedule 5 of the Reference Offer.

### **3(B) Insufficient capacity to provide the requested services**

- 3.13 In its 23 September Letter Batelco states that it was unable to deliver the requested wholesale leased line services to 2Connect as

## SECTION 35 ORDER

### Order No. 1/08 – Batelco's obligation to provide Customer Access Tail Service

there was no capacity available in key nodes of the network over which this service is supplied. It further states:

*"To explain, CATs are supplied over Batelco's "UMUX core network". 2Connect's point of presence is connected to the UMUX node of this network in Manama. That node is in turn connected to the Seef UMUX node [sic.] and to the Diplomat UMUX nodes which serve those respective areas. Unfortunately, there is no capacity available on either of these nodes. In particular, UMUX capacity is obtained in multiples of E1 (2Mbps) and there is insufficient capacity free to supply a further E1 transmission link on this UMUX multiplexer node."*

- 3.14 In Batelco's 4 November Letter, Batelco states that it will not provide the wholesale leased line services in the Relevant Areas if terms of the Reference Offer have to be applied. Specifically, Batelco states:

*"As to further action that Batelco intends to take, Batelco still considers that, apart from its efforts to make the most of the remaining capacity on the Seef, Manama and Diplomat nodes, which is ongoing, the best way forward is for Batelco and 2Connect to enter into a commercial arrangement outside of the Reference Offer."*

- 3.15 In section 10 of Batelco's Reply Letter to the Draft Order, Batelco states:

*"Even if 2Connect had complied with the requisite obligations, the Service Description and the Supply Terms make it clear that there is no obligation on Batelco to supply where there is no available capacity...The TRA's Draft Order seems to imply that Batelco is obliged to somehow fully predict full network capacity requirements at all times, and make appropriate investments to ensure that capacity issues do not arise. The TRA's Reference Access Offer Order of 12 July 2006 confirms that this is not the correct interpretation."*

- 3.16 Batelco quotes Clause 4.1(c)(ii) of the Order No.2 of 2006 the Reference Access Offer Order (the **"2006 RAO Order"**) which states:

*"The Authority acknowledges that the availability of CATs will depend upon physical constraints, so that it is fair and reasonable to provide that the service will be subject to availability...In any event, if there is a dispute between licensees then this can in due time be deferred to the Authority".*

- 3.17 For the reasons set out below, TRA does not consider this to negate the arguments raised in TRA's 4 October Letter and the Draft Order.

## SECTION 35 ORDER

### **Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service**

- 3.18 Article 3.2 of the Access Regulation states that a licensed operator that is obliged to meet all reasonable requests for access may only refuse to provide such access on the basis of objective criteria related to technical feasibility or maintenance of network integrity. TRA does not believe that refusal on the ground relating to technical feasibility can be justified in every case where expenditure specific to a service and/or wholesale client is needed. In fact, under clause 3.3 of Schedule 5 of the Reference Offer, Batelco can reject an order for lack of then available infrastructure or capacity on the proviso that it must use reasonable endeavours to accept all orders. Specifically, under clause 3.3(d) of Schedule 5 of the Reference Offer states:

*“Batelco will use reasonable endeavors to accept all Orders. Batelco may reject an Order or a variation to an Order only if...the Order is not capable of being fulfilled on the basis of Batelco’s then available infrastructure or capacity provided that Batelco shall use reasonable endeavors to increase the available infrastructure as soon as commercially practicable and provided that, at all times, Batelco shall make available infrastructure and capacity on a non-discriminatory basis for all interconnecting Licensed Operators and itself;”*

- 3.19 TRA considers that Batelco’s argument related to Clause 4.1(c)(iii) of the 2006 RAO Order should be analysed in the context of the purpose of the specific clause. The cited clause states in full:

*“The Authority acknowledges that the availability of CATs will depend upon physical constraints, so that it is fair and reasonable to provide that the service will be subject to availability. However, the Authority is satisfied that a transparent means needs to be developed to handle multiple requests for CAT services with respect to any particular CAT, to ensure non-discrimination in the determination of whether there is availability for Batelco to provide any CAT service. The Authority therefore considers that it is fair and reasonable for a transparent Priority Policy to be adopted for the handling of such multiple requests”*

