Date: 1st March 2009

Mr. Alan Horne
General Director
Telecommunications Regulatory Authority
P.O. Box 10353
Manama
Kingdom of Bahrain

Dear Sir,

Subject: Response to Dominance designation for termination services on individual mobile networks & The Regulation of Mobile Termination Services

Please find enclosed the response of Zain Bahrain to the above draft regulations issued by the TRA.

Zain Bahrain welcomes the opportunity to comment on the TRA's Draft Statement on the Regulation of Mobile Termination Service ("Draft Statement") and the Draft Determination on Dominance designation for termination services on individual mobile networks ("Draft Determination"). Because of the close links existing between both documents under consultation, Zain Bahrain will present its comments in a single, combined submission that addresses the most salient issues identified.

Should you require additional information or clarification, please do not hesitate to contact me.

Yours sincerely,

Jaffar Abdulla

A/Manager, Regulatory & Interconnection

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Response to Draft Regulations

“Response to Dominance designation for termination services on individual mobile networks”
&
“The Regulation of Mobile Termination Services”

Issued by the Telecommunications Regulatory Authority on 25th Nov 2008

March 1st, 2009

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Following the Telecommunications Regulatory Authority's ("TRA") Request for Comments contained in document reference MCD/11/08/091 of November 25, 2008, and document reference MCD/11/08/092 of November 25, 2008, Zain Bahrain welcomes the opportunity to comment on the TRA's Draft Statement on the Regulation of Mobile Termination Service ("Draft Statement") and the Draft Determination on Dominance designation for termination services on individual mobile networks ("Draft Determination"). Because of the close links existing between both documents under consultation, Zain Bahrain will present its comments in a single, combined submission that addresses the most salient issues identified.

After carefully reviewing the Draft Statement and Draft Determination, Zain Bahrain respectfully submits that in these documents the TRA appears to be presenting a solution in search of a problem.

First, the TRA does not provide any compelling evidence on the merits of modifying and/or extending existing dominance-related regulations in the wholesale mobile termination market. Presently, Zain Bahrain is not subject to dominance-related regulation[1] and the TRA has provided no evidence of market failure deriving from this situation, nor has it provided evidence that prospective market failure would be expected absent dominance-related regulation.

Second, the contention that a need exists to further regulate the Bahraini wholesale mobile termination market is extremely perplexing when we consider that, under the current regulatory status, mobile termination rates ("MTR") are by far the lowest of the sample countries benchmarked by the TRA.[2] In fact, the average MTR of the country sample presented by the TRA is 506% higher than current MTRs in Bahrain, with the second lowest MTR presented, which corresponds to Cyprus, still being 47% higher than MTRs in Bahrain. A similar situation exists with regards to SMS. In this case, the average termination rate of the countries benchmarked exceeds by 317% the rate applicable in Bahrain, with the second lowest rate being 185% higher than existing rates in Bahrain. Accordingly, the TRA makes no compelling case that, despite these stellar showings of Bahrain vis-à-vis the third countries chosen by the TRA, Zain Bahrain's MTRs are excessive and must be subject to dominance-related regulation.

Because of this, Zain Bahrain submits that the costs and disadvantages of imposing the proposed dominance-related regulation significantly outweigh any possible and undetermined benefits that could derive from it. Imposing dominance-related ex-ante regulation on Zain Bahrain in the wholesale mobile termination market would compel Zain Bahrain to expend a considerable amount of resources on regulatory compliance, including preparing a cost model for calculating termination

[1] TRA specifically recognizes this fact. *See* Draft Statement, ¶ 13.
[2] *See* Draft Statement, ¶ 44.

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rates; overseeing the regulatory process; preparing, submitting and periodically updating a Reference Interconnection Offer. This will lead to inefficient expenditures, as these resources could otherwise be channelled to enhance productivity. On this basis, Zain Bahrain respectfully submits that no additional regulation should be imposed in the wholesale mobile termination market.

