



**Submission to the Telecommunications Regulatory Authority by
VIVA BAHRAIN in response to the
Public Consultation issued on 15 December 2015:**

**“Draft Order on the Reference Offer of the Bahrain
Telecommunications Company B.S.C (Ref: MCD/12/15/092)”**

NON CONFIDENTIAL Version

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1. Please provide any comments you may have in relation to the Authority’s premise of fair, reasonable and non-discriminatory terms, conditions and tariffs for regulated RO products and services.

Comment:

VIVA welcomes the overall enhancements made to the Batelco reference offer. However, we believe that the changes proposed will be insufficient to achieve a fair, reasonable and non-discriminatory outcome.

We have six key points that we wish to make in this regard:

- VIVA believes that fair, reasonable and non-discriminatory terms and conditions for regulated wholesale products cannot be guaranteed until Batelco upstream units and downstream units have been structurally separated;
- The reference offer provides little protection against Batelco’s incentives to act in a discriminatory manner and we believe that firmer requirements need to be imposed on Batelco through the Order to ensure that the reference offer is not only fair and reasonable, but also non-discriminatory;
- Passive access remedies continue to be critical components of the Telecom Law and we do not agree with suggestions in the draft Order that an enhanced WDC product will be an adequate substitute for passive access, neither in price nor non-price terms;
- In fact, the inclusion of dark fibre passive access is consistent with an NBN policy that envisages a single infrastructure provider in the Bahraini market, so we do not believe that the TRA would be compromising potential future Government policy by ensuring dark fibre passive access for OLOs;
- The proposed service level regime in the draft Order falls short of international best practice in a number of important respects, which means that Batelco is unlikely to be sufficiently motivated to improve the responsiveness and quality of service that it provides to OLOs unless changes are made; and
- The proposed prices for WLA and WDC products are very high, particularly in relation to other alternative solutions such as point-to-point fixed microwave link fees, and should be re-examined by the TRA. In our view, they are far from being reasonable and cost oriented.

1.1 Importance of separation

We consider the TRA is heading in the right direction with an improved reference offer, but it only takes us so far. Bahrain should aspire to deliver “best in class” performance. This means that Batelco should be structurally separated, with the new “AssetCo” focussed on improving, deploying and monetising the best possible passive infrastructure to enable a competitive telecommunications market.

A structurally separated Batelco would present numerous advantages for the competitive environment in Bahrain:

- a) A legally separate AssetCo with an independent board would have no incentive to favour any particular downstream provider over any other, eliminating concerns about discrimination both in relation to the provision of existing products and the development of new products and in relation to the benefits Batelco currently derives from its vertical integration.
- b) A legally separate AssetCo would be able to raise capital on its own account and would not rely on capital allocation decisions of a parent. Nor would the profits that it earns be redirected to other competitive businesses, such as mobile. The extent to which this results in more fibre deployment, or better service delivery is likely to depend on the ownership of the separated company. If it were jointly owned by Bahraini operators, then they would be expected to have strong incentives to ensure that performance is improved.
- c) Separation would also allow the TRA to begin to dismantle much of the regulation which it applies today to address problems arising from Batelco's current integrated structure. Of course, a separated network monopoly would remain a monopoly and so the TRA would also need to consider how that entity would be regulated to prevent exploitative behaviour.

1.2 Importance of non-discriminatory terms

Few would dispute that a vertically integrated firm facing downstream competition has strong incentives to discriminate in favour of its own downstream interests and against those of its rivals.

It is clear from the Law and the Regulations that the terms and conditions in the reference offer must not only be fair and reasonable, but also non-discriminatory¹. In VIVA's view, the reference offer does not adequately address Batelco's incentives to act in a discriminatory manner and we believe this needs to be firmly addressed by the TRA.

In para 59 of the draft Order, the TRA recognises the dangers of discriminatory conduct due to limitations in the existing reference offer:

“There are therefore limited safeguards in the RO to mitigate Batelco's ability to:

- a. discriminate between an OLO's and Batelco's retail business unit, when provisioning regulated wholesale products, which are in competition in downstream retail markets; and*
- b. restrict competition by supplying poor quality wholesale products to OLOs.”*

Having acknowledged the limited safeguards in the existing reference offer to mitigate Batelco's ability to engage in discriminatory behaviour, there is little in the draft Order to improve the situation and prevent this conduct going forward.

The only instances in the draft Order where the TRA attempts to address discriminatory behaviour are in paragraph 84, where it requires Batelco to follow a “first come, first served” policy in setting the Expected RFT Dates for Service Request, and in paragraph 196, where it floats the idea that the same online database for the pre-sale process could be accessible by both OLOs and Batelco's retail arm.