- 3.20 As is clear from the above, TRA acknowledges that there might be some instances when physical constraints will affect Batelco’s ability to make CATs available. For this reason, TRA considered it necessary that a Priority Policy be developed to deal with multiple requests in a non-discriminatory way. However this statement does not absolve Batelco from providing CATs in all the possible instances when Batelco claims that there is the lack of capacity. Clause 3.3(d) of the Schedule 5 the Reference Offer allows Batelco to reject an Order where there is no available capacity only

## SECTION 35 ORDER

### Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service

***“...provided that Batelco shall use reasonable endeavours to increase the available infrastructure as soon as commercially practicable”.***

- 3.21 Batelco’s arguments for refusing to provide services in this specific case relate to either: (a) an assertion that the regulated weighted average cost of capital (“WACC”) provides for insufficient returns over its investment; or (b) an assertion that an investment in the required infrastructure may result in stranded assets.

#### **3(B)(i) WACC Determination**

- 3.22 In Batelco’s 23 September Letter, Batelco stated that:

*“... it is clear to Batelco wholesale that there is no possibility of capital expenditure and further costs being made available from within Batelco if the rate of return of the wholesale department is only is only [sic.] cost plus WACC under the Reference Offer, since this will be rejected”.*

- 3.23 Batelco reiterated this point in its second response to TRA, dated 4 November 2007, cited at paragraph 3.14 above.

- 3.24 At a meeting attended by representatives of TRA and Batelco on 28 November 2007, Batelco further explained its process for determining capital investment decisions. During that meeting, Mr. Peter Kaliaropoulos, the Chief Executive of Batelco, explained that any requests for investments that were not anticipated at the beginning of the year must be submitted to Batelco’s capital review board. Mr. Kaliaropoulos stated that the capital review board would compare the profits generated by Batelco’s retail arm with the profits generated by an investment by Batelco’s wholesale division, which amounted to the WACC. The WACC Determination set the WACC at 12.2%. Mr. Kaliaropoulos noted that upon comparison of these rates of return, it is not foreseeable that the capital review board would approve infrastructure investments requested by Batelco’s wholesale division.

- 3.25 Therefore, it appears from Batelco’s 23 September Letter and 4 November Letter and the meeting dated 28 November 2007 that Batelco considers it has no obligation to provide services requested under the Reference Offer at the charges set out in the Reference Offer as Batelco does not believe that the regulated rate of return provided by the imposition of WACC generates sufficient return on investment.

- 3.26 Batelco considers that TRA mischaracterises Batelco’s objection related to WACC and at paragraph 3.E.2 of its Reply Annex to the Draft Order states that *“Batelco was putting to TRA that returns*

## SECTION 35 ORDER

### Order No. 1/08 – Batelco's obligation to provide Customer Access Tail Service

would not be representative of the additional investment in any way". This, in TRA's view, is simply a repetition of Batelco's position which does not seem to have changed from that expressed by Batelco in its 23 September, 22 October and 4 November Letters.

- 3.27 Article 6.1 of the Access Regulation states that tariffs for all access services shall be fair, reasonable and non-discriminatory. As explained above, TRA, acting in accordance with paragraph 3 of section 57(e) of the Telecommunications Law and Article 5.3 of the Access Regulation, determined the tariffs for providing CAT Services that it considered reasonable by issuing the RAO Order. Section 3.3(e) of the RAO Order has clearly stated that TRA considers that additional "*wholesale margin over network costs for CAT services ... is not fair and reasonable*" as "*each of the network cost elements ... includes a cost of capital of 12.2 percent based upon the regulated rate of return for the service*". Additionally, section 2.3 of the RAO Order states that "*appropriate incentives for investment for regulated services are cost based tariffs*" and no further incentives for investment beyond WACC is needed.
- 3.28 Batelco argues at Section 2 of its Reply Annex to the Draft Order that Clause 4(e) of the CAT Service Description identifies that where investment by Batelco is undertaken because of capacity constraints involving insufficient existing transmission and cable routes being available, it may seek a further contribution from the licensed operator on the basis of a commercial arrangement. TRA disagrees with this. It is clear that the Availability Charges apply only where the Access Seeker seeks specific and non-industry standard installation requirements or where the contract period is less than the minimum Service Period. Batelco has not claimed that 2Connect sought anything different from that offered under the RAO, such that clause 4(e) of the CAT Service Description should apply.
- 3.29 Therefore Batelco's justification here for refusing to provide the requested services is contrary to Batelco's legal obligations under section 57(e) of the Telecommunications Law, articles 3.2 and 5.4 of the Access Regulation, Section 13.1 of its National Fixed Services License and clause 3.2(b) of Schedule 1, Service Description 2-6, and clause 3.3 of Schedule 5 of the Reference Offer.

