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Access Regulation

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A Report issued by the Telecommunications
Regulatory Authority on the Consultation

30 April 2005

Purpose: Report on the Consultation regarding the draft Access Regulation.



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1 Introduction

The Telecommunications Regulatory Authority of the Kingdom of Bahrain (“TRA”) commenced addressing Access through its consultation paper which was published last year entitled “Dominance in certain markets and the provision of Access services for the purposes of section 57(e) of the Telecommunications Law”. Following that consultation paper, the TRA issued a further consultation paper on 13 February 2005 entitled “Draft Access Regulation” (ERU/0205/025). This latter consultation paper focused on a draft Access Regulation prepared by the TRA pursuant to section 57(e) of the Telecommunications Law. In it, the TRA invited comments from interested parties in response to specific questions raised or on any other matter related to the draft Access Regulation.

The purpose of this present report is to report on the major comments received from respondents to the consultation. That is, in line with the TRA’s transparent approach to its activities, the TRA provides, through this report, feedback on the submissions received covering the main comments received and how the TRA decided to address these in the final Access Regulation. As a Report, this document has no status other than as a means of disseminating information.

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2 Comments received

The consultation invited comments in response to specific questions raised in relation to certain aspects of the draft Access Regulation. In addition, interested parties could comment on any other matter related to the draft Access Regulation. The comments received covered both general issues and answers to the specific questions raised.

The TRA received four responses in total by the due date. Responses were received from (in alphabetical order):

- Batelco;
- Lightspeed Communications;
- MTC Vodafone (Bahrain); and
- Stratum.

The comments received from respondents represented a range of opinions and views on the draft Access Regulation. Respondents addressed both the specific questions raised by the TRA as well as broader related matters. Having reviewed all comments received, the TRA has, in this report, decided to address those comments which it considers to be substantive, rather than to address all comments received.

Overall, the TRA considers that there were seven substantive matters raised through the consultation process. These are addressed under the following headings:

- Dominance and the Relevant Market;
- Access Scope;
- Regulatory Uncertainty;
- RAO Contents;
- Access Charges;
- Access Orders and other Instruments; and
- Implementation Timetable.

After considering the comments received on each of the above matters, the TRA has made some changes to the draft Access Regulation. Some of these changes are more substantial than others. The following discussion identifies the matters raised in the comments received and how the TRA chose to address these matters in the final Access Regulation. It should also be noted that the TRA has made a range of relatively minor changes to the draft Access Regulation which are not specifically addressed in this report. Such changes arose from the following:

- specific comments raised in the consultation process;
- consequential changes after making some relatively major amendments; and
- the TRA's own review of the draft Access Regulation.

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2.1 Dominance and the Relevant Market

One respondent was concerned with the application of dominance in the context of imposing Access Obligations. The respondent took the view that the Telecommunications Law prescribes different methodologies for the assessment of dominance in the “interconnection” and “access” contexts. The respondent argued that section 57(e) of the Telecommunications Law applies access obligations to a “licensed operator in a dominant position” without requiring the identification of a relevant market or the need for a prior determination by the TRA. Moreover, the respondent argued that this contrasted with section 57(b) which provides for the imposition of interconnection obligations only on a “public telecommunications operator determined by the TRA to have a dominant position in a particular telecommunications market”.

The TRA considers that, while section 57(e) does not expressly refer to a “dominant position in a particular telecommunications market”, it nonetheless hinges on the concept of a “dominant position”. Section 1 of the Telecommunications Law, defines “dominant position” as “the Licensee’s position of economic power that enables it to prevent the existence and continuation of effective competition in the relevant market through the ability of the Licensee to act independently – to a material extent – of competitors, subscribers and users”. As such, the TRA considers that section 57(e) unequivocally requires the definition of the relevant market. The Access Regulation must be consistent with the Telecommunications Law and, as such, it must ensure that the concept of dominance is referable to a relevant market.

The same respondent sought clarification from the TRA on what it considered to be the “relevant market”. This matter is addressed in the discussion under the heading “access scope”, below, as it relates to a broader matter concerning the interpretation of Article 3.6 in the draft Access Regulation.

2.2 Access Scope

Various respondents raised concerns about the construction and interpretation of Article 3.6 in the draft Access Regulation. From the comments received, Article 3.6 appears to have been construed as specifying discrete markets for access. However, this is not its purpose. It was intended to provide a list of access obligations which may be imposed on a dominant operator in a relevant market. By implication, the relevant market is likely to be bigger than any one of the items specified in this article.

One respondent commented that the TRA’s powers to make access regulations under the Telecommunications Law extends to “telecommunications facilities” and “telecommunications networks” but not to “services”. The TRA notes the point raised but also notes the definition of “access” in section 1 of the Telecommunications Law which makes reference to the “making available of telecommunications facilities and/or telecommunications services ...”.

