

**IN THE NAME OF HIS MAJESTY KING HAMAD BIN ISA AL KHALIFA,
KING OF THE KINGDOM OF BAHRAIN
IN THE MATTER OF THE ARBITRATION UNDER ARTICLE 66
OF THE TELECOMMUNICATIONS LAW OF THE KINGDOM OF BAHRAIN
AND**

IN THE MATTER OF AN ARBITRATION

BETWEEN

BAHRAIN TELECOMMUNICATIONS COMPANY BSC

CLAIMANT

-v-

TELECOMMUNICATIONS REGULATORY AUTHORITY

RESPONDENT

FINAL AWARD

Save as to:

(a) Costs and (b) Any other relief claimed.

The Arbitration Panel:

John Swift QC;

Jack Hodder SC;

Michael Hwang SC (Chairman)

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1. THE PARTIES

1.1. The Claimant in this arbitration is:

BAHRAIN TELECOMMUNICATIONS COMPANY BSC

P.O Box 14

Manama, Kingdom of Bahrain

(**“Batelco”** or the **“Claimant”**).

1.2. The Claimant is a company incorporated in Bahrain and is a telecommunications operator providing services as contemplated by Article 80 of the Telecommunications Law (**“TL”** or **“Telecommunications Law”**) and pursuant to various licences issued and reissued to it by the Telecommunications Regulatory Authority of Bahrain pursuant to the TL.

1.3. The Claimant is represented in this arbitration by its duly authorised attorneys, who attended the hearing for and on its behalf:

a) Mr Michael Lazarus of Counsel (3 Verulam Buildings, Gray’s Inn, London, WC1R 5NT, United Kingdom);

b) Hassan Rhadi & Associates (Mr Hassan Radhi and Ms Fatima Al Ali) (605 Diplomat Tower, Diplomatic Area, PO Box 5366, Manama, Kingdom of Bahrain); and

c) Gilbert + Tobin Lawyers (Mr Steven Daniel Glass and Mr Ghassan Kassisieh) (Level 37, 2 Park Street, Sydney 2000, New South Wales, Australia).

1.4. The Respondent in this arbitration is:

Telecommunications Regulatory Authority

PO Box 10353

Manama, Kingdom of Bahrain

(**“TRA”** or the **“Respondent”**).

- 1.5 The Respondent is a statutory authority of the Kingdom of Bahrain established under Article 2 of the TL.
- 1.6 The Respondent is represented in this arbitration by its duly authorised attorneys, who attended the hearing for and on its behalf:
- a) Mr Daniel Beard Q.C. of Counsel (Monckton Chambers, 1 & 2 Raymond Buildings, Grays Inn, London, WC1R 5NR, United Kingdom);
 - b) Shaikha Haya Rashid Al Khalifah and Ms Yasmeen Al-Ansari of Haya Rashed Al Khalifa Attorneys at Law and Legal Consultants, 1st Floor, Bahrain Development Bank, P.O Box 1188, Diplomatic Area Manama. Kingdom of Bahrain; and
 - c) Messrs Paul Stone and Gareth Mills and Ms Elora Mukherjee of Charles Russell LLP, 31st Floor, Bahrain World Trade Centre, West Tower, Isa Al Kabeer Avenue, PO Box 31249, Manama, Kingdom of Bahrain.

2. THE ARBITRAL TRIBUNAL

- 2.1 The Arbitral Tribunal in this arbitration is comprised of:
- a) Mr Michael Hwang S.C. of 8 Marina Boulevard. #06-02 Marina Bay Financial Centre Tower 1, Singapore 018981
 - b) Mr Jack Hodder S.C. of Chapman Tripp, 10 Customhouse Quay, PO Box 993, Wellington 6140, New Zealand; and
 - c) Mr John Swift Q.C. of Monckton Chambers, 1 & 2 Raymond Buildings, Grays Inn, London, WC1R 5NR, United Kingdom.
- 2.2 The Arbitral Tribunal was constituted on 6 January 2010.¹

3. PROCEDURAL HISTORY

- 3.1 The Tribunal sees no need to recapitulate the entirety of the correspondence with Counsel over the course of these proceedings. All procedural orders have been reduced to writing

¹ See paragraph 3.8 below.

and need not be set out in full here. This section, therefore, provides a summary of the key procedural events in this arbitration.

- 3.2 On 24 November 2009, the TRA issued Batelco with an Order entitled “*Article 35 Order No. 1 of 2009 Mena Telecom’s Application for Facilities Access to FLAG Supplied Equipment at Batelco’s Salmaniya Complex*”, expressed to be pursuant to its powers under Articles 3, 35 and 57 of the Telecommunications Law (“**Order**”).
- 3.3 TRA’s Order directed Batelco to comply with: (i) Article 57(e) of the Telecommunications Law; (ii) Articles 3.2 and 5.4 of the Access Regulation; (iii) Section 13.1 of Batelco’s National Fixed Services Licence; (iv) Section 7.1 of Batelco’s International Licence; and (v) Batelco’s Reference Offer (in particular Schedule 7 thereof).
- 3.4 In order for Batelco to comply with the foregoing, TRA’s Order required the Claimant to (among other things):
- 3.4.1 Offer to Mena Telecom (“**Mena**”) the right to submit an order in accordance with clauses 7(b) and 8 of Schedule 7 of Batelco’s Reference Offer, as requested by Mena on 29 April 2009;
- 3.4.2 Pay a fine of BD² 5,038,088 discounted by BD 100,000 for each working day for which Batelco complied with the Order by the “Due Date” (i.e. 30 working days after the date of the Order).
- 3.4.3 Pay a fine by way of periodic payment of BD 100,000 for each calendar day after the Due Date, as appropriate, for which Batelco failed to comply with the terms of paragraph 1 of the Order.
- 3.5 The Claimant, through its solicitors, commenced this arbitration disputing the Order by serving a Notice of Dispute pursuant to Article 66 of the TL on 14 December 2009 (“**Notice of Dispute**”) setting out (in brief) its complaints against the Order and seeking appropriate relief.
- 3.6 On 23 December 2009, the Respondent appointed **Mr John Swift Q.C.** as its party-nominated arbitrator.

² Bahrain dinars

- 3.7 On 24 December 2009, the Claimant appointed **Mr Jack Hodder S.C.** as its party-nominated arbitrator.
- 3.8 On 6 January 2010, Mr John Swift Q.C. and Mr Jack Hodder S.C. appointed **Mr Michael Hwang S.C.** to be the Chairman of the Arbitration Panel pursuant to Article 68(a) of the TL. (The term “Tribunal” has been used in this Award in substitution for the term “Panel” appearing in the TL as the former term is more usual in arbitration practice internationally.)
- 3.9 On 5 May 2010, the Claimant filed an application to stay TRA’s Order (“**Application to Stay**”). This was Batelco’s first communication to the Panel in respect of the dispute³.
- 3.10 On 6 May 2010, the Tribunal invited the TRA to put to it by 4 June 2010 any comments it wished to make on Batelco’s Application to Stay. The direction to TRA to file a reply to the Claimant’s Application to Stay was suspended until the determination of the preliminary/jurisdictional question of the Tribunal’s competence. On 27 August 2010, the Claimant decided that, in the interests of proceeding expeditiously to a final determination, it would not pursue its Application to Stay.

A. THE PRELIMINARY ISSUE OF THE JURISDICTION OF THE ARBITRATION TRIBUNAL

- 3.11 On 20 May 2010, the Respondent, through its Deputy General Director, Mr Robert Middlehurst, wrote to the Tribunal and made reference to Chapter Seven, Article 237 of the Bahrain Civil and Commercial Procedural Law 1971 (“**CCPL**”) which required arbitrators to give an award within three months of their agreeing to arbitrate. Mr Middlehurst further stated that “...*as no decision has been reached by the Tribunal within the three month period since accepting to arbitrate [viz from 6 January 2010], the [TRA] finds that the dates specified as per the Laws of the Kingdom of Bahrain determine that the period has expired.*”

³ Excluding correspondence relating to the fees of the Tribunal.

- 3.12 It was clear to the Tribunal that the TRA's contention that the Tribunal had ceased to have jurisdiction after 5 April 2010 had to be determined as a preliminary issue. The Tribunal invited Batelco to comment.
- 3.13 On 24 May 2010, the Claimant filed its reply to Mr Middlehurst's letter, stating that TRA's submissions regarding the alleged expiry of the time for conducting the arbitration were misconceived and set out the reasons why Article 237 of the CCPL was inapplicable.
- 3.14 From 24 May 2010 to 22 July 2010, the Parties filed and exchanged submissions regarding the issue of whether the Tribunal had ceased to have jurisdiction.
- 3.15 The Tribunal decided that it was not necessary to have an oral hearing, having had full written representations from the Parties on what it considered to be all relevant issues. On 12 August 2010, the Tribunal issued its decision on jurisdiction and stated that:

*"These are our findings. In summary we find that with effect from our appointment on 6 January 2010, **the Panel has at all times had the exclusive power and duty to determine the dispute between Batelco and the TRA within Article 66 of the Telecommunications Law**; and that the first indent of Article 237 of the CCPL does not apply so as to limit the inherent jurisdiction of the Panel to determine the dispute in a just and reasonable manner in accordance with the Law of Bahrain or to exhaust the jurisdiction if no decision is reached within three months from appointment (unless such jurisdiction is extended by joint agreement of the parties)." (emphasis added)*

"[t]he legislation has imposed no time limit on the TRA in respect of its enforcement decisions under Article 35 of the Telecommunications Law. We see no reason why any such time limit should be imposed upon an independent and impartial panel, empowered to decide matters that may be of considerable complexity and in which considerations of due process may well require a period from notification to decision well beyond the three month limit⁴."

⁴ Decision on Jurisdiction at para 39.

“...as Article 237 of the CCPL, first indent, stands, it is not applicable to the case of a statutory arbitration because it depends for its validity on the pre existence of an arbitration agreement voluntarily entered into by litigants as a preferred way of settling their dispute⁵.”

- 3.16 On 3 September 2010, the Tribunal issued Procedural Order (1) which authorized the Chairman of the Tribunal to make rulings on behalf of the Tribunal⁶.
- 3.17 On 30 September 2010, the Claimant filed its Statement of Case, setting out the basis for its case and the relief sought.
- 3.18 On 27 October 2010, the Tribunal issued Procedural Order (2) setting the timetable for the Parties to file their respective pleadings.

B. CONFIDENTIALITY OF THE ARBITRATION

- 3.19 On 9 December 2010, the Respondent filed its Statement of Defence, setting out its response to the Claimant’s Statement of Case. On the same date, through a letter attached to its Defence, the Respondent informed the Tribunal that *“...some arguments and facts set out in [its] Pleadings are confidential so that disclosure of them by the Respondent’s staff and advisers may result in them breaking Article 23 of the [TL]....We [the Respondent] will therefore only serve upon the Claimants a non-confidential version of our Pleadings, until we have an order from the Panel, as a court under Bahrain law, to disclose the full Pleadings. To this end, we attach a draft procedural order that the Panel may wish to consider for this purpose.”*
- 3.20 On 16 December 2010, the Tribunal invited the Claimant to comment on the Respondent’s request.
- 3.21 On 7 January 2011, the Claimant submitted to the Tribunal the Claimant’s Response to the Tribunal’s Questions Regarding Confidentiality, that it was *“in principle, willing to enter [into] reasonable confidentiality undertakings”*.

⁵ Decision on Jurisdiction at para 44.

⁶ Procedural Order (1) set conditions as to when the Chairman could make rulings on behalf of the Tribunal, viz:

- (i) all correspondence is copied to the co-arbitrators;
- (ii) the Chairman shall be free to consult, in his discretion, with the other arbitrators and may refer significant or difficult matters to the full Tribunal for decisions;
- (iii) the full Tribunal shall hear and determine any procedural matter if requested by either party or an arbitrator; and
- (iv) a direction or order of the Arbitral Tribunal is sufficiently given to the parties if given under the hand of the Chairman of the Arbitral Tribunal.

3.22 On 21 January 2011, the Tribunal issued Procedural Order (3) directing a number of the Claimant's Advisers⁷ to sign an undertaking of confidentiality.

C. TIMETABLE TO DECEMBER 2011 HEARING

3.23 On 24 January 2011, the Claimant filed its Reply, responding to the matters pleaded in the Respondent's Defence.

3.24 On 7 February 2011, the Tribunal issued Procedural Order (4), revising the timetable allowing for extension(s) of time as requested by the Parties to file their respective pleadings.

3.25 On 12 February 2011, the Respondent filed its Rebuttal, responding to the Claimant's Reply.

3.26 On 18 February 2011, the Claimant filed an application for production of documents.

3.27 On 22 February 2011, the Chairman of the Tribunal conducted a Case Management Conference ("CMC") with the Parties via teleconference, which was memorialized in Procedural Order (5). During the CMC, and by letter received on 22 February 2011, the Respondent acceded, subject to any issues regarding confidentiality therein, to the requests made by the Claimant.

3.28 On 7 March 2011, the Tribunal issued Procedural Order (5) which (among other things) set the timetable leading to the hearing fixed on 10 to 14 April 2011 and granted the Claimant's application for production of documents (as the Respondent had acceded to the Claimant's requests).

3.29 On 14 March 2011, the Tribunal received an email from Mr Andrew Sharpe of Charles Russell LLP, solicitors for the Respondent, informing the Tribunal of the security situation then current in the Kingdom of Bahrain.

3.30 On 15 March 2011, The Tribunal received an email from Mr Steven Glass of Gilbert & Tobin, solicitors for the Claimant, saying that he "*agree[s] that it is not feasible to hold the arbitration in Bahrain on the scheduled dates in the present circumstances.*"

⁷ The names of the Claimant's Advisers directed to sign the undertaking of confidentiality, are set out in Procedural Order (3) Schedule, Part A.

- 3.31 On 22 March 2011, Mr Sharpe requested that the April Hearing “*in Bahrain ...should be formally vacated*”. On 24 March 2011, Mr Glass confirmed by email that the only feasible option was to move the hearing dates and keep the venue in Bahrain.
- 3.32 On 24 March 2011, the Tribunal issued Procedural Order (6), vacating the hearing scheduled on 10 to 14 April 2011.
- 3.33 On 21 April 2011, the Tribunal issued Procedural Order (7), re-scheduling the hearing for 11 to 16 December 2011.
- 3.34 The hearing was duly held in Bahrain from 11 December to 15 December 2011.
- 3.35 On 26 June 2012, the Tribunal indicated that it was nearing finalization of the Award, and expected to be able to complete the Award by the end of the month. Once all the members of the Arbitration Panel had received confirmation that sufficient deposits were being held to account of their fees, the Award would be released to the parties by electronic soft copy and hard copy.
- 3.36 On 27 June 2012, Gilbert + Tobin informed the Tribunal that certain Bahraini procedural requirements needed to be followed in handing down the Award:
- 3.36.1 That the Tribunal’s Award be made in writing (but that it could be issued in English).
- 3.36.2 That the Tribunal must pronounce its Award by reading its findings aloud in the hearing (which can be by telephone conference call) fixed for issuing the Award.
- 3.36.3 That the Tribunal’s Award must include a brief summary of the litigants’ statements (including representations made during the oral hearings) and documents, grounds for the Award, the ruling and date of issue of the Award, and the signatures of the arbitrators.
- 3.36.4 That the Award must include the names, surnames and capacities of the litigants, the domicile of each of them, whether they attended or were absent at the ruling hearing, and the names of their attorneys.
- 3.36.5 That the Award must be deposited at the High Civil Court – Administrative Division – within 3 days from its issuance. An Arabic translation of the Award must be deposited at the High Civil Court – Administrative Division. The Court’s Clerk would then be required to record this deposition and send a copy of the record to the Parties in the dispute.

- 3.37 On 29 June 2012, the Tribunal wrote to the Parties for confirmation of the Bahraini procedural requirements. On 3 July 2012, Charles Russell gave its comments on the Bahraini procedural requirements. On 10 July 2012, the Tribunal sought further clarifications and set out its understanding of the procedure agreed by the Parties.
- 3.38 Parties confirmed the appropriate procedure by way of an agreed email on 3 September 2012, which set out the procedures described below.
- 3.39 **Depositing the award.** The Parties asked the Tribunal to expressly direct that the Parties' Bahraini counsel jointly deposit the Award with the Clerk of the High Civil Court – Administrative Division within three days of the Award being issued, in accordance with Article 240 of the Civil and Commercial Procedure Law.
- 3.40 The Parties requested that the Tribunal make its direction either in the Award itself or by letter of appointment.
- 3.41 **Translation.** The Parties agreed that the Award should be translated into Arabic by the Tribunal before the Award was handed down so that both Arabic and English versions could be deposited within three days of the Award being issued. The Parties agreed that the costs of translation should follow the event. The Parties also agreed on two acceptable translators.
- 3.42 **Cover note.** The Parties agreed to confer with each other on the drafting of a cover note to be deposited with the Award.
- 3.43 With the cover note, the following documents will be enclosed (translated into Arabic) to demonstrate the commencement of the Arbitration and formal constitution of the Tribunal under Article 66 of the Telecommunications Law:
- The relevant extract of the Telecommunications Law (Chapter 16);
 - Notice of dispute dated 14 December 2009⁸;
 - Appointment of Mr Swift dated 23 December 2009⁹;
 - Appointment of Mr Hodder dated 24 December 2009¹⁰; and

⁸ Hearing Bundle ("HB"): 1408

⁹ HB: 1411

¹⁰ HB: 1412

- Appointment of Mr Hwang dated 6 January 2010¹¹.

3.44 The following sets out the procedure for issuing this Award.

A	Award is finalized and signed by the Tribunal.	The Award will be made in English, and its substance will accord with those requirements of Bahrain's Civil and Commercial Procedures Law which the Parties have informed the Tribunal as being relevant. The Parties' Counsel will act as the Tribunal's agents for purposes of depositing the Award.
B	Deposits are paid up to date.	
C		A translator agreed by the Parties will commence translation of the Award. The Parties agreed that the costs of translation should follow the event.
D	Stage One (Notice from Tribunal)	Email from Tribunal to the Parties that the Award is ready for issuance.
E		The Parties will arrange for the Teleconference on such date suitable to both Parties and the Tribunal. The Chairman may attend the teleconference on behalf of the Tribunal, and it is not necessary for all the Tribunal members to attend.
F	Stage Two (Issuing the Award by Teleconference)	The Chairman reads aloud the dispositive section of the Award during the Teleconference.
G		The Tribunal will indicate what further matters are to be decided (if any) and discuss with the Parties what directions will need to be issued to establish a timetable for resolution of any unsettled matters in the Arbitration.
H		At the end of the Teleconference, a PDF copy of the Award will be sent to both Parties.