In the alternative, if the TRA decides to impose additional regulations on market power dominance and MTRs, then the same rate and regulations should be imposed on all three mobile operators as Zain Bahrain does not agree with the TRA's view presented in Article 43 of the draft determination that it is premature to declare the new third operator as dominant. Indeed, the, TRA's approach and analysis presented in both documents should be applicable to all mobile operators with no exceptions. The European Commission's recent Recommendation on MTRs specifically notes that "[n]ew entrants should be aware that symmetrical termination rates are applicable to all operators and they should not rely on receiving higher termination rates upon market entry."[3] New entrant status alone does not justify a higher MTR for such operator. As the TRA has stated "termination rates should be symmetrical unless there are objective and material cost differences which are outside the control of operators."[4] This is consistent with the position of the European Commission and the European Regulator's Group which have both recognized that termination rates should normally be symmetric and asymmetry requires an adequate justification.[5]

STC also enjoys numerous advantages that should obviate any perceived need for a higher MTR for STC based on its new entrant status.

For example, the TRA is conducting a Wireless Telecommunications Network Facility Sharing consultation.[6] Under this initiative, the TRA wants mobile network operators that own, manage, or lease wireless network facilities to share those facilities with other operators. Mobile network operators would be required to share their facilities under fair and reasonable terms except if it is unfeasible to do so. The TRA says that infrastructure sharing can avoid unnecessary and inefficient duplication of wireless facilities and will facilitate entry.[7]

Similarly, the TRA's guidelines for telecommunications infrastructure deployment specify that telecommunications infrastructure providers must reserve at least 20% of the capacity of any new

[3] Draft Commission Recommendation of […] on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, Brussels, C(2008) at p. 4.
[4] Draft Statement ¶ 34.
[5] ERG (07) 83 final 080312, p. 73 and Draft Commission Recommendation of […] on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, Brussels, C(2008), at p. 2.
[6] TRA, *A Consultation on a Draft Regulation on Wireless Telecommunications Network Facility Sharing*, TOD/0808/175 (Aug. 2008).
[7] *Id.*

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conduits installed.[8] Again, this is because the TRA wants to "encourage the sharing of telecommunications infrastructure in order to maximize the utilization of it [and] minimize the cost of network deployment . . . ."[9]

These initiatives would clearly benefit STC as it builds out its network in Bahrain. Being able to use existing infrastructure would represent substantial costs savings for STC. As compared to its predecessors, STC would be able to build out its network faster and at a lower cost.

While it must be noted that a form of infrastructure sharing existed when Zain entered the market, the situation then was quite different. Zain's licence allowed it to use Batelco's facilities for only one year. Plus, as the second licensee, Zain was facing an incumbent with 100% market share. When STC enters the market, it will have two competing networks from which to choose between for purposes of entering an infrastructure sharing agreement. Competition between Zain and Batelco for sharing revenues would translate into a lower build out cost for STC.

Furthermore, setting asymmetrical rates could create a disincentive to taking advantage of infrastructure sharing opportunities. STC's incentive to share infrastructure may be dampened if it were afforded a higher termination rate than its peers – it could be more advantageous for STC to invest in its own infrastructure in that situation.

Finally, there is evidence that consumers in Bahrain are open to switching between mobile operators. The experience of the last four years, when Zain and Batelco have competed for a share of the market, has served to make the Bahraini consumer more comfortable with the concept of shopping around for mobile service and switching carriers if necessary. In fact, a recent survey shows that almost 40% of mobile users in Bahrain have changed mobile operators in the past.[10]

As previously highlighted, the global trend is to shift to symmetrical MTRs. STC has numerous regulatory and market tools (including its size, vertical integration, economies of scale and being a well-established company with deep pockets) to ensure that it enjoys a level playing field with its competitors. Therefore, the adoption of a higher MTR for STC would only result in a regulatory measure that distorts the sector, encourages inefficiencies by discouraging STC from entering into infrastructure sharing agreements, and results in an unlevel playing field. In addition, as noted by the European Commission, establishing a common approach based on an efficient cost standard and

[8] TRA, *Guidelines – Telecommunications Infrastructure Deployment*, TOD/0308/062, at 29 (Dec. 2008).
[9] *Id.*
[10] Michael Schwartz, *Two-mobile habit catching on in Bahrain*, Developing Telecoms (Oct 2, 2008) (citing Arab Advisor Group's survey of mobile use in Bahrain), available at http://www.developingtelecoms.com/content/view/1474/26/.