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In order to address these concerns, the TRA has amended Article 3.6 which now appears as Article 3.5 in the final Access Regulation. The TRA considers that the link between access and “telecommunications facilities” and “telecommunications networks” should be reinforced, and has done so.

Consequently, Article 3.5 in the final Access Regulation provides that a dominant operator may be required to provide access services in relation to a list of telecommunications networks’ elements and telecommunications facilities. The list of items in this article reflects the input provided by respondents. Accordingly, this list comprises specific telecommunications networks’ elements and telecommunications facilities to which relevant operators may be required to provide access.

In this context, the relevant market in which market power is assessed will be defined in accordance with the methodology set out in the TRA's "Methodology for the Definition of Telecommunications Markets" determination. It is likely that the relevant market for access will be broadly defined rather than access to each telecommunications networks’ element or telecommunications facility constituting a discrete relevant market.

2.3 Regulatory Uncertainty

One respondent was concerned that the draft Access Regulation creates regulatory uncertainty, creating a strong disincentive to investment. The respondent was particularly concerned about the level of discretion that the draft Access Regulation provides to the TRA.

The TRA considers that the draft Access Regulation should not be changed in respect of the discretions that it provides to the TRA and the degree of its specificity. The TRA considers that a degree of discretion is inevitable in a Regulation which is designed to apply in a wide variety of circumstances in a dynamic environment. In drafting the draft Access Regulation, the TRA sought to ensure that the draft Access Regulation would provide a structured framework within which the TRA would exercise its discretion in accordance with the overall provisions of the Telecommunications Law as appropriate to a wide range of situations. Overall, the TRA believes that the draft Access Regulation strikes an appropriate balance between the TRA's need for flexibility and discretion and operators' desire for certainty.

2.4 RAO Contents

Various respondents commented on the detail regarding the content of the RAO set out in the draft Access Regulation. One respondent considered that the prescriptive manner in which the TRA may specify the form of an RAO is overly intrusive. This view was in sharp contrast to that expressed by other respondents who considered that the format of an RAO should be prescribed much more precisely.

Having considered the strong opposed views expressed, the TRA is of the view that the form and contents of an RAO as specified in the draft Access Regulation

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are appropriate. In particular, the TRA considers that the degree of specification balances the discretion that should be afforded to relevant operators required to prepare an RAO with establishing minimum requirements for the benefit of those who seek access. Accordingly, the TRA has not amended the draft Access Regulation in relation to this matter.

2.5 Access Charges

One respondent objected strongly to the prescription in the draft Access Regulation of “forward looking incremental cost” for the tariffs for all access services, other than those specified and provided on a wholesale basis for resale. The respondent considered that such a pricing principle would be contrary to the Telecommunications Law and would create significant market distortions. The TRA accepts that the principle for “forward looking incremental cost” applies to interconnection services in accordance with section 57(b) of the Telecommunications Law and does not specifically apply to access services under section 57(e).

The relevant pricing principle for access services is “fair and reasonable terms” as set out in section 57(e). Article 6 of the draft Access Regulation has been amended accordingly.

2.6 Access Orders and other Instruments

Various respondents raised concerns about the use of the concept of the “Access Order”. Overall, it is apparent from the comments received that there is some confusion between the terms “Access Order”, “Orders” and “determination” as used in the draft Access Regulation. This has led to TRA to tighten up the use of these terms to overcome this confusion.

In particular, “Access Orders” may be issued under Article 2 of the final Access Regulation, to impose Access Obligations on a licensed operator. An “Order” pursuant to section 35 of the Telecommunications Law, may be issued under Article 5. Such an Order is to be used by the TRA to specify terms and conditions of an RAO, where the TRA does not consider the terms and conditions submitted under Article 5.2 to be fair, reasonable and non-discriminatory. Finally, the TRA may make a “determination” under Article 3.6 to add to, or remove from, or otherwise amend the list of telecommunications networks’ elements or telecommunications facilities for which access services may be required to be provided under Article 3.5.

2.7 Implementation Timetable

One respondent was concerned that it may take until December 2006 before the access regime is fully implemented. The respondent was concerned that it would take that long to finalise the Access Regulation, conduct and consult on market reviews, determine dominance, issue Access Orders, conduct consultations and review and implement an RAO. The TRA considers this to be very much a worst case scenario, reflecting a number of misunderstandings. In particular, and as noted above, it is not intended that the process of defining “relevant markets” for assessing dominance will take as long as the respondent envisaged. Moreover, as

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provided for in Article 5, the Access Regulation sets out a timetable to be followed for the approval of an RAO.

Various respondents also raised concerns about the process for reviewing and approving RAOs. These concerns have resulted in the TRA making a number of amendments to Article 5 to simplify this process.