¹¹ Email dated 6 January 2010

I		The physical copy of the English language Award is sent by same-day courier to the Parties' Counsel in Bahrain, and the Parties' Counsel will jointly deposit the Award with the Clerk of the High Civil Court – Administrative Division.
J	Stage Three (Depositing the Award)	A copy of the Telecommunications Law will be deposited in Court alongside the Award (together with the cover note and supporting documents) within three days of the Teleconference. An Arabic translation of the Award will be deposited at the High Civil Court – Administrative Division within three days of the Teleconference.
K		The Court's Clerk will record the deposit of the Award and send a copy of the record to the Parties and the Tribunal.

3.45 This Award is limited to deciding the issues raised by the Parties in their pleadings (e.g. Claimant's Statement of Case and Respondent's Defence) and their written and oral submissions at the hearing (such as their Opening and Closing Submissions). The factual and legal issues raised were many, and the Tribunal has considered their respective submissions on all these issues. It is not necessary, however, to decide all such issues for the purpose of this Award. Moreover, the Tribunal provides reasons below only for those issues which it has decided are necessary for its decisions in this Award. The fact that any particular issue or submission by either Party is not expressly addressed here does not indicate that it has not been considered by the Tribunal during these arbitration proceedings.

3.46 In this Award, the Tribunal has not reproduced the arguments made by the Parties in their pleadings separately as these arguments were repeated, developed and refined in later submissions made by the Parties, and the Tribunal has only extracted and analysed the final critical arguments presented by each of the Parties.

4. FACTUAL BACKGROUND

4.1 It is necessary at the outset to briefly summarize the principal facts for the purposes of this Award. At the time of Mena’s requests to Batelco, international telecommunications connectivity was provided in Bahrain primarily by four international submarine cable systems where Batelco owned transmission capacity in each:

- (a) The Fibre Optic Gulf (“FOG”);
- (b) Saudi Fibre Optic (“SFO”);
- (c) Marine Fibre Optic (“MFO”) Cable;
- (d) FALCON – a fibre optic loop that connects all of the countries in the Gulf region to the global Fiber-Optic Link Around the Globe (“**FLAG System**”).

Batelco is the landing party for all four systems. Batelco contends that, at the time of TRA’s Order, several further connections to international cables were being developed.

4.2 The FALCON system was constructed by FLAG Telecom Group Limited (“**FLAG**”). Batelco entered into two agreements with FLAG in respect of the FALCON system:

- (a) Landing Party Agreement¹² dated 27 July 2004 – where Batelco was granted the right to be the landing party for the FALCON cable in Bahrain; and
- (b) a Capacity Right of Use Agreement¹³ dated 27 July 2004 - where Batelco purchased capacity on the FALCON cable for a “minimum term of 15 years” or longer.

4.3 Under the Landing Party Agreement, the FALCON cable would terminate in Bahrain at the FALCON cable landing station which is located on the third floor of Telegraph House, a Batelco-owned facility (“**FLAG Landing Station**”).

4.4 The companies owning the FALCON system were purchased by the Reliance Group and FLAG changed its name to Reliance Globalcom Limited on 11 March 2008 (“**Reliance**”). The FALCON system was activated in April 2006 and, since that date, FLAG has occupied the FLAG Landing Station, and Batelco has operated the FLAG Landing Station on FLAG’s behalf.

¹² [HB:711]

¹³ [HB:670]

A. MENA'S FIRST APPLICATION FOR ACCESS TO BATELCO'S FACILITIES (2008)

4.5 On 22 July 2008, Mena sent by email to Batelco an application for "Facility Access" requesting collocation space in Telephone House for the stated purpose of housing a rack of fibre cable terminating equipment (Mena's "**First Application**")¹⁴. Telephone House is a Batelco facility adjacent to Telegraph House (where the FLAG Landing Station is located). Mena's First Application did not mention collocation with, or access to, the FLAG Landing Station. Mena did not describe why it wanted the collocation apart from indicating that it would provide "*flexibility and [a] central point for our future cable run through ducts*".

4.6 On 10 August 2008, Batelco wrote to Mena regarding its First Application¹⁵. Mr. Khalil Amin of Batelco indicated in that letter that Batelco considered the First Application to be "tentative" and "informal" and that it had "nothing to do with co[]location".

"If...Mena wishes to proceed with a request for collocation at Telephone House, please comply with the requirements of Schedule 7 to the Supply Terms by providing appropriate details including the nature and type of equipment which Mena would propose to install and the purpose for such installation."

4.7 On 14 August 2008, Mena wrote to Batelco that it wanted the access to Telephone House for the purposes of accessing international capacity. This was because Mena was planning to lease capacity from FLAG in the future and wanted "*to reach their landing station in Telephone [H]ouse*". But Mena had made an error, as there was no landing station in Telephone House. The landing station was in Telegraph House.

4.8 On 24 August 2008, Batelco wrote to Mena rejecting its First Application:

*"I have to advise that your Facility Access request has been rejected. The reason for this rejection is that there are no Batelco services with which Mena plans to interface in Telephone House which justify Mena having collocation."*¹⁶

¹⁴ [HB:913]

¹⁵ [HB:917]

¹⁶ [HB:923]

- 4.9 On 25 August 2008, Mena submitted a complaint to TRA in respect of Batelco’s rejection of Mena’s First Application. On 4 December 2008, TRA wrote to Batelco confirming it was commencing a formal investigation into Batelco’s rejection of Mena’s First Application.
- 4.10 TRA states that, rather than seeking finally to determine the dispute between Mena and Batelco on the First Application, it considered that it would be more constructive and appropriate instead to ensure that, if Mena continued to want access to connect to FLAG directly, it should put forward a further request that did not admit of any ambiguity and would provide Batelco an opportunity to reflect carefully on its position.
- 4.11 On 8 April 2009, Mr. Alan Horne (then General Director of TRA) sent an email to FLAG. It related to the connection to FLAG of Other Licensed Operators (“OLOs”)¹⁷, advising that TRA “will give every assistance to enable”: (i) agreements between FLAG and OLOs for Flag capacity; (ii) collocation agreements between OLOs and Batelco; (iii) links between OLO networks and the FLAG landing station, and alluding to the prospect of regulatory intervention. Mr Eamon Holley ([Director of Legal Affairs] of TRA) forwarded Mr Horne’s email to Mena on 8 April stating that TRA would review any new application for access that Mena would choose to make.¹⁸
- 4.12 TRA’s position is that, in circumstances where TRA was not taking specific enforcement action in relation to the refusal of the First Application, TRA was concerned that any objections to access should not be on some technical basis by reason of some perceived flaw in the application itself. TRA contends in its submissions that this was the reason why, on 14 April 2009¹⁹, Mr Holley specifically e-mailed Mr Eric Dunand, the Specialist Technical Adviser to TRA²⁰ to review the application. TRA says that it expected a “massive pushback from Batelco” on the request²¹ and argues that Mr Dunand wanted to ensure that there was no ambiguity in the application which might be used as an excuse to refuse the request without dealing with the substance of the request.²²

¹⁷ i.e. operators other than Batelco

¹⁸ [HB:1016]

¹⁹ [HB:1027]

²⁰ [HB:533]

²¹ Email from Holley to Dunand, HB 1027

²² TRA’s Opening Submissions at paragraph 88

- 4.13 Mr Dunand replied to Mr. Holley on 14 April setting out various issues concerning technical specifications of equipment and the requirements for connection.²³ To assist the process, he attached a diagram of Telegraph House. Mr. Holley forwarded the email with the attachment to Mena on the same day, and arranged for a meeting.
- 4.14 Mr Holley says that he was concerned that differing technical inputs and specifications in relation to the further application could create confusion which would undermine the strategy that TRA had adopted to deal with the issues between Batelco and Mena and of which a clear further application by Mena formed a part.²⁴ Mr Holley thought Mena and TRA should speak about the technical issues in relation to the application, and a meeting was held shortly afterwards between Mr. Dunand and Ms. Eman Ahmed (of Mena) to discuss such issues.²⁵
- 4.15 Mena pressed TRA for final comments on its second application, which were eventually forthcoming in Mr. Holley's email of 29 April 2009²⁶ where he wrote:

"TRA has no further comments to add, apart from Eric's [Dunand's] which include removing his name from the properties of the diagram of Telegraph [H]ouse.

As you suggest it can do no harm to copy Alan and Gert (CE[O] of Batelco Bahrain) to the application, and myself."

B. MENA'S SECOND APPLICATION FOR ACCESS TO BATELCO'S FACILITIES (2009)

- 4.16 On 29 April 2009, Mena wrote to Batelco informing it that Mena had entered into negotiations for services from FLAG and requested a solution to reach the FLAG Landing Station at Telegraph House. In its letter, Mena enclosed a "Duct Rental Application", a "Facilities Access Application to obtain space in Batelco's Riser Room" and a "Facilities Access Application to Co-Locate with FLAG" (collectively Mena's "**Second Application**"). Also enclosed was a simplified diagram showing the features of the solution, the technical specifications of the OADM and an area plan.

²³ [HB:1027]

²⁴ [HB:1027]

²⁵ [HB: 1024, 1039]

²⁶ [HB:1048]

- 4.17 On 9 June 2009, Batelco wrote to Mena rejecting its Second Application because “*there are no Batelco services with which Mena plans to interface in Telegraph House*”, but suggested two alternatives: (a) a proposed Internet Protocol connection to link Mena’s premises to the Internet via FLAG, and (b) if Mena required capacity to link to FLAG other than for access to the Internet, a proposed connection and international backhaul product using Batelco’s international gateway.
- 4.18 Batelco says that (a) its resistance to granting Mena’s Second Application and giving Mena physical access to Telegraph House was based on what it considered its rights under the regulatory scheme, and (b) its desire to propose alternatives to Mena’s request were due to (i) practical concerns about the security of “*vital, non-redundant Batelco facilities located at Telegraph House*” and (ii) congestion of cable ducts at Telegraph House.²⁷
- 4.19 On 10 June 2009, Mena informed Batelco that it was initiating a dispute in relation to Batelco’s rejection of its Second Application in a letter entitled “Dispute Escalation – Section 24 of the Supply Terms”.

C. TRA INVESTIGATES AND ISSUES ORDER AGAINST BATELCO

- 4.20 On 9 July 2009, TRA formally notified Batelco that it was commencing an investigation into Batelco’s control of, and provision of access to, international telecommunications facilities and alleged breaches of the Telecommunications Law, Access Regulation and Reference Offer, referring to Mena’s First Application and Second Application. Batelco responded to TRA’s notice on 6 August 2009, pointing out its disagreements with the TRA’s reasons for investigation.
- 4.21 On 14 September 2009, TRA issued a draft Order under Article 35 of the TL. On 29 September, TRA issued an amended Draft Order. Both drafts were substantially in the same terms as the eventual Order.

²⁷ Batelco’s Brief to the Tribunal (11 November 2011), paragraph 36.

- 4.22 On 30 September 2009, Batelco met TRA and discussed a number of alternatives to Mena’s Second Application. According to Batelco, the solutions it provided Mena would have the same functionality, technical specifications and cost as it would have obtained by collocating its own equipment.
- 4.23 On 5 October 2009, Batelco set out four options that it was prepared to offer Mena.²⁸ Batelco contends that the fourth option was functionally identical to the service which Mena sought in its Second Application.
- 4.24 On 22 October 2009, a major power outage occurred in an area controlled by Mena. The power outage caused the disconnection of a link which was supplying Batelco services to another licensed operator (2Connect). There is a dispute as to whether Mena or Batelco bears ultimate responsibility for the power outage.
- 4.25 Mena did not agree with Batelco’s proposed alternatives, and resubmitted its Second Application on 22 October 2009. This crossed with Batelco’s letters of 21 and 22 October 2009²⁹ advising the TRA and Mena that it was willing to offer Mena space to install and operate equipment on the sixth floor of Telegraph House to enable Mena to access FLAG.
- 4.26 On 26 October 2009, Batelco withdrew its offer for access to the sixth floor of Telegraph House “*due to its concerns about Mena’s compliance with interception security requirements and to a power outage caused by Mena which affected Batelco’s services to another telco, 2Connect, at the NBB Tower.*”³⁰
- 4.27 On 29 October 2009, Batelco submitted its detailed response to TRA’s draft Order³¹, taking the position that:

“(a) Batelco is not required by its current regulatory obligations to provide the access sought; and

(b) even if:

(i) Batelco’s current regulatory obligations theoretically require Batelco to provide the access sought (which Batelco denies); or

²⁸ [HB:1239]

²⁹ [HB: 1278 and 1281]

³⁰ Batelco’s Brief to the Tribunal, at paragraph 49.

³¹ HB:1301

(ii) the TRA were to lawfully vary Batelco's regulatory obligations such that the regulatory obligations would then theoretically require Batelco to provide the access sought (regarding which, Batelco has reservations), the access sought is not feasible, being subject to "access restraints"."

- 4.28 On 3 November 2009, Batelco proposed another option to provide facilities to link Mena's equipment to the FLAG Landing Station through Batelco's Seef Exchange, which Mena did not accept.
- 4.29 On 24 November 2009, TRA issued the Order against Batelco.
- 4.30 On 14 December 2009, Batelco notified TRA that it intended to commence arbitration proceedings disputing the Order.
- 4.31 On 21 January 2010, in compliance with paragraph 1 of the Order, Batelco offered Mena (a) a space on the sixth floor of Telegraph House, (b) cabling between FALCON on the third floor and (c) proposed space on the sixth floor and immediate security clearance for Mena's authorized personnel. The proposed Service Description was described as the "International Falcon Connection Service (**IFC Service**)".³² Mena, however, informed Batelco by way of a letter dated 1 February 2010 that the proposed Service Description did not meet its needs.³³
- 4.32 On 2 February 2010, Batelco asked TRA to convene an emergency meeting to provide guidance on what constituted reasonable terms for the IFC Service under Article 57 (e) of the TL. On 18 March 2010, TRA commenced a formal process for determining the dispute regarding the terms of the proposed IFC Service by way of a letter entitled "LAU 350 – Article 53 request for information and Article 57(g) access dispute resolution".
- 4.33 On 16 March 2010, Batelco received a letter from TRA confirming that Batelco's offer to Mena of 21 January 2010 complied with Batelco's obligations under the Order. The letter demanded payment of a fine of BD 5,038,088 (approximately US\$ 13.4 million) plus BD 200,000 (approximately US\$ 266,000) applied for a late period of two days.

³² HB:1459

³³ HB:1484

- 4.34 On 24 and 25 March 2010, Mena and Batelco respectively confirmed Batelco's compliance with Paragraph 1 of the Order.
- 4.35 On 26 August 2010, Batelco paid the fine (and late payment penalty) of BD 5,238,088 to TRA.

5. THE LEGAL FRAMEWORK AND APPLICABLE LAW

5.1 Articles 66 and 68 of Chapter 16 of the Telecommunications Law (“TL”)³⁴ provide:

“Article 66

Resorting to Arbitration

With the exception of the regulations and regulatory decisions issued by the [TRA], and the decisions issued in accordance with the provisions of Article 56 of this Law, the Arbitration Panel which shall be formed in accordance with the provision of Article 68 of this Law shall have the power to determine the disputes arising between [TRA] and any Licensed Operator.

The Licensee shall have the right to resort to arbitration, provided that it shall notify [TRA] of its intention within thirty days of the date on which it become aware of the disputed decision, order or measure.

The disputed decision, order or action shall remain in effect unless the Arbitration Panel decides to stay the execution of the decision or to nullify it.”

“Article 68

Formation of the Arbitration Panel

(a) The Arbitration Panel shall consist of three arbitrators, of whom [TRA] and the Licensed Operator shall each appoint one arbitrator within fourteen days from the date on which the Licensed Operator notifies [TRA] of its intention to refer the dispute to the Arbitration Panel. The appointed arbitrators shall, within fourteen days from the date on which they are notified of the appointment, appoint the third arbitrator to be the Chairman of the Arbitration Panel.

The Chairman of the Arbitration Panel shall be proficient and experienced in the field of the dispute referred to the Arbitration Panel.

(b) If the Authority fails to appoint an arbitrator on its part within the period referred to in the preceding paragraph, or if the two appointed arbitrators fail to agree upon

³⁴ With one exception, both Parties have used and accepted the same unofficial English translation of the original Arabic text of the TL as correct for the purposes of this arbitration. The exception is in Article 35(a) of the TL where the unofficial translation uses the expression "material breach" and where the correct translation should be "severe breach". The Tribunal received the evidence of an expert translator (appearing on behalf of Batelco) which was not challenged by the TRA.

the third arbitrator within the period, the Appointing Authority³⁵ shall, at the request of the Licensed Operator, make such approval.

If the operator fails to appoint an arbitrator on its part, the application for arbitration shall be deemed null and void.

(c) The application for referring the dispute to the Arbitration Panel may be submitted by more than one Licensed Operator, provided that the subject matter of the dispute is one and the same. The arbitration applicants shall agree upon choosing one arbitrator in the Arbitration Panel. They may request that such arbitrator be appointed by the Appointing Authority.”

5.2 The arbitration proceeding is governed by Bahrain Law.

5.3 The relevant instruments of the Bahrain telecommunications regulatory framework are, in chronological order:

- (a) The Telecommunications Law (2002);
- (b) Batelco’s Licences issued pursuant to the Telecommunication Law (2003);
- (c) Access Regulation (30 April 2005);
- (d) Dominance Determination (22 January 2006);
- (e) Reference Offer Order (12 July 2006); and
- (f) Batelco’s Reference Offer (15 February 2006 version)³⁶.

A. THE TELECOMMUNICATIONS LAW OF THE KINGDOM OF BAHRAIN (2002)

5.4 In 2002, the Government of the Kingdom of Bahrain introduced the Telecommunications Law as Legislative Decree No. 48 of 2002³⁷ which provides for the regulation of the telecommunications industry in the Kingdom of Bahrain. The Telecommunications Law enabled the liberalisation of the telecommunications market by establishing an open licensing regime and creating an independent regulatory authority, the TRA.