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the application of symmetrical termination rates would benefit end-users in terms of lower retail prices.[11] Therefore, if the TRA decides to impose MTRs, they should be symmetrical.

Question 1: Do you agree with the market definition proposed by TRA? Please elaborate

1.1. Product dimension

Zain Bahrain believes that a need exists to reassess the product dimension of the relevant market as defined by the TRA, as demand-side substitution at the wholesale level has been inadequately addressed. The TRA states that "there are no effective demand-side wholesale substitution services for termination on individual mobile networks at the wholesale level."[12] As a consequence, the TRA finds that "termination is a bottleneck." This analysis excludes from the scope of the relevant product market any possible existing or prospective alternative sources of wholesale supply that a customer of wholesale mobile termination could switch to when faced with a small but significant and non-transitory increase in price ("SSNIP").

1.1.1. Comment

Zain Bahrain respectfully submits that the TRA's analysis of this issue is flawed as it does not take into account existing demand-side substitutes at the wholesale level for mobile termination services. Moreover, the TRA's position is contradictory to its own analysis contained in the Draft Statement regarding this topic.

Specifically, the TRA dismisses, without any analysis, the use of wholesale transit services through the fixed line network of Batelco as a substitute for termination in Zain Bahrain's mobile network. The TRA's position is contrary to the market reality in Bahrain, as wholesale transit services offered by Batelco are not only a viable alternative for terminating services on Zain Bahrain's network, but some providers have already availed themselves of this substitute product at the wholesale level.

Moreover, the TRA is cognizant of this fact and expressly recognized it in the Draft Statement:

> "In terms of interconnection arrangements in place, TRA understands that Batelco and Zain interconnect directly and that a few Other Licensed Operators ("OLOs") also interconnect directly with Zain. OLOs have direct interconnection agreements with Batelco. **OLOs,**

[11] Draft Commission Recommendation of […] on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, Brussels, C(2008) at p. 3.

[12] *See* Draft Determination, ¶ 27.

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> **which do not have direct interconnection with Zain, use Batelco as a transit operator to terminate traffic on Zain's network**."[13]

Similarly, in the Draft Statement, the TRA also recognizes that wholesale transit services are capable of constraining a mobile operator's ability to price discriminate in the wholesale mobile termination market:

> "Incumbent MNOs could also set discriminatory MTRs (*i.e.*, higher MTRs) to a new entrant, though TRA appreciates that the possibility for the new entrant to transit through Batelco fixed network for terminating traffic on existing MNOs would reduce the extent to which MNOs can price discriminate."[14]

From the extracts presented above, it is clear that the TRA considers wholesale transit services offered by Batelco as a demand-side wholesale substitute to termination on Zain Bahrain's mobile network. Zain Bahrain agrees with this conclusion. Inexplicably, however, the TRA does not take this crucial factor into account when defining the scope of the relevant product market for wholesale termination on mobile networks, particularly in the case of Zain Bahrain's network. Such omission is contrary to the market definition methodology that the TRA purports to apply, which expressly requires including within the scope of the relevant product market all products found to be demand-side substitutes.[15] Zain Bahrain respectfully submits this has resulted in a flawed definition of the scope of the relevant product market and should be remedied by the TRA.

1.1.2. Recommendation

On this basis, Zain Bahrain finds that the analysis of demand-side substitution at the wholesale level conducted by the TRA in the Draft Determination is incomplete and hence directly affects the scope of the relevant product market defined by the TRA. Accordingly, Zain Bahrain respectfully recommends that the TRA:

- Reassess demand-side substitution alternatives at the wholesale level to review the competitive constraints of wholesale transit services through Batelco's fixed line network;

[13] *See* Draft Statement, ¶ 24.
[14] *See* Draft Statement, ¶ 20.
[15] *See* TRA, Methodology for the Definition of Telecommunications Markets, A Determination issued on 19 April 2003, p.3. *See also* Draft Determination, ¶ 20.