Achieving non-discriminatory terms and conditions in the reference offer is fundamental to the TRA's role in supervising the reference offer under the Law and the Regulations. Yet, paragraphs 84 and 196 are the only proposals that seek to address Batelco's incentives to act in a discriminatory

¹ Article 57(b) of the Law; article 5 of the Regulations

manner in favour of its downstream retail units. It is important to recognise that, for example, a strengthened service level regime or improved pricing does not guarantee that Batelco's downstream retail/enterprise business units won't be treated more favourably than OLOs.

As Ofcom expressed it in its recent BCMR²:

“Such forms of non-price discrimination encompass quality of service such as the ability and incentive of a dominant provider to supply products with different levels of quality - e.g. different SLAs and SLGs, providing fault repair and/or the installation of products on different timescales, using different Operational Support Systems (OSS) for order handling and/or fault reporting, prioritising the needs of its downstream divisions in developing improvements and enhancements, and taking longer to address, or avoiding addressing, the requirements of its competitors.”

VIVA believes that the TRA should address these forms of non-price discrimination as a priority in the Order to ensure that Batelco's reference offer is “non-discriminatory” as well as being “fair and reasonable”.

a) Impermeable procedural barriers

Today, organisationally at Batelco, the delivery/implementation function reports to the Enterprise business and does not reside within the wholesale business unit. Hence, the first step is to require Batelco to restructure organisationally to ensure that such conflict is not by design. This will necessitate the erection of procedural barriers (or Chinese Walls) between Batelco's downstream business units (retail/enterprise) and the parts of Batelco that control the upstream bottleneck assets (network/wholesale). These requirements should also include rules to ensure the impermeability of these procedural barriers, including:

- the downstream business units should be kept physically separate from the upstream units and procedures and protocols put in place to ensure OLO confidential information that may be provided to Batelco upstream units does not fall into the hands of Batelco downstream units; and
- the remuneration incentives of management and staff in the upstream business units should be linked to the performance of that division, rather than Batelco as a whole. This helps to focus management and staff on the business objectives of the network and wholesale parts of Batelco and deliver to *all* of their customers (Batelco upstream as well as OLOs) and not on the retail performance.

Unless there is a robust demarcation of Batelco's upstream and downstream business units, we cannot see how the TRA can meet its duties to ensure that non-discrimination can be achieved. Demarcation is a necessary first step to identifying the boundary at which non-discrimination obligations are imposed and, without it, the TRA will not know whether discriminatory behaviour is taking place.

b) Non-discrimination obligation

The next step is to impose stronger and more effective non-discrimination obligations on Batelco than under clause 10.2 of Supply Terms of the reference offer.

² “Business Connectivity Market Review”, Ofcom, proposals 15 May 2015 (BCMR), para 13.10

The TRA should require the reference offer to be revised so that Batelco must ensure that its demarcated downstream business units engage with Batelco's upstream business units on the same timescales and terms and conditions (including price and service levels), with the same service, system and process reliability and performance and with the same commercial information provided as applies to OLOs under the reference offer. Batelco's downstream units should engage with the upstream business units by means of the same systems and processes as OLOs.

This is more comprehensive than the inadequate provisions in clause 10.2 of the Supply Terms, which only require Batelco to "use reasonable endeavours" to ensure services are of an equivalent quality and faults are maintained and repaired in an equivalent manner.

More detailed requirements, such as contemplated by paragraphs 84 and 196, should also be included to reinforce this non-discrimination obligation.

c) Effective monitoring

Finally, there must be effective monitoring of these commitments by the TRA (or a proxy, such as an independent oversight group); otherwise there is a significant risk that they will not be complied with.

For this to be successful, there must be mandatory reporting and information flows to the TRA or the oversight group from Batelco's upstream and downstream units and strong powers of investigation to assess potential non-compliance.

Batelco should be required to immediately notify the TRA or the oversight group if it identifies a failure to comply with the non-discrimination requirements. Batelco also should be required to certify compliance (or otherwise) with these requirements on a regular (say quarterly) basis. Another key feature that facilitates monitoring is whistle blower protections, which will be a disincentive to Batelco in seeking to avoid non-discrimination requirements.

Batelco may argue that a reference offer is not the place to deal with semi-structural matters such as demarcated units and strict non-discrimination obligations. Although Batelco's downstream units will not be entering into the reference offer in the same way as OLOs, it is clear from the Law and the Regulations that non-discrimination must be achieved through the reference offer. Put another way, the reference offer would be invalid in our view if Batelco's downstream units were treated more favourably than OLOs because it would not achieve the legal requirement for non-discrimination.