³⁵ Telecommunications Law Article 1 Definitions - “**Appointing Authority** – the Minister of Justice and Islamic Affairs in his capacity as the Authority that appoints the Arbitration Panel provided for in Chapter 16 of this Law”

³⁶ The version of the Reference Offer in the agreed Hearing Bundle was a composite, including some post- 2006 components, but Counsel’s arguments, and the Tribunal’s consideration, have focussed largely on the text of its principal terms as they stood in February 2006 and, as the Tribunal understands it, at the time of the applications by Mena in 2008 and 2009.

³⁷ [HB:1750]

- 5.5 The First National Telecommunications Plan (20 July 2003) set out the Government’s policy to create a free market environment that would be increasingly attractive to private sector entrants. The Government converted the then public incumbent operator, Batelco, into a private entity and stated its policy that Batelco should be encouraged to thrive by “responding constructively and fairly to competition” (see Introduction to the Second National Telecommunications Plan³⁸, 13 February 2008). It also provided the TRA with relevant powers to regulate the telecommunications market. The Telecommunications Law introduced a system of regulation which enabled TRA to promote and extend competition in Bahrain (so-called “*ex ante*” regulatory provisions) as well as powers to penalise companies that breached general competition standards (“*ex post*” competition provisions).
- 5.6 Under Article 24 of the Telecommunications Law, no person may lawfully operate, among other things, a “Public Telecommunications Network” or provide a “Telecommunications” service in the Kingdom except with a “Licence”³⁹. It is the TRA which grants such licences (pursuant to Article 25 - Individual Licences)⁴⁰. Such “Individual Licences” can be subject to requirements and conditions imposed by the TRA (see Article 28(c) of the Telecommunications Law)⁴¹.
- 5.7 The Telecommunications Law sets out the duties and powers of the TRA. These are provided at Article 3 of the Telecommunications Law⁴². In particular, Article 3(b) sets out the TRA’s core duties, which in the English (unofficial) translation published by the TRA are described as:

“(b) The TRA undertakes in carrying out its duties relating to Telecommunications services in the manner best calculated to:

- i. protect the interests of Subscribers and Users in respect of:*
 - the tariffs charged for services.*
 - availability and provision of services.*
 - quality of services.*

³⁸ [HB:2594]

³⁹ [HB:1773]

⁴⁰ [HB:1773]

⁴¹ [HB:1774]

⁴² [HB:1760]

- *protection of personal particulars and privacy of services.*
- ii. *promote effective and fair competition among new and existing Licensed Operators.*
- iii. *ensure, when assessing applications involving provision of Public Telecommunications Services, that any applicant, or any Person who is assigned the responsibility of the provision of such services, shall be able to provide that service.”⁴³*

5.8 Article 3(c) of the Telecommunications Law gives the TRA broad powers in order for it to fulfil its duties. These include powers to issue regulations, orders and determinations so as to implement the Telecommunications Law (Article 3(c)(1)) as well as to ensure compliance with that law (see Article 3(c)(2)).

5.9 Specific reference is made in the TL to monitoring and enforcing compliance with Licence terms and conditions (Article 3(c)(4)). The TRA’s powers in relation to Licensees include the power to revoke a licence (Article 31)⁴⁴ or to order the restructuring of Licensees (see Article 3(c)(2))⁴⁵.

5.10 Article 35 of the Telecommunications Law makes provision for the TRA to be able to take enforcement action against a Licensee which has been (or is) in what is referred to as “severe”⁴⁶ breach of any provision of the Telecommunications Law or any condition of its Licence.⁴⁷

5.11 As set out in the Second National Telecommunications Plan, section 5, the Government considers that a liberalised and competitive telecommunications market should assist providers to develop innovative services “both for the Kingdom as well as regionally”.⁴⁸ The Plan states:

*“To support investment it is crucial that Bahrain has available diverse, high capacity and low cost **international connectivity**. All the relevant authorities shall ensure that there are no unjustified barriers hindering the development of such*

⁴³ [HB:1761]

⁴⁴ [HB:1777]

⁴⁵ [HB:1761]

⁴⁶ The meaning of this term is discussed at paragraphs 8.1 – 8.4 below.

⁴⁷ [HB:1778]

⁴⁸ [HB:2598]

*international connectivity. TRA shall monitor and review the market developments in this field and undertake necessary actions (including submitting relevant suggestions in this regard to the Government) in order to remedy identified market failures, hindering development of **international connectivity**.*" (emphasis added)

5.12 The Telecommunications Law regulates two forms of telecommunications network operators' interaction, being "interconnection" and "access".

5.13 The relevant provision setting out the regulatory regime for access is under Article 57(e) of the Telecommunications Law⁴⁹. Article 57(e) requires a dominant operator to provide a Licensed Operator with "Access" to its "Telecommunications Network" on fair and reasonable terms upon request.

5.14 Article 1 TL (definitions) includes:

*"Access": **the making available of telecommunications facilities and/or telecommunications services to another Licensed Operator for the purpose of providing telecommunications services, and including the connection of equipment by wire or wireless means, access to physical infrastructure including buildings, ducts, cables and masts, access to mobile networks and access to number translation or networks offering equivalent functionality.***

"Interconnection": the physical and logical linking of Telecommunications networks used by the same or a different operator in order to allow the Subscribers of one operator to communicate with Subscribers of the same or another operator, or to receive services provided by another operator.

"Telecommunications Facility": any part of the infrastructure of a Telecommunications Network including any antenna, circuit, duct, equipment, fibre (whether partially or fully in service or not), line, mast, pole, tower or any other structure or any other thing used or intended for use in connection with a Telecommunications Network.

"Telecommunications Network": a network permitting the conveyance of messages, sound, visual images or signals between defined termination points by wire, radio, optical or other electro-magnetic means." (emphasis added)

⁴⁹ [HB:1791]

5.15 Article 57(e) TL reads:

*“A Public Telecommunications Operator in a Dominant Position shall offer upon request **Access** to its **Telecommunications Network** on fair and reasonable terms to any Licensed Operator. Such operator shall only be under an obligation to offer **Access** to the ducts if the Authority considers that there is an essential need for such **Access**, whereby such demand is deemed to exist in the case of **Access** for a holder of a mobile Telecommunications Licence. [a]*

*The Authority may publish regulations with regards to **Access**, including a regulation concerning the reference **Access** offer similar to a reference Interconnection offer. [b]*

*If the Authority consider the tariffs and the terms and conditions on which **Access** is offered by an operator in a Dominant Position are unreasonable, it may determine such tariffs and terms and conditions as it considers appropriate, and the provisions of paragraph (b) of this Article shall apply in this respect.[c]”*
(emphasis added)

B. BATELCO’S NATIONAL FIXED SERVICES LICENCE AND INTERNATIONAL TELECOMMUNICATIONS FACILITIES LICENCE (2003 AND 2005)

5.16 The TRA issued 14 licences to Batelco in June 2003, covering the full range of its services. These licences were granted on 21 June 2003, and were re-issued with amendments on 14 June 2005. In particular, the licences included Batelco’s International Telecommunications Facilities Licence and National Fixed Services Licence (these two licences will be referred to collectively in this Award as “**the Licences**”).

5.17 The TRA has stated in this arbitration that, since Batelco was the incumbent (and thus still the dominant operator) in a number of markets, the conditions in its Licences are more extensive so as to ensure that competition is more fully protected⁵⁰. The TRA monitors Batelco’s Licences especially closely and seeks to work with Batelco to ensure

⁵⁰ TRA’s Opening Submissions at paragraph 31

that Batelco complies with its obligations and does not improperly exploit or abuse its dominant positions.

(i) National Fixed Services Licence

5.18 Under the terms of Batelco's Individual National Fixed Services Licence ("NFS Licence"), Batelco is permitted by the TRA to install, operate and manage its national fixed telecommunication network for the provision of national fixed telecommunications services, public payphone services, telegraph services and telex services in the Kingdom (Section 3.1)⁵¹.

5.19 "National fixed telecommunications network" is defined at Section 2.1 of Batelco's NFS Licence as being

*"a public telecommunications network which facilitates the conveyance by whatever means, including, but not limited to, fixed wireless technology, of signals between network termination points at fixed locations within the licensed area but which does not comprise any telecommunications equipment designed or adapted for use for mobile radiocommunications"*⁵².

This includes all facilities on the national side of a cable landing station, to the extent that these are not international facilities licensed under the International Telecommunications Facilities Licence.

5.20 Section 13.1 of the NFS Licence provides:

*"Subject to section 13.3, for as long as [Batelco] is a public telecommunications operator in a dominant position, [Batelco] shall provide access to its national fixed telecommunications network on the reasonable request of any licensed operator in accordance with section 57 of the Telecommunications Law. Access shall be provided in a manner which is non-discriminatory and at a point or level within such network that is determined by the [TRA] to be technically feasible and consistent with the most efficient delivery of telecommunications services to the ultimate consumer of such services."*⁵³

⁵¹ [HB:1859]

⁵² [HB:1858]

⁵³ [HB:1867]

5.21 Where the TRA considers that a request for access is not reasonable, Batelco is not required to provide access (Section 13.3)⁵⁴. The TRA may determine access services tariffs (Section 13.4)⁵⁵.

(ii) International Telecommunications Facilities Licence

5.22 Under the terms of Batelco’s Individual International Telecommunications Facilities Licence (“**ITF Licence**”)⁵⁶ Batelco is permitted by the TRA to install, operate and manage its international telecommunications facilities in the Kingdom (Section 3.1)⁵⁷. Section 2.1(a) of the ITF Licence states that:

“A meaning or definition provided for any word, phrase or expression under the Telecommunications Law shall also be applicable to such word, phrase or expression in this license; unless the context requires otherwise.”

5.23 In line with the definition of “Telecommunication Facility” found in the Telecommunications Law, “International Telecommunications Facilities” are defined at Section 2.1 of Batelco’s ITF Licence as being:

“any other telecommunications facilities used or intended for use in connecting the Kingdom of Bahrain to other countries for the provision of an international telecommunications service”⁵⁸.

Section 4.1 specifically requires Batelco to provide TRA with a specific description of the location of each “cable landing station”, which is defined as *“the point at which any cable landed in Bahrain connects to another public telecommunications network within the Kingdom, including but not limited to, buildings, equipment and land necessary to establish and maintain such connection”*.

5.24 Section 7.1 of the ITF Licence provides (among other things) that, as a public telecommunications operator in a dominant position, Batelco must provide access to its international facilities when reasonably requested to do so by any licensed operator⁵⁹:

⁵⁴ [HB:1867]

⁵⁵ [HB 1867]

⁵⁶ [HB:1839]

⁵⁷ [HB:1842]

⁵⁸ [HB:1842]

⁵⁹ [HB:1844]

*“...for so long as the licensee is a public telecommunications operator in a dominant position, the licensee shall provide access to its international telecommunications facilities **on the reasonable request** of any licensed operator in accordance with section 57 of the Telecommunications Law.”* (emphasis added)

- 5.25 Section 7.1 provides that access must be provided in a manner which is non-discriminatory, and at a point or level within the network that is determined by the TRA to be technically feasible (and consistent with the most efficient delivery of telecommunications services to the ultimate consumer).
- 5.26 Where the TRA considers that a request for access is not reasonable, Batelco is not required to provide access (Section 7.3)⁶⁰. The TRA may determine access services tariffs (Section 7.4)⁶¹.

C. ACCESS REGULATION (30 APRIL 2005)

- 5.27 Article 57(e) TL contemplates the TRA issuing a regulation in relation to access. Accordingly, the TRA published an access regulation on 30 April 2005 (Regulation 1 of 2005) (the “**Access Regulation**”)⁶² under the power provided for the TRA to do so at Article 57(e). The Access Regulation employs the same definitions as the Telecommunications Law (insofar as relevant).
- 5.28 The “Definitions” in the Access Regulation include the following:

“Definitions

Any word, phrase or expression used in this Regulation shall, unless the context requires otherwise or it is expressly defined herein, have the same meaning as in the Telecommunications Law and the terms below shall have the following meaning for the purposes of this regulation only: ...

***Access Seeker** means a Licensed operator seeking Access from a Licensed operator holding a Dominant position. It does not apply or refer to Access by end users. ... ”*

⁶⁰ [HB:1845]

⁶¹ [HB:1845]

⁶² [HB:1811]

5.29 Article 3 of the Access Regulation reads:

“Article 3 – Access to, and use of, specific Telecommunications networks and Telecommunications facilities

3.1 The TRA may, in accordance with the provisions of Article 2, impose obligations on Licensed operators to meet reasonable requests for Access to, and use of, specific elements of Telecommunications networks and Telecommunications facilities.

*3.2 A licensed operator that is obliged to **meet all reasonable requests, for Access, in the forms mandated by the TRA from time to time, may only refuse to provide such Access on the basis of objective criteria related to technical feasibility or maintenance of network integrity.** Where an Access Seeker takes the view that any such refusal is not based on such objective criteria, it may initiate dispute resolution pursuant to the procedures set out in Section 57(g) of the Telecommunications Law.*

3.3 A Licensed operator that has been declared by the TRA to hold a Dominant position in a relevant market shall:

...

(b) negotiate in good faith with Access Seekers; and

(c) make available a Reference Access Offer in accordance with Article 4.

...

3.4 Where a Licensed operator is declared to hold a Dominant position in a relevant market, the TRA may additionally require it to:

...

(e) provide co-location or other forms of facility sharing, including duct, building or mast sharing; ...

3.5 Where a Licensed operator is declared to hold a Dominant position in a relevant market, the TRA may require it to provide various Access services in relation to any of the following Telecommunications networks' elements or Telecommunications facilities: ... (b) international capacity; ...”

(emphasis added)

5.30 Article 4 of the Access Regulation reads:

“Article 4 – Reference Access Offer

4.1 Any Licensed operator which is subject to Access Obligations, or is required to provide Access to ducts pursuant to Section 57(e) of the Telecommunications Law, shall make available a Reference Access Offer.

A Reference Access Offer must include offers for all Access services that the Licensed operator is required to provide, and must set out a description of the relevant offerings, unbundled according to market needs where this is technically and economically feasible together with the associated terms, conditions and tariffs.

A Reference Access Offer must also contain all necessary information regarding technical specifications and network characteristics for Access Seekers to be able to effectively and efficiently acquire and use each Access service.”

5.31 Article 5.4 of the Access Regulation reads:

“The terms and conditions and tariffs specified in a final Order issued pursuant to Article 5.3 shall become effective in the Reference Access Offer on the effective date of the final Order. Such final Orders shall be effective from their date of issue, unless the TRA specifies another date in the relevant final Order.”

D. TRA’S DOMINANCE DETERMINATION (22 JANUARY 2006)

5.32 Pursuant to Article 2.1 of the Access Regulation⁶³ and Article 57(e) of the Telecommunications Law⁶⁴, the TRA determined that Batelco was dominant in certain wholesale markets, as set out in the determination “Dominance in Wholesale Markets by Batelco” published by the TRA on 22 January 2006 (Determination No. 1 of 2006) (the “**Access Dominance Determination**”)⁶⁵.

5.33 The Access Dominance Determination included the wholesale market for access to international facilities in which Batelco was determined to be dominant⁶⁶, and in which the TRA included the market for access to international call termination facilities and

⁶³ [HB:1813]

⁶⁴ [HB:1791]

⁶⁵ [HB:1828]

⁶⁶ [HB:1837] (Paragraph I, bullet point 3, of the Access Dominance Determination)

international capacity (paragraphs 4.6.1 and 4.6.2 of the Access Dominance Determination)⁶⁷.

5.34 The following clauses from Article 1 of the TRA's Access Dominance Determination are relevant:

"1. Pursuant to the [Access] Regulation, the Authority may impose access-related obligations on a licensed operator declared to hold a dominant position in a relevant market. ... Section 57(e) of the law states that a dominant operator shall offer access to its Telecommunications Network and Telecommunications Facilities to any licensed operator on request. The Authority is satisfied that 'access' encompasses the making available of any telecommunications facilities (or network elements) and telecommunications services by one licensed operator to another for the purposes of providing telecommunications services.

As such, "access" is construed to include : ... co-location or other forms of facility sharing (e.g. ducts, buildings, masts); access to specified network elements or facilities, including, but not limited to, unbundled local metallic or non-metallic path and line sharing; ..." (emphasis added)

5.35 Article 4.6.2 of the Access Dominance Determination reads:

*"4.6.2 ... Since the Authority has concluded that Batelco is dominant in the supply of international outbound call termination and international capacity, it concludes that Batelco is dominant in the wholesale market **for access to international facilities.**"*⁶⁸
(emphasis added)

5.36 The dispositive section of the Access Dominance Determination reads in part:

"IV. Batelco shall provide the Authority with a Reference Access Offer (RAO) for its approval, within two months from the date of this Determination. The RAO should, at a minimum, cover the markets identified under (I) above.

V. This Determination is without prejudice to the obligations that accrue on licensees who hold a dominant position in any other market under the Law, the Access Regulation and/or any other relevant applicable provisions.

⁶⁷ [HB:1835 - 1836]

⁶⁸ HB Vol 5 p.1836

VI. This Determination is without prejudice to the TRA's powers under the Law, the Access Regulation, and the outcome of any ongoing or future investigation, consultation or other regulatory process carried out pursuant to such powers, all or any of which may result in the application of different terms and/or findings than those of this Determination."

E. REFERENCE OFFER ORDER (12 JULY 2006)

5.37 TRA issued a **Reference Offer Order** on 12 July 2006. The part of that Order that addresses Schedule 7 of the Reference Offer reads (in part):⁶⁹

"4.2 Reference Access Offer Schedule 7 – Facilities Access Service

(a) Scope

The Authority is satisfied that the facilities access service should be available for all sites where collocation or facility sharing may be possible. This is because there are particular physical restraints present in the Bahrain telecommunications market that restrict or prevent actual or potential Licensed Operators from developing competing network infrastructure to Batelco.

...

(d) Paragraph 7

The Authority is not satisfied that giving the Access Provider sole discretion in any matter is fair and reasonable.

The Authority is satisfied that to ensure fairness, reasonableness and non-discrimination the outcome of a Field Study should include the cost estimates of any Make Ready Work to give the Access Seeker the ability to determine whether obtaining the facilities access service is a cost effective means to it providing a competitive telecommunications service or network. ..."

