



**Article 35 Order No. 1 of 2009**  
**Mena Telecom's Application for Facilities Access to FLAG Supplied Equipment at Batelco's Salmaniya Complex**

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**FLAG Supplied Equipment at Batelco's Salmaniya**  
**Complex**

An Order issued by  
Telecommunications Regulatory Authority  
under article 35 of the Telecommunications Law to  
Bahrain Telecommunications Company B.S.C.  
on access to the Landing Station for the FALCON  
submarine cable

24 November 2009



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**ORDER**

**IN THE EXERCISE OF ITS POWERS  
UNDER ARTICLES 3, 35 AND 57 OF THE TELECOMMUNICATIONS LAW,  
THE AUTHORITY MAKES THE FOLLOWING ORDER:**

**1 Menatelecom Access to FLAG Landing Station**

1.1 For the reasons set out in the reasoning of this Order, Batelco is hereby ordered to:

- (a) comply with article 57(e) of the Telecommunications Law, condition 7.1 of its International Facilities Licence, condition 13.1 of its National Fixed Services Licence, the terms of the Reference Offer (and in particular Schedule 7) and articles 3.2 and 5.4 of the Access Regulation, and in order to do so, Batelco shall offer to Mena Telecom the right to submit an order for the requested Facilities in accordance with clause 7(b) and 8 of Schedule 7 of Batelco's Reference Offer as requested by Mena Telecom on 29 April 2009 and if such an order is submitted by Menatelecom in accordance with clause 8 of Schedule 7, then by complying with that order. In doing so Batelco shall comply with the procedure outlined:
- (i) from clause 7(b)(iii) to 7(b)(vii) of Schedule 7 to notify Mena Telecom of any:
- (A) relevant Make Ready Work,
  - (B) estimated Access Charges,
  - (C) time required to deliver access,
  - (D) security clearance; and
  - (E) any other matters reasonably required for the provision of the requested Facilities Access Services and offering the right to Menatelecom to issue an Order in respect of the Facilities in accordance with clause 7 of Schedule 7.; and
- (ii) should Menatelecom submit an order in accordance with clause 8 of Schedule 7, Batelco must:
- (A) comply with all processes outlined therein, and
  - (B) provide the Facilities Access requested by Menatelecom not later than the Advised Delivery Date stated in Batelco's Order Response issued pursuant to clause 8 of Schedule 7.
- (b) Bearing in mind that Menatelecom applied for the Facilities Access on 22 July 2008, 29 April 2009 and most recently on 22 October 2009 (which request followed Batelco's statement to the Authority by letter dated 21 October 2009, and to Mena Telecom by letter dated 22 October 2009 offering collocation at Telegraph House), the Authority considers it reasonable that access to such Facilities be made available within a matter of days of Menatelecom's order.
- (c) The Authority therefore requires Batelco to expedite the process outlined in clause 7 of Schedule 7 to ensure that the offer to Menatelecom of the right to submit an order



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for the requested Facilities is made to Menatelecom in accordance with clause 7(b) of the Schedule 7 as soon as practicable but in any case not later than thirty (30) working days after the date of this Order (the "Due Date"), unless granted an extension to that time limit in writing by the Authority.

- (d) To this end the fine issued under this Order will be reduced in accordance with the procedure in paragraph 2.1 below for each working day prior to the Due Date that Batelco complies with this Order.
  - (e) Batelco must provide the Authority with a detailed status report on the progress with its compliance with this Order by 4pm on each Thursday from the date of this Order until Batelco has complied with the Order or otherwise agreed with the Authority (including where Menatelecom submits an order, to the date of delivery of the Facilities Access). The Authority may request further information relating to Batelco's compliance with this Order to be provided at any time.
- 1.2 Batelco shall provide Facilities Access Services to Menatelecom on fair and reasonable terms in accordance with article 57(e) of the Telecommunications Law. Should the Authority consider that the tariffs and the terms and conditions on which Access is offered by Batelco are unreasonable, the Authority may determine such tariffs and terms and conditions as it considers appropriate in accordance with article 57(e) of the Telecommunications Law.
- 1.3 On the basis that Batelco and Menatelecom have been negotiating access to the FLAG Landing Station since at least 29 April 2009 the Authority considers that the parties have complied with the negotiation prerequisites of article 57(g) and that should Batelco and Menatelecom be unable to agree the terms and conditions of any access or collocation within a further fifteen (15) working days of the Due Date, either party may refer the dispute to the Authority to resolve such dispute.

**2 Fine**

- 2.1 Further to the Authority providing Batelco with written notice on 29 September 2009 of its intention to impose a fine under article 35 of the Telecommunications Law as a result of Batelco failing to provide access and collocation services to Menatelecom on a fair, reasonable or non-discriminatory basis as required under:
- (a) Article 57(e) of the Telecommunications Law;
  - (b) Articles 3.2 and 5.4 of the Access Regulation;
  - (c) condition 13.1 of its National Fixed Services Licence;
  - (d) conditions 7.1 of its International Facilities Licence; and
  - (e) Schedule 7 of its Reference Offer;

Batelco shall pay:

- (i) a fine of BD 5,038,088.000 discounted by BD 100,000 for each working day for which Batelco complies with this Order by the Due Date; and
- (ii) a fine by way of periodic payment of BD 100,000.000 for each calendar day after the Due Date, as appropriate, for which Batelco fails to comply with the terms of paragraph 1 of this Order.



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- 2.2 Batelco shall pay the fines set out in paragraph 2.1 of this Order not later than 5 working days from the date of Batelco's and Mena Telecom's joint written confirmation of compliance to the Authority with this Order, to the following account:

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

3 **Compliance**

The Authority hereby advises Batelco that any failure to comply with the terms of this Order will constitute a material breach of Batelco's National Fixed Services Licence and/or International Facilities Licence, either or both of which may then be revoked pursuant to the terms of article 35(d)3 of the Telecommunications Law.

4 **Entry into force**

This Order shall enter into force on 24 November 2009.

ALAN HORNE  
General Director  
for and on behalf of the Telecommunications Regulatory Authority  
24 November 2009



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**LEGAL BASIS AND REASONING FOR THIS ORDER**

**1 Definitions**

Unless otherwise defined in this Order, any word, phrase or expression shall, unless the context so requires, have the meaning given to it in the Telecommunications Law or the Reference Offer and the terms below shall have the following meaning:

**"2009 Reference Access Order"** means the order relating to the reference access offer published by the Authority on 24 May 2009 (Order No. 1 of 2009);

**"Access Dominance Determination"** means the determination 'Dominance in Wholesale Markets by Batelco' published by the Authority on 22 January 2006 (Determination No. 1 of 2006);

**"Access Regulation"** means the access regulation issued by the Authority on 30 April 2005 (Regulation No. 1 of 2005);

**"Authority"** means the Telecommunications Regulatory Authority of Bahrain established under article 1 of the Telecommunications Law.