#### **3(B)(ii) Stranded assets**

- 3.30 At the meeting of 28 November 2007 Batelco representatives stated that the obligation to provide services was limited to services offered on existing legacy networks only and that services provided over new infrastructure are not regulated. Mr. Peter Kaliaropoulos stated

## SECTION 35 ORDER

### Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service

that at the end of 2008 UMUX based CAT Services would not exist. When TRA representatives noted that TRA would not focus on the technology by which the CAT Service is being provided and referred to the CAT Service as being a point to point connection, Mr. Kaliaropoulos stated that differing functionality amounted to a different service.

- 3.31 In an e-mail from Peter Kaliaropoulos to Alan Horne, the General Director of TRA, on 29 November 2007, Mr. Kaliaropoulos stated:

*“Investment required to support RIO/RAO obligations are not being discriminated against in favour of retail services. The only case in which any issue of this nature has arisen as regards wholesale investment in relation to RIO/RAO services has been in connection with the CAT service, because it relates to a legacy network on which there are significant issues concerning stranded costs as you know. There is no retail proposal in this respect, so any investment proposal has to stand by its wholesale returns alone, and on that basis there is simply no business case for investment in new network infrastructure in a legacy system if the revenue is going to be equal to the approved costs plus determined WACC for an uncertain period.”*

- 3.32 TRA’s views on Batelco’s arguments outlined in paragraphs 3.30 and 3.31 above are set out below.

#### 3(B)(ii)(a) Investment required in the existing network

- 3.33 In its 23 September Letter, Batelco states that “UMUX capacity is obtained in multiples of E1 (2 Mbps)” and that Batelco at that date had received from 2Connect 44 CAT orders that had not been delivered. Mr. John Ford explained in a meeting with TRA on 25 September 2007 that the speed of most of these CATs is 512 kbps. On this basis TRA therefore understands that any capacity remaining, after fulfilling the requested orders, will not be disproportionately large such that it creates a significant excess of capacity, as the requested capacity can be obtained by increases of small increments relative to the size of the orders submitted.

- 3.34 Batelco stated in its 23 September, 22 October and 4 November Letters and at the meeting with TRA on 25 September 2007 that the investment required to remedy the lack of capacity and provide the CAT Service is in the UMUX infrastructure and SDH core network. However TRA understands that UMUX shelves and service cards and, even more so, SDH equipment can be reused to provide services to other wholesale or retail customers in the same or other locations.

## SECTION 35 ORDER

### **Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service**

#### 3(B)(ii)(b) Transition to the Next Generation Network

3.35 In Paragraph 3.H.2 of Batelco’s Reply Annex to the Draft Order, Batelco further claims that

*“In terms of UMUX Cards, Batelco has already optimized its network and is continuously trying to redistribute equipment and increase existing capacity...However, there are clear constraints on this from (a) the need to guarantee availability and some redundancy on the network as a whole and (b) the fact that new shelf space is required and this requires further investment. UMUX cards are only one part of the capacity constraints however. UMUX core termination and transmission are also constrained...Neither UMUX cards nor UMUX shelves nor UMUX termination nor UMUX transmission can be reused on the NGN Network”.*

3.36 At the same time Batelco states in Paragraph 3.K.2 of its Reply Annex to the Draft Order that *“there is still no solution which would deliver over NGN the CAT orders specified by 2Connect”*. Additionally, Batelco states in its reply to the Draft Order that *“it was not possible in 2007 nor will it be possible for several months, to supply a point-to-point service over MPLS that would enable Batelco to deliver the CAT orders specified by 2Connect”*.

3.37 As stated above in paragraph 3.1 of this Order, According to Clause 4.1 of the Dominance Determination Batelco has been found dominant in the wholesale market for access to customer premises, which includes leased lines as a relevant access input. Therefore, as explained above, Batelco has a legal obligation to provide CAT services. A situation in which Batelco effectively withdraws any Access product by neither providing it using existing technologies nor implementing the new ones to support it, is contrary to Batelco’s legal obligations as explained above.