(emphasis added)

⁶⁹ HB Vol 5 p.1902, and see also p. 1961, 1963.

F. REFERENCE OFFER (15 FEBRUARY 2006)

- 5.38 As a result of the finding of dominance in the determination “Dominance in Interconnection Markets” published by the TRA on 9 August 2003⁷⁰ and the Access Dominance Determination, pursuant respectively to Articles 57(b) and (e) TL⁷¹ (and Articles 3.3 and 4 of the Access Regulation)⁷², Batelco was legally required to (1) develop and publish a so-called “Reference Interconnect Offer” in relation to Interconnection⁷³, and (2) make available a “Reference Access Offer” in accordance with Article 4 of the Access Regulation.
- 5.39 Batelco publishes a single document which it calls its Reference Offer, which includes the Reference Interconnect Offer and the Reference Access Offer, (as well as other unregulated wholesale services offers) and is revised from time to time. Where the term “**Reference Offer**” is used in this Award, it refers to the Reference Offer published at the date of the Order, unless otherwise stated.
- 5.40 The preamble to the Reference Offer refers, not just to telecommunications network, but also to telecommunications facilities.

“Preamble B

*Under section 57(e) of the Telecommunications Law, a telecommunications operator determined to be in a dominant position in a telecommunications market by the Regulator is required to offer access (on fair and reasonable conditions) within that market, to its telecommunications network **and telecommunications facilities. Although there has been no such finding**, Batelco may accept requests from other licensed operators for access to the Access Services on the terms and conditions set out in this Reference Offer.”* (emphasis added)

There is also an error in Preamble B referring to the lack of a dominance finding. In fact, there had been a finding of “Dominance” on 22 January 2006.

⁷⁰ (Determination No. 4 of 2003) [HB:2450]

⁷¹ [HB:1790 - 1791]

⁷² [HB:1814]

⁷³ Defined in the Determination as “*the physical and logical linking of telecommunications networks used by the same or a different organization to communicate with users of the same or another organization, or to access services provided by another organization*”.

5.41 Section 1 of the principal terms (as distinct from the Schedules) of the Reference Offer reads (in part):

“s.1.1

...

(b) Schedule 1 – Service Descriptions for each of the Services which Batelco is offering under this Reference Offer;

...

(d) Schedule 3 – Charges for Interconnection Services, Access Services and Wholesale Services and other Services.

...

(h) Schedule 7 – Facilities Access Service”

5.42 Section 3 of the principal terms of the Reference Offer reads (in part):

“s.3.1 If, in accordance with Schedule 2, a Service Request for a specified Regulated Service has been submitted by a Licensed Operator authorized to make such a Service Request and has been accepted by Batelco, Batelco must enter into Supply terms with the Licensed Operator for the supply of the requested Regulated Service:

at the Charges specified in Schedule 3 and such negotiated Charges as may apply in respect of the provision of Services by the Licensed Operator; and on the terms and conditions of the Supply Terms as agreed by the parties.

...

s.3.3 For the avoidance of doubt, if the Licensed Operator request[s] Batelco to provide services outside the scope of Schedule 1 (Service Descriptions) , Batelco has no obligation to enter into Supply Terms with the Licensed Operator for the supply of those services.”

5.43 Section 5 of the Reference Offer reads (in part):

“s.5.1 By using the contracting framework of this Reference Offer, a supply agreement made between Batelco and a Licensed Operator under this Reference Offer in relation to the supply of Service (“Supply Agreement”) will incorporate the following, whether physically assembled as a single document or not:

(a) The signed Supply Terms [i.e. Schedule 9]; and ...

- (b) Schedule 1: Service Descriptions for those Services (set out in Schedule 1 to this Reference Offer) which Batelco is required, or has otherwise agreed in accordance with the processes set out in this Reference Offer to provide;*
- (c) Schedule 2: Notification and Acceptance of Service Request for each Service which the Licensed Operator has requested from Batelco and which request Batelco has accepted;*
- (d) Schedule 3: Charges; ...*
- (h) Schedule 7: [this Schedule is only included if the Facilities Access Service is provided]; ...”*

5.44 Schedule 7 of the Reference Offer reads (in part):

“1(a) The Access Seeker requests access, and is provided access by the Access Provider, to Facilities in accordance with:

- (i) this Schedule;*
- (ii) the Supply Terms; and*
- (iii) the Facilities Access Technical Manual;*
- (iv) the relevant Facility Lease or Facility Sub-Lease.*

...

*(c) The **Access Provider** has agreed to grant the **Access Seeker** non-exclusive access to the **Facilities** to install, operate and maintain Equipment for the lawful provision of public telecommunications networks or services in the Kingdom of Bahrain (the “Permitted Use”).” (emphasis added)*

“6. Rejection Of A Facilities Access Application

6(a) A Facilities Access Application may be rejected for the following reasons:

- (i)*
- (v) the Access Provider is not legally required to provide Access Services;”*

5.45 Schedule 8 comprises a “Dictionary and Rules of Interpretation and Construction”. The definition of “Access Provider” is linked to its definition of “Service”, which is in turn linked to the definition of “Access Service”, which is defined somewhat circularly as:

“Access Service means a Service Batelco is required to supply under section 57(e) of the Telecommunications Law and which is described in Schedule 1.” (emphasis added)

- 5.46 One issue is whether the “and” in the definition of “Access Service” in the Reference Offer means “and/or”. TRA argues at [160] of its Opening Submissions that “and” should be read as “and/or”.
- 5.47 The definition of “Access Seeker” in Schedule 8 of the Reference Offer contemplates that an Access Seeker can seek access either to Facilities or Services. However, access to a “Facility” is linked to ownership by the “Access Provider”, which again leads back to the definition of “Access Service”, and the question noted in the previous paragraph above.

6. MEMORANDUM OF ISSUES

6.1 By way of a Memorandum of Issues dated 9 March 2011, the Tribunal and the Parties agreed that the Tribunal will decide four main issues:

- Issue I. Scope of the Tribunal's Review
- Issue II. TRA's Jurisdiction to make the Order
- Issue III. TRA's Order
- Issue IV. Appropriateness of the Fine

6.2 The Tribunal will therefore deal with these issues (and their related sub-issues) in this Award.

7. ISSUE I. SCOPE OF THE TRIBUNAL'S REVIEW

Pursuant to the Telecommunications Law of the Kingdom of Bahrain (Telecommunications Law), what is the nature and scope of the Tribunal's power to review the Order made by the TRA on 24 November 2009?

- 7.1 By way of an email dated 10 March 2011, after reviewing the Parties' respective briefs on the *Nature and Scope of the Tribunal's Powers*, the Tribunal informed the Parties that:

"The Tribunal is of the provisional view that it has full power of appellate review in this arbitration. The Tribunal, therefore, proposes to allow the Claimant to present its case on that basis so that both Parties can prepare their evidence and submissions accordingly. However, the Tribunal has not reached a final decision on this point and the Parties are at liberty to further address this issue in their respective Opening Submissions."

- 7.2 After carefully considering the full submissions of the Parties at the hearing, the Tribunal has confirmed its provisional view that, under the Telecommunications Law, it exercises an appellate jurisdiction rather than one confined to common law judicial review. Its reasoning is as follows.

- 7.3 The Tribunal has an appellate jurisdiction under Article 36 TL⁷⁴, which in turn refers to the Chapter 16 provisions (Articles 66 to 71). The reference in Article 66 TL to the "*Arbitration Panel ... hav[ing] the power to determine the dispute arising between the Authority and any Licenced Operator*"⁷⁵, and the use of an independent tribunal (including some expectation of proficiency and experience in the field of the dispute as stated in Article 68(a))⁷⁶, point towards an appellate jurisdiction.

- 7.4 Although the Tribunal is well aware of the principles of administrative law, both common law and civil, pertaining to the scope of judicial review of executive action, in which the courts have tended to concentrate on how a decision has been arrived at rather than the substance of the decision itself, nevertheless the TL has conferred very substantial powers

⁷⁴ [8C/66]

⁷⁵ [8/C/85]

⁷⁶ [8/C/85]

on the TRA, in effect as "prosecutor, judge and jury", not least in its ability to impose very substantial fines in the case of severe breach, and has conferred exclusive jurisdiction on an independent Tribunal to "determine the dispute". Where, for instance, the TL introduces into the regulatory system the concept of reasonableness - as in the case of a reasonable request by an Access Seeker - the Tribunal considers that to be an objective test on which the Tribunal can rightly be expected to form its own judgment on the facts, even if that requires substituting its judgment for that of the TRA. The Tribunal is of the view that the TL imposes on the Arbitral Tribunal a duty to determine (in the sense of resolve) the dispute and not merely to conclude whether the impugned decision fell within the bounds of reasonable judgment of the decision maker.

- 7.5 The Tribunal disagrees with the TRA's submission that the word "nullify" in the last sentence of Article 66 (para 3) TL defines or limits the Tribunal's role and/or powers. In particular, the use of the word "nullify" in Article 66 does not limit the Tribunal's ability to substitute its own conclusions on any particular issue following any conclusion that the decision under appeal cannot stand and needs to be set aside (nullified) either with or without substituted or further orders.
- 7.6 In any case, the TRA has conceded that all of Batelco's grounds of appeal could be subsumed under the judicial review ground.
- 7.7 The Tribunal thus confirms its provisional view of 10 March 2011 that it does have appellate jurisdiction. The effect of the Tribunal exercising its jurisdiction on a fresh hearing in the context of any procedural defects by TRA is set out in the answer to Issue III.2 below.

8. ISSUE II. TRA'S JURISDICTION TO MAKE THE ORDER

*Whether any contravention by Batelco of the Telecommunications Law, the Access Regulation, the terms of its Reference Offer and provisions of its International Facilities License and National Fixed Service Licence (**Regulatory Obligations**) as set out in the Order was such as to attract the jurisdiction of the TRA to issue an order under article 35, and in particular:*

- i. Whether it was necessary for there to be a severe breach for the purposes of Article 35 and if so whether any breach by Batelco was severe?*
- ii. Must the Order serve the "public interest"? If so, to what extent must the Order serve the public interest and, on the basis of any breach identified, does it do so (or do so sufficiently)?*

Issue II.(i) *Whether it was necessary for there to be a severe breach for the purposes of Article 35 and if so whether any breach by Batelco was severe?*

- 8.1 Parties have agreed that, in the first line of Article 35, the words "in material breach" should be read as "in severe breach".
- 8.2 However, the issue remains as to what is the threshold involved in a "severe breach". For the purposes of this dispute, it is not necessary for the Tribunal to give an extensive or exhaustive definition of what "severe breach" means.
- 8.3 In the context of the current dispute, the Tribunal will take "severe breach" to mean a breach which is more than minor and/or transient, and which contravenes the identifiable purpose of the relevant provision of the Telecommunications Law breached by the conduct in question.
- 8.4 For the reasons set out in relation to Issue III below, the breach of the Telecommunications Law is indeed "severe" within the meaning of that term in Article 35.

Issue II.(ii) *Must the Order serve the “public interest”? If so, to what extent must the Order serve the public interest and, on the basis of any breach identified, does it do so (or do so sufficiently)?*

8.5 Parties have agreed that the “public interest” sub-issue must stand or fall with the “severe” issue, and thus the Tribunal is not required to address this sub-issue⁷⁷.

9. ISSUE III. TRA’S ORDER

1. *Whether, by refusing to permit Menatelecom (“Mena”) direct access to the FLAG Landing Station on the terms requested by Mena, Batelco violated provisions of the Regulatory Obligations, and in particular whether:*
 - i. *Batelco complied with the Reference Offer and thereby discharged its Regulatory Obligations;*
 - ii. *Mena’s request was, in all the circumstances, a reasonable request within the meaning of the Access Regulation, Batelco’s International Telecommunications Facilities Licence and/or Batelco’s National Fixed Services Licence; and*
 - iii. *Batelco offered upon request access to Mena on fair and reasonable terms within the meaning of the Telecommunications Law.*
2. *Whether, by TRA’s conduct, it breached its duty to exercise its powers efficiently, effectively, regularly, reasonably and in a non-discriminatory and transparent manner.*

⁷⁷ Batelco’s Closing Submissions, Counsel’s Speaking Notes, #35

9.1 The term “Regulatory Obligations” is defined in the text of Issue II, set out earlier, and includes the primary legislation, the Telecommunications Law. As appears in the paragraphs following, the issue of Batelco’s violation of Article 57(e) of the TL itself is important, albeit that it is addressed under the subheading below relating to Issue III.1(i), which refers to the Reference Offer.

A. ISSUE III.1.(I) WHETHER BATELCO COMPLIED WITH THE REFERENCE OFFER AND THEREBY DISCHARGED ITS REGULATORY OBLIGATIONS

Batelco’s principal arguments

9.2 Batelco argues as follows.

- (a) It is only required to supply “Access Services” under the Reference Offer and an Access Service is “*a Service Batelco is required to supply under Article 57(e) of the Telecommunications Law **and** which is described in Schedule 1*” (emphasis added), i.e. only those services which are described in Schedule 1 of the Reference Offer. However, since Mena did not request a service provided under Schedule 1, but only requested a service under Schedule 7, there was no “Access Service” to be provided. Batelco contends that “facilities access services” (which Mena did seek) under Schedule 7 of the Reference Offer are merely “ancillary services” to the principal Schedule 1 services which the Reference Offer obliges Batelco to provide.
- (b) The Reference Offer is exhaustive of its Regulatory Obligations, and it has no further obligations under Article 57(e) of the Telecommunications Law. Batelco argues that it fully complied with its Reference Offer, and thereby discharged its obligations under the Telecommunications Law, the Access Regulation, Batelco’s International Telecommunications Facilities Licence, Batelco’s National Fixed Services Licence and the Reference Offer itself.
- (c) Its Schedule 7 obligations under the Reference Offer are contingent on the provision of Schedule 1 “services” to Mena, and Schedule 7 obligations are not “standalone”.

(d) Article 57(e) only requires access to be provided to Batelco's telecommunications network and not access to Batelco's facilities (e.g. buildings, ducts or other infrastructure).

(e) Mena's application exceeded Batelco's obligations in

*"seeking a connection to be made by Batelco between Mena's network and Flag's network. In no sense could this part of the application be said to be an application for 'Access to [Batelco's] Telecommunications Network'."*⁷⁸

TRA's principal arguments

9.3 TRA argues as follows.

(a) "Access" is defined in the Telecommunications Law as access to either services or facilities or both.

(b) "Access" is not qualified by the term "Telecommunications Network".

(c) Even if the definition of "Access" is qualified by the term "Telecommunications Network", this term "Telecommunications Network" is only used in the first paragraph of Article 57(e) TL, and not in the second or third paragraphs, and hence those paragraphs are not qualified.

(d) "Telecommunications Network" includes all the physical infrastructure and facilities, and they form part of the network. In order for Batelco's arguments to work, the law should refer to "Public Telecommunications Network" instead. The reference to Access to ducts only when there is an essential need shows that Article 57 envisages access to physical facilities which form part of the network.

(e) Batelco has failed to comply with its obligations under Schedule 7 of the Reference Offer.

⁷⁸ Batelco's Closing Submissions, Counsel's Speaking Notes [39(b)]

(f) Schedule 7 imposes “standalone” obligations (i.e. independent of any request for, or supply of, Schedule 1 services) to provide Access to any part of Batelco’s telecommunications facilities. Facilities access services are not merely ancillary.

(g) TRA concedes that, in the majority of cases, a facilities access service will be ancillary to a request for a Schedule 1 service. However, the TRA contends that the conjunction “and” in the description of Access Services should be read as “and/or”. In support of its contention, TRA argues that the Reference Offer is made to operate over the range of access services which are required to be provided under Article 57(e), and are not limited to those specified in Schedule 1 of the Reference Offer but also include free-standing services specified in Schedule 7.

9.4 TRA argues further that the Reference Offer should be read so as to ensure that services which could be reasonably requested in line with Article 57(e) TL are made available under it. The purpose of Schedule 7 would be wholly undermined if it were not to give rise to free-standing obligations.

9.5 TRA argues that, even if Batelco had complied with the Reference Offer, it did not thereby discharge its Regulatory Obligations and, in particular, its obligations under Article 57(e) of the Telecommunications Law, the Access Regulation, the Dominance Determination, the International Telecommunications Facilities Licence and the National Fixed Licence.

B. TRIBUNAL’S ANALYSIS OF BATELCO’S REGULATORY OBLIGATIONS

9.6 The Regulatory Obligations listed in Issue II are the Telecommunications Law, the Access Regulation, the Reference Offer Order, the Reference Offer and its licences. The primary legal rules are those enacted as legislation which, in this case, are found in the Telecommunications Law.

(i) Principal substantive issue

9.7 The principal substantive, as distinct from procedural, issue before the Tribunal was whether Batelco, having received Mena's Second Application, dated 29 April 2009 and headed “Application for Solution to Co-Locate with FLAG”, was lawfully required to

comply with that request under its regulatory obligations. In the Tribunal's judgment the answer to that question is Yes. The Tribunal sets out its reasons below.

(ii) The connection between Article 35 TL, Article 57(e) TL and Batelco's Licences

9.8 Article 35 of the Telecommunications Law - headed "Ensuring Compliance with Individual and Class Licences" - provides the TRA with an order-making power, which it used in this case:

*"35(a) If it is apparent to [TRA] that a Licensee [such as Batelco], has been or is in material [severe] breach of **any provision of this Law or any condition of the Licence** or that there are serious indications or evidence that a Licensee is likely to commit such breach, [TRA] shall issue an order in accordance with the procedures provided for in paragraphs (b), (c) and (d) of this Article by taking the measures it considers necessary to secure compliance by the Licensee with the provisions of this law and the conditions of the Licence, and sending a copy of such order to the Licensee. ..."* (emphasis added)

9.9 The relevant provision of the Law is Article 57(e). The two Licences referred to in the TRA's Article 35 Order are the International Telecommunications Facilities Licence and the National Fixed Licence, under which Batelco is authorised to provide its telecommunications services in Bahrain.