**"Batelco"** means the Bahrain Telecommunications Company B.S.C., P O Box 14, Kingdom of Bahrain, Commercial Registration number 11700-1;

**"Draft Order"** means the draft to this Order dated 29 September 2009;

**"Draft Order Response"** means Batelco's response dated 29 October 2009 (ref GCL/489/09) to the Draft Order;

**"Facilities"** shall have the same meaning as accorded to it in Schedule 8 of the Reference Offer.

**"Facilities Access Services"** means those services provided or offered to be provided by Batelco pursuant to Schedule 7 of the Reference Offer;

**"FALCON"** means the FALCON system submarine cable owned and operated by FLAG;

**"FLAG"** means FLAG Telecom Group Limited, a company organised under the laws of Bermuda and having its principal office at Milner House, 18, Parliament Street, Hamilton, HM12, Bermuda, or its successors or assignees to the capacity and landing agreements entered into by FLAG and Batelco in connection with the first landing of the FALCON cable in the Kingdom of Bahrain;

**"Landing Station"** means the space and related facilities provided by Batelco as well as the use of and access to the Common Areas (the defined in the Landing Party Agreement between Batelco and FLAG) and to a sufficient portion of the Facility (as defined in the Agreement) as is required to house the Common Equipment (defined in that Agreement) used by FLAG in order to support the operation of the FALCON System;

**"FOG"** means the Fibre Optic Gulf submarine cable owned and operated jointly by Batelco, the Ministry of Communications of Kuwait and the incumbent telecommunications operators of the United Arab Emirates (Etisalat) and Qatar (Qtel);

**"Formal Notice"** means the notice of commencement of investigation and requests for information made by the Authority to Batelco in connection with Batelco's control and provision of access to international telecommunications facilities and the FLAG Landing Station, being the letter dated 9 July 2009 (ref LAU/0609/178);



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**"Formal Response"** means Batelco's responses to the Formal Notice, being the letter dated 6 August 2009 (ref GCL/380/09);

**"International Facilities Licence"** means the international telecommunications facilities licence issued to Batelco by the Authority on 21 June 2003, which was re-issued with amendments on 14 June 2005;

**"Licensed Operator"** means any Person who has been licensed by the Authority under the Telecommunications Law;

**"Menatelecom"** means Menatelecom WLL, P O Box 3173, Kingdom of Bahrain, Commercial Registration 51486;

**"National Fixed Services Licence"** means the national fixed services licence issued to Batelco on 21 June 2003, which was re-issued with amendments on 14 June 2005;

**"Order"** means this order regarding access to the FLAG Landing Station;

**"Other Licensed Operator (OLO)"** means any Licensed Operator other than Batelco;

**"Reliance"** means Reliance Globalcom Limited, which is the successor company to FLAG;

**"Reference Offer"** means the Batelco document published on its website at the date of this Order, which includes the reference interconnection offer it is required to publish under the Telecommunications Law and reference access offer it is required to publish under the Access Regulation, as amended from time to time by approval or order of the Authority in accordance with article 57 of the Telecommunications Law and the Access Regulation;

**"Schedule 7"** means Schedule 7 of Batelco's Reference Offer

**"SFO"** means the Saudi Fibre Optic cable over the Bahrain-Saudi Arabia causeway;

**"Telecommunications Law"** means the law promulgated by Legislative Decree No. 48 of 2002;

**"Telegraph House"** means the Batelco owned telecommunications building known as 'Telegraph House' at Salmaniya, Kingdom of Bahrain;

**"Wholesale Broadband Markets Dominance Consultation"** means the consultation paper, 'Dominance Designation in Wholesale Broadband Markets: Draft Determination' published by the Authority on 26 March 2009; and

**"Wholesale Broadband Markets Dominance Response"** means the Batelco response to the Wholesale Broadband Markets Dominance Consultation dated 7 May 2009.

**2 Legal Basis**

**Licences**

- 2.1 Batelco provides telecommunications services pursuant to article 80 of the Telecommunications Law and the Authority granted various licenses to Batelco on 21 June 2003, which were re-issued with amendments on 14 June 2005, including a National Fixed Services Licence and an International Facilities Licence.
- 2.2 Although Batelco may have a legitimate expectation that the terms of its licences as re-issued on 14 June 2005 incorporate consideration of appropriate amendments to take into account the reliance it placed between 21 June 2003 and 14 June 2005 on the form of licenses issued



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to it on 21 June 2003, the Authority considers that no determination included in this Order relies upon licence conditions in the corrected licenses such as to prejudice Batelco's interests.

#### Article 3: Authority Duties and Powers

- 2.3 The Authority considers that by setting out a detailed explanation for its Order in this Annex to the Order, it is in compliance with the requirements for transparency as set out in article 3(a) of the Telecommunications Law.
- 2.4 Under article 3(b) of the Telecommunications Law, the Authority undertakes to carry out its duties relating to Telecommunications services in the manner best calculated to protect the interests of Subscribers and Users in respect of, amongst other things, the availability and provision of services, and to promote effective and fair competition among new and existing Licensed Operators.
- 2.5 Article 3(c)(1) of the Telecommunications Law grants the Authority the power to make such regulations, orders and determinations as may be necessary for the implementation of the Telecommunications Law, including determinations in connection with, amongst other things, interconnection, access to the network and its facilities, services tariffs, access to real property and promotion of competition.
- 2.6 Article 3(c)(2) of the Telecommunications Law grants the Authority with the power to monitor and investigate compliance with the provisions of the Telecommunications Law and any regulations, orders and determinations made under the Telecommunications Law, both on its own initiative and at the request of any Person, and making such orders and determinations as are necessary to ensure compliance in accordance with this Law and any such regulations, orders and determinations.
- 2.7 Article 3(c)(13) of the Telecommunications Law grants the Authority the power to encourage, regulate and facilitate adequate access and interconnection arrangements, including, where necessary, enforcing the sharing by public telecommunications operators of the benefits of facilities and property;
- 2.8 The Authority is required by article 3(f) of the Telecommunications Law, when proposing to take measures that may have a material effect on a particular telecommunications market, to give interested parties the opportunity to give their opinions as to those measures. Consultation for the purposes of the Authority's investigation into control and provision of access to international telecommunications facilities and capacity was carried out by;
- (a) submission of the Formal Notice to Batelco, which was made pursuant to articles 3(c)2 and 53 of the Telecommunications Law, setting out detailed questions on the provision of the access to the FLAG Landing Station and the Authority's preliminary views on the nature and lawfulness of Batelco's rejection of Menatelecom's applications for facilities access services.
  - (b) submission of the Draft Order (on 29 September 2009).

#### Article 35: Compliance with Individual Licences

- 2.9 Condition 13.1 of the National Fixed Services Licence and Condition 7.1 of the International Facilities Licence provides, amongst other matters, that Batelco as a public telecommunications operator in a dominant position must provide access to its national fixed



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services telecommunications network and/or international facilities, as appropriate, where reasonably requested by any Licensed Operator.

- 2.10 The Authority notes that the International Facilities Licence authorises Batelco to provide international facilities, which are defined in Condition 2.1 of the International Facilities 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". Reading this provision together with the definition of "Telecommunications Facilities" in the Telecommunications Law it is clear that any or all facilities associated with a cable landing station are international facilities. "Telecommunications Facilities" is defined in the Telecommunications Law 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".

**Article 57 and the Access Regulation**

- 2.11 Article 57(e) of the Telecommunications Law states that 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.
- 2.12 Pursuant to its powers under article 57(e) of the Telecommunications Law, which provides, amongst other things, that the Authority may publish regulations in connection with access, including regulations regarding a reference access offer similar to a reference interconnection offer, the Authority published the Access Regulation.
- 2.13 Pursuant to the requirement set out at article 2.1 of the Access Regulation, the Authority determined that Batelco is dominant in certain wholesale markets, as set out in the Access Dominance Determination, including the wholesale market for access to international facilities (paragraph 1, bullet point 3, of the Access Dominance Determination), which the Authority expressly stated included the market for access to international capacity (paragraph 4.6.2 of the Access Dominance Determination).
- 2.14 The Access Dominance Determination states that the Authority would review the relevant access markets within twenty-four (24) months of its date of issue, that is by 22 January 2008.
- 2.15 Batelco has continued to submit reference access offers pursuant to the Access Regulation since 22 January 2008, without at any time seeking to challenge the findings of dominance in relation to it set out in the Access Dominance Determination. In addition, the Authority has carried out a review of some of the wholesale (broadband) access markets relevant to the Reference Offer, as described in the Wholesale Broadband Markets Dominance Consultation and Access Order No. 1 of 2009. That Access Order only superseded the Access Dominance Determination with regards to wholesale broadband services; all other findings in the TRA's Access Dominance Determination of 2006 remain and continue. In its Wholesale Broadband Markets Dominance Response to that consultation, Batelco has not raised any questions or issues concerning findings as to its dominance set out in the Access Dominance Determination.