#### 3(B)(ii)(c) Demand for Capacity in the Relevant Areas

3.38 In Batelco’s 23 September Letter, Batelco conceded that it *“was aware of this problem”* relating to limited capacity on the Seef, Manama and Diplomatic Area nodes and therefore highlighted a demand for the services.

3.39 The Seef, Manama and Diplomatic Area districts are the areas where many major business users are located and which are further actively developed. Batelco’s involvement in the activities of the Ministry of Works’ Central Planning Unit provided it with information relating to commercial expansion and business development potential throughout the northern and central regions of Manama.

## SECTION 35 ORDER

### **Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service**

- 3.40 Batelco did state in its 23 September Letter, that it “*had been hoping until recently that there would be a reduction in the capacity that was being utilized on these nodes*” but failed to state why it assumed that the Seef, Manama and Diplomatic Area districts, the key financial and business districts in the Kingdom of Bahrain, would have a reduced requirement for leased lines.
- 3.41 Batelco explains in Paragraph 3.I.2 of the Annex of its reply to the Draft Order the reasons behind this assumption, namely (i) inaccurate wholesale estimates resulting from the location of OLO premises and the phenomenon of doubling; and (ii) Batelco’s anticipation that capacity would be freed up on the UMUX by the removal of Batelco’s internal security/CCTV and possibly GSM capacity, which did not occur. This explanation does not negate the arguments above.
- 3.42 Furthermore, as noted at paragraph 3.12 above, Batelco has not formally rejected the outstanding orders in question. Therefore it is required now to provide the outstanding orders.

#### 3(B)(ii)(d) Batelco’s opportunity to seek amendments to Reference Offer provisions on CAT Services

- 3.43 The charges and minimum service periods in the Reference Offer are based, *inter alia*, on cost information provided by Batelco and then reviewed by TRA for either approval or ordering. Pursuant to article 5.1 of the Access Regulation, Batelco must submit a revised reference access offer to TRA for approval no later than six months from the date of publication of its previously published reference access offer. Therefore, Batelco has a frequent and regular opportunity to revise its costs and charges, terms and conditions and to limit its exposure to the possibility of stranded assets.
- 3.44 Given the frequency of the Reference Access Offer cycle and the relative currency of that particular RAO Order as at 27 June 2007<sup>3</sup>, its knowledge gained from participation in the activities of the Central Planning Unit and the forecasting requirements placed on Access Seekers, it would be reasonable to have expected Batelco to have foreseen capacity constraints and requirements within its network well in advance. Under such circumstances it would have been reasonable for Batelco to make provisions to ensure its continued compliance with its legal obligations.
- 3.45 In Paragraph 3.J.2 of the Reply Annex to the Draft Order, Batelco states that it has “*raised the issue of CAT capacity constraints to the*

---

<sup>3</sup> The date that the oldest undelivered CAT Service order from 2Connect was raised, according to the list attached to Batelco’s letter of 22 October 2007.



## SECTION 35 ORDER

### Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service

*TRA in late September [2007]” which was “the time at which Batelco had to assess the investment requirement because it was clear that there was a capacity constraint which was not going to disappear”. Batelco also notes that TRA “did not raise the possibility that one way to deal with stranded costs would be to make special arrangements relating to CAT pricing on terms in the RAO”. Batelco claims “without such a suggestion, Batelco would have no anticipation that this solution could be accepted by the TRA”.*