9.10 Under Article 57(e) TL, a Public Telecommunications Operator in a dominant position *"shall offer upon [reasonable] request Access [as defined in Article 1 of TL] to its Telecommunications Network [as also defined in Article 1] on fair and reasonable terms to any Licensed Operator."*

9.11 In January 2006, pursuant to the Access Regulation of April 2005, the TRA issued a Determination that Batelco held a dominant position in certain wholesale markets, including the wholesale market for access to international facilities.

9.12 Section 7.1 of Batelco's International Facilities Licence (the version of June 2005), provides that Batelco, for as long as it is in a dominant position

"shall provide access to its international telecommunications facilities on the reasonable request of any licensed operator in accordance with section [sic] 57 of the Telecommunications Law."

9.13 Section 13.1 of Batelco's National Fixed Licence, the version of the same date, has a similar provision, albeit with slightly different wording, the relevance of which will be discussed below.

(iii) The purpose and scope of these provisions in Article 35 TL and Article 57(e) TL and Batelco's Licences

9.14 The purpose of these provisions is to impose a duty on Batelco to comply with reasonable requests by other Licensed Operators, such as Mena, for access (the nature of which is discussed below). If Batelco does not comply with any such request, the TRA may use its order-making powers to compel it, but only where there is a severe breach.

(iv) What kind of access is mandated by the Telecommunications Law?

9.15 The issue of what kind of access could lawfully be requested by the Licensed Operator had been the subject of lengthy argument before the Tribunal. However, although Batelco had argued in its pleadings that Mena's request was not reasonable, and that Batelco had acted reasonably in its offer of alternatives in the course of 2009, the evidence of the witnesses before the Tribunal was largely uncontested: namely, that Mena's request was technically feasible and, in that sense, reasonable in that it could be complied with at a cost that did not have adverse effects on the operation of Batelco's own network and facilities. Moreover, Batelco had offered Mena such access on 21 October 2009 before withdrawing the offer.

9.16 Indeed, the issue of reasonableness, in the sense of the offer of reasonable alternatives, was not pursued by Mr Lazarus in the oral hearing. He focussed his case on whether the access sought by Mena fell within the scope of Batelco's obligations under the law of Bahrain and, indeed, the totality of what he referred to as the "regulatory regime". If it did not, then the question of reasonableness did not arise. In Mr Lazarus's submission, the response made by Batelco to Mena in the course of 2009 was never compelled by the Law of Bahrain, including the offer of 21 October 2009.

(v) The nature of Mena's request and Batelco's response

9.17 Before, however, the Tribunal turns to consider in more detail the meaning and effect of the provisions of the Telecommunications Law (and, consequently, the Licences held by Batelco), and other instruments falling within the regulatory regime and deriving their legitimacy from the Telecommunications Law (such as the Access Regulation, the Reference Offer and the Reference Order), the Tribunal will summarise the nature of the request and the reasons given at the time by Batelco for its rejection. Although these reasons were elaborated on in later submissions made by Batelco to the TRA, before and after the Provisional Order was made, the substantive reasons for Batelco's rejection remained largely unchanged. The reasons why Batelco's rejection of the request was said to be lawful were also developed at length in the written and oral submissions in this arbitration.

(vi) The letter of 22 July 2008 (Mena's First Application to Batelco)

9.18 In its letter of 29 April 2009, Mena informed Batelco that it had "entered into negotiations for services from FLAG" and that it understood that "FLAG is located at Batelco's Telegraph House premises."

9.19 The Tribunal can deal with the First Application fairly shortly. In its opinion, whether or not Batelco knew at the time or should have known that Mena's request for "*a space as collocation in Telephone House*", as distinct from Telegraph House, had something to do with Mena's aspirations to connect its network with that of FLAG, it was not until it received the letter of 29 April 2009 that it was put clearly on notice that a request was being made to it for access to Batelco's telecommunications facilities and services for that purpose.

9.20 The Tribunal concludes that Batelco was not in breach of the TL or its Licences in rejecting the request of 22 July 2008, which fell below the standard of what may be considered to be reasonable. In its judgment, there has to be a high degree of care and accuracy in requests made by Licensed Operators (which are in many cases substantial and well-financed undertakings) before a request triggers an obligation on the part of a dominant operator, failure to comply with which can expose the dominant firm to severe sanctions.

9.21 In any event, between 22 July 2008 and 29 April 2009, Mena was working on defining more precisely the nature of the access that it was seeking.

(vii) The letter of 29 April 2009 (Mena's Second Application to Batelco)

9.22 This letter from Mena to Batelco is quoted in full below, addressed to Mr John Ford, General Manager Wholesale and Carrier Services, Batelco, Manama, Bahrain:

"Dear John

Application for Solution to Co-Locate with FLAG

Mena Telecom has entered into negotiations for services from FLAG. We understand that FLAG is located at Batelco's Telegraph House premises.

As such, we require a solution to reach FLAG's landing station at Telegraph House. We believe this solution encompasses the following Reference Offer services:

- 1. Duct rental Application from Mena Telecom's Disaster recovery Site in Ghufool to Batelco's Telegraph House (enclosed)*
- 2. Facilities Access Application to obtain space in Batelco's Riser Room at Telegraph House for Mena Telecom to install a cable to reach Mena Telecom's equipment (enclosed).*
- 3. Facilities Access Application to Co-Locate with FLAG(enclosed).*

We also enclose a simplified diagram showing the features of the solution, the technical specifications of the OADM and an area plan.

Pursuant to clause 5(a)(i) of the Facilities Access Schedule under the Reference Offer, we understand that you have 5 Working Days to inform us of any additional information required.

I look forward to receiving your acceptance of the above requests.

Yours sincerely

Laith Sadiq

Chief Executive Officer"

9.23 The letter was copied to, among others, senior officers of TRA.

9.24 As Mr Laith Sadiq (CEO of Mena) said at the hearing, his solution required compliance with three requests. The Duct Rental Application was completed on a Batelco form. The Facilities Access requests for the Riser Room and for Collocation were not on Batelco forms, but were on forms prepared by Mena and signed by Mr Sadiq with a space for signature by an employee of Batelco. The details provided of the requests in each of the one page Facilities Access Requests were said to be "the required details for such application pursuant to Section 3(b) of Schedule 7 to the Reference Offer". Indeed, they followed the requirements of Section 3(b) closely.

(viii) Batelco's response to Mena's Second Application

9.25 On 9 June 2009 Mr John Ford (Batelco's General Manager of Wholesale and Carrier Relations) replied to Mr Sadiq. It is not necessary to quote the whole letter, which included offers of existing services under the Reference Offer and new services. The following passage is the most relevant:

"In relation to the Combined Request, we advise you that each of the components of the Combined Request have been rejected as there are no Batelco services with which Mena plans to interface in Telegraph House, in particular:

(a) an ODF fibre connection between the Mena equipment and the Flag landing station; and

(b) related facilities management services over and above merely co-locating your equipment and racks in Telegraph House.

In relation to your duct application from Telegraph House, Salmaniya to Al Bader, Ghufool, Batelco has carried out a desk study and rejects the current duct application because contrary to Batelco's duct policy, the order comprises primary and secondary duct routes (rather than primary routes only)."

9.26 Mr Ford also drew attention to security concerns "relating to the rental of duct and co-location space to third parties within its own property. [REDACTED]

Batelco's legal arguments on Article 57(e) TL

⁷⁹ HB: 1068

9.27 Mr Lazarus argues that the only obligation on the dominant firm under Article 57(e) TL is to offer access to its Network, as defined in Article 1, rather than component parts of the Network. He emphasises that Article 57(e), first paragraph, refers to “Telecommunications Network” and not to “Telecommunications Facilities” and that “Access” to such facilities and/or services could be required only where the other Licensed Operator was requesting “Access” to the Network. He also argues that the wording of the Reference Offer, which is considered below, is consistent with this construction of the primary legal obligation.

TRA’s legal arguments on Article 57(e) TL

9.28 Mr. Beard contends on behalf of TRA that the required access “to a telecommunications network” in Article 57(e) includes access to any part of a Telecommunications Network⁸⁰, which he contends is made up of both facilities and services, and that means requiring access to all the facilities therein. Mr. Beard takes the position that it is not actually necessary to read in the words “and Telecommunications Facilities” into Article 57(e) as this would be otiose; and he relies most strongly on the definition of “Access” in the Telecommunications Law (and Access Regulation), which requires “the making available of telecommunications facilities and/or telecommunications services”.

(ix) Article 57(e) of the Telecommunications Law is the primary source of Batelco’s regulatory obligations as a dominant firm

9.29 Article 57(e) requires (among other things) that:

“A Public Telecommunications Operator in a dominant position shall offer upon [reasonable] request Access to its Telecommunications Network on fair and reasonable terms to any Licensed Operator.”

9.30 Accordingly, the Tribunal has to determine the scope of the “Access” which may reasonably be requested. Access may be narrowly or broadly defined. Its scope is critically important, as is illustrated by this case. Mena did not want (or seek) access to Batelco's network as such, in the sense of acquiring network services from Batelco such as those offered by Batelco in its letter of rejection of 9 June 2009 (referred to at paragraph 9.25 above). Mena did not wish to be dependent upon such services when

⁸⁰ Defined as “a network permitting the conveyance of messages, sound, visual images or signals between defined termination points by wire, radio, optical or other electro-magnetic means.”

entering the market as a competitor of Batelco. However, it did wish to have access to Batelco's telecommunications facilities.

9.31 Article 1 of the Telecommunications Law defines "Access" as

"the making available of telecommunications facilities and/or telecommunications services to another Licensed Operator for the purpose of providing telecommunications services, and including the connection of equipment by wire or wireless means, access to physical infrastructure including buildings, ducts, cables and masts, access to mobile networks and access to number translation or networks offering equivalent functionality."

9.32 Article 1 TL further defines "Telecommunications Facility" as

"any part of the infrastructure of a Telecommunications Network including any antenna, circuit, duct, equipment, fibre (whether partially or fully in service or not, line, mast, pole, tower or any other structure or any other thing used or intended for use in connection with a Telecommunications Network."

9.33 "Telecommunications Network" is itself defined as

"a network permitting the conveyance of messages, sound, visual images or signals between defined termination points by wire, radio, optical or other electro-magnetic means."

9.34 The Tribunal cannot accept Batelco's narrow construction of Article 57(e) TL. In its judgment, the ordinary meaning of the obligation in the context, which includes the statutory objectives in Article 3 to be pursued by the TRA, is that a reasonable request for "Access" - as defined in Article 1 - will extend to requests to the dominant firm to "make available" facilities and services, and that there is no limitation on the scope of the request, provided that what is sought is access to part of the infrastructure of a network and that the purpose is to provide telecommunications services.

9.35 Each of Articles 3(e) and 40(6) of the Telecommunications Law contemplate unqualified “Access” to the facilities of dominant Licenced Operators. These provisions reinforce the argument for TRA that Article 57(e) TL should read:

*“Access to its [i.e. the Dominant Operator’s] Telecommunications Network **and Telecommunications Facilities**”* (addition in bold underline)

9.36 Such a reading in is legitimate and necessary to give effect to the plain purpose of the TL, taking into consideration (i) the other Articles in the Telecommunications Law contemplating access to facilities and (ii) the policy underlying the enactment of the Telecommunications Law and the granting of “Access” in particular.

9.37 In the present case, Mena wished to obtain a connection between its network and that of FLAG rather than that of Batelco. Mr Lazarus argues that such a request was wholly outside the obligations of Batelco. The Tribunal cannot accept that argument: Batelco was the gatekeeper at Telegraph House for any Licensed Operator that wanted to compete with Batelco through acquiring capacity from the FLAG network without using Batelco network services, so as to secure its share of that capacity. Accordingly, the Tribunal does not accept that access to facilities or services is reasonable only in circumstances where there is a request for access to the Batelco Network. Nor does the Tribunal find that there is anything unreasonable in requesting Batelco to provide the incidental services for the connection to the FLAG network. The Tribunal thus holds that the obligation in Article 57(e) TL is to offer Access to its Telecommunications Network and Telecommunications Facilities (using these terms in their statutorily defined meanings).

(x) TRA’s multiple statutory objectives and its statutory powers to issue regulation as well as supervise

9.38 Thus far the Tribunal has considered only the connection between Articles 35 and 57(e) of the Telecommunications Law in order to ascertain how the obligations of the dominant firm are to be enforced. But the Tribunal must also consider the context of the statutory objectives and the primary duties placed on the TRA. That takes the Tribunal to Article 3 TL, headed “Duties and Powers of the Authority”. In respect of the present dispute between Batelco and the TRA, the Tribunal notes that, under Article 3(b) TL, the

Authority "*undertakes in carrying out its duties relating to Telecommunication [S]ervices in the manner best calculated to [sic]: ...*

2 promote effective and fair competition among new and existing Licensed Operators... ."

9.39 At Article 3(c)(13) the Telecommunications Law provides that the Authority shall have the power to "*encourage, regulate and facilitate adequate Access and Interconnection and interoperability of services, including where necessary enforcing the sharing by Public Telecommunications Operators of the benefit of facilities and properties.*" The Tribunal views these provisions as consistent with its interpretation of Article 57(e).

9.40 In further support of this construction of this primary part of the regulatory regime, reference can be made again to the first unnumbered paragraph of Article 57(e) which provides that:

"such operator shall only be under an obligation to offer Access [as defined] to the ducts⁸¹ if the Authority considers that there is an essential need for such Access, whereby such demand is deemed to exist in the case of Access for a holder of a mobile telecommunications Licence".

9.41 That appears to be a clear derogation of the primary obligation in respect of one, and one only, part of the infrastructure where the request, in order to be considered reasonable, has to establish essential need. But there could be nothing in that paragraph to suggest that an application for (say) duct rental could be reasonable only if it is part of or ancillary to an application for access to the Network itself.

(xi) The significance of Batelco's Obligations Under its Licences

9.42 The majority of the Tribunal takes the view that an analysis of Batelco's obligations under its Licences is relevant to "check" the consistency of Batelco's Regulatory Obligations (i.e. comparing the interpretation of Batelco's obligations under the "higher" law represented by Article 57(e) Telecommunications Law, with those under the Reference Offer and the Licences). The minority takes the view that an analysis of regulatory instruments subsidiary to the Telecommunications Law (including the Licences) is of no relevance to the interpretation of Batelco's obligations under Article

⁸¹ "Duct" is included both in the definition of Access and Telecommunications Facilities

57(e) TL. However, this difference of opinion does not affect the final conclusion of the Tribunal on the challenge raised by Batelco, which will be explained at paragraphs 9.73 to 9.82 below.

- 9.43 The majority considers it relevant that the broad scope of the requirement to provide "Access" to facilities and services is also found in the International Telecommunications *Facilities* [emphasis added] Licence. Section 7 of this License requires that the Licensee
- "shall provide access to its international telecommunications facilities on the reasonable request of any licensed operator in accordance with section 57 of the Telecommunications Law".*

Section 7 goes on to provide that *"Access shall be provided in a manner that is non-discriminatory and at a point or level within such network that is determined by the regulator to be technically feasible and consistent with the most efficient delivery of telecommunications services to the ultimate consumer of such services."*

There is no suggestion in Section 7 that Batelco's duty to provide access to international facilities under this Licence only arises where there has been a reasonable request for access to the Telecommunications Network itself.

- 9.44 Although the NFS Licence, in its equivalent provision (viz Section 13), refers to access to its national fixed telecommunications network on the reasonable request of any licensed operator in accordance with section 57 of the Telecommunications Law, Section 13 is consistent with, and does not in any way reduce, Batelco's obligation to provide access under the Telecommunications Law.

- 9.45 Further, TRA's Dominance Determination of January 2006 includes the following statement:

*"Section 57(e) of the Law states that a dominant operator shall offer access to its Telecommunications Network **and Telecommunications Facilities** to any licensed operator on request. The Authority is satisfied that "access" encompasses the making available of any **telecommunications facilities** (or network elements) and telecommunications services by one licensed operator to another for the purpose of providing telecommunications services." (emphasis added)*

(xii) Whether Batelco's obligations under the Reference Offer are exhaustive of its Regulatory Obligations

9.46 The Telecommunications Law is the source of primary and on-going obligations. In other words, if there is any "gap" in Batelco's Reference Offer to access seekers, it is covered by the "residual" force of Article 57(e) TL. Batelco and any other regulated entities must always have regard to their primary obligations under the Telecommunications Law.

9.47 Regardless of whether Batelco breached the Reference Offer, there is no force to Batelco's proposition that the Reference Offer is exhaustive of Batelco's obligations under Article 57(e) of the Telecommunications Law.

(xiii) The construction of regulatory instruments subordinate to the Telecommunications Law: the Access Regulation and Reference Offer

9.48 There was extensive argument before the Tribunal on the legal effects of the Access Regulation and of the Reference Offer made pursuant to Article 4 of that Regulation. Indeed, in its Order of 24 November 2009, the TRA held that Batelco was in breach of both instruments. Since these are recognised to be subordinate instruments, the question for the Tribunal is whether its conclusions in respect of Batelco's primary obligations under the Telecommunications Law are, in some way, dependent upon its conclusions on the construction of the subordinate instruments. In the Tribunal's view, they are not. Indeed, the Tribunal did not understand Mr Lazarus to be arguing that, if the Tribunal found for him on the construction of the Reference Offer but against him on the construction of the primary rules, the entire order would be nullified.

9.49 The TRA also argued that there was no inconsistency between the various instruments that made up the whole of the regulatory matrix. But, in its view, Schedule 7 to the Reference Offer was not only a standalone means of obtaining access within the meaning of Article 57(e). It provided in elaborate and prescriptive detail all the rules by which the Access Seeker (Mena) and the Access Provider (Batelco) would be bound in arriving at a solution to a reasonable request.

(xiv) The complexity and obscurity of the Reference Offer is undesirable

9.50 The Access Regulation has been in existence since 2005. The first iteration of the Reference Offer appears to be in 2006, since when it has plainly been subject to various changes. It is, in the Tribunal's view, most unfortunate that a document of this importance within the regulatory matrix should be, in 2011, the subject of wholly different interpretations by TRA on the one hand, which approved it, and Batelco, on the other hand, which submitted it for approval. The Tribunal accepts that each side has put forward its interpretation in the honest belief that it was right. But, looking ahead, the Tribunal gives the strongest recommendation to TRA that it should consider producing a document that is clear, capable of being understood by businessmen as well as lawyers, devoid of complexity and circularity in its definitions and clearly linked to the rest of the regulatory matrix. At present it is deficient in all these respects.