We acknowledge that Batelco may incur costs in complying with these requirements and, if so, they will complain that these will be prohibitive. However, these costs must be weighed against the benefits to competition of an effective non-discrimination regime in Bahrain. VIVA asks, unless the requirements in this section 1.2 are imposed, how will the TRA be confident that the reference offer terms are non-discriminatory as required by law?

1.3 Importance of passive access

VIVA is concerned with indications in the draft Order that revitalised active products may remove the need for Batelco to provide passive access, either by way of duct access (which is a legal requirement) or the recently proposed dark fibre product. VIVA disagrees with these views in the draft Order and believes that passive remedies should be available to OLOs wherever feasible.

Batelco has a substantial advantage over OLOs in its ownership and control of the nationwide duct network, where overbuild is not permitted. It is the unfettered use of the duct network resulting

from being the monopoly communications provider which makes upgrading customers from copper access or installing new and incremental fibre so much cheaper for Batelco than its competitors.

We submit that the TRA should hold to its previous view of the importance of passive access, specifically dark fibre. In paragraph 301 of the 2014 final Domestic Data Connectivity Service determination³, the TRA noted:

“In the Authority’s view, it is also important that wholesale access is available at the passive level, as well as at the active level (such as wholesale leased line services). In particular, access at the passive level provides OLOs with greater flexibility, control, and incentives to invest in their own facilities. Such access also avoids duplication of key infrastructure such as ducts”.

The TRA had considered that the introduction of a dark fibre service is consistent with Government policy direction in the 3rd NTP and that Batelco should offer access to dark fibre. VIVA agrees with this. However, the TRA also went on to state that a fit-for-purpose dark fibre product may allow for the withdrawal of the existing duct access product from Batelco’s reference offer⁴, which we disagree with.

In VIVA’s view, there are two main reasons why passive remedies, especially dark fibre, should be available to OLOs wherever feasible.

a) Product and service innovation

Passive access allows competing OLOs to install their own fibre and/or install their own active equipment. OLOs would not necessarily be restricted to Batelco’s network topology, allowing them to connect in a more efficient way that meshes with the OLO’s network, rather than Batelco’s.

This increased capability will give OLOs complete control over how products and services are developed and brought to market. This allows competition over a broad range of product characteristics which OLOs can use to meet the needs of their customers and opens up opportunities for greater downstream innovation in the retail market.

This is in contrast to the situation in which OLOs are dependent on Batelco’s regulated active wholesale products to provide broadband to their customers. This arrangement limits the ability of OLOs to innovate in products and services. If all that is happening is a resale of Batelco’s regulated active products, we are likely to see a continuation of the same retail product being sold in broadly the same way from a number of different brands.

It is Batelco’s technology choices and service provision decisions that determine many of the key parameters of the broadband products that OLOs consume. For example, an OLO cannot launch a new speed broadband product, unless the profile has been designed and implemented by Batelco, which is a complex and time-consuming process. In the absence of passive access, decisions about the technical specifications of the broadband product are left almost entirely in the hands of Batelco, which dictates the pace and nature of product innovation in the market.

³ “Determination of Significant Market Power and Determination of Dominant Position in the Markets for Domestic Data Connectivity Services”, 10 April 2014 (Ref: MCD/04/14/026) (**the Domestic Data Connectivity Services determination**)

⁴ Paragraphs 303 and 304 of the Domestic Data Connectivity Services determination

b) Control over the entire customer experience and impact on competition

In markets where operators have been able to develop their own FTTP networks through use of passive access, they are able to fully control the customer experience from sale to activation and throughout the customer lifetime, which has driven differentiation and an overall improvement in quality of service experienced by customers. On the other hand, where OLOs are dependent only on active access to Batelco's network, customers of all OLOs receive a similar quality of service which is mainly dictated by the performance of Batelco.

Requiring passive access on regulated terms could make significant improvements to the Bahraini market, whether Batelco remains vertically integrated or not going forward. Countries that have implemented passive access include Spain (duct), Portugal (duct), France (duct and dark fibre), Singapore (duct and dark fibre), Netherlands (dark fibre) and New Zealand (dark fibre)⁵.