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**Article 57 and the Reference Offer**

- 2.16 Having been found to be in a dominant position, as set out in the Access Dominance Determination, Batelco is required by articles 3.3 and 4 of the Access Regulation to make available a reference access offer. That reference access offer includes, at Schedule 7 of the Reference Offer, the terms and conditions and a description of a Facilities Access Service.
- 2.17
- 2.18 The scope of Schedule 7 of the Reference Offer requires Batelco to provide the Facilities necessary to install, operate and maintain telecommunications equipment. Clause 1(c) of Schedule 7 states that the Access Provider (Batelco) 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. This is described there as the "Permitted Use".
- 2.19 Schedule 8 of the Reference Offer defines "Facility" as a:
- (a) Tower;
  - (b) Radiocommunications Site;
  - (c) Duct;
  - (d) main distribution frame equipment room;
  - (e) local exchange;
  - (f) Duct chamber;
  - (g) underground plant;
  - (h) cable station;
  - (i) earth station;
  - (j) power room;
  - (k) street cabinet; and
  - (l) riser room,

*as the context requires, which has already been constructed and is owned by the Access Provider at the time a Facilities Access Application is made."*

- 2.20 Schedule 8 of the Reference Offer defines "Equipment" as:
- "...equipment that is owned or used by a person and used or designed for use for the supply of a telecommunications service by means of radiocommunications or any other means and includes:*
- (a) *antennae, microwave dishes or satellite dishes of less than 2.5 meters in diameter;*
  - (b) *associated transmission equipment, power plant (including standby power), and air conditioning plant;*
  - (c) *associated feeders, waveguides and waveguide pressuring equipment;*
  - (d) *cabling and cabling works;*
  - (e) *prefabricated modules, risers or other structures housing any of the above;*
  - (f) *cable gantries;*
  - (g) *lines, joints/splices and such other ancillary equipment as necessary to support the use of a line which may be housed in pits or manholes where suitable space is available or as agreed between the parties;*



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- (h) *towers, masts, poles, antennae mountings and other similar structures which bear or are capable of bearing items noted in paragraph (a) – (g);*
- (i) *Underground Plant; and*
- (j) *such other ancillary equipment as may be agreed by the parties from time to time."*

**Draft Order and Draft Order Response and Final Order**

- 2.21 The Authority, having conducted an investigation into Batelco's actions, including setting out its initial assessment in the Formal Notice, and taking into account Batelco's views regarding the initial assessment supplied to the Authority in the Formal Response, set out its findings and that it was minded to order access and collocation as well as impose a fine as set out in the Draft Order, which Batelco was requested to respond to within thirty (30) days;
- (a) on 29 September 2009 the Authority submitted its Draft Order to Batelco on substantively the same terms as this Order;
  - (b) on 29 October 2009 Batelco submitted its Draft Order response.

**Authority analysis of Batelco's responses**

- 2.22 The Authority has carefully considered each of Batelco's points in its Formal Response and Draft Order Response. A summary of the Authority's considerations of Batelco's Draft Order Response is set out in section 4 and Annex 2 of this Order.

**Decision to issue Order**

- 2.23 Consequently the Authority has decided to issue this Order on Batelco and to impose a fine on Batelco, including a fine by way of periodic penalty payments to ensure compliance with the Order.

**3 Factual Background**

**Kingdom of Bahrain International Capacity and Facilities**

- 3.1 The Kingdom of Bahrain is served by three high-capacity international telecommunications cables:
- (a) FOG: a submarine cable owned and operated by a consortium of incumbent telecommunications operators in Gulf Cooperation Council countries, including Batelco;
  - (b) FALCON: a submarine cable owned and operated by FLAG/Reliance;
  - (c) SFO: a cable that uses the Bahrain / Saudi Arabian causeway bridge owned and operated by the King Fahd Causeway Authority, but terminates in Bahrain on a Batelco cable.

Each of these cables transit through or terminate in Telegraph House. The FALCON cable is the only cable in which Batelco has no legal interest, controlling or non-controlling.

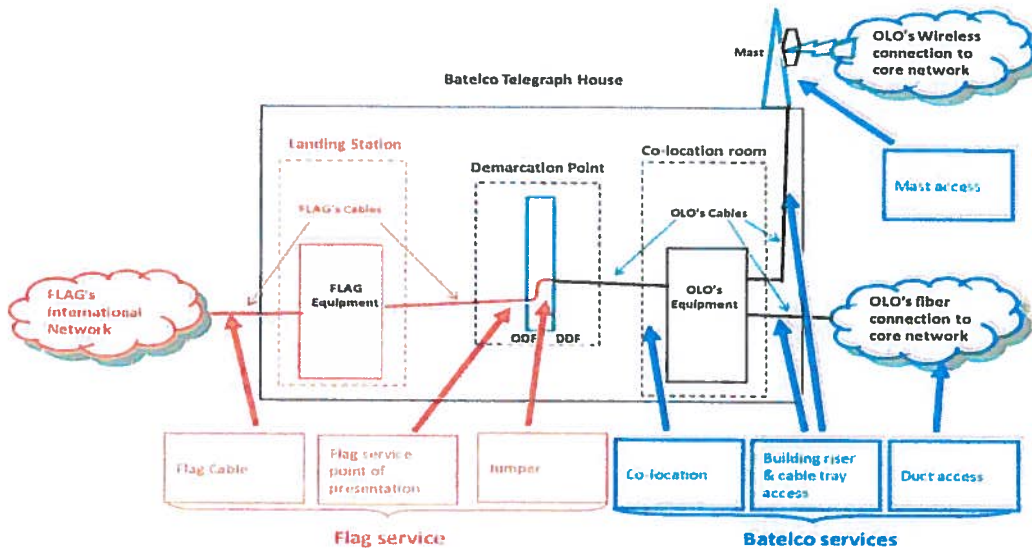
- 3.2 The FALCON cable system lands at the Landing Station. Consequently any OLO wishing to purchase international capacity directly from FLAG on the FALCON cable has to negotiate and obtain from Batelco the necessary Facilities Access Services to connect their point of presence to the FLAG capacity.