(xv) Article 57(e) TL is the starting point of Batelco's Regulatory Obligations

9.51 To understand these arguments, one needs to go back to the second and third unnumbered paragraphs of Article 57(e) TL. They are as follows:

"The Authority may publish regulations with regards to Access, including a regulation concerning the Reference Access offer similar to a Reference Interconnection offer."

The Tribunal will refer to this sub-paragraph as Article 57(e) at (2).

"if the Authority considers the tariffs and the terms and conditions on which Access is offered by an operator in a Dominant Position are unreasonable, it may determine such tariffs and terms and conditions as it considers appropriate, and the provisions of paragraph (b) of this Article shall apply in this respect."

The Tribunal will refer to this sub-paragraph as Article 57(e) at sub-clause (3).

9.52 In respect of Interconnection, the relevant provisions of Article 57 TL are at sub-articles 57(a) to (d). Article 57(b) needs to be cited in full:

"A Public Telecommunications Operator determined by the Authority to have a Dominant Position in a particular telecommunications market shall, within three months of such determination and every six months thereafter, publicise a

reference interconnection offer after obtaining the Authority's approval to such an offer.

Such offer shall include a full list of basic interconnection services, conditions of interconnection and the tariff for every service.

The Authority may issue an order specifying the terms and conditions and the tariffs if it does not approve the contents of such an offer in this respect, which order shall be effective from date of issue, unless the Authority specifies another date.

Such terms and conditions and tariffs shall be fair, reasonable and non-discriminatory and the tariffs shall be based on forward-looking incremental costs or by benchmarking such tariffs against tariffs in comparable telecommunications markets.

The tariffs and terms of the Interconnection offered may differ between a Licensed Operator and another only where objectively justified on the basis of the type of interconnection provided."

- 9.53 The cross reference in Article 57(e) TL at sub-clause (3) to Article 57(b) is in general terms, but would appear to be most relevant to the manner of establishing the terms and conditions of the tariffs for the "full list of basic interconnection services".

(xvi) The Access Regulation, Article 3

- 9.54 TRA, in accordance with Article 57(e) at 2, issued an Access Regulation on 30 April 2005, the purpose of which is stated to be

"to provide a framework for Access obligations and the requirements for the publication of a Reference Access Offer by Licensed Operators that are declared to hold a dominant position in a relevant market."

- 9.55 In its Order of 24 November 2009, TRA found that Batelco was non-compliant with Articles 3.2 and 5.4 of the Access Regulation, in addition to its breaches of Article 57(e) and the Licences.

- 9.56 Article 3.2 of the Access Regulation provides:

"A licensed operator that is obliged to meet all reasonable requests, for Access, in the forms mandated by the TRA from time to time, may only refuse to provide such Access on the basis of objective criteria related to technical feasibility or maintenance of network integrity. Where an Access Seeker takes the view that any such refusal is not based on such objective criteria, it may initiate dispute resolution pursuant to the procedures set out in Section 57(g) of the Telecommunications Law."

- 9.57 It is unclear why TRA, in a document issued at about the same time as the revised International Telecommunications Licence, chose to use different language for the conditions justifying a refusal; it is also unclear whether the *"forms mandated by the TRA from time to time"* were intended to be pursuant to the Reference Offer, as contended by Mr Lazarus. The Tribunal agrees with him that, to the extent that Article 3.2 of the Access Regulation imposes an enforceable obligation on Batelco, it is not additional to any obligation already imposed under the provisions of the Telecommunications Law and the Licences. Nevertheless, it states explicitly that all reasonable requests for access must be met. There is no suggestion that the forms mandated by TRA are anything other than forms by which reasonable requests may be submitted for access to telecommunications facilities or services.
- 9.58 It has not been easy or simple to understand the full scope of Article 3 of the Access Regulation. There is a clear obligation on Batelco under Article 3.3 (c) to *"make available a reference Access Offer in accordance with Article 4"*. Article 3.4 of the Access Regulation confers a power on the TRA whereby it may *"additionally require the [Dominant Firm]"* to do certain things set out at (a) to (g) from which it would appear they are additional to the requirements at Article 3.3. Yet, Article 3.4 (e) of the Access Regulation refers to *"provide [collocation] or other forms of facility sharing, including duct, building or mast sharing"* which the Tribunal would have thought had already been included within the definition of "Access" under the TL and the Licences.
- 9.59 Moreover, Article 3.5 of the Access Regulation empowers the TRA to require the dominant firm *"to provide various Access services in relation to any of the following telecommunications **networks'** elements or telecommunications **facilities"*** (emphasis added) at (a) to (h) including at (b) *"international capacity"*. Other services identified in those sub-paragraphs seem to find their way into the definition of Service Descriptions in

Schedule 1 of the Reference Offer. In the event, the Tribunal considers that nothing turns on the construction of Article 3 - but it contributes to the lack of clarity in this subordinate instrument as to what it was intended to achieve other than the means by which the Reference Offer is to be introduced into the matrix.

9.60 Article 5 of the Access Regulation is headed "Approval of the Reference Access Offer". Article 5.4, included in the Order of 24 November 2009, deals with the circumstances in which the TRA has determined that a Reference Offer is not acceptable, and has specified what must be included in it, which is then transposed into the Reference Access Offer and takes effect from that date. As with Article 3.2 of the Access Regulation, it does not appear to create any new obligation.

(xvii) Whether Batelco's obligations under the Reference Offer can narrow the scope of its obligations under the Telecommunications Law

9.61 In its Order of 24 November 2009, TRA also held that Batelco was in breach of Schedule 7 of the Reference Offer. Mena's original Second Application submitted on 29 April 2009 (as well as its resubmitted version on 22 October 2009) were made in accordance with that Schedule. TRA proceeded on the basis that Schedule 7 imposed what were referred to in the arbitration as "standalone" obligations; and the remedies it imposed on Batelco under the Order required compliance with that Schedule.

9.62 Batelco's argument, summarised above, is that Article 57(e) TL requires Batelco to give operators access to its network and to give such operators access to facilities, individual parts of its network, but only if requested for the purpose of getting access to its network. The Tribunal has rejected that argument. In its judgment, both the policy underlying the legislation, and the ordinary meaning of Article 57(e) and the Licences in that context, permit the kind of request made by Mena in this case, in which Mena explicitly rejected the offer of network services on the ground that it might compromise the competing service that it wished to provide from its own network, connected to that of FLAG, against that of Batelco.

9.63 Mr Lazarus, after taking the Tribunal through the Reference Offer, argued that the requirement to give access to infrastructure components for the purpose only of giving access to its network is reflected in the Reference Offer "*making it clear that access to*

facilities is only required on an ancillary basis to a Schedule 1 service [Schedule 1 to the Reference Offer]". Thus he concluded, in oral argument:

"so both instruments are making the same distinction between Batelco's primary obligation to give access to its network and its ancillary obligation to give access to its facilities in order to give practical effect to the primary obligation."

9.64 However, as stated above, the Tribunal does not understand Mr Lazarus to be arguing that, if the Tribunal finds against him on the construction of Article 57(e) TL, nevertheless the Reference Offer obligations, if it construes them as he suggests, and such obligations being in a subordinate regulatory instrument, "trump" the provisions of Article 57(e) and the Licences. In such a case, the Tribunal would have to find that the provisions of Schedule 7 to the Reference Offer, having no standalone status within the Reference Offer, were not breached - thus nullifying that part of the Order - but that the other breaches were established and provided a legal basis for the Order.

(xviii) Interpretation of the Reference Offer

9.65 Given the Tribunal's decision that Batelco has breached its Regulatory Obligations under the Telecommunications Law, and that compliance with the Reference Offer is not exhaustive of Batelco's Regulatory Obligations, it is not strictly necessary for the Tribunal to decide whether Batelco failed to comply with the Reference Offer.

9.66 The Tribunal has considered whether, in the circumstances of its finding that Mena's Second Application did fall within the obligations placed on Batelco under the provisions of Article 57(e), it should then proceed to a detailed exposition of the views of the majority and the minority on whether Batelco was in breach of the Reference Offer. The Tribunal has concluded that, not least because the Reference Offer was relied on by TRA as a separate justification for making the Order, the Tribunal should express its conclusions on its construction, but that it is not necessary to burden the Award with a detailed analysis of all the terms and conditions of such a complex document.

9.67 The operative provisions of Schedule 7 are:

"SCHEDULE 7 – FACILITIES ACCESS SERVICE

1. SCOPE AND STRUCTURE

(a) The Access Seeker requests access, and is provided access by the Access Provider, to Facilities in accordance with:

(i) this Schedule;

(ii) the Supply Terms; and

(iii) the Facilities Access Technical Manual;

(iv) the relevant Facility Lease or Facility Sub-Lease.

...

The Access Provider has agreed to grant the Access Seeker non-exclusive access to the Facilities to install, operate and maintain Equipment for the lawful provision of public telecommunications networks or services in the Kingdom of Bahrain (the "Permitted Use")."

(xix) Lack of unanimity in the Tribunal on the interpretation of the Reference Offer

9.68 The majority of the Tribunal is of the view that the Reference Offer should be construed so as to impose an obligation on the Access Provider to meet reasonable requests for access to facilities even if that is the sole object of the application. Otherwise, in its view, there is a large piece missing in the jigsaw, which cannot have been the intention of the legislature when provision was made in Article 57(e) for a Reference Offer forming part of a coherent and internally consistent matrix.

9.69 "Access Service" is defined in Schedule 8 of the Reference Offer (which contains no less than 19 pages of "Dictionary") as meaning a "Service Batelco is required to supply under section 57(e) of the Telecommunications Law and which is described in Schedule 1." "Service" is defined as meaning "each Interconnection Service, each Access Service and each Wholesale Service." "Access Service" is not a term found in Article 57(e) TL, which instead uses the term "Access"⁸² to a "Telecommunications Network"⁸³.

⁸² Article 57(e) TL instead uses the term "Access", which is defined as "the making available of telecommunications facilities and/or telecommunications services to another Licensed Operator for the purpose of providing telecommunications services, and including the connection of equipment by wire or wireless means, access to physical infrastructure including buildings, ducts, cables and masts, access to mobile networks and access to number translation or networks offering equivalent functionality."

⁸³ defined as "a network permitting the conveyance of messages, sound, visual images or signals between defined termination points by wire, radio, optical or other electro-magnetic means"

9.70 The means by which such a purposive interpretation of the Reference Offer would be achieved would be by defining “Access Service” to mean a “Service”:

(a) which Batelco is required to supply under section 57(e) of the Telecommunications Law; and/or

(b) which is described in Schedule 1”, i.e. the Access Services which Batelco is required to supply are those required under section 57(e) TL, and not merely those described in Schedule 1 of the Reference Offer.

9.71 Courts in different jurisdictions have interpreted the word “and” to mean “or” in different contexts, where the sentence containing “and” either (i) did not make sense (was unintelligible); or (ii) made less sense than the same sentence with the word “or” replacing “and” or (iii) if the use of “or” produces an intelligible result which is not otherwise present. This is the case even if the new interpretation is detrimental to the subject of the statute.⁸⁴

9.72 The minority view finds that, while legislative and other documents intended to have legal effect should achieve a fair and purposive, rather than pedantic, reading of the actual language used, the Reference Offer cannot be substantially rewritten under the guise of interpretation. The structure as well as the definitions of the Reference Offer point consistently to Schedule 1 services as central, and Schedule 7 services as ancillary. To interpret the definition of “Access Services” in the way suggested by Counsel for TRA would be a very substantial rewriting of the document, and exceed the proper bounds of interpretation. In particular the natural meaning of the principal terms (as distinct from the Schedules) of the Reference Offer was to confine the obligations of the Access Provider to the supply of the Schedule 1 services as they were listed at the time of the application. and there was no justification for finding within the Reference Offer a specific obligation to supply Schedule 7 services on a standalone basis.

9.73 In summary, the majority view is that the Reference Offer should be read in such as way as to be consistent (or harmonize) with the purpose of Article 57(e) TL. While the

⁸⁴ Examples are the English Court of Common Pleas in *Bedford v. White* (1827), 130 E.R. 773, 4 Bing. 276 (Eng. C.P.) the Privy Council decision in *Attorney General for New Zealand v Brown* [1917] AC 393, the Newfoundland Court of Appeal in *Boy Scouts of Canada, Provincial Council of Newfoundland v. Doyle* (140) D.L.R.(4th) 22. (Nfld.C.A.), and The Scots Land Court (Full Court) in *Morrison-Low v Paterson’s Executors* 2005 S.L.T. (Land Ct) 2.

Tribunal shares concerns about the drafting of the Reference Offer (discussed below), the majority view is that one must try very hard to give a meaning to the Reference Offer (and Schedule 7) in such a way as not to conflict with Article 57(e), as argued by counsel for TRA. The minority opinion on the Reference Offer is that it cannot be read to allow applications for standalone Schedule 7 services. However, even in the view of the minority, the Reference Offer must yield to the superior force of Article 57(e). In the result, the Tribunal is of the unanimous view that Article 57(e) prevails over the Reference Offer, and whether Reference Offer is in actual conflict with Article 57(e) (whether on a purposive or literal interpretation) is only of academic interest.

9.74 The Tribunal's unanimous conclusion, as stated above, is that the Reference Offer is in need of serious review and repair if it is to continue to serve as a key instrument within the regulatory matrix. Although the Tribunal was not taken through all the iterations of the Reference Offer over time, it would appear that the Reference Offer has been subject to several amendments over the years, not least in what appears to have been the original inclusion within Schedule 1, as service 2.3, of a Facilities Access Service. As stated above, the Panel is not unanimous on this subsidiary (but important) issue of the construction of the Reference Offer.

(xx) Final summary of the Tribunal's findings on whether Batelco contravened its Regulatory Obligations

9.75 The Tribunal thus unanimously concludes that, on the proper construction of Article 57(e) TL, Batelco was required to comply with a reasonable request for access to its telecommunications facilities and services on a "stand alone" basis, and that Mena's Second Application of 29 April 2009 fulfilled that condition.

9.76 The policy of the legislation includes the promotion of competition as between Licensed Operators. The wording of the legislation expressly provides that "Access" was to be given a broad meaning so as to include access to the telecommunication facilities and services of a dominant firm. At the hearing, there was no serious dispute that Mena's request of 29 April 2009 was indeed a reasonable request for access to such facilities and services. That request was rejected, although on 21 October 2009 it had been accepted, only for the acceptance to be withdrawn. The conclusion must be that Batelco was in

breach, both of Article 57(e) and of the relevant conditions of its Licences (which expressly refer to Article 57(e)).

- 9.77 The Tribunal also finds, by a majority, that on a purposive interpretation of the Reference Offer, Batelco's Schedule 7 obligations to provide facilities access service to Access Seekers are standalone, and not ancillary to the provision of Schedule 1 services.
- 9.78 The Tribunal therefore finds by a majority that, by rejecting Mena's Second Application, Batelco failed to comply with the Reference Offer.
- 9.79 In any case, whether or not Batelco complied with the requirements of the Reference Offer, the Tribunal is of the unanimous view that compliance with the Reference Offer does not discharge Batelco's regulatory obligations, in particular its obligations under Article 57(e) of the Telecommunications Law.
- 9.80 For completeness, the Access Regulation does not impose any new (or greater) obligations on Batelco which are additional to its primary obligations under the Telecommunications Law.
- 9.81 The Tribunal finds unanimously that Batelco breached its obligations under Article 57(e) of the Telecommunications Law.
- 9.82 The Tribunal finds unanimously that Batelco's breach of Article 57(e) was indeed a "severe" breach for the purposes of Article 35(a) of the Telecommunications Law (as required under Issue II above).

C. ISSUE III.1.(II) WHETHER MENA'S REQUEST WAS, IN ALL THE CIRCUMSTANCES, A REASONABLE REQUEST WITHIN THE MEANING OF THE ACCESS REGULATION, BATELCO'S INTERNATIONAL TELECOMMUNICATIONS FACILITIES LICENCE AND/OR BATELCO'S THE NATIONAL FIXED SERVICES LICENCE

- 9.83 Once the core issue of interpretation is resolved, the question of the reasonableness of Mena's request is relatively simple.

9.84 Mena's request was reasonable.

9.85 This was admitted by all of Batelco's technical witnesses (including Batelco's technical expert Mr. Mark Harper). Mena's request was reasonable on its face, and TRA's assertion that the IFC service has worked well up to now was not contradicted by Batelco.

D. ISSUE III.1.(III) WHETHER BATELCO OFFERED UPON REQUEST ACCESS TO MENA ON FAIR AND REASONABLE TERMS WITHIN THE MEANING OF THE TELECOMMUNICATIONS LAW.

9.86 Batelco did not offer upon request access to Mena on fair and reasonable terms.

9.87 This was because Batelco started with the incorrect assumption that Mena's request was unjustified, and Batelco therefore only offered alternatives to Mena's requested mode of access.

10. ISSUE III.(2) WHETHER BY TRA'S CONDUCT, IT BREACHED ITS DUTY TO EXERCISE ITS POWERS EFFICIENTLY, EFFECTIVELY, REGULARLY, REASONABLY AND IN A NON-DISCRIMINATORY AND TRANSPARENT MANNER

A. ALLEGATION OF PREJUDGMENT OR BIAS

10.1 Article 3(a) of the Telecommunications Law states:

"The Authority shall carry out its duties and exercise its powers efficiently, effectively, regularly, reasonably and in a non-discriminatory and transparent manner."

10.2 The issue at III.(2) is whether TRA's conduct challenged by Batelco amounted to either a breach of its duties under Article 3(a) of the Telecommunications Law or its obligations under Bahrain's legal principles of natural justice. Batelco criticizes, in particular, the decisions and actions of Mr. Alan Horne (General Director of TRA), Mr. Eamon Holley (Director of Legal Affairs of TRA), and Mr. Eric Dunand (Specialist Technical Advisor to TRA) to assist Mena in its Second Application.