Ofcom, in its BCMR, proposed a dark fibre remedy, for the following reasons⁶:

"We propose to include dark fibre in the package of remedies because:

i) a package of remedies including passive remedies can offer substantial benefits relative to imposing active remedies only;

ii) whereas we recognise that imposing passive remedies would also carry substantial risks, the pricing of passive access would determine the balance between benefits and risks;

iii) we are able to propose a dark fibre remedy priced in a way that we consider would achieve a good balance between delivering substantial benefits while mitigating the risks, and better than the balance achievable between benefits, costs and risks associated with duct access (whether imposed in addition to or instead of dark fibre); and

iv) we consider that the balance of benefits and risks associated with the dark fibre remedy we have designed is such that a package of remedies including both active and passive access would be a more appropriate means of addressing the competition problems in the relevant markets than a package of remedies including active access only."

The dark fibre remedy, as proposed by Ofcom, is still to be finally designed but *"the guiding principle ... should be that the quality of service arrangements applicable to dark fibre should be consistent with those applicable to Ethernet services where appropriate"* (para 9.111).

The European Commission also recognised the importance of passive remedies in its Recommendation on regulated access to Next Generation Access Networks (NGA)⁷:

"Where the market includes operators in a dominant position (SMP), NRAs should put in place remedies which must take into account:

...

unbundled access to the local fibre loop in the case of FTTH deployment which should be accompanied by appropriate measures for co-location and backhaul. In addition, this access

⁵ For a comprehensive description of regulation of NGA in a variety of countries, including duct and dark fibre access, see this recent report by Analysys Mason for Ofcom (the **2015 Analysys Mason Report**): http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/annexes/International_case_studies.pdf

⁶ Para 7.39

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:si0018>

should take place at the most appropriate point in the network, which is normally the Metropolitan Point of Presence (MPOP)”.

Dark fibre service

VIVA envisages that a dark fibre service could be used by OLOs in Bahrain in various scenarios, including:

- to offer new solutions for enterprise customers and for OLOs to change their network configuration to access these customers more cleverly and efficiently. For customers, dark fibre enables OLOs to offer more flexible pricing structures, differentiated SLAs and customer experience and is an important element in attracting foreign ICT investors to build regional hubs in Bahrain;
- to better connect OLOs mobile base stations;
- to create future network extensions of optimal efficiency by meshing dark fibre with the OLO’s own existing network and new network that they build, to ensure that future network extension is of optimal efficiency; and
- to support future mobile access technology, such as Cloud Radio Access Network (C-RAN), which is one of potential mobile architecture solutions expected to be deployed by mobile operators for LTE-Advanced technologies, as noted by Ofcom in BCMR⁸. C-RAN uses a specialized network interface for backhaul known as Common Public Interface (CPRI) which works only on the physical layer (Layer 1) and which is not compatible with Batelco’s active wholesale products at all.

As Ofcom states in the BCMR⁹:

“Our aim is for dark fibre to enable CPs to provide leased line services in competition with BT, which support innovation, competition and investment in the supply of downstream markets. Our proposed remedy would provide a form of physical access, which, at a minimum, should allow CPs to replicate the features of certain active access products to enable CPs to provide leased line services in competition with the wholesale services which BT offers and uses itself. Therefore we consider that CPs should be able to obtain dark fibre circuits in similar configurations to some of the current range of BT’s active services. We propose to require BT to provide dark fibre terminating segments, including:

- *disaggregated access and backhaul segments;*
- *short range end-to-end segments.”*

To ensure that dark fibre allows the opportunity for OLOs network structure to be used rather than Batelco’s network structure, the TRA should provide for in-span handover of dark fibre, for connection at an agreed chamber or other places than the end user site and the Batelco exchange.

As Ofcom also noted in its BCMR¹⁰:

⁸ Figure 1, BCMR on passive remedies issued on 5 Nov 2014:

http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr-passives/summary/BCMR_passives.pdf

⁹ Para 9.34, BCMR

¹⁰ Para 9.38

“We also think that a dark fibre remedy could facilitate new handover arrangements for the termination of access segments. Unlike active services, which are generally terminated in buildings (because of power and environmental requirements), it would be feasible for dark fibre access segments to be terminated in external structures such as joint boxes, where they could, for example, be directly spliced to CPs’ fibre networks”.

With dark fibre, it is not necessary for a fibre to traverse the Batelco exchange and this flexibility will enable smarter and more efficient network design by the OLO.

Duct access service

In the case of duct access, OLOs have rights under law to duct access and the TRA is not permitted to prevent OLOs from exercising these rights. The Law¹¹ provides a right of duct access to mobile licensees:

“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.”

VIVA is a holder of a mobile Telecommunications Licence. Yet, despite numerous requests, we have been denied access to Batelco’s ducts by the TRA, contrary to the requirements of the Law. This is limiting our ability to compete effectively in the business segment in particular and should be rectified as soon as possible.