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3.3 The direct access, interconnection and collocation options are shown on the diagram below:

**Services that may be provided by Batelco and Flag**



**Contractual Relationship between FLAG and Batelco**

- 3.4 On 27 July 2004 Batelco and FLAG entered into two agreements being:
- (a) a landing party agreement dated 27 July 2004 ("Landing Agreement"); and
  - (b) a capacity right of use agreement dated 27 July 2004 ("Capacity Agreement").
- 3.5 The Authority approved these contracts by letter dated 1 September 2004.
- 3.6 Annex 1 of this Order contains the provisions the Authority considers relevant to this Order. The Authority is clear that some components or elements of the FLAG Landing Station are in the possession or control of Batelco and form part of its international facilities as defined in its International Facilities Licence as more particularly indicated at paragraph 2.10 above.
- Menatelecom's requests for Facilities Access and Batelco's rejection**
- 3.7 At paragraph 28 of Batelco's Draft Order Response, Batelco stated that it is "...prepared to assume that such physical access conceptually falls within the bounds of [the Authority's] previously defined market for access to international facilities, although such access was not identified in the [Access] Dominance Determination as falling within the bounds of that market".
- 3.8 Menatelecom has on three occasions sought Facilities Access under Schedule 7 from Batelco to allow it to collocate to access directly and/or interconnect with the FLAG Landing Station.
- 3.9 As far as the Authority is aware, to date no Licensed Operator has been able to obtain the access and collocation services necessary from Batelco to be able to connect their Networks



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to the FLAG Landing Station. Menatelecom was the first OLO to inform the Authority that it had applied to and been rejected by Batelco for the access and collocation services necessary to enable access to the FLAG Landing Station.

- 3.10 Menatelecom submitted a request for Facilities Access:
- (a) at Telephone House for the purposes of collocating on 22 July 2008 (request to collocate at Telephone House (the "First Application")); and
  - (b) at Telegraph House for the purposes of collocating with the FLAG Landing Station on 29 April 2009 (application for collocation to access FLAG Landing Station (the "Second Application")).
- 3.11 Batelco rejected the First Application (the "First Rejection") on 24 August 2008 on the grounds that there were no Batelco services with which Menatelecom planned to interface in Telephone House which justified, in Batelco's view, Menatelecom having collocation.
- 3.12 On 9 June 2009 Batelco rejected the Second Application (the "Second Rejection") on the grounds that there were no Batelco services with which Menatelecom planned to interface in Telegraph House, in particular:
- (a) an ODF fibre connection between the Menatelecom equipment and the Flag Landing Station; and
  - (b) related facilities management services over and above merely co-locating Menatelecom's equipment and rack in Telegraph House.
- 3.13 In relation to the duct application that formed part of the Second Application, Batelco carried out a desk study and rejected the application on the basis that it was contrary to Batelco's duct policy, as the order comprised primary and secondary duct routes (rather than primary routes only). The Authority notes that this was not cited as a reason for rejection of the Second Application per se.

**Batelco's Offer to Allow Collocation and Subsequent Withdrawal of Offer**

- 3.14 On 21 October 2009 Batelco wrote to the Authority noting that it was able to offer Menatelecom space to install and operate its equipment on Level 6 of Batelco's data centre (within Telegraph House) "...within days of their request to do so". Batelco acknowledged that this was in the context of what it referred to as "...the FLAG Landing Station access request".
- 3.15 On 22 October 2009 Menatelecom submitted its third application for Facilities Access Services, on the same terms as its Second Request (the "Third Application").
- 3.16 On 26 October 2006 Batelco emailed the Authority noting that it was "...now not able to offer access to Salmaniya premises."

**4 Authority's Analysis**

- 4.1 The Authority determines that Batelco is required to continue to provide the requested Facilities Access Services in accordance with its legal obligations below.
- 4.2 In this instance the Authority considers Batelco's failure to provide a valid reason for rejection and failure to continue with the provision of the Facilities Access Services in accordance with the relevant procedures of Schedule 7 to be a breach of:



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- (a) article 57(e) of the Telecommunications Law;
  - (b) articles 3.2 and 5.4 of the Access Regulation;
  - (c) condition 13.1 of its National Fixed Services Licence;
  - (d) condition 7.1 of its International Facilities Licence; and
  - (e) Schedule 7 of its Reference Offer.
- 4.3 The purpose of this Order is to enforce Batelco's legal obligations by requiring Batelco to provide to Menatelecom the Facilities Access Services required by Menatelecom to enable Menatelecom to directly interconnect with the FLAG Landing Station for the purposes of purchasing international capacity directly from Reliance.
- 4.4 In coming to this conclusion the Authority has considered the following points. These points can be summarised as follows:
- (a) Batelco is dominant in the market for access to international capacity;
  - (b) article 57(e) of the Telecommunications Law obliges Batelco to provide access when reasonably requested. This obligation is further supported by Condition 7.1 of Batelco's International Facilities Licence and Condition 13.1 of Batelco's National Fixed Services Licence;
  - (c) Batelco is offering Facilities Access Services under Schedule 7 of its Reference Offer. The language of this Schedule clearly covers the Facilities Access Services requested by Menatelecom, including collocation where required;
  - (d) Menatelecom submitted three reasonable requests for Facilities Access Services in the form of an application under Schedule 7;
  - (e) Batelco and FLAG's agreements clearly contemplate FLAG selling international capacity to third party licensees;
  - (f) Batelco has in fact stated to the Authority by letter dated 21 October 2009 that it was able to offer Menatelecom space to install and operate its equipment [REDACTED] in Telegraph House "...within days of their request to do so";
  - (g) Menatelecom's Third Application was made on this basis; and
  - (h) Batelco has subsequently withdrawn its offer of availability of space in Batelco's data centre.
- 4.5 The Authority determines that:
- (a) as Batelco has not provided any valid reason why it could not offer the requested Facilities Access Services;
  - (b) as Batelco stated to the Authority on 21 October 2009 that it could offer Menatelecom space to install and operate its equipment in Batelco's data centre;
  - (c) Menatelecom submitted its application to Batelco for Facilities Access Services for the same purpose on three separate occasions, two occasions on the same form and the third occasion being on 22 October 2009, after the Draft Order was issued and Batelco had stated to the Authority that it could offer Menatelecom space to install and



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operate its equipment in Batelco's data centre. Batelco wrote to Menatelecom on 22 October 2009 outlining its offer to Batelco;

- (d) as Batelco confirmed to the Authority on 26 October 2009 that it could no longer provide that access for no stated reason,

the Authority considers it can rely on the facts referred to in paragraph 4.5 (b) to (d) and can consider them as part of Batelco's Draft Order Response as they occurred after approximately 3 weeks after the Draft Order was issued to Batelco and approximately 1 week prior to the due date for Batelco's Draft Order Response.

4.6 The Authority considers that it is the correct legal analysis that for the reasons summarised in paragraph 4.4 above and discussed in more detail in below, Batelco is obliged to provide the requested Facilities Access in accordance with Schedule 7 of the Reference Offer.

4.7 Based upon:

- (a) Batelco's statement in its letter to the Authority on 21 October 2009; and  
(b) its letter to Menatelecom on 22 October 2009;

the Authority considers that Batelco is precluded from stating that it cannot provide the requested Facilities Access to Menatelecom under Schedule 7 and should now continue with the Field Test to the extent necessary to enable Batelco to issue an the right to Menatelecom to place an order for the requested Facilities Access pursuant to paragraphs 7(b) and 8 of Schedule 7.