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- Include within the relevant product market for wholesale termination in Zain Bahrain's mobile network, the wholesale transit services over Batelco's fixed line network used to terminate calls on Zain Bahrain's mobile network.

1.2. Geographic and functional dimensions

Zain Bahrain concurs with the TRA's analysis and conclusion on the geographic and functional dimensions of the relevant market. Accordingly, Zain Bahrain finds no need to comment further on these issues.

2. Question 2: Do you agree with the findings of dominance by TRA? Please elaborate

Zain Bahrain believes that the flaws identified in the previous section regarding the TRA's definition of the relevant product market for wholesale termination on its mobile network directly affect the TRA's findings of dominance. The TRA has not considered the competitive constraints on wholesale termination services on Zain Bahrain's mobile network. These constraints, deriving from wholesale transit services, directly discipline Zain Bahrain's ability to price-discriminate against new entrants wishing to terminate calls on its mobile market.

In addition, Zain Bahrain believes that the TRA has erred in its analysis of the degree of countervailing buyer power ("CBP") held by Batelco and how it constraints Zain Bahrain's possibility to act independently – to a material extent – of competitors, subscribers and users in the wholesale mobile termination market. The TRA has Batelco's CBP in light of its position in both the fixed and mobile markets. Accordingly, Batelco's vertical integration has a significant effect on the bargaining power of Zain Bahrain to credibly threaten to unilaterally increase its MTR.

2.1. Application of the Modified Greenfield Approach

Under the proposed methodology to assess dominance, the TRA has stated it will apply the so-called "Modified Greenfield Approach" (MGA) advocated by the European Commission, and applied by national regulatory authorities in the European Union.[16] However, Zain Bahrain notes that TRA has

[16] *See* Draft Competition Guidelines ("Draft Guidelines"), document MCD/11/08/080 of November 4, 2008, ¶ 97.

As noted by TRA, the EC has categorized the MGA as an analytical tool to avoid circularity in market analysis in the context of ex-ante regulation. It is intended to "ensure that absence of SMP is only found and regulation only rolled back not applied the MGA in its analysis of the wholesale market for mobile termination on Zain Bahrain's mobile network.

For purposes of consistency and transparency, Zain Bahrain respectfully requests the TRA to repeat the market analysis applying the MGA. When applying the MGA in the case of Zain Bahrain's mobile network, it should be noted that, at present, no dominance-related regulation has been imposed on Zain Bahrain in the mobile termination market.[17] The TRA has recognized this much in its Determination of January 3, 2005 resolving an interconnection dispute between Batelco and Zain Bahrain.[18] Similarly, it has clearly stated this fact in the Draft Statement.[19]

Nevertheless, the MGA does allow regulators take into account other dominance-related regulation in their analysis of the specific relevant market in question. For this purpose, Zain Bahrain requests the TRA to specifically identify what existing dominance-related regulation in other markets (not components of the value chain under review) it will consider. This will be particularly relevant to assess CBP. For instance, Zain Bahrain finds that existing dominance-related regulation applicable to Batelco for the provision of wholesale termination on its mobile network is not related, and does not affect any component of the value chain of wholesale termination services on Zain Bahrain's mobile network. As such, this regulation should be considered by the TRA when applying the MGA to the mobile termination market on Zain Bahrain's network.

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where markets have become sustainably competitive, and not where the absence of SMP is precisely the result of the regulation in place." Commission decision of 17 May 2005, Case DE/2005/0144, C(2005) 1442 final, ¶ 23.

As noted by Cave, Stumpf and Valletti, a MGA "takes account of non-SMP regulation and of SMP-related regulation originating in markets which are not a component of the value chain under review." *See* Martin Cave, Ulrich Stumpf, Tommaso Valletti, A Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to ex ante Regulation, Independent Report prepared for the European Commission, July 2006, note 2.