1.4 Dark fibre is consistent with a single national network policy

The TRA refers in several places in the draft Order to uncertainties over the Government’s NBN policy. We recognise this is a relevant consideration in the context of the draft Order.

We envisage that the NBN policy may include a single infrastructure provider (**SIP**) that provides wholesale-only, open access to the NBN to all service providers – Batelco and OLOs. That SIP should not be controlled by Batelco. It should provide layer 1 passive access and layer 2 bitstream access. An example of a layer 1 provider is NetLink Trust in Singapore, which provides layer 1 access to Nucleus Connect and other service providers. An example of a layer 1 and 2 provider is Chorus in New Zealand, who provides both dark fibre access for point to point connections as well as active bitstream products over fibre.

Whichever of these options are contemplated, we consider that the imposition of dark fibre passive access through the reference offer would not prevent or complicate a potential transition to an NBN with a SIP.

We would expect that the SIP would be required to provide both layer 1 and layer 2 services to Batelco and OLOs, so that an OLO that acquires dark fibre passive access from Batelco under the reference offer would be able to continue to receive this dark fibre service from the new SIP. However, even if the SIP provides layer 2 services only, then the OLO’s active infrastructure may be made available by the OLOs on the same arm’s length basis as Batelco would be making its electronics available. Provided that the OLO is no worse off than Batelco arising out of this arrangement, there’s no reason to expect that OLOs would not participate.

¹¹ Article 57(e) of the legislative decree no. 48 of 2002

We would expect the SIP would be separated from Batelco and therefore would need to deal with Batelco on arm's length terms. The SIP would not prefer Batelco, so would be equally open to acquiring assets from OLOs as from Batelco.

If the NBN policy does indeed create a different policy environment which may require a reconsideration of the Order, then we recommend that the TRA conducts a consultation with the industry at that time, with a view to making any changes that may be required to the Order.

In VIVA's view, it is not appropriate for the TRA to simply wait and defer crucial enhancements to Batelco's reference offer (or contradict the Telecom law and deny legal rights, such as duct access) in anticipation of a different policy environment, particularly one where the changes that are required are unlikely to compromise the potential new Government policy, especially in case of the dark fibre access.

1.5 Adequacy of the Service Level regime

We appreciate that the proposed service level regime represents a significant improvement over the current service level regime. However, it remains behind international best-practice benchmarks, such as the United Kingdom.

The current United Kingdom service level regime for leased lines was summarised by Ofcom in the BCMR¹²:

“The existing SLG Direction requires that BT's terms and conditions for the supply of Ethernet services in the wholesale AISBO markets, amongst other things, provide the following:

- *pay compensation at 100% of one month's line rental per day up to 60 days for orders not delivered by the Contractual Delivery Date (CDD) or the Customer Requirements Date (whichever is later);*
- *pay compensation at 15% of one month's line rental per hour up to 200 hours for faults not repaired within 5 hours;*
- *pay SLG compensation payments proactively; and*
- *make compensation payments without prejudice to any right of CPs to claim for additional losses.”*

The TRA's proposals fall short of this level of Service Credits:

- instead of 100% of MRCs per day for up to 60 days for provisioning, the TRA is proposing a Service Credit of 20% plus 10% per working day, capped at 500% if >2 months (para 106);
 - this means that a 10 working day delay under the TRA's proposal would amount to 120% of MRCs, whereas it would be 1,000% of MRCs in the United Kingdom; and
- instead of 15% of MRCs per hour for up to 200 hours for faults, the TRA is proposing a Service Credit (for standard connections) of 10% plus 5% per hour, capped at 300% per connection per month;

¹² Para 13.245

- this means that a long outage (say 48 hours) under the TRA’s proposal would amount to 250% of MRCs, whereas it would be 645% of MRCs in the United Kingdom.

Therefore, the “run rate” at which delivery and availability Service Credits accrue is slower than in the United Kingdom and the caps are lower.

It is important to emphasise that OLOs can suffer considerable direct and indirect losses as a result of poor quality of service from Batelco:

- Direct costs include costs of expansion of service desk workload to contact Batelco (e.g., OLOs chasing orders and obtaining updates for its customers), updating internal systems with revised order information and contacting customers to keep them informed of progress with their order, as well as any service credits that may be payable by the OLO to its customer; and
- Indirect costs include reputational damage to the OLO, with customers becoming dissatisfied to the point of cancelling orders or being less likely to engage in incremental business with the OLO.