4.8 A more detailed analysis of the considerations listed in paragraphs 4.4 to 4.7 of this Order as follows.

**Batelco offer of collocation**

- 4.9 On 21 October 2009 Peter Kaliaropoulos, Group Chief Executive of Batelco, wrote to the Authority noting that Batelco was able to offer Menatelecom space to install and operate its equipment [REDACTED] in Telegraph House Building, Salmaniya Technical Exchange Complex, "...within days of their request to do so".
- 4.10 On the basis of that letter on 21 October 2009, Eamon Holley, Director of Legal Affairs of the Authority spoke with Eman Ahmed, Senior Lawyer of Menatelecom noting that Batelco had confirmed to the Authority that it was able to offer Menatelecom the collocation space and to consider submitting its Facilities Access application again.
- 4.11 On 22 October 2009 Menatelecom submitted its third Facilities Access Services application to Batelco.
- 4.12 On 22 October 2009 Batelco wrote to Menatelecom offering the collocation.
- 4.13 To date Batelco has not provided the Facilities Access Services as requested by Menatelecom and as offered by Batelco.
- 4.14 On 26 October 2009, Peter Kaliaropolous emailed Alan Horne, General Director of the Authority and confirmed that Batelco was "...now not able to offer access to Salmaniya premises". Batelco did not provide any reasons for its withdrawal until a meeting between Batelco and Mena Telecom on 3 November 2009 when it was verbally confirmed by Batelco at



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a meeting with Mena Telecom that the offer to collocate had been withdrawn on 2 November 2009.

- 4.15 The Authority believes that as Batelco's letters to the Authority and Menatelecom of 21 and 22 October 2009 were issued approximately three weeks after the Authority's issuance of a Draft Order, but approximately one week prior to the due date for Batelco's Draft Order Response, and was directly related to the subject matter of the Draft Order, the Authority may consider these letters. The Authority does not consider that its reference to these facts is introducing any new allegation that requires a further Draft Order.

**Batelco dominance in the market for access to international capacity.**

- 4.16 Batelco in its Draft Order Response considers that the Authority should have reviewed its Access Dominance Determination in January 2008. Batelco contends that if the Authority had conducted a review then the Authority's findings of dominance in this market would be different.
- 4.17 The Access Dominance Determination does not lapse for the lack of a review of the relevant markets discussed in the determination and remains in force. Furthermore the Authority considers that as there have been no material changes to the relevant markets addressed by the Access Dominance Determination, Batelco cannot have been prejudiced by the lack of a formal review. In particular, the Authority has not been formally notified of any plans to commission new international facilities or capacity, whether landing at Telegraph House or otherwise, although it is aware that announcements have been made concerning intentions to commission such facilities or capacity. The Authority does not consider that any of these potentially new facilities or capacity are imminent, so as to prejudice any order for access made against Batelco. The Authority considers that the Access Dominance Determination stands until such time as the Authority amends or repeals it. The Access Dominance Determination does not lapse because the Authority has not reviewed the relevant markets discussed in it. Therefore the Authority's findings of dominance in the relevant market discussed in the Access Dominance Determination stand.

**Batelco provision of international facilities access**

- 4.18 Article 57(e) requires Batelco, as the dominant operator in the relevant market, to offer upon request Access to its Telecommunications Network or International Facilities on fair and reasonable terms to any Licensed Operator.
- 4.19 Condition 7.1 of Batelco's International Facilities Licence and Condition 13.1 of its National Fixed Services Licence requires Batelco, for as long as the licensee is a public telecommunications operator in a dominant position in the market for access to international capacity, to provide access to its international telecommunications facilities and national fixed telecommunications network on the reasonable request of any licensed operator in accordance with article 57 of the Telecommunications Law. 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.

**Batelco Facilities Access Services offer in Schedule 7.**

- 4.20 The Authority considers that the purpose of Schedule 7 is clear (and stated in paragraph 1(c) of the Schedule). Nothing in the language of the Schedule 7 limits the "Permitted Use" to



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connection of domestic telecommunications services only, nor to telecommunications services in which the Access Provider is dominant. Batelco may reject an application where it is not required to provide Access Services per paragraph 6(a)(v) of Schedule 7. However Batelco is required to provide Access Services by virtue of its dominance in the relevant market. Furthermore it is dominant in a market for access to international capacity, within which Batelco concedes the requested form of access falls.

- 4.21 The Authority considers that the definition of "Facility" and "Equipment" in Schedule 8 are both clear in the context of the telecommunications industry and introduce nothing that is either controversial nor is delimiting to one specific type of telecommunications service, whether national or international, nor do the definitions exclude from their application any particular type of telecommunications service.
- 4.22 The Authority considers that collocation space is contemplated and implied by Schedule 7, and refers to the use of the word "collocation" at paragraph 2.3 (c) and (d) of Schedule 7, paragraph 3(b) of Schedule 7, which details the minimum requirements for a Facilities Sharing Application and requires at paragraph 3(b)(x) the applicant to detail:

*"...the area required expressed in square meters and any further information such as floor to ceiling height in respect of accommodation within buildings or mounting positions in respect of Tower space or otherwise as the circumstances require to be specified..." [Authority emphasis added].*

Paragraph 6(a)(viii) provides as a reason for rejection of an application that:

*"...the Facilities Access Application relates to a Facility where an existing user has commenced preparatory conduct (Preparatory Conduct), and the provision of access to the Access Seeker would prevent the existing user's intended use of the Facility (Intended Use) and for the purposes of this paragraph, the existing user has commenced Preparatory Conduct where it has commenced provisioning or providing capacity in or on the Facility for an Intended Use..." [Authority emphasis added].*

- 4.23 The Authority also notes that the definition of "Facility" whilst not listing "collocation" as a facility, lists facilities that would require collocation were access to be granted to them. This includes but is not limited to the necessary riser and cable tray facilities to access the collocation space, access to ducts and the main distribution frame equipment room and related access.
- 4.24 The Authority considers that the provisions referred to above clearly contemplate collocation, if not a facility within the definition of Facility in Schedule 8, is a service that is ancillary to Facilities Access Services.

**FLAG direct selling of international capacity**

- 4.25 Batelco has entered into contracts with FLAG that acknowledge that FLAG has the right to directly sell international capacity to other licensees. Specifically the Authority notes the following:
- (a) clause 10.1 of the Capacity Agreement details the "Put Option", which was effective only until approximately 31 March 2009 and is no longer effective;
  - (b) clause 10.2 of the Capacity Agreement states that subject to clause 10.1 of the Capacity Agreement, FLAG shall be able to sell or lease any amount of capacity on



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the FALCON System to any duly licensed third party on such terms as FLAG determines, including as to price or rental amounts. FLAG shall not inform Batelco of the proposed purchasers or lessees or the proposed purchase prices or rental amounts applicable to such capacity. If the disclosure of such information is required to enable Batelco to interconnect the capacity concerned, FLAG shall be entitled to seek the prior written approval of the Authority to disclose such information to Purchaser on a case by case basis;

- (c) clause 6 of the Landing Agreement states that Batelco shall allow access to the Site and Facility including to the Common Areas and the Landing Station by FLAG, its Affiliates and their respective suppliers and customers, provided that such entities agree to abide by any reasonable access rules of Batelco. FLAG (and its Affiliates, their respective suppliers and customers) shall be permitted such access as is necessary to install, test, commission, operate, maintain, repair, enhance and upgrade any FLAG Supplied Equipment located or to be located in the Facility. [Authority emphasis added]

4.26 FLAG has confirmed in writing to the Authority that the FLAG Supplied Equipment has not been legally transferred to Batelco. FLAG Supplied Equipment is defined to mean "...the equipment to be supplied by FLAG, its customers (to the extent required by law) or its suppliers comprising all assets necessary for the installation and operation of the FALCON System (excluding the Infrastructure), to be agreed in writing by the Joint Working Group prior to the RFE Date." [Authority emphasis added].

4.27 The Authority considers that these provisions (and those referred to in Annex 1 of this Order) clearly contemplate that FLAG has always been free to sell international capacity to any other appropriate licensees in the Kingdom of Bahrain, without any Batelco mediated or intermediate services. However now that the Put Option has expired the financial disincentive for FLAG to sell directly to other licensees has been removed.