- 3.46 The arguments above cannot be accepted as reasonable. It is for Batelco to comply with legal obligations in force without specific direction from TRA. Furthermore, bearing in mind the asymmetry of information between Batelco and TRA, it is only Batelco that can know and make known the specific plans for its introduction of its own NGN and any proposed transition from the legacy technologies. Further the Reference Offer is based on the information provided by Batelco and only amended by TRA where it determines it unfair, unreasonable or discriminatory with regard to other licensed operators. It is up to Batelco to raise to TRA issues which can impact Batelco’s ability to implement its obligations, and not for TRA to anticipate them.
- 3.47 In Section 3 of its Reply Letter to the Draft Order, Batelco stated that the CAT Service, which is a ‘*dedicated circuit*’, does “*not apply on the NGN Network*”. Batelco explains in Section 2 of its Reply Letter to the Draft Order that it has “*decided to introduce NGN in 2004 in a 5 year programme (2005-2009)*” which will “*involve the replacement of a number of separate Batelco networks with a single IP/MPLS network providing multiple services*”. Additionally, Batelco proposed an NGN Layer 2 Solution offering a similar functionality to the CAT service, the availability of which Batelco has been anticipating since December 2006 (Section 3 of Batelco’s Reply Letter to the Draft Order).
- 3.48 It is therefore quite evident that Batelco was fully aware, since its decision to implement its NGN in 2004, that there will be direct implications on regulated products which Batelco is obliged to provide under Section 57 of the Telecommunications Law, especially in terms of service descriptions and charges. As such, Batelco could have used the appropriate legal channel available to it – the Reference Offer review cycle – to accommodate these changes well before September 2007.
- 3.49 On the contrary, Batelco, in its submissions leading up to the TRA’s RAO Order of 23 May 2007, did not raise the issue of migration of the CAT Service from one technology to another or otherwise investing in the UMUX node network over which the service is presently provided by, for instance, amending the costs stacks

## SECTION 35 ORDER

### **Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service**

provided to the TRA for assessment of the CAT service description. In fact TRA notes that Batelco has not sought any amendments to the CAT Services product as part of the reference offer cycle in 2006 or 2007.

- 3.50 Because of the reasons above it is evident that Batelco cannot simply change the terms and conditions of providing a specific service without using the appropriate channel to do this – i.e., the Reference Offer approval cycle.

#### 3(B)(ii)(e) Technology Neutrality

- 3.51 Neither the Reference Offer nor Access Regulation requires Batelco to use a specific technology for the provision of CAT services. On the contrary, clause 8.5 of Schedule 9, Supply Terms, of the Reference Offer states:

*“...a party has the right to modify, change or substitute underlying technology or the specifications of the Services to improve the functioning or performing of the Services or its Network provided that such modifications do not materially adversely alter the functioning or performance of the Services supplied to the other party. Such modifications may include replacement of elements of existing Network infrastructure or systems with alternate technology.”*

- 3.52 In Paragraph 3.A.2 of the Reply Annex to the Draft Order, Batelco claims that *“...the suggestion of technological neutrality is incorrect if it is taken to suggest that an NGN product would have fallen within the Service Description for the CAT”*. Furthermore, Batelco states that the CAT Service, which is a ‘dedicated circuit’, does *“not apply on the NGN Network”*.

- 3.53 TRA notes clause 3.6(c) of the CAT Service Description in Schedule 1, Service Description 2-6, which states

*“The Access Provider may at any time change the technical specification of the Service provided that any such changes do not materially affect the substance of the performance of the Service”.*

TRA notes that this clause itself makes a distinction between the service being provided and the underlying technology.

- 3.54 Therefore since TRA notes that nothing in the Service Description is technology specific, Batelco is free to establish a forward looking view to investments into provision of CAT Services and use a different technology, within the legal and regulatory constraints of the terms of the Reference Offer and Access Regulation.

## SECTION 35 ORDER

### Order No. 1/08 – Batelco's obligation to provide Customer Access Tail Service

#### 4. Specificity of Order

- 4.1 In Paragraph 1(a) of the Reply Annex to the Draft Order, Batelco states that *"neither the letter nor the Draft Order refer to any other parties other than 2Connect in respect of whom a breach of a supposed obligation to supply has occurred nor do such documents purport to explain such breaches."*
- 4.2 Although Batelco has a general obligation to provide Access products and in the particular context of this order, CAT services, TRA has taken into account Batelco's comment in this regard and has amended the Order to reflect this point and has therefore limited the remedial action required for this Order to the provision of the remainder of the 44 pending CAT services ordered by 2Connect and shown in the attachment to Batelco's 23 September Letter. This is without prejudice to TRA's power to take further action should Batelco fail to comply with this order, repeat the breaches or commit a similar offence.