We are concerned that the overall service level regime proposed by the TRA, including the penalties, will not cover OLOs for the likely direct, let alone the indirect, costs. But more importantly, we are concerned that the service level regime will in fact mean that Batelco would not suffer any significant consequences from failing to meet those service levels.

This is particularly the case where an OLO customer that is frustrated by failures in delivery or availability will often perceive the OLO as the cause of the problem or they perceive that the OLO is vulnerable to Batelco gaming. In these cases, the customer is likely to consider Batelco as the “default” service provider, which means that Batelco has an “upside” from poor performance, to compensate against any limited service credits it has to pay to the OLO.

The TRA needs to avoid the situation where it is more economical for Batelco to “take a hit” on service credits than resolve the problem at hand. The TRA must therefore reconsider the service level regime with a view to bringing it up to international best practice. We include more detailed recommendations in the body of this submission, but in particular we recommend that:

- the run rate and caps should be brought up to the level in the United Kingdom;
- the reference offer should be changed so that Service Credits are no longer the OLO’s “sole, complete and final remedy” for non-performance¹³. Instead, Service Credits should be without prejudice to any right of OLOs to claim for additional losses;
- there should be a “ratchet” mechanism, so that higher levels of poor performance (which may be on an aggregated level) become subject to higher and higher levels of penalty. In these cases, the caps should not apply; and
- the overall cap on liability for Batelco should be increased substantially to allow for the service credit regime to apply meaningful pressure on Batelco to perform.

We also recommend that the TRA needs to examine implementing what is being considered in the United Kingdom, which is a quality of service condition on Openreach around provisioning and repair time that applies at an aggregate level to Openreach’s performance.

¹³ Clause 10.6, Schedule 9, Supply Terms 7 February 2007

It is notable that this quality of service condition does not derogate from the service level regime in the United Kingdom that we refer to above, but applies on top of this to ensure that Openreach achieves the necessary quality of service standards. In other words, Ofcom believes that the service level regime, in itself, is insufficient (notwithstanding it is considerably more onerous than proposed in the draft Order) and that an additional quality of service condition is necessary.

We believe this quality of service condition, on top of the service level regime, would assist in imposing the sort of discipline on Batelco that is currently missing and would enhance the service level regime overall.

1.6 Pricing for WLA and WDC products

The proposed prices for WLA and WDC products are very high, particularly in relation to other alternative solutions, such as point-to-point fixed microwave link fees¹⁴. This is demonstrated in the following examples (please see the Annexure to these submissions on the complete list of price comparison between WDC/WLA products with point-to-point microwave links):

- For WLA speeds of 100Mbps (BD 450.9), it will cost 358% more than an equivalent point-to-point microwave link fee based on the current schedule of fees (BD 126), and 221% more than the draft schedule of fees (BD204.17).
- For WLA speeds of 1Gbps (BD 1610.60), it will cost 803% more than an equivalent point-to-point microwave link fee based on the current schedule of fees (BD 201), and 329% more than the draft schedule of fees (BD490).
- WDC MRC charges (BD 1875 for 2Gbps) are also unreasonably high with 2250% more than microwave link fees based on the current schedule of fees (BD 83) and 1948% more based on the draft schedule of fees (BD 96.25) for an equivalent 2Gbps speed.

This disparity suggests that the TRA needs to re-examine the WLA and WDC charges, given there are far lower cost options available.

2. Do you agree with the Authority's proposed general amendments to be made to Batelco's RO? Please explain your position. If you disagree, please propose an alternative.

Comment:

VIVA generally agrees with the proposed changes to Schedule 3.

2.1 Period to implement changes

We do not accept that Batelco should have 60 calendar days to implement the changes to its reference offer (para 38) and we do not believe there is a justification for such a long period. This means that the new terms and conditions will not be effective before September 2016. In the meantime, OLOs are deprived of well-priced, effective wholesale products, relying on an inadequate service level regime, all the time impacting on competition and benefits for end-users in Bahrain. Batelco should have no more than 30 calendar days to implement the changes.

¹⁴ See the new fixed MW prices suggested in the TRA draft schedule of fees (Ref: TOD/ICT/0315/007) dated March 15, 2015

3. Do you agree with the Authority’s proposal to mandate the introduction of Service Levels for the Wholesale Data Connection and the Bitstream products and services? Please explain and justify your position.

Comment:

We generally agree with the TRA’s proposal to mandate the introduction of Service Levels for the Wholesale Data Connection and the Bitstream products and services.

3.1 VIP installation team

Enterprise customers will often specifically require that installation be undertaken by personnel that have been trained to operate in “sensitive” premises or have the proper security clearances. Batelco already has a VIP installation team for customers who request these types of personnel and will not allow other personnel to enter their premises. OLO’s should be able to require that installation for enterprise customers be undertaken by Batelco’s VIP installation team if requested by OLOs and this should be at no additional cost to OLOs.