4.28 Currently for this to occur, OLOs must be able to directly connect to FLAG and its Equipment within Telegraph House. This is what Menatelecom is seeking.

**Menatelecom reasonable requests for Facilities Access Services**

4.29 Menatelecom submitted a reasonable request for Facilities Access Services in respect of Batelco's international facilities. The Authority considers that Menatelecom's request for access, including entry ducts, cable risers and collocation space in Telegraph House is a simple, feasible and efficient method of obtaining access to the FLAG Landing Station. The Authority considers that Batelco has not provided Menatelecom with any valid reason why the requested access cannot be provided and that the reasons provided to Menatelecom fall outside the permitted scope of paragraph 6 of Schedule 7.

**Batelco lack of valid reasons for the denial of Facilities Access Services**

4.30 Batelco's First and Second Rejections;

- (a) do not fall within the permitted reasons in paragraph 6(a) of Schedule 7;
- (b) do not provide any valid reason why the requested Facilities Access Services cannot be provided;



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- (c) did not raise as reasons for rejection other reasons subsequently provided to the Authority in its Formal Response or Draft Order Response, specifically national security.

**Duct Access**

- 4.31 Batelco did not make clear whether it had rejected the Second Application due to the issues it identified with ducts. The Authority does not consider that this was a valid reason for rejection. Furthermore it does not fall within the reasons for rejection under paragraph 6 of Schedule 7.
- 4.32 Batelco refers to Menatelecom's application for ducts as being contrary to its duct policy as the requested route requires "primary" and "secondary" ducts. The Authority has reviewed Batelco's duct policy. No definition is made for primary and secondary ducts. Batelco did not explain why Menatelecom's application or which parts of it, fall into the secondary duct areas (if such a thing exists).
- 4.33 Batelco's reason for rejection of Mena Telecom's applications for ducts (although the Authority does not consider this to be a legitimate reason for rejection under paragraph 6 of Schedule 7) is in any event not reasonable as it fails to explain which parts of the application for duct space falls within the secondary duct map (undefined). In spite of Batelco's offer in the Second Rejection to conduct a site survey, the rejection is not transparent and is disingenuous as Menatelecom (and any other OLO) would not spend money on a site survey if Batelco had already rejected the other parts of the Facilities Access Application that were not related to the application for ducts.
- 4.34 The Authority can only speculate that Menatelecom decided not to enter into a site survey for ducts after Batelco had rejected the application in the first place. In any event that is irrelevant. The Authority notes that paragraph 7 of Schedule 7 envisages a Field Study when the Access Provider accepts an application under article 5(c) of Schedule 7. It is unclear why Batelco would offer a site survey for ducts it had prima facie determined were not available.
- 4.35 Batelco should have more properly suggested a modification to this part of the Facilities Access Application under paragraph 5(a)(ii) of Schedule 7.

**National security**

- 4.36 Batelco has raised to the Authority issues related to security in its Second Rejection and national security in its Formal Response and in its Draft Order Response.
- 4.37 The Authority considers that the "concerns" raised in the Second Rejection were not given as reasons for rejection under paragraph 6(a)(i) of Schedule 7 and were not clearly outlined as being concerns to do with national security.
- 4.38 Batelco's Formal Response did not clearly outline or detail to the Authority what Batelco's national security concerns were but merely stated that if the facilities application was pressed that it reserved the right to use the undisclosed reasons as a "...further formal, lawful and reasonable ground for rejection if the Second Application is pressed" and that this may "...need to become the subject of input from interest stakeholders other than Batelco".
- 4.39 In Batelco's Draft Order Response, Batelco submitted a "confidential annex" and referred to and relied upon this throughout its Draft Order Response. The Authority is enforcing Batelco's reference offer and Batelco's obligations arising as a result of its dominance designation under the duties bestowed upon it by the Telecommunications Law. The Authority and its staff are



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bound by a strict confidentiality provision of article 23 of the Telecommunications Law, the breach of which carries a serious penalty under the Telecommunications Law that is without prejudice to any stronger penalty under other laws. The Authority considers Batelco's reliance upon national security and a confidential annex in the Draft Order Response not disclosed to the Authority to be a disingenuous obfuscation of process.

- 4.40 Security concerns, to the extent that there are any legitimate concerns at all, and whether they be related to national security or simply security of Batelco's network, can be overcome in many uncontroversial ways. Many operators in jurisdictions all over the world have dealt successfully with this issue. It appears that Batelco has also overcome this issue by allowing retail customers collocation within Batelco's data centre within Telegraph House. Indeed this was reflected in Batelco's letter of 21 October 2009 where it was stated that:

*"...[E]xisting security arrangements for Menatelecom's access and usage of the Salmaniya Complex will apply, given that this complex houses strategically critical and sensitive telecommunications infrastructure for the Kingdom."*

**Batelco international capacity**

- 4.41 Batelco is offering international capacity through Batelco using an IPLC, Wholesale IDD and apparently through an as yet unapproved IP Connection Services. Indeed Batelco appears to be offering almost every form of access to international capacity except direct access to the FLAG Landing Station, which Batelco concedes in its Draft Order Response falls within the scope of the market in which Batelco has been determined dominant, which has been reasonably requested by Menatelecom and which would be the most basic form of direct access to FLAG at present.
- 4.42 In each of Batelco's access to international capacity offerings it remains an intermediary between FLAG and the OLO. This is not requested and not required by Menatelecom. In the terms of the relevant conditions of Batelco's National Fixed Services Licence and International Facilities Licence, Menatelecom's requests for the provision of this access and collocation to international facilities in a market in which Batelco is dominant is "technically feasible and consistent with the most efficient delivery of telecommunications services to the ultimate customer of such services."

**Batelco unreasonable refusal to allow direct access**

- 4.43 The Authority has already stated above that the Authority considers that Batelco has not provided any valid reason why the Facilities Access could not be provided nor has it rejected within the reasons allowed under paragraph 6(a) of Schedule 7.
- 4.44 The Authority considers that Batelco's refusal to allow direct physical access to the FLAG Landing Station by OLOs has a serious impact on the long-term development of the telecommunications market in the Kingdom of Bahrain. Article 3(b) of the Telecommunications Law states that the Authority must carry out its duties in a manner best suited to protect the interests of users and subscribers and promote effective and fair competition among new and existing Licensed Operators. As such it is reasonable for the Authority to take this factor into account.
- 4.45 Consistent with Conditions 7.1 of Batelco's International Facilities Licence and Condition 13.1 of its National Fixed Services Licence allowing such direct access is also in the long-term interests of end users, as OLOs seek to develop their own Networks, including with



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international capacity, without the mediation of Batelco's international products and services such as IPLC or a newly-defined IP Connection Service, so that innovative, cost-effective and high quality services can be developed by OLOs as alternatives to those offered by Batelco.

**Authority not imposing new obligations**

- 4.46 Batelco's Draft Order Response accuses the Authority of imposing a new obligation upon Batelco through this Order. The Authority considers that it is plain and clear that based upon the analysis above the Authority is not imposing any new obligation, but merely enforcing an obligation that has existed since at least the inception of the Access Dominance Determination.

**5 General Regulatory Reasons for Making This Order**

The Authority's general reasons for ordering Batelco to comply with its obligations to provide the access and collocation services necessary to allow direct connection to the FLAG Landing Station are set out below.