Batelco's argument

- 10.3 Batelco contends that Bahrain law (drawing heavily on Egyptian jurisprudence) imposes similar requirements on public bodies as found under the common law in respect of pre-judgment.
- 10.4 Batelco also contends that, as a matter of language, Article 3(a) TL imposes duties on TRA to act impartially and not to prejudge matters of dispute between market participants.
- 10.5 Batelco says that TRA's Order must be nullified because "*this was the clearest imaginable case of prejudgment on the part of TRA*"⁸⁵.
- 10.6 Batelco says TRA's failure to carry out its duties can be seen from the following matters:
- (a) TRA "prejudged" the matters on which it purported to ask Batelco to make submissions. TRA prematurely decided that Mena was entitled to connect with the FLAG Landing Station through Batelco under the existing regulatory regime.
 - (b) By materially assisting Mena with the Second Application, TRA was assisting Mena in the dispute with the formulation of the very request which would later become the subject of the dispute, TRA ceased to be, or be seen, as an impartial and independent umpire in the dispute which eventuated.
 - (c) By soliciting Mena to resubmit its request for access to Telegraph House (which it had itself assisted in drafting) TRA acted irregularly, and gave the impression that it was predisposed to a particular outcome in the very matter in which it was investigating. It was implicit, from the actions of TRA, that it had already taken the view that Batelco could not lawfully refuse the redrafted Second Application.
 - (d) TRA did not want Batelco to know of their involvement in the Second Application.

⁸⁵ Paragraph 61 of Batelco's Closing Submissions.

- 10.7 Batelco argues that this collaboration between TRA and Mena on the Second Application was not regular, reasonable or transparent as required by Article 3(a) TL.
- 10.8 Batelco says the facts strongly suggest that TRA had effectively prejudged the validity of Mena's Second Application, and had made that known to Mena before Mena had even submitted the Second Application to Batelco.
- 10.9 It was therefore, submits Batelco, substantially more difficult for TRA to resolve the dispute between Mena and Batelco with impartiality, as Article 3(a) TL requires, because TRA had already decided that the Second Application was valid, regardless of Batelco's case. As a result, Batelco concludes that TRA arrived at erroneous decisions on issues II.1 (Severe breach) and III.1 (Compliance with Reference Offer).

TRA's argument

- 10.10 TRA's intention (and one of its principal functions) was to promote competition. TRA contends there was no impropriety when TRA forwarded the FLAG email to Mena. The email from TRA to FLAG related to concerns on FLAG's part in relation to the connection to FLAG of OLO's, not of Batelco. TRA was justified and obligated (to promote competition) to say that TRA would give every assistance to enable the necessary steps to facilitate connection of OLO's with FLAG. Its purpose was to clarify that TRA would review further applications should Mena decide to make any. TRA was concerned that any objections to access could not be on some technical basis by reason of some perceived flaw in Mena's application.⁸⁶
- 10.11 TRA states that it was concerned that a new application would be objected to on a technical basis or because of some "perceived flaw" in the application itself. Mr Holley referred to these expected objections as "massive pushback from Batelco". Such objections would be counter-productive to TRA's overall strategy, which was to resolve disputes between Batelco and Mena. Mr Dunand reviewed the application from a technical point of view and included a diagram, again, to achieve TRA's overall strategy. His input was accepted and the diagram incorporated, without his name, into the Second Application. By this stage, the diagram belonged to Mena, not Mr Dunand. There is

⁸⁶ TRA's Opening Submissions at paragraph 86.

nothing inappropriate about TRA making technical expert suggestions to applications. By giving advice, TRA helped the regulatory scheme to run more efficiently.

- 10.12 What Batelco characterizes as prejudgement, TRA characterizes as being “more constructive and appropriate” and “not seeking to be heavy handed with Batelco and instead facilitating effective use of the existing procedures”⁸⁷. TRA says that

*“a regulator must be afforded a discretion as to when to use “hard” powers and when to use a “softer” approach. Here TRA hoped for a sensible resolution of the access dispute without recourse to enforcement measures.”*⁸⁸

- 10.13 TRA denies that it prejudged the matters. TRA says it has dealt with the matter impartially and independently, and that it engaged in discussion both with Batelco and Mena, and took sensible steps as a responsible regulator to avoid the need for any final order and financial penalty.

- 10.14 As a matter of policy to promote the efficient and effective exercise of its dispute resolution powers, TRA routinely advises parties who claim to have an interconnection or access dispute. It works on the Reference Offer so that only genuine disputes between Batelco and parties seeking interconnection or access need be pursued.

B. WHAT IS THE RELEVANCE OF THE TRIBUNAL’S APPELLATE ROLE FOR ANY VIOLATIONS OF DUE PROCESS (WHICH MAY AMOUNT TO A BREACH OF TRA’S DUTIES IN ARTICLE 3 TL)?

- 10.15 The starting point is that any such violations must lead to appellate consideration of whether TRA’s order and fine should be set aside (nullified) if TRA breached its duties in making the Order.

- 10.16 However, upon any such breach, would the matter be “remitted” to TRA for a retrial of the issues by TRA (which decision may be appealed again to this or another tribunal), or can the Tribunal substitute its own judgment for that of TRA?

⁸⁷ TRA’s Opening Submissions at paragraph 83-84.

⁸⁸ TRA’s Opening Submissions at paragraph 165.

- 10.17 As outlined earlier (see paragraphs 7.1 ff, above), the Tribunal would have all the relevant material that had been before TRA, and the Tribunal has concluded that the hearing before the Tribunal is a fresh hearing and not simply judicial review.
- 10.18 However, that conclusion leaves the question whether any procedural defects on TRA's part will have been cured by a fresh and detailed hearing before the Tribunal, and the Tribunal reaching its own decision on the substantive issues.
- 10.19 The recently published *NZ Judicial Review Handbook* (2011) collects authorities which support an affirmative answer on the question of whether the exercise of an appeal right may cure a procedural defect by the first instance decision maker (Chapter 77). See also Chapter 25 in the same text.
- 10.20 The Privy Council decision in *Calvin v Carr* [1980] AC 574, an Australian appeal regarding a disqualification imposed under the Rules of Racing of the Australian Jockey Club, is authority for the proposition that, although there is no absolute rule, an appeal by way of re-hearing may supersede and "cure" a breach of natural justice relating to the first instance hearing in an "administrative or quasi-judicial" context (and reflecting any contractual expectations of an administrative or domestic tribunal); but not in "extreme" cases (for example, where impartiality in the conduct of an appeal is difficult): at 592C-593H.
- 10.21 The substantive speeches in *Lloyd v McMahon* [1987] 1 AC 625 (HL), a House of Lords decision regarding an appeal by Liverpool city councillors against an auditor's certificate against them for loss incurred or deficiency caused by wilful misconduct, cite *Calvin v Carr* with apparent approval, and, in the context of a statutory authority, with particular emphasis on not impeding an appellate jurisdiction from fully investigating the merits where "*justice can properly be done*" thereby. Further, Lord Templeman noted that the appeal was general in scope, the evidence on appeal was on oath, and the defects at first instance did not impair the conduct of the appeal: Lord Keith at 697C-G; Lord Bridge at 708D-G and 709F-G; Lord Templeman at 715G-716G.
- 10.22 Similarly, in *R ("DR") v St George's Catholic School* [2002] EWCA Civ 1822, an English Court of Appeal decision in respect of pupils appealing against their permanent exclusion from their school, also involving statutory powers, there was something close to

a presumption that a fairly conducted full merits appeal would cure first instance defects unless such defects “tainted” or “infected” the appeal process: Simon Brown LJ at [45]; Keene LJ at [55].

- 10.23 As stated by Lord Keith in *Lloyd v McMahon* [1987] AC 625 at p.697 and cited in *R (DR) v Head Teacher of St George’s Catholic School* [2002] EWCA Civ 1822 at [38]:

“... In the circumstances it would be quite unreasonable and not in accordance with the intent of the enactment to hold that the court, where an issue is raised as to the fairness of the procedure adopted by the auditor, is confined to a judicial review species of jurisdiction so as to have power only to quash or affirm the auditor’s certificate without entering upon its own examination of the case. No doubt there may be cases where the procedural defect is so gross, and the prejudice suffered by the appellant so extreme, that it would be appropriate to quash the auditor’s decision on that ground. But in my opinion the court has a discretion, where it considers that justice can properly be done by its own investigation of the merits, to follow that course.”

- 10.24 On 2 July 2012, the Tribunal sought Parties’ views whether, if there was a finding that there were certain defects of procedural fairness in the TRA investigation, the Tribunal nonetheless had a power to give ‘substitutionary relief’ and cure any procedural defects by TRA when considering matters afresh on appeal.

- 10.25 Hitherto, Batelco’s appeal to the Tribunal had been about the manner in which TRA dealt with Mena’s complaint against Batelco, and Batelco had argued that, if there had been procedural unfairness in the investigation, then TRA’s decision ought to be set aside (nullified) on that ground.

- 10.26 In its letter of 2 July 2012, the Tribunal invited Parties to consider whether procedural unfairness must necessarily lead to the setting-aside of the Order or whether, in general, an error of natural justice made by the original authority could be cured by an appellate (i.e. fresh) hearing under Article 66 of the Telecommunications Law.

- 10.27 While acknowledging that this was essentially a matter of Bahraini law, the Tribunal pointed out that there was a principle in other countries, particularly in the

Commonwealth, that, an appeal by way of re-hearing could supersede and “cure” a breach of natural justice relating to the first instance hearing in an “administrative or quasi-judicial” context; but not in “extreme” cases.

10.28 The Tribunal wished to clarify whether there could also be a distinction drawn between procedural defects in a decision by a purely judicial entity and a decision by an entity having additional administrative or policy roles.

10.29 The Parties were asked to consider whether such an approach was consistent with the provisions of the Telecommunications Law, particularly:

(i) Article 3(a)

(ii) Articles 3(b), (c)(1) (2) (4) (13) (17);

(iii) Article 35; and

(iv) Article 36.

10.30 In response to the Tribunal’s queries on this issue, TRA made two submissions, on 16 July (“TRA 1”) and 13 August 2012 (“TRA 2”). Batelco made two submissions, on 30 July (“Batelco 1”) and 17 August (“Batelco 2”). TRA offered to translate certain legal authorities on 22 August 2012 from Arabic to English in response to Batelco’s Reply Submissions. The Tribunal invited TRA to do so, and the translations with a cover email was sent on 28 August 2012. Batelco submitted supplementary reply submissions on 3 September 2012.

10.31 The Tribunal sent an email on 3 August 2012 in response to the first round of submissions (i.e. TRA 1 and Batelco 1). The legal issue was stated simply:

“Does the law of Bahrain prohibit this Tribunal, in the exercise of its statutory functions, from determining whether Batelco has been in breach of one or more of its obligations under or deriving from the Telecommunications Law, and thus determining the dispute referred to it, unless the Tribunal has also concluded that the TRA has complied with the provisions of Article 3 of the TL.”

10.32 In other words, the Parties were asked to submit on the question whether, if the Tribunal did have the power to determine the issue of the merits (whether there was a lawful and reasonable request for access), whether it had the jurisdiction to “cure” any defects of due

process in the making of the Order appealed from? And if the Tribunal did have the power to "cure" any defects of due process, was there a limit to the exercise of that jurisdiction?

10.33 In this context, the Tribunal asked for an analysis of the approach taken in *Calvin v Carr* [1980] AC 574 (PC) and *Lloyd v McMahon* [1987] 1 AC 625 (HL).

10.34 TRA submitted that the position under Bahraini law on whether a "defect of form/procedure" can be cured by an appellate hearing (or subsequent hearing) is broadly equivalent to that under English and Commonwealth law. TRA confirmed that *Calvin v. Carr* and *Lloyd v. McMahon* were the seminal cases. TRA cited, among other authorities, De Smith's *Judicial Review* 6th Ed.) and *TalkTalk Telecom Group plc v Office of Communications* [2012] CAT 1 a 10 January 2012 judgment by the Competition Appeal Tribunal, a specialist UK competition court, in respect of a telecommunications operator. TRA submitted that it was only when the procedural defect was so flagrant, and the consequences so severe, that a rehearing could not cure the defect. TRA pointed out that, assuming that the Tribunal maintained its provisional decision as to the nature and scope of appeal, (i) the appeal is on the merits, (ii) extensive new evidence was heard, (iii) Batelco and TRA had a week-long hearing with voluminous materials and cross-examination, and (iv) the Tribunal had a full rehearing of the issues initially determined by TRA and the case received overall, full and fair consideration.

10.35 Batelco submitted that a breach of Article 3(a) TL went beyond a "defect of form" as TRA did not have power under the Telecommunications Law to act in any other way but in conformity with its obligations under Article 3(a). A breach of this Article meant that TRA's acts were not grounded in any statutory authority and would be an abuse of power or authority. Batelco strongly denied that Bahraini or Egyptian jurisprudence allowed the Tribunal's hearing to cure a breach of Article 3(a) TL, and denied the applicability of *Calvin v. Carr* and *Lloyd v. McMahon* under Bahraini law. In the alternative, Batelco submitted that these English cases "are clearly distinguishable in this case where the question of curative power only arises if the TRA is found to have acted in such a seriously improper way", and even under the English authorities, TRA's breach was so serious that it cannot be cured.

10.36 Batelco submitted that a breach of Article 3(a) TL could lead to the conclusion that the TRA acted in error on any number of administrative law grounds including: “(a) object of the decision violates the law; and/or (b) abuse of authority”. Batelco submitted that there is no Bahraini or Egyptian jurisprudential support for the proposition that an appellate decision-maker can, by conducting its appellate hearing, remedy a procedural below by the first instance decision-maker. Procedural unfairness at first instance therefore must lead to the impugned decision being held null and void by the appellate decision-maker. Batelco relied strongly on Egyptian jurisprudence which emphasizes the importance of procedural fairness, and, in particular, decisions by the Egyptian High Administrative Court. Batelco provided translations of Mohammed Majid Yaqoot, *Osool Al Tahqeeq Al Edari Fi Al Mukhalafat Al Ta’adibia (Principles of Administrative Investigation in Disciplinary Offences)*, Abdul Raof Eid Al Mutwali, *Ekhitisis Al Mahakem Al Ta’deebia (The Jurisdiction of Disciplinary Courts)*, and Ali Hassan Ali Abdul Jayed, *Al Gulo Fi Al Jaza’ wa Atharoh a’la’ al Qarrar al Edari (Exaggeration in Penalties and their Effect on Administrative Decisions)*. One of the translations provided by Batelco reads:

“The High Administrative Court in one of its judgments provided that: *“Initially the jurisdiction of the court of invalidation judiciary is limited to look into the legitimacy of the challenged (appealed) resolution (order). If it reaches to the conclusion that the resolution is legitimate, it shall reject the challenge, if it reaches to the conclusion that it is non-legitimate it shall rule its nullification. However, the Court does not have the authority to replace the defeated order by another (administrative) resolution (order), which may achieve the same goals avoiding the reasons which caused its non-legitimacy. The judge does not replace the issuer of the resolution as this is not permitted by the Constitution on the ground of the principle of Separation of Powers. This shall include resolutions issued by the superior disciplinary authority.”*

“However, the jurisdiction of the court of invalidation, the subject matter of which is the legitimacy, which is a mere legal matter, does not exempt any of its elements from the authority of supervision of the Court on such legitimacy. Therefore, such jurisdiction (of the Court) shall extend to include all the elements of legitimacy related to the challenged (appealed) resolution (order) and that deal with its elements and parts on the ground that the question of legitimacy is a matter of law and, that its essential objective is to examine the violation of the law

and its misapplication or misinterpretation. Such jurisdiction is similar to the jurisdiction that a civil court of cassation exercises on judgments in civil cases.”

(Ali Hassan Ali Abdul Jayed- Al Gulo Fi Al Jaza' wa atharoh a'la' al qarrar al edari, page 434.)

“The Court of Disciplinary has the authority to amend the resolution of penalty (the order) or to nullify it, when such a resolution is issued by an administrative authority” (*ibid* page 435).” (emphasis in the original)

10.37 TRA cited a text by Dr Sheha⁸⁹, which was the subject of submissions by both parties. The translated text emphasises that, in administrative cases, the High Administrative Court considers that defending the public interest has priority over personal or individual interests. Dr Sheha states that a defect of form or procedure does not automatically invalidate a decision:

“But the administrative court – in France and Egypt - have seen that they should achieve a certain degree of flexibility to determine the invalidity of the decision, and to avoid strictness in the instances where it shows that there is no effect caused from the forms or procedures that were not followed by the authority to the substance of the order or to the guarantees determined for individuals therein whereas nullifying every order with a defect of form would place a hurdle on the authority's work. Therefore, administrative judicature has sought to review each instance for specifying the importance of the form or procedure that has been breached by the authority. Where in some instances, the form or procedure may seem fundamental but in another it is not. This aims to facilitate the work on the authority and to pardon it from what would be a hurdle in the way of its activities, without ignoring conditions for penalties or form on the grounds that is to facilitate.”

10.38 In the circumstances of this case:

- (a) The Tribunal has concluded that the appeal right is general, and not limited to judicial review grounds;
- (b) the appeal has been conducted on a “full merits” basis, with evidence on oath;

⁸⁹ Administrative Law: The Jurisdiction of Administrative Law, Claims for Revocation, by Professor and Doctor E.A.A. Sheha (2006) at p.522-531

- (c) this appellate Tribunal has been able to operate entirely impartially, and cannot sensibly be thought to be tainted by any defects at first instance by TRA; and
- (d) the previous points are consistent with the legislative intention inherent in providing for general appeal rights to an independent arbitral tribunal.

10.39 In this context, the Tribunal finds that any procedural defects on TRA's part will have been cured by this fresh and detailed hearing *de novo* before the Tribunal, and by the Tribunal having reached its own decision on the substantive issues and on the evidence and arguments presented. Its reasons are set out in the following Sections C-F.

C. WHAT IS THE SCOPE OF THE TRIBUNAL'S POWERS ON APPEAL UNDER THE TELECOMMUNICATIONS LAW?

10.40 The Tribunal has examined the provisions of the Telecommunications Law and the submissions by the Parties. In particular, under Article 66 TL, the Tribunal "*shall have the power to determine the disputes arising between [TRA] and any Licensed Operator*". The Tribunal finds that the hearing before it, as a full and *de novo* hearing on appeal under Article 66 TL, means that it has full appellate powers, and is not confined to any kind of judicial review role.

10.41 The appellate powers of Tribunal will extend to the normal "curative" powers unless there is an express constraint under Bahraini law, and no such express constraints were cited to the Tribunal.