#### 5. TRA's right to intervene

- 5.1 In section 13 of its Reply Letter to the Draft Order Batelco states:

*"This matter involves the application and interpretation of the Supply Agreement made between 2Connect and Batelco on the basis of the Reference Offer. The TRA should therefore only intervene in such case where a dispute has been referred to it...Batelco strongly rejects any suggestion that it has breached any of its legal obligations, and therefore considers that to adopt any order in relation to the above matter is unwarranted".*

- 5.2 According to the Section 3(c)(2) of the Telecommunications Law,

*"The Authority shall have the power to monitor and investigate compliance with the provision of this Law and any regulations, orders, determinations made hereunder, both on its own initiative and at the request of any person, and making such orders and determinations as are necessary to ensure compliance with this Law and any such regulations, orders and determinations".*

Therefore, a complaint from 2Connect is not a compulsory precondition for TRA take an enforcement action in this case.

#### 6. Establishment of an infringement

- 6.1 In Paragraph 1(b) of the Annex of its reply to the Draft Order, Batelco states:

## SECTION 35 ORDER

### **Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service**

*“Batelco does not consider that statements made to the TRA can amount to a failure to supply under any circumstances, in that it cannot be found to be in violation of any obligation or to be fined for its views and opinions alone. Equally, no alleged statements about an intention to reject or refuse can amount to a rejection or refusal”.*

- 6.2 TRA considers that there is sufficient evidence from the correspondence between TRA and Batelco, including the reply to the Draft Order and the specific statements Batelco has made to TRA, which denied any obligation to provide the remaining 2Connect CAT orders, that Batelco has not provided the CAT services, referred to in this Order. Therefore TRA considers that it has reasonably established that Batelco has actually committed the infringement (by failure to act), which leads to issuance of this Order.
- 6.3 Batelco’s admission of this breach is in fact further evidenced by the fact that Batelco has itself proposed in Paragraph 14 of its reply letter to the Draft Order *“to promptly establish a Rapid Deployment Task Force to ensure the expeditious delivery of all the outstanding CAT Services orders, hopefully well before the end of April 2008”*.

#### **7. Batelco’s Breach and Required Remedial Action**

- 7.1 TRA determines that Batelco is in breach of section 57(e) of the Telecommunications Law, Articles 3.2 and 5.4 of the Access Regulation, Section 13.1 of its National Fixed Services License and clause 3.2(b) of Schedule 1, Service Description 2-6, and clause 3.3 of Schedule 5 of the Reference Offer.
- 7.2 To remedy the breach Batelco must, by 1 May 2008 as proposed by Batelco in its Reply Letter to the Draft Order, provide the remaining CAT Service Orders which are still pending out of the 44 CAT Service Orders listed on the attachment of Batelco’s 23 September Letter, according to the terms, conditions and tariffs of the Reference Offer to 2Connect. ,

#### **8. Issuance of Order**

- 8.1 Pursuant to section 35 of the Telecommunications Law, TRA issues the attached Order to remedy the issues identified above.
- 8.2 The Order is without prejudice to any further orders or determinations that TRA may consider necessary under section 35 or 65 of the Telecommunications Law in connection with the conduct of Batelco described above.

## SECTION 35 ORDER

### **Order No. 1/08 – Batelco's obligation to provide Customer Access Tail Service**

#### **9. Determination of Fine**

- 9.1 Section 35(d)(2) of the Telecommunications Law states that TRA shall issue an order containing a suitable fine on the Licensee provided that such fine is objectively justified and non-discriminatory. The following criteria used to develop a suitable fine upon Batelco for this specific infringement are without prejudice to TRA's right to develop and publish fining guidelines or to apply different criteria in assessment of fines in other cases.
- 9.2 There is no limit in section 35 of the Telecommunications Law for the level of a fine for material breach of the Telecommunications Law or a License. However TRA notes that section 65 of the Telecommunications Law limits the fine to 10% of the annual revenues of the operator where the licensed operator has been deemed to be acting anti-competitively. As such TRA in this specific instance considers it reasonable that it will also limit the ultimate amount of fine under section 35 to 10% of the gross annual revenues of Batelco.
- 9.3 In determining what is a suitable fine TRA has considered the respective breaches, their duration, their effect, the deterrent effect of a fine and the fact that this is the first section 35 Order issued by TRA against Batelco.
- 9.4 Batelco's breaches consist of breaches of section 57(e) of the Telecommunications Law, articles 3.2 and 5.4 of the Access Regulation, section 13.1 of its National Fixed Services License and clause 3.2(b) of Schedule 1, Service Description 2-6, and clause 3.3 of Schedule 5 of the Reference Offer. TRA considers that the scope of instruments that the breaches have occurred in and Batelco's pattern of conduct with respect to the breaches show a disregard for its wholesale provision obligations and the related regulatory regime imposed upon it by the Telecommunications Law. As such TRA considers that the breaches are material and serious.
- 9.5 The breach has lasted since at least late June/early July 2007. As at the date of this Order the breaches have continued for approximately 9 months. TRA considers that, particularly in view of the seriousness and effect and potential effect of the breach that this is a significant period of time.
- 9.6 TRA considers that apart from being a material and serious breach of Batelco's obligations, that the breaches have unnecessarily delayed the provision of reasonably requested wholesale services to at least one licensed operator, being 2Connect. Bearing in mind that 2Connect has a significant number of clients that have requested services from it to be provided over the CAT Service it is