**5.1 Promotion of Competition**

- (a) One of the core duties of the Authority is to carry out its duties in the manner it considers best calculated to protect the interests of consumers of telecommunications services in the Kingdom of Bahrain by, amongst other matters, ensuring the availability and provision of services – article 3(b)(1) of the Telecommunications Law. The Authority is also charged with promoting effective and fair competition among new and existing Licensed Operators – article 3(b)(1) of the Telecommunications Law.
- (b) Given these duties, the Authority considers it will be failing its duties and the telecommunications market in the Kingdom of Bahrain if it did not act in such a way as to ensure that Batelco complies with its existing obligations to provide fair and reasonable access by any Licensed Operator to a facility such as an international high-capacity submarine cable.

**5.2 Good Regulation**

The Authority is required by the Telecommunications Law to act and exercise its powers efficiently and effectively, and to monitor and enforce compliance with Licence terms and conditions by Licensed Operators – article 3(a) and 3(c)(2) of the Telecommunications Law.

**5.3 Orderly Conduct**

The Authority is given various dispute resolution powers under the Telecommunications Law in order to provide a mechanism for the effective and efficient resolution of disputes between Licensed Operators. It is essential, in order for the Authority to comply with its overriding duty to carry out its duties efficiently, effectively and reasonably and to maintain orderly conduct between Licensed Operators, that it be seen to act expeditiously and thoroughly in dealing with disputes between Licensed Operators. This is particularly important when the matters in dispute have a serious impact on the competitiveness of the telecommunications market in the Kingdom of Bahrain.

**5.4 Access and Interconnection**

The Authority is specifically charged under the Telecommunications Law to encourage, regulate and facilitate adequate access and interconnection – articles 3(c)(1) and 3(c)(13) of



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the Telecommunications Law. It would be failing in its duties under the Telecommunications Law if it did not ensure, to the extent that it is able by exercising its powers efficiently and effectively, such adequate access and interconnection when it is brought to its attention that there is a serious failure in the telecommunications market in the Kingdom of Bahrain in this regard.

**6 Fining Guidelines**

6.1 Section 35(d)(2) of the Telecommunications Law states that the Authority shall issue an order containing a suitable fine on the Licensee provided that such fine is objectively justified and non-discriminatory. The Telecommunications Law does not provide specific guidance on the setting of fines.

6.2 The Authority is aware that it has not published or consulted on guidelines or procedures it will follow in determining the appropriate level of any fine it considers necessary to award against any person subject to an order under section 35 of the Telecommunications Law. Partly this is the result of the co-operation the Authority has received from Batelco and the Other Licensed Operators in the Kingdom of Bahrain as it has rarely been necessary for the Authority to consider imposing a fine. In the absence of any fining guidelines or principles, the Authority considers that it is appropriate to be guided by the Telecommunications Law as well as to consider international best practice.

**6.3 International Best Practice**

(a) The Authority notes that there does not appear to be a uniform approach to setting fines for technical breaches of telecommunications licenses or equivalent conditions of general authorisations. The Authority also notes that the regulator in the United Kingdom, Ofcom, has consistently been ranked as the most effective regulator in the European Union by organizations such as the European Competitive Telecommunications Association.<sup>1</sup> The Authority has therefore studied the approach taken by Ofcom to see if there are lessons that would be useful for application of fining principles in the Kingdom.

(b) Ofcom has published Penalty Guidelines.<sup>2</sup> In the interim, before the Authority can consult on its own guidelines, the Authority proposes to follow these principles, which are reproduced with minor amendments below.

**(c) General criteria**

(i) The amount of any fine must be appropriate and proportionate to the contravention in respect of which it is imposed. In addition the Authority will have regard to any representations made to it by the licensee in breach. Accordingly, the Authority, in setting the level of fine will consider all relevant circumstances.

<sup>1</sup> See ECTA Regulatory Scorecard 2008, published 28 January 2009. All ECTA Regulatory Scorecards are available at: <http://www.ectaportal.com/en/basic651.html>

<sup>2</sup> Penalty Guidelines – Section 392 of the Communications Act 2003, Ofcom. Available at: <http://www.ofcom.org.uk/about/accoun/pg/>



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- (ii) In general, the Authority is likely first to consider the following factors in determining the starting figure of any fine:
  - (A) the seriousness of the contravention;
  - (B) any precedents set by previous cases; and
  - (C) the need to ensure that the threat of fines will act as a sufficient incentive to comply.
  
- (d) **Specific criteria which may be relevant depending on the contravention**

Certain specific criteria may be relevant to adjust the starting figure of any fine depending on the type of contravention. This may include, but would not necessarily be limited to:

  - (i) any gain (financial or otherwise) made by the licensee in breach (or any connected body);
  - (ii) the degree of harm caused, or increased cost incurred by consumers or other market participants;
  - (iii) size and turnover of the licensee;
  - (iv) the extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the licensee;
  - (v) the duration of the contravention; and
  - (vi) whether a fine in respect of the same conduct has already been imposed by the Authority or another body.
  
- (e) **Factors tending to lead to an increase in the level of any fine**

These may include, but would not necessarily be limited to:

  - (i) repeated contraventions by the same licensee;
  - (ii) continuation of the contravention after either becoming aware of the contravention or being notified of a contravention by the Authority;
  - (iii) the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur;
  - (iv) the absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent contravention by the licensee concerned or other bodies in the same group.
  
- (f) **Factors tending to decrease the level of any fine**

These may include, but would not necessarily be limited to:

  - (i) the extent to which the licensee has taken steps in advance to identify and mitigate external factors that might result in a contravention;
  - (ii) the extent and timeliness of any steps taken to end the contravention in question, and any steps taken for remedying the consequences of the contravention; and



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(iii) co-operation with the Authority's investigation.

**6.4 Final amount of fine**

Having taken regard of any submissions made by the licensee and having considered the factors listed above (to the extent that they are relevant) and any other circumstances relevant to the particular case under consideration, the Authority has determined an appropriate and proportionate fine.

**6.5 Maximum amount of fine**

- (a) The Authority notes that there is no maximum fine defined in article 35 of the Telecommunications Law. Without prejudice to its right to impose any fine under article 35 that it considers appropriate and proportionate, the Authority will normally not seek to impose a fine under article 35 of the Telecommunications Law above the maximum set out in article 65(f)2 of the Telecommunications Law, discussed below.
- (b) The Authority considers that for enforcement actions under article 35, the most appropriate method for the Authority is to begin determination of the level of fine from the maximum permitted under article 65(f)2 of the Telecommunications Law, to which the Authority will apply the appropriate factors set out above. In this instance in order to establish the maximum amount of the fine the Authority is guided by the 10% of turnover cap established under article 65(f)2.

**7 Fine under this Order**

**7.1 Basic Amount**

In applying the guidelines and principles above, the Authority notes that in its Annual Report for the year ending 31 December 2008, Batelco's aggregate revenue for telecommunications services provided in the Kingdom of Bahrain was BD 223,915,000 (Note 29 in the Auditor's Report to Batelco's Annual Report). The maximum amount of fine in this Order is 10% of turnover i.e. BD 22,391,500. In this instance the Authority has decided that the starting point shall be 1% of turnover. Therefore the starting point for the fine is BD 2,239,150 (the "Basic Amount").

