

## EMERGENCY ORDER NO. 2 OF 2010 AGAINST BATELCO FOR UNAUTHORISED COMMENCEMENT OF UNAPPROVED RETAIL AND WHOLESALE BROADBAND TARIFFS

### Non - Confidential Version

Confidential information is marked with [X Redacted]

### ORDER

1. For the reasons cited below, the Telecommunications Regulatory Authority (“**the Authority**”) considers that Bahrain Telecommunications Company BSC (“**Batelco**”) has issued:
  - a. unauthorized retail broadband tariffs in breach of Articles 3.1, 9.3 (a) and 9.3(b) of the Retail Tariff Notification Regulation, Authority Regulation No 1 of 2010 (the “**Retail Tariff Regulation**”), Clause 12.1 of its National Fixed Services License (“**NFL**”), Clause 6.1 of its Internet Service Providers License (“**ISP Licence**”), Article 58(a) of the Telecommunications Law; and
  - b. unapproved wholesale broadband tariffs in breach of Clause 4.1 of the Reference Offer Body Terms, Articles 3.3(a), and 5.5 of the Access Regulation and Article 57(e) of the Telecommunications Law.
2. Therefore, with respect to the unapproved retail broadband tariffs Batelco is ordered to immediately:
  - a. cease the implementation of the following:
    - i. The purported upgrade of the retail residential 256Kbps broadband product to a speed of 640Kbps at the same price;
    - ii. The purported upgrade of the retail residential 640Kbps broadband product to a speed of 1Mbps at the same price.
  - b. Re-instate the tariffs and terms and conditions for Batelco’s 256Kbps, 640Kbps and 1Mbps retail broadband services as approved by the Authority immediately prior to 7 June 2010 and revert all upgraded customers to their previously approved packages;
  - c. contact all effected customers and notify them in writing, either by email or by posted letter, with the following message;

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“The cancellation of the upgrade to the higher speed and reversion to the previously approved package is due to Batelco’s failure to comply with Article 58(a) of the Telecommunications Law, Articles 3.1, 9.3(a) and 9.3(b) of the Retail Tariff Notification Regulation and Clause 12.1 of Batelco’s National Fixed Services License and Clause 6.1 of its Internet Service Providers License.”

- d. issue a statement in the Arabic and English language press in the Kingdom of Bahrain with the same message.
  - e. Post the redacted version of this Emergency Order and its reasoning in a prominent position on the following webpage [http://www.batelco.com/portal/broadband/broadband\\_packages.asp](http://www.batelco.com/portal/broadband/broadband_packages.asp).
  - f. Retract the press releases and any other marketing material and communications of any form in relation to the offering of the abovementioned Controlled Tariffs.
3. With respect to the unapproved wholesale broadband tariffs Batelco is immediately ordered to:
- a. cease the implementation of the following:
    - i. the purported upgrade of the 256Kbps broadband product to a speed of 640Kbps; and
    - ii. the purported upgrade of the 640Kbps broadband product to a speed of 1Mbps.
  - b. Re-instate the tariffs and terms and conditions for Batelco’s 256Kbps, 640Kbps and 1Mbps wholesale broadband services as approved by the Authority immediately prior to 7 June 2010 and revert all upgraded customers to their previously approved packages;
  - c. contact all effected customers and notify them in writing, either by email or by posted letter, issue a statement in the Arabic and English language press in the Kingdom of Bahrain with the following message;

“The cancellation of the upgrade to the higher speed and reversion to the previously approved wholesale package is due to Batelco’s failure to comply with Clause 4.1 of the Reference Offer Body Terms, Articles

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3.3(a), 5.5 of the Access Regulation and Article 57(e) of the Telecommunications Law.”

- d. issue a statement in the Arabic and English language press in the Kingdom of Bahrain with the same message.
- e. Post the redacted version of this Emergency Order and its reasoning in a prominent position on the following webpage - <http://www.batelco.com/portal/wholesale/>
- f. Retract the press releases and any other marketing material and communications of any form in relation to the offering of the abovementioned wholesale broadband tariffs.

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#### REASONING

##### Relevant Legal Provisions

4. The Authority has granted Batelco an NFL and ISP Licence pursuant to its powers under the telecommunications law promulgated by legislative decree no. 48 of 2002 (the "**Telecommunications Law**").
5. Article 3(b)(1) of the Telecommunications Law requires the Authority 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 the tariffs charged for services.
6. Article 3(b)(2) of the Telecommunications Law requires the Authority to carry out its duties relating to Telecommunications services in the manner best calculated to promote effective and fair competition among new and existing Licensed Operators.
7. With respect to the relevant wholesale tariffs:

- a. 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.