4. Do you agree with the Authority’s proposed definition and description of the service request process? Please explain and justify your position.

Comment:

4.1 Reasons for rejection

We note (para 70(e)) that there should be an exhaustive list of potential reasons for which Batelco may reject a Service Request documented in the relevant RO schedule. If Batelco rejects for these reasons, it should be required to set out in that notice to the OLO why the request is insufficient (including exactly what would make it sufficient) and why the information is incorrect.

Failure to include these reasons should result in an invalid Service Request Confirmation. This failure by Batelco may lead to deemed acceptance by Batelco if they do not provide a valid Service Request Confirmation by the end of the Maximum Time for Service Request Confirmation.

4.2 Provision of assistance

In para 70 (g), it is stated that Batelco will only provide assistance to the OLO to complete a valid Service Request Form if there have been more than two rejections. We believe Batelco should provide this assistance if there has been any rejection.

5. Do you agree with the Authority’s proposed definition and description of the service delivery process? Do you agree with the proposed provisions that the Authority considers should apply in case an OLO cancels a Service Request during the delivery process? Please explain and justify your position.

Comment:

VIVA generally agrees with proposed definition of service delivery process and description of the service delivery process.

5.1 Notification date penalties

We note in para 118 that the penalties for Notification of Expected RFT and RFS Dates are not capped. However, we remain concerned that the proposed 5 service credits per day will be insufficient to incentivise Batelco, in circumstances where the OLO's relationship with its new customer is at its most vulnerable. Uncapped service credits are helpful, but the reality is that the OLO's customer will ultimately become frustrated and cancel its order with the OLO if the OLO cannot confirm the ready for service date.

We consider there should be a ratchet applied here, so that the service credits per day double every 3 days of delay.

5.2 Potential anti-competitive conduct

This leads us to a more general point that the TRA should be prepared to regard service level failures by Batelco in the service delivery process as potentially anti-competitive conduct under Article 65 of the Law. We are anticipating that, with a more competitive environment facilitated by an improved reference offer, Batelco will be incentivised to frustrate competitors in how it handles service requests and so extra focus is required on Batelco's service delivery performance.

If demarcation of Batelco's downstream units is achieved as we set out in this submission, it will be relatively easy for the TRA to gather data from Batelco confirming whether Batelco's downstream units are being treated more favourably than OLOs. Service delivery data should be collected from Batelco by the TRA based on different customer categories, including enterprise customers.

However, the TRA responding to periodic data gathering may not be sufficient. The failures in question may apply to single high-value customers where the competitive stakes will be high. In these cases, the TRA may need to act promptly, including in response to complaints by OLOs.

5.3 Dispute resolution process

The TRA should address the circumstances where there is a dispute between Batelco and the OLO over whether service level terms have been met. For instance, validation based on Acceptance Criteria is a key moment in the delivery process and where delay and uncertainty around the outcome of the dispute is disproportionately felt by the OLO.

There should be an adjustment to the dispute resolution process to address this. We suggest that, pending resolution of that dispute under clause 24 of the Supply Terms, the OLO's decision prevails and if the dispute resolution results in a determination that the service level terms have in fact been met then the OLO should be required to refund any resulting service credits to Batelco, plus interest. The requirement to refund with interest would deter potential frivolous disputes by the OLO.

Also, we wish to highlight that the dispute resolution process is currently based on TRA's guidelines¹⁵, which takes quite a long time to complete. We believe that investigation of disputes related to Batelco's RO should be promptly addressed and resolved to avoid any detrimental impact it has on OLOs and end-users. VIVA recommends that a streamlined dispute resolution process should be established by the TRA to expeditiously address disputes regarding failures by Batelco to comply with its obligations under the reference offer.

¹⁵ TRA's Dispute Resolution Guidelines in Relation to (i) Dispute Between Licensees and (ii) Complaints Against Licensees Pursuant to Chapter 17 of the Law, published on 25 Aug 2015

Furthermore, as mentioned under sections 1.2(c) and 23.8, there must be mandatory reporting and information flows to the TRA to expedite investigation of any dispute arising between OLOs and Batelco.

5.4 Clarity of Acceptance Criteria

The Acceptance Criteria will need to be clear and unambiguous.

5.5 Batelco to follow same Service Request process

In para 84, a “first come, first served” regime is acknowledged. If demarcation is achieved as we request in section 1.2, then this would mean Service Requests from Batelco’s downstream unit and OLOs will be handled in the order in which they come in to Batelco’s upstream unit (using the same processes etc.).