[17] It should further be noted that, unlike operators such as H3G in the United Kingdom, Zain Bahrain has not exploited this lack of regulation to set termination charges above the level of its competitor.

[18] The TRA expressly found authority under section 57(g) of the Telecommunications Law to resolve interconnection disputes between operators even if one of them has not been declared dominant and is hence not subject to ex-ante price regulation. *See* Determination of the Telecommunications Authority to Bahrain Telecommunications Company B.S.C. and MTC Vodafone (Bahrain) B.S.C. pursuant to section 57(g) of the Telecommunications Law, 3 January 2007, LAU DC 931, ¶ 34.

[19] *See* Draft Statement, ¶ 13.

2.2. Competitive constraints deriving from wholesale transit services over Batelco's fixed line network

As noted above, the TRA has omitted considering demand-side substitution between wholesale transit services over Batelco's fixed line network and wholesale termination on Zain Bahrain's mobile network. This is a serious shortcoming of the Draft Determination, as the fact that these services are available in the market and are being used by service providers in Bahrain indicates that new entrants, such as STC, could continue availing themselves of these products, or have the threat of doing so, to terminate traffic on Zain Bahrain's mobile network.

This would considerably constrain Zain Bahrain's ability to act independently – to a material extent – of competitors, subscribers and users in the wholesale mobile termination market. Particularly, as recognized by the TRA, this possibility would reduce Zain Bahrain's ability to engage in price discrimination against new entrants (*i.e.*, attempting to charge new entrants higher MTRs than the ones charged to Batelco), as it could not credibly threaten a new entrant with a unilateral increase of its MTRs. Such a threat would be constrained by the price of wholesale transit services of Batelco which are currently priced at 2.1 fils, while Zain Bahrain's MTRs are priced at 6.626 fils per minute for Batelco only, whereas with OLO's directly interconnected with Zain BH it is between **[✂]** per minute. Accordingly, we respectfully request the TRA to reassess the impact of such viable demand-side alternative on its draft finding that Zain Bahrain is dominant in the wholesale termination of mobile calls on it network.

2.3. Assessing Batelco's CBP

2.3.1. Impact of vertical integration on Batelco's CBP

Zain Bahrain finds that the TRA has closely followed the analysis and approach adopted by Ofcom in the United Kingdom to analyze the wholesale mobile termination market. This is particularly the case in its analysis of the existence of CBP. However, there is an important difference between both systems which is the fact that Batelco is vertically integrated, being the fixed-line monopoly provider as well as the major mobile operator. Such a position is not shared by any operator in the United Kingdom. Because of this, Batelco's bargaining power cannot be assessed considering its mobile and fixed line services separately as has been done by the TRA. Such decoupling of Batelco's activities leads to an unrealistic assessment of its CBP.

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2.3.2. The use of interconnection dispute resolution to abate excessive pricing

The TRA has not taken into account in its analysis of CBP the impact of Batelco's ability to again avail itself of the dispute resolution mechanism contained in Article 57(g) of the Telecommunications Law. Zain Bahrain respectfully submits that this omission significantly alters the analysis of CBP and therefore merits a reassessment of the issue by the TRA.

In fact, the lack of appropriate consideration of this factor was one of the reasons why the Competition Appeals Tribunal ("CAT") in the United Kingdom struck down Ofcom's decision on Wholesale Mobile Voice Call Termination of June 2004. To this effect, the CAT stated:

> "The possibility of dispute resolution by OFCOM in the future is therefore part of the overall picture which has to be taken into account in assessing whether BT has a real and effective bargaining position that is sufficient to counter the factors which would otherwise point in favour of H3G having SMP."[20]

Such analysis is therefore also necessary in the case of Bahrain to determine Batelco's CBP and its ability to discipline Zain Bahrain's ability to unilaterally alter the terms and prices of wholesale termination services on its mobile network. However, the TRA has not considered this fact when assessing Batelco's bargaining power.

2.3.3. Recommendation

Zain Bahrain accordingly respectfully requests the TRA to reassess the extent of Batelco's CBP considering both factors outlined above.