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

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

- b. Article 3.3 of the Access Regulation states that:

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

- (a) continue to offer, and not withdraw, Access to Telecommunications networks and Telecommunications facilities already granted, except where justified by a widely applicable upgrade to a Telecommunications network agreed with the TRA and subsequent to giving a reasonable period of notice;
- (b) negotiate in good faith with Access Seekers; and
- (c) make available a Reference Access Offer in accordance with Article 4”.

c. Article 5.5 of the Access Regulation states that:

“A Licensed operator which has submitted a Reference Access Offer that has been approved by the TRA or that has been subject to an Order by the TRA must publish that Reference Access Offer within two Weeks of the grant of such approval or Order including posting a copy of the Reference Access Offer on the relevant Licensed operator's website. After publication a Reference Access Offer shall remain in force until such time as a revised Reference Access Offer becomes effective.”

d. Clause 4.1 of the Reference Offer Body Terms states:

“Subject to Batelco first obtaining any approval from the Regulator required by the Telecommunications Law, Batelco may, by notice published on the Batelco Wholesale Services website, amend or vary the Reference Offer, including without limitation:

- (a) offering any new service and any amendment or variation to the Reference Offer arising from the new service; or
- (b) cancelling any service and any terms or conditions, and any amendment or variation to the Reference Offer arising from the cancellation of that service”.

8. With respect to the relevant retail tariffs:

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- a. Article 58 of the Telecommunications Law states that:

“Licensed Operators with significant market power shall be subject to tariff controls in relation to any Telecommunications services for which the Authority determines that insufficient competition exists. The Authority shall specify in the regulations or in the Licence granted to the operator, the tariff controls and the period during which they shall remain in effect”.
- b. Clause 12.1 of Batelco’s NFL states:

“The licensee’s tariffs for the provision of licensed services shall be subject to section 58 of the Telecommunications Law and any regulation made thereunder”.
- c. Clause 6.1 of Batelco’s ISP License states:

“The licensee’s tariffs for the provision of licensed services shall be subject to section 58 of the Telecommunications Law and any regulation made thereunder”.
- d. On 25 February 2010, the Authority issued the Retail Tariff Notification Regulation, Regulation 1 of 2010 (the “**Retail Tariff Regulation**”).
- e. The Retail Tariff Regulation defines “Controlled Tariff” as a “Retail Tariff of a Retail Telecommunications Service in a retail market in which a Licensed Operator is determined by the Authority to have Significant Market Power in accordance with the definition of “Operator with Significant Market” in the Telecommunications Law (“SMP”). Controlled Tariffs shall also include any Retail Tariffs for Bundles of Retail Telecommunications Services comprising at least one Retail Telecommunications Service offered in a retail market in which the Licensed Operator is determined to have SMP”.
- f. Article 2.1 of the Retail Tariff Regulation states,

“This Regulation applies to all Licensed Operators determined by the Authority to have SMP in any relevant retail markets and which intend to introduce, change or withdraw Retail Tariffs in any of those retail markets in which it has been determined by the Authority to have SMP”.

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- g. Article 3.1 of the Retail Tariff Regulation states,
- “Any Licensed Operator determined by the Authority to have SMP in any relevant retail markets shall notify the Authority of its intention to introduce, change or withdraw any Controlled Tariff. This shall include notifying the Authority of any of the following:
- (a) Introduction of new Controlled Tariffs.
  - (b) Any changes that affect the prices of Controlled Tariffs which relate to existing Retail Telecommunications Services.
  - (c) Any changes to the non-price terms (including terms and conditions) of Controlled Tariffs which amount to a material change in the resulting price or the cost of provision of Retail Telecommunications Services”.
- h. Article 5.1 of the Retail Tariff Regulation states:
- “The Notification Period shall be twenty (20) working days from the Notification Date. The Authority may extend the Notification Period by written notice to the Notifying Operator in the following circumstances:
- (a) Where the Notifying Operator submits a Wholesale Telecommunications Service for the Authority’s approval in accordance with Article 3.2 of this Regulation”.
- i. Article 9.3 of the Retail Tariff Regulation states:
- “A Notifying Operator may not implement any Controlled Tariff:
- (a) before it has been notified to the Authority;
  - (b) before the expiry of the Notification Period, unless the Authority expressly decides otherwise in exceptional or unforeseeable circumstances”.
- j. Article 10.1 of the Retail Tariff Regulation states:

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“Without prejudice to TRA’s powers defined in Articles 35 and 65 of the Telecommunications Law, in the event that the Controlled Tariff is Implemented in breach of this Regulation, the Authority may order the Licensed Operator to:

- (a) immediately cease the implementation of the Controlled Tariff.
- (b) take any other appropriate measures necessary in order to withdraw the Controlled Tariff or rectify the breach.
- (c) take any other appropriate measures including refraining from taking particular actions that are deemed necessary to restore the situation existing prior to the implementation of the Controlled Tariff”.

9. On 22 January 2006, the Authority issued a Determination on Dominance in Wholesale Markets by Batelco, in which the Authority determined Batelco to be an operator in a Dominant Position in the wholesale markets for broadband access. This Determination was superseded by a Determination on Dominance in Wholesale Broadband Markets issued on 14 September 2009. This Determination found Batelco dominant in:
  - a. the wholesale physical network infrastructure access market in the Kingdom of Bahrain; and
  - b. the wholesale broadband access market in the Kingdom of Bahrain.
10. On 3 June 2008, the Authority issued the Determination of Significant Market Power in certain Relevant Retail Markets, in which the Authority determined Batelco to have Significant Market Power in the retail market for broadband internet access services from a fixed location (Market 5b).

### Background

11. On 8 April 2010, Batelco has notified the Authority that it is intending to reduce consumer broadband package prices as detailed below:

Current Packages:

Speed	16Mb	10Mb	8Mb	4Mb	2Mb	1Mb	640k	256k
Throttle Speed	2M	1M	1M	512k	256k	256k	128k	128k



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Threshold (GB)	80	50	40	25	20	15	5	2
Tariff (BD)	100	80	60	50	30	25	16	10

Proposed Packages:

[~~Redacted~~]

12. On 14 April 2010, the Authority sent Batelco an "Article 4.3 notice of invalidity of the notification form" (ref: MCD/04/10/046) because it lacked the required information and analysis and was therefore not compliant with Article 4.2 of the Regulation.
13. On 19 April 2010, Batelco re-notified the Authority of the same changes to the consumer broadband packages.
14. On 4 May 2010, the Authority gave Batelco written notice (ref: MCD/05/10/051) of extension of the Notification Period pursuant to Article 5.1(a) of the Regulation. The Notification Period was extended until 10 working days following the date of the approval of the two wholesale products corresponding to the Notified Controlled Tariff, namely:
  - a. WDSL, submitted on 1st April 2010 (ref: GCL/129/10);
  - b. Bitstream (revised), submitted on 8th April 2010 (ref: GCL/139/10).
15. On 30 May 2010 Batelco sent a letter to the Authority (ref: GCL/216/10). That letter outlined Batelco's claim that the Authority has unfairly withheld the review of the Notified Controlled Tariff by making it contingent upon the approval of concomitant wholesale products. In that letter Batelco demanded that by 1 June 2010 that the Authority:
  - a. "Provide a certain time when this will be done in order to allow this NCT to be launched"; and
  - b. "confirm that the NCT assessment will not be linked to the RO assessment as a whole, nor to the LLU project, since the costing assessment under the retail tariff regulation is separate (and the Authority have had the opportunity to assess the retail and wholesale costs for the purposes of the NCT)".

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16. As at the date of this Emergency Order the Authority has not responded to this letter.
17. On 7 June 2010 the Authority became aware that Batelco has issued a press release announcing a free speed upgrade for Batelco's 256Kbps and 640Kbps Broadband Subscribers to 640Kbps and 1Mbps respectively for no additional charges.
18. The Authority notes that the notification form dated 19 April 2010 proposed a 1 Mbps package with a threshold of [X Redacted] GB to be offered at BD [X Redacted]. As announced by Batelco, Batelco are effectively offering the 1Mbps with 5 GB threshold for 16 BD.
19. Batelco has effectively changed the monthly retail price for the following packages (or introduced new packages):
  - a. 1Mbps from BD 25 to BD 16, a reduction of BD 9 or -36%.
  - b. 640Kbps from BD 16 to BD 10, a reduction of BD 6 or – 37.5%
20. On 7 June 2010 at 3:34pm and 4:01pm, Batelco (James Ibbetson) sent to the Authority (Eamon Holley) two emails concerning a "courtesy notification, of speed upgrade changes to Batelco's wholesale DSL and retail inet packages" in which Batelco indicated that it has changed the wholesale DSL price for the 640Kbps and the 1Mbps while decreasing the current threshold for these two wholesale DSL packages. The relevant parts of the email stated:

[X Redacted]

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21. In effect the email announced the following:
- a. At the wholesale level:
    - i. The reduction of tariff for the 640Kbps wholesale broadband package from BD 16 to BD 10 per month;
    - ii. The reduction of tariff for the 1Mbps wholesale broadband package from BD 25 to BD 16 per month.
  - b. At the retail level:
    - i. The reduction of tariff for the 640Kbps retail broadband package from BD 16 to BD 10 per month;
    - ii. The reduction of tariff for the 1Mbps retail broadband package from BD 25 to BD 16 per month.
22. Although Batelco asserts these changes are free upgrades they are in effect changes to the key features of the packages, namely speed or threshold which amount to changes to the tariffs of the packages or the introduction of new packages with new tariffs.
23. The Authority also notes that it would appear that Batelco has effectively withdrawn the base level retail package of 256Kbps as it is no longer available on Batelco's retail broadband website (accessed 7 June 2010 at 18:20 on [http://www.batelco.com/portal/broadband/broadband\\_packages.asp](http://www.batelco.com/portal/broadband/broadband_packages.asp)) contrary to what is claimed by Batelco in its 7 June 2010 so called "courtesy notification".

### Basis for Emergency Order

24. None of the wholesale or retail tariffs or changes or introductions referred to in Batelco's email of 7 June 2010 have been notified to or approved by the Authority in accordance with either the Retail Tariff Notification Regulation or the Access Regulation.
25. The Authority considers that in relation to the relevant retail tariffs a breach of Articles 3.1, 9.3 (a) and 9.3(b) of the Retail Tariff Notification Regulation, Clause 12.1 of Batelco's NFL, Clause 6.1 of its ISP Licence, and Article 58(a) of the Telecommunications Law.

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26. The Authority considers that in relation to the relevant wholesale tariffs a breach of unapproved wholesale broadband tariffs in breach of Clause 4.1 of the Reference Offer Body Terms, Articles 3.3(a), and 5.5 of the Access Regulation and Article 57(e) of the Telecommunications Law.
27. With respect to the relevant retail tariffs, clause 10.1(a) of the Retail Tariff Notification Regulation provides the Authority with the express power to issued this Order to Batelco to immediately cease the implementation of the Controlled Tariffs and the other ordered actions.
28. With respect to the relevant wholesale tariffs and retail tariffs, the Authority considers that in any event the continued breach of the relevant provisions requires immediate action so as to prevent any irreparable or irreversible harm to the telecommunications market and to protect the interests of Subscribers, Users and other Licensed Operators with respect to the promotion of effective and fair competition.
29. This is consistent with the Authority's obligations under articles 3(a), (b) and (f) of the Telecommunications Law.

### **Effect of this Emergency Order**

30. This Emergency Order is issued without prejudice to further investigation by the Authority into Batelco's implementation of the mentioned Retail and wholesale Tariffs, and a breach of Article 3.1 and Article 9.3 (a) and Article 9.3(b) of the Retail Tariff Notification Regulation, Clause 4.1 of the Reference Offer Body Terms, Article 3.3(a) and 5.5 of the Access Regulation, Clause 12.1 of its NFL, Clause 6.1 of its ISP License and Article 58(a) and 57(e) of the Telecommunications Law and therefore precedes the commencement of an Article 35 and/or 65 Order process.
31. This Emergency Order and any further action taken by the Authority is without prejudice to the rights of any other entity to take relevant action as they may deem appropriate under the law of the Kingdom of Bahrain.
32. The issuance of this Emergency Order does not prejudice the Authority's right to:
  - a. expand the scope of its investigation into this matter;

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- b. issue further orders relating to other breaches arising out of the same set of facts;
- c. find, develop or introduce new evidence relating to the alleged activities described herein.

### **Effective Date of this Emergency Order**

33. This Emergency Order is effective immediately.

Issued on 8 June 2010

**Dr Mohammed Ahmed Al Amer**  
Chairman of Board of Directors  
Acting General Director  
Telecommunications Regulatory Authority  
Manama, Kingdom of Bahrain