**7.2 Aggravating Factors**

In determining what aggravating factors should be applied to the Basic Amount, the Authority notes in connection with the breach:

- (a) the breach is a serious one, given that it has the potential effect of preventing direct access to international capacity via submarine cables. It also distorts competition in markets in which international capacity is an input, such as the retail broadband markets and the retail international calls markets. This has a significant impact on the development of the market in the Kingdom of Bahrain, and so the factor the Authority considers that it is appropriate to apply to the Basic Amount to take into account the seriousness of the breach (the "Seriousness Factor") is fifty percent (50%) of the Basic Amount, and should be added to the Basic Amount;
- (b) the Authority notes that this is the second serious *refusal or failure to supply* case that it has dealt with concerning Batelco in less than two years (see the Authority's Order No. 1 of 2008 dated 30 March 2008, *Batelco's obligation to provide Customer Access*



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*Tail Service*). The Authority therefore considers that a repeat offence factor (the "**Repeat Factor**") of twenty five percent (25%) of the Basic Amount should be added to the Basic Amount; and

- (c) the Authority notes that in meetings at the offices of the Authority with the Chief Executive Officer of Batelco Bahrain, Gert Rieder, and the General Manager of Wholesale and Carrier Relations, John Ford, both have shown awareness of the issue of Menatelecom's desire to access the FLAG Landing Station, so that knowledge of Batelco's failure to supply appropriate access and collocation or any other fair and reasonable solution to the problem of access to the FLAG Landing Station is known to Batelco's executive team at the highest level. The Authority therefore considers that a senior management factor (the "**Management Factor**") of fifty percent (50%) of the Basic Amount should be added to the Basic Amount.

### 7.3 Mitigating Factors

- (a) The Authority notes that there has been no acknowledgement on behalf of Batelco of any wrongdoing. In fact, the one factor that could have been considered a mitigating factor, Batelco's offer to Mena Telecom of 22 October 2009 was withdrawn shortly thereafter. Batelco's Formal Response and Draft Order Response denies any culpability by Batelco and rejects all the points of investigation and allegation set out by the Authority in the Formal Notice and Draft Order. The Authority is therefore unable to apply a mitigation factor.
- (b) The Authority has included in this Order a mechanism for mitigation of any final fine, if Batelco co-operates with the Authority and Menatelecom in expediting access and collocation. The Order also includes a mechanism for adjusting any final fine, if Batelco does not comply with the Order.

In conclusion, the Authority sets the fine under this Order (the "**Fine**") as follows:

$$\begin{aligned} \text{Fine} &= \text{Basic Amount} + \\ &\quad \text{Basic Amount} \times \text{Seriousness Factor} + \\ &\quad \text{Basic Amount} \times \text{Repeat Factor} + \\ &\quad \text{Basic Amount} \times \text{Management Factor} \\ &= \text{BD } 2,239,150 + \text{BD } 1,119,575 + \text{BD } 559,788 + \text{BD } 1,119,575 \\ &= \text{BD } 5,038,088 \end{aligned}$$

This Fine can be increased or decreased in accordance with the provisions of clause 2.1 of the Order.





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Mena Telecom's Application for Facilities Access to FLAG Supplied Equipment at Batelco's  
Salmaniya Complex

[REDACTED]



Article 35 Order No. 1 of 2009  
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Salmaniya Complex

[REDACTED]



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**Annex 2 - A summary of the Authority's consideration of Batelco's response to the draft FLAG Landing Station Order**

**Background**

The Authority refers to:

1. the draft FLAG Landing Station Order provided to Batelco by way of letter dated 29 September 2009 (Draft Order); and
2. Batelco's response to the draft FLAG Landing Station Order dated 29 October 2009 (Batelco's Response).

**Batelco's Response – main issues raised**

The Authority notes that in Batelco's Response, the following main relevant issues were raised:

1. Licence compliance – Batelco denies it is required to provide the facilities access sought by Menatelecom pursuant to its licence conditions;
2. Markets, dominance and access remedies – Batelco alleges that the Authority failed to review its 2006 Dominance Determination and that consequently, Batelco has been prejudiced by a lack of formal review;
3. Alleged source of confusion regarding the definition of 'Facilities' – Batelco suggests that the definition of 'Facilities' and in particular, the phrase 'cable station' has caused confusion resulting in the Authority broadening the scope of the definition of Facility;
4. The nature of the access sought – Batelco alleges that the Authority has not taken into consideration other forms of access to the FLAG Landing Station proposed by Batelco; and
5. Reasonable request – Batelco alleges that:
  - a. Menatelecom's request for facilities access to enable direct interconnection with FLAG is a request for a service that is not provided by Batelco under the Reference Offer; and
  - b. The nature of the Draft Order is not reasonable for various reasons.
6. The Landing Station and the access sought – Batelco alleges that the Authority discounts, ignores and undermines Batelco's commercial interests in the performance of the Landing Party and Capacity Right of Use agreements (Agreements).



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7. **Fine Issues** – Batelco alleges the fine proposed by the Authority is extravagant, unconstitutional and unfairly calculated.
8. **National Security Concerns** – Batelco alleges that it cannot provide Menatelecom with facilities access in order to directly connect to FLAG due to national security concerns.

**The Authority's response to Batelco's Response**

The Authority considers that:

9. in response to point 1, Batelco's International Facilities Licence clearly obliges Batelco to provide the facilities access sought by Menatelecom;
10. in response to point 2, the 2006 Dominance Determination remains in force until replaced or repealed by the Authority. The information provided by Batelco does not evidence any material change in market conditions such that Batelco would be prejudiced by the existing Dominance Determination remaining in force;
11. in response to point 3, it has not broadened its interpretation of the term 'Facility' which is clearly defined in the Reference Offer;
12. in response to point 4, the other forms of access proposed by Batelco do not address Batelco's legal obligation to provide Menatelecom with facilities access to directly interconnect with FLAG;
13. in response to point 5:
  - a. under the Reference Offer, there is a clear obligation that Batelco is to provide facilities access to enable Menatelecom to directly interconnect with FLAG; and
  - b. the Draft Order is reasonable, fair, justified, within the scope of the Authorities powers and is required to enforce Batelco's lawful obligations;
14. in response to point 6 and after review of the Agreements, the Authority is firmly of the view that Batelco's commercial interests are not being ignored, discounted or undermined by the Order as, among other things, the Agreements clearly contemplate direct access to FLAG by other Licenced Operators;
15. in response to point 7, it has the appropriate power under sections 35 of the Telecommunications Law to issue the fine and that the fine is appropriately calculated;



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16. in response to point 8, the Authority considers that Batelco cannot now rely upon factors not raised or properly relied upon as reasons for rejection of Menatelecom's applications in the first instance.

Batelco also fails to refer to or rely upon TRA's duty of confidentiality under article 23 of the Telecommunications Law which clearly states that,

"The General Director and staff members of the Authority shall not be permitted to divulge any confidential information which may come directly or indirectly to their knowledge during the course of their work. This obligation shall continue even after such Persons leave the service of the Authority."

TRA is not aware of any similar legal duty or restriction imposed on any officer or employee of Batelco, yet it clearly considers that its staff are more trustworthy of information relating to its network and issues of alleged "national security" than the staff of the regulator who are under an express legal duty to retain the confidentiality of any confidential information provided to it.

Batelco has had ample opportunity to raise these issues before and to rely upon the statutory protections of Article 23 of the Telecommunications Law, including at the meeting with TRA of 30 September 2009. TRA therefore considers Batelco's reliance on vague and undisclosed issues of alleged "national security" at this late stage to be a tactic for the mere delay and obstruction of this process, and its reference to raising "national security" as a further lawful reason for rejection to be disingenuous and an obfuscation of process.

**The Authority's Conclusion**

After careful consideration of Batelco's submissions and the relevant circumstances, the Authority has firmly concluded that:

1. Batelco is obliged to provide the facilities access requested by Menatelecom; and
2. the proposed Draft Order is appropriate, reasonable and necessary and should be enforced in accordance with the terms set out in the Order.