## SECTION 35 ORDER

### **Order No. 1/08 – Batelco's obligation to provide Customer Access Tail Service**

reasonable to consider that the delay in providing the CAT Service has affected not only the provision of 2Connect's services to its clients, but also 2Connect's reputation and relationships (business and legal) with its clients as well as the customer experience of 2Connect's clients.

- 9.7 As this case relates to Batelco's failure to provide wholesale services in the key financial and business districts of the Kingdom of Bahrain the TRA is concerned that such actions are generally affecting the telecommunications sector of the Kingdom of Bahrain as a whole i.e. operators and consumers.
- 9.8 TRA considers that a fine has two functions. Firstly, it must be a punishment for a licensee's breach of its legal obligations. Secondly, it must also act as a deterrent to the licensee in question and other licensees from repeating or continuing the breach. In this particular case, considering the scope and seriousness of the breaches and their effect upon 2Connect, its consumers and the telecommunications industry as a whole, TRA considers that the fine must be substantial enough to act as a deterrent.
- 9.9 Batelco's revenues for the year ending 31 December 2007 were BD204,527,000<sup>4</sup> as the basis for setting the fine.
- 9.10 As such, for the purposes of this Order, the ultimate level of fine the TRA considers it could issue upon Batelco is BD20,452,700, which constitutes 10% of Batelco's Annual Revenue for the Kingdom of Bahrain for the year ending 31 December 2007.
- 9.11 As noted TRA considers that due to the scope, duration, seriousness and effect of the breach that a substantial fine would be in order. However TRA notes that this is the first section 35 Order TRA has issued against Batelco and as such any fine issued should reflect this, whilst still being sufficient to be considered a deterrent.
- 9.12 Having considered the issues raised in paragraphs 6.1 to 6.11 above in the Draft Order TRA has considered that a suitable fine in this instance is BD500,000. This is approximately only 2.44% of the ultimate level of fine TRA could issue and is also approximately only a quarter of one percent of Batelco's Annual Revenue for the Kingdom of Bahrain for the year ending 31 December 2007.
- 9.13 However, given that Batelco have undertaken in its reply to the Draft order "to promptly establish a Rapid Deployment Task Force to ensure the expeditious delivery of all the outstanding CAT

---

<sup>4</sup> See Batelco's Annual Report 2007, p 64

## SECTION 35 ORDER

### **Order No. 1/08 – Batelco’s obligation to provide Customer Access Tail Service**

Services orders, hopefully well before the end of April 2008” and thereby proactively committed to remedy the breach in a relatively short timeframe, TRA considers it reasonable to further reduce the fine.

- 9.14 Therefore, as a result of Batelco’s commitment to make the investment, TRA considers that a suitable fine in this instance is BD 100,000.

#### **10. Confidentiality**

- 10.1 Batelco has marked all of its letters, including its Reply Letter and Annex to the Draft Order, as confidential.

- 10.2 After considering TRA’s Guidance Paper No.2 of 2007 *Guidance Paper on TRA Treatment of Confidential and Non-Confidential Information*, TRA is of the view that the information in Batelco’s letters and annex referred to above contain no information of a confidential nature. Batelco has not explained to TRA the reason for claiming its submissions to be confidential, and TRA does not consider that the information provided by Batelco in the letters is confidential in nature nor contains any information of a commercially sensitive or valuable nature.