The reference in paragraph 84 to classifying service requests is vague and may permit a “let off” for Batelco’s non-discrimination obligations. Further clarification is requested on the process to ensure that non-discrimination is maintained.

5.6 Preferred installation date

In para 85, it states that an OLO’s preferred installation date is to be considered, “provided that this not done at the expense of any other Service Requests”. This provision requires clarification. Is it “considered” or “given effect to”? What is meant by “done at the expense of any other Service Requests”? We appreciate there needs to be a way of managing competing requests, but the wording of para 85 gives Batelco too much latitude, particularly to prefer its own Service Requests.

5.7 Additional charges if OLO or end user not present

Para 89 details what happens if a Batelco technician must be present at the end-user site to install a connection and contemplates the imposition of charges if the OLO or end user is not present on the relevant day. We believe further clarity is required around this stage of the process as it is susceptible to misuse by Batelco and imposition of unreasonable charges.

We suggest that any Expected RFT Date must specify either morning or afternoon and provide the OLO with a 2 hours’ time window to be present at the end-user site. It is an unreasonable inconvenience to require the OLO or end-user to be available at any time on a particular day. The Batelco technician must attend the premises during working hours and at least have called the OLO representative if it appears that the OLO or end user are not present at the relevant time. The Batelco technician should provide some evidence of attendance at the premises at the relevant time, such as a photo with a date/time stamp.

With regard to the two scenarios described in para 90, VIVA believes that it’s unfair for the OLO to be liable to pay two installation and configuration charges when the RFS Certificate is issued by Batelco. The OLO should instead be liable to pay a fixed amount that reflects the cost incurred by Batelco when mobilising the technician for the visit.

5.8 Next available date

Paras 92-94 detail the circumstances that arise where Batelco is not in a position to meet the Expected RFT Date. Batelco must notify the OLO of the next available dates. However, we are concerned this process may be gamed, as there is no requirement to offer up any alternative later dates or that they are within a certain number of days of the original scheduled date. Batelco is incentivised, if the first available date does not suit the OLO, to push the next alternative date out as

long as possible. Accordingly, we request that the next available date must be no later than 2 working days after the original scheduled date.

Also, the process should state how much notice Batelco must give of its inability to meet the Expected RFS Date.

5.9 Paragraph 106 and cancellation of Service Requests

We disagree that the OLO should have only two working days after the notice of Expected RFT and RFS Dates to cancel the Service Request before being penalised, as contemplated by para 106(b). The cause of the cancellation will almost always be due to a customer cancelling its order with the OLO and the two-step process of cancellation by the customer and then cancellation by the OLO would reasonably be expected to take longer than two working days. We recommend instead a period of 5 working days (and para 106(b) should be adjusted accordingly).

Under para 106 (b), if the OLO cancels after the 5 working days has elapsed, OLOs should only be liable to pay the amount of 1 capped NRC (if any is payable under the reference offer) instead of 1 MRC. The NRC is a more appropriate measure of any loss that Batelco may suffer from a delayed decision by the OLO to cancel as the NRC is supposed to represent the actual installation costs borne by Batelco.

We believe the TRA's intention in para 106(c) is to apply a form of ratchet if there has been a 2-month delay by Batelco following the Maximum RFS Date. Batelco would be liable for 3 month's MRC, even though the OLO has cancelled after two months. However, by our calculation, if Batelco is two months late, there would be 420 Service Credits (i.e., 20SC plus 10SC x 40 WDs), which is over 4 months MRC. So, the effect of the 3 months MRC cap may be the opposite to which the TRA is intending. It means there would be no further Service Credits available after 28 working days if the OLO needs to cancel.

We suggest a different approach to para 106(c) and (d). We recommend the TRA adopt international best practices such as the United Kingdom levels of Service Credit, which would accrue at 100 SCs for each day up to 60 days for orders not delivered by the Maximum RFS Date (see section 1.5 above). If the OLO cancels an order, or if Batelco issues the RFS Certificate, within that period then the Service Credit due would be the credits that accrued to that point.

As we have submitted in section 1.5, we believe the service level regime needs to be enhanced with a "ratchet" mechanism, so that higher levels of poor performance (which may be on an aggregated level) become subject to higher and higher levels of penalty. In these cases, the caps in para 106 should not apply.

For example:

- if Batelco incurs service credits in greater than 25% of the OLO's service requests in any calendar month, then there would be a further aggregate service credit of 25 SCs across all OLO connections from