2.4. The TRA's assertion that absent regulation the potential CBP is insufficient to constraint independent MNO's from acting independently

The TRA concludes that "in the absence of regulation the potential CBP of the other MNO (Batelco/Zain) or fixed operators is not sufficient to prevent the terminating MNO (Batelco/Zain) from behaving independently of its competitors, subscribers and ultimately of users such that prices are constrained."[21]

[20] *See* CAT, Judgment of 29 November 2005, Case No: 1047/3/3/04, ¶ 132.

[21] *See* Draft Determination, ¶ 64.

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2.4.1. Analysis

Zain Bahrain respectfully finds such assertion perplexing, as it does not comport with the actual conditions of the Bahraini market. The TRA's reasoning would suggest that the lack of dominance-based regulation in the wholesale market for termination services on Zain Bahrain's mobile network (one of the relevant markets the TRA proposes to define) would allow it to behave independently from its competitors, subscribers and users.

However, this assertion overlooks the fact that, to date, Zain Bahrain has not been subject to dominance-related regulation in the market for wholesale market for termination services on its mobile network. In fact, as noted by the TRA, such services "provided by Zain are currently unregulated and left to commercial negotiations."[22]

Despite this lack of dominance-related regulation, as evidenced by international benchmarks presented by the TRA itself, Zain Bahrain's MTRs are neither excessive nor above competitive levels. This shows that even in the absence of such regulation, during the last four years, Zain Bahrain has not had the ability to act unilaterally and impose above cost MTRs. Moreover, the TRA does not present any arguments to the effect that, prospectively, Zain Bahrain will suddenly begin to exploit this alleged market power to the detriment of its customers, competitors and consumers.

2.4.2. Recommendation

Based on the preceding analysis, Zain Bahrain respectfully recommends the TRA to reassess its finding that, absent regulation, CBP is insufficient to constrain Zain Bahrain from unilaterally imposing excessive MTRs.

In applying symmetric MTRs, Zain Bahrain would like TRA to still consider the additional cost difference that Zain bears with respect to the microwave links used in its network and the cost of using Batelco's leased lines needed for the international connectivity, both of which are very expensive and which result in higher termination costs than those currently being experienced by Batelco (we are prepared to show you these numbers as analyzed extensively in our own LRIC cost model).These should be considered as objective and material cost differences which are outside the control of Zain Bahrain. In addition, and so as to avoid immediate and excessive loss of Zain Bahrain revenue, Zain Bahrain respectfully urges the TRA to accept LRIC Glide Path prices for

[22] *See* Draft Determination, ¶ 6.

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Zain's MTR with OLO, and to revisit the current termination fixed rates used by both Batelco and OLO.

Moreover, Zain BH would like to bring to the TRA's kind attention that the calls originated to toll-free numbers "800xxxxx" are currently charged as the same as the termination charges, where there is a difference between the calls originated and terminated. For example, if a Batelco mobile customer places a toll free call to an OLO, the OLO will be subsequently charged for that call based on the MTR. If the calls are made from a Zain BH mobile, the OLO will be charged by applying the Batelco MTR plus a transit charge (given that the call is originated from a Zain mobile). This gives Batelco a distinct competitive advantage over Zain BH particularly on the OLO's international calling card products. As the TRA has no doubt already noticed, this means that the OLO's are currently providing cheaper rates on Batelco's mobiles for international calls through the use of the OLO's toll-free numbers.

Zain Bahrain respectfully submits that the TRA should regulate the OLO calling card tariffs and that these tariffs need to be equal for all mobile operators, thereby allowing the OLO's to compete on the destination tariffs rather than competing based on which mobile operator has originated the call.

Conclusion

Given the concerns expressed in this response regarding the elements in the consultation in urgent need of re-examination,

Zain Bahrain believes that it is important to have a meeting to discuss these matters in more detail.

Sincerely,

Jaffar Abdulla

A/Manager, Regulatory & Interconnection

Zain Bahrain

March 1st, 2009

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