10.42 The Tribunal is a creature of statute and the only body capable of "determining the disputes" between the TRA and Licensed Operators. The Telecommunications Law confers substantial discretion on the Tribunal as to the circumstances in which it should uphold a decision of the TRA or to nullify it, in the public interest of Bahrain.

10.43 The statutory discretion given to the Tribunal shows no such limitation in its powers to determine the disputes referred to it in the overall interests of Bahrain, including competition in the telecommunications market.

10.44 In the statutory context, it is relevant (and supportive of the "cured on appeal" outcome) that, under the Telecommunications Law of 2002:

- (a) TRA has both pro-active and adjudicative roles: see Article 3(b), (c)(1) (2) (4) (13) (17); and Article 35;
- (b) notwithstanding such various roles, Article 35 requires TRA to make first instance decisions on complaints, and prescribes only general procedural requirements;
- (c) the Article 3(a) references to TRA conducting itself “in a non-discriminatory and transparent manner” may be read in context (e.g., the law favours the promotion of Access – and the immediate interests of access seekers – over incumbents’ property rights [i.e. over their “facilities”]; and “transparent” cannot extend to lack of confidentiality in some investigatory and deliberative aspects of TRA’s work); and
- (d) Article 36 confers an unqualified right of appeal on a Licensee objecting to any Article 35 decision by TRA.

10.45 The Tribunal has been asked to adjudicate, and has received evidence and submissions on, the issues whether the 2009 (and 2008) requests by Mena for access to the facilities of Batelco were lawfully and reasonably made; and whether, in those circumstances, Batelco had any objective justification in refusing access, as it did later in 2009.

10.46 In this context, the essential difference between a judicial review role and an appellate role is important. In judicial review, the reviewing tribunal must generally refrain from itself becoming the decision maker: its role is to ensure that the decision maker has not abused its originating (usually statutory) power. In contrast, on a general appeal, the appellate tribunal must itself make the correct decision.

10.47 The Tribunal is not confined to a judicial review analysis of the reasoning of the Order or the processes adopted by TRA in arriving at the Order, and its appellate role incorporates the curative consequences of the authorities discussed above.

10.48 Such an approach is entirely consistent with a fair and purposive interpretation of the Bahrain legislation, and it would be unreasonable, and not in the public interest, were the Tribunal to quash a decision which was plainly the right decision in law on the facts of the case. While the Egyptian texts and legal authorities cited to the Tribunal speak of the

importance of procedural fairness, they also emphasize the importance of balancing or taking into consideration the public interest. The authorities cited by Batelco do not specifically address the issue of a regulatory agency such as TRA having multiple objectives in the pursuit of the public interest.

- 10.49 The Tribunal is conscious that the international legal authorities referred to in this Award do not actually form part of the law in Bahrain. The Tribunal's references to these international legal authorities in the Award are for the purpose of articulating, by reference to persuasive judicial authority, what the Tribunal considers to be fundamental and generally applicable legal principles in any legal system.

D. IS BAHRAINI LAW DIFFERENT FROM ENGLISH AND COMMONWEALTH LAW IN RESPECT OF THE LINE OF AUTHORITIES REPRESENTED BY CALVIN V. CARR AND LLOYD V. MCMAHON IN RELATION TO WHETHER THIS TRIBUNAL CAN “CURE” PROCEDURAL DEFECTS BY THE TRA?

- 10.50 The Tribunal concurs with the submissions by TRA that the position under Bahraini law on whether a “defect of form/procedure” can be cured by an appellate hearing (or subsequent hearing) is broadly equivalent to that under English and Commonwealth law. In other words, the Tribunal has the power to cure any procedural defect in due process, provided that the defect is not of such gravity (“extreme”) as to prevent the Tribunal from determining the substantive dispute itself.
- 10.51 The Tribunal finds that the authorities cited by Batelco (including the jurisprudence of the Egyptian High Administrative Court), are not of direct application to the regulatory framework of the Telecommunication Law as they appear to be opinions expressed in the context of disciplinary and/or criminal proceedings rather than a regulatory decision involving policy factors. TRA also argued persuasively that the Egyptian authorities cited by Batelco do not apply where the appellate body can test and check the evidence for the decision to see whether the decision is right, and that extensive evidence was submitted to this Tribunal. In appropriate cases, the power to cure procedural defects on appeal would reduce the costs from unnecessarily prolonging the dispute resolution process and also promote legal certainty.

10.52 Under the Telecommunications Law, the Tribunal is an expert arbitral body acting on appeal, and is part of the machinery for the promotion of the statutory objectives because it is expected to determine the dispute within that statutory framework. Moreover, the essence of licence enforcement is mandatory action to change behaviour in the interests of ultimately the consumers of telecom services in Bahrain. The Tribunal can find no principle of Bahraini law prohibiting guidance from international jurisprudence in determining disputes under Article 66 TL, when such guidance assists with furthering the statutory objectives of the Telecommunications Law and the public interest of Bahrain.

10.53 The Tribunal concludes that (a) Bahraini law does not expressly address the present situation; but (b) on general principles is compatible with the *Calvin* approach. In its application of the *Calvin* approach, the Tribunal will take into account the overall objectives of the Telecommunications Law.

E. GIVEN THE TRIBUNAL'S APPELLATE ROLE, AND THE REHEARING, IS IT NECESSARY TO FORM A FINAL VIEW ON ISSUE III (2)?

10.54 As the Tribunal has already concluded, it is plain that the TL confers upon the Tribunal a full appellate jurisdiction to determine the dispute.

10.55 The defects of concern at first instance relate to the processes followed by TRA in April 2009, when Mena's complaint (on its First Application) was before TRA, in pursuing or developing a "strategy" (including direct drafting assistance) to maximise the credibility of Mena's Second Application. Such defects are less "extreme" than those indicated as incurable in *Calvin* or subsequent cases; and TRA's procedural defects are (and have been in fact) eminently curable.

10.56 The Tribunal does not need to decide Issue III.2, because it has the power to cure defects of process through its *de novo* hearing of the dispute. In view of the Tribunal's exercise of an appellate jurisdiction, and having undertaken a full re-hearing to reach its own decision on the TL violation issue, it has concluded that it is unnecessary for the Tribunal to decide:

- (i) whether any error or procedural defect by TRA in issuing its Order of 24 November 2009 was of such materiality as to call for the decision to be quashed,

were there to be a judicial review process – which on the Tribunal’s analysis there is not, there being no means under Bahrain legislation to challenge TRA decisions of this kind other than through the arbitral process in the Telecommunication Law;

- (ii) whether TRA breached its duty to exercise its powers efficiently, effectively, regularly, reasonably and in a non-discriminatory and transparent manner.

10.57 However, the Tribunal does record that it sees some force in Batelco’s criticisms of TRA’s undisclosed collaboration with Mena in relation to Mena’s Second Application. At best, aspects of that collaboration were uncomfortably close to the line (not easy to define) of conduct which fell short of due process and TRA’s Article 3 duties, given that TRA had before it a “live” complaint from Mena about the First Application. In other words, the greater the scope for TRA to be seen as a collaborator with Mena in relation to the Second Application, the greater was the risk of TRA being perceived as a “judge in his own cause” in determining any complaint by Mena related to that application (or the earlier application).

F. IF BAHRAIN LAW IS NOT DISTINGUISHABLE FROM COMMONWEALTH LAW IN THIS AREA, ARE THE PRESENT CIRCUMSTANCES SO “EXTREME” THAT THE CALVIN “EXCEPTION” SHOULD APPLY TO PRECLUDE ANY “CURATIVE” RESULT?

10.58 After careful reflection on Batelco’s alternative case on the applicability of the *Calvin* “exception” to the facts of this case, the Tribunal is not persuaded that, having regard to the mixed roles conferred on it by the statute, and looking at the entirety of process from the events leading to Mena’s second application to the making of the draft and then the final order, the conduct of the TRA was such as to cause the Tribunal to conclude that there was no alternative but to nullify the Order.

10.59 The Tribunal does not see the TRA’s conduct complained of as falling in the “extreme” category, incapable of cure by virtue of a full rehearing on appeal, referred to in *Calvin v. Carr* and the other authorities discussed above. The conduct is, in the Tribunal’s view, appropriately (if loosely) classified as “marginal”.

10.60 In this context, the Tribunal recognises that TRA’s responsibilities include the exercise of a range of powers. Thus, under Article 3(c) of the Telecommunications Law, TRA has the power (and duty) to:

“1 issue regulations, orders and determinations as may be necessary for the implementation of the provisions of the provisions of this Law, including in particular... Access to the network and its facilities,

...

4 monitor and enforce compliance with Licence terms and conditions by Licensees;

...

13 encourage, regulate and facilitate adequate Access and Interconnection and interoperability of services, including, where necessary, enforcing the sharing by Public Telecommunications Operators of the benefit of facilities and properties.

...

17 examine complaints and resolve disputes arising between Licensees, Licensees and Subscribers or any other Person involved in the Telecommunications Industry, and taking necessary and proportionate measures in relation to such matter.”

10.61 There is a different character, and different processes are required, as between “encouraging” and “facilitating” Access and Interconnection, where informality may be expected, and “*examin[ing] complaints and resolv[ing] disputes*” (here, of Batelco’s non-compliance with the Regulatory Obligations and liability for fines under Article 35 TL), where there are properly expectations of due process and impartiality.

10.62 In other words, while it is certainly required to “encourage” competition (Article 3(b)(2) and 3(c)(13)TL), in doing so TRA cannot breach due process. TRA is expected to act in a quasi-judicial manner in relation to complaints (supported by Article 3(a)TL). In that context, TRA’s communications with either a complainant or an Operator (such as Batelco) must be, and must be seen to be, even-handed.

10.63 It was neither necessary nor wise for the TRA to assist Mena in the preparation for its Second Application. It is also unfortunate that TRA’s assistance to Mena was not made transparent to Batelco.

- 10.64 While TRA's conduct in relation to the appearance of bias or the requirements of due process has to be judged in the light of its mixed roles, the Tribunal recommends that it would be highly desirable for the TRA's two functions to be separated in the future so that different officers undertake different functions.
- 10.65 As stated earlier, the Tribunal has concluded that it is not necessary to determine Issue III (2), which cannot affect the Tribunal's findings on the core issues of liability and fine. Nevertheless, the Tribunal observes that, given TRA's receipt of Mena's (still unresolved) complaint about Batelco regarding the First Application, it is not apparent why TRA did not advise Mena, a substantial firm, to obtain its own legal and technical advice on its subsequent Second Application. TRA's prior review of that application and provision of technical assistance were unwise as they were capable of being considered as giving rise to an appearance of lack of even-handedness. Notwithstanding the statutory authority that empowers TRA to perform the dual role of encouraging liberalization of telecom services as well as adjudicating on such disputes over "Access", from the viewpoint of the rule of law, and for avoiding suspicion, there would be sound reasons for competing functions of TRA to be handled by different and discrete personnel or units, or at least for TRA personnel not to engage in collaboration with one party in a potentially contentious matter, in a form which they would not unhesitatingly disclose to the other party.
- 10.66 Accordingly, the Tribunal takes the view that (i) the procedural defects leading to the TRA Order were cured by the full hearing on appeal to the Tribunal, regardless of whether the procedural defects breached Article 3(a) TL, and (ii) the procedural defects complained of by Batelco do not fall within the exception to the *Calvin v. Carr* principle.

11. ISSUE IV. APPROPRIATENESS OF THE FINE

1. *Whether the fine was beyond the power of the TRA under Article 35 (read together with the Constitution) because it is a punishment.*

- 11.1. This issue is adjourned by agreement.

2. *Whether the TRA unlawfully purported to impose a fine under article 35 for conduct which was, or included, conduct in respect of which a fine may only be imposed under article 65.*

11.2. This issue has been abandoned by Batelco.

3. *Whether Batelco could have mitigated the quantum of the fine by complying with the Order on or about the date it was made.*

11.3. This issue does not arise, given the decision on issue (4) below.

4. *Whether the amount of the fine was permitted under article 35 d(2) of the Telecommunications Law.*

- 11.4. The dispute as to quantum involved extensive argument by the parties as to the jurisdiction of the Tribunal. TRA argued, in line with its basic argument as to the scope of review, which the Tribunal has rejected, that the Tribunal could nullify that part of the Order relating to the quantum of the fine but could not substitute its own figure, there being no power in TL for it to do so. Batelco argued that there was no such limitation. The Tribunal does not accept the TRA's submission. The Tribunal concludes that Article 66 was intended to give the Tribunal full powers to determine the dispute as to quantum and that its statutory function, as the only appellate body in Bahrain, could not satisfactorily be performed without an enforceable power to determine what the fine should have been and to secure repayment of any excess.
- 11.5. In all the circumstances, the Tribunal finds the fine of BD 5,203,888 imposed by TRA was excessive and not consistent with Article 35(d)(2). In the Tribunal's judgment, the reasoning of TRA, as set out in the Order, falls well short of justifying a fine that is far in excess of a fine that it had recently imposed on Batelco for a recent breach of Article 57(e) (the CAT dispute). The consequences of Batelco's breach in the FLAG Order case may have had wider implications for the liberalisation of the market for international communications than in the case of a refusal to supply an existing Schedule 1 service (in the CAT dispute). Nevertheless, they are both instances of refusal to supply services, and the Tribunal was told that Mena has been the only OLO to pursue the form of access to facilities now covered by the new Schedule 1 IFC service.
- 11.6. If TRA is to seek to justify fines of the magnitude that it has imposed in the Order, it would be most desirable for it to have set out in published guidelines the principles relating to punishment and deterrence so that there is full transparency and an ability on the part of licensed operators to know the "rules of the game". Such an approach would best promote the rule of law in this context. Moreover, the reasoning of TRA involved a "pick and mix" choice of OFCOM (UK) guidelines, European Union regulations and case law so as to arrive at a starting point for the fine and then adjust that starting figure. At no stage did TRA appear to address the counterfactual, as to whether a lower level of fine might be expected to produce a fair result in terms of a punishment appropriate to the breach and to achieve specific or general deterrence.

- 11.7. The Tribunal wishes to make it clear that, in any regulated market, it is a matter for the regulator to determine in the first instance the nature of the sanctions that it regards as essential to achieve the statutory objectives of the legislation. However, in order to achieve legality and enforceability, it must do more than arrive mechanistically at a figure and rationalise that as appropriate. The Tribunal recognises that the Telecommunications Law has adopted the EU principles of a maximum of 10 per cent of turnover for an abuse of a dominant position and that, in certain respects, breaches of licences - such as refusal to supply competitors with access to facilities - are actions similar to those connected with abuse of dominance. Nevertheless, TRA chose not to allege abuse of dominance in this case and cannot represent the action of Batelco in the present case as if it were equivalent to abuse.
- 11.8. The Tribunal has no doubt that Batelco's refusal to meet Mena's reasonable request for access to facilities was a severe breach of the law and merits a fine appropriate for a non-trivial breach. The Tribunal is not significantly assisted by international comparisons, because it believes that each State must determine for itself the gravity of infringements for licence breach and the kind of deterrents that it wishes to put in place. Nor does the Tribunal find much help in considering the level of fines for other and different breaches of the TL, although it notes that the maximum fine provided under Article 73 TL (for certain breaches of Articles 24, 37 or 43) is BD 500,000.
- 11.9. The relevant circumstances include the following matters:
- (a) The initial fine set for the earlier CAT refusal to supply, although the CAT case was different from the present as it was a failure to supply a Schedule 1 service and there was no defence. Here there was a genuine doubt held by Batelco about the correctness of TRA's decision.
 - (b) The maximum fines provided under Article 73 (BD 500,000) and Article 65(f) (10% of turnover).
 - (c) The confused nature of Mena's First Application.
 - (d) The period of delay in Mena's Second Application being met by the IFC Services offer.

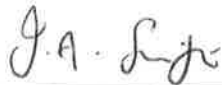
- 11.10. The most relevant comparator, in the Tribunal's view, is the fine which the TRA considered appropriate for the earlier CAT decision. The Tribunal has found that the Reference Offer is lacking in clarity, and that the arguments put forward by Batelco at the time as to its application could honestly and reasonably have been held. Nevertheless, to have refused the reasonable request in April 2009, to have complied with that request in October 2009 only under the pressure of a Provisional Order, then to have withdrawn the offer and complied only after a Final Order was made in November 2009, does seem to the Tribunal to fall within the class of conduct that is expressly prohibited of a dominant firm under the TL and its Licences.
- 11.11. In the round, the circumstances lead the Tribunal to the view that a fine in the range of BD 500,000 to BD 1,000,000 would have been (and is) appropriate. TRA's fine was well outside that range, and cannot stand. The Tribunal determines that the appropriate fine would be at the mid-point of this range, i.e. BD 750,000.

12. RELIEF

12.1 The Tribunal DETERMINES and ORDERS as follows:

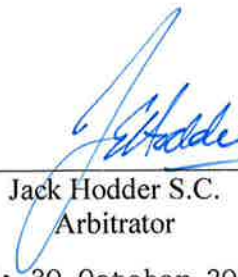
- (A) The Tribunal finds that Batelco breached Article 57(e) of the Telecommunications Law and each of the Licences (and, by a majority, the Reference Offer) through its refusal of Mena's Second Application.
- (B) The TRA's Order is nullified as the quantum of the fine exceeded the appropriate range.
- (C) The Tribunal substitutes a fine of BD 750,000 in place of the TRA's nullified Order.
- (D) TRA is to repay the excess fine to Batelco.
- (E) All other remedies claimed by Batelco are dismissed.
- (F) Parties are to submit on Costs and any other relief claimed.

12.2 The Parties' Bahraini counsel, namely Hassan Rhadi & Associates and Haya Rashed Al Khalifa Attorneys at Law and Legal Consultants, are directed to jointly deposit the Award with the Clerk of the High Civil Court – Administrative Division within three days of the Award being issued, in accordance with Article 240 of the Civil and Commercial Procedure Law.



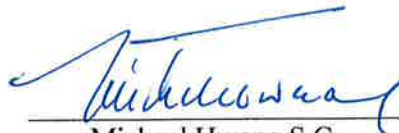
John Swift Q.C.
Arbitrator

Dated: 30 October 2012



Jack Hodder S.C.
Arbitrator

Dated: 30 October 2012



Michael Hwang S.C.
Chairman of the Arbitration Panel

Dated: 30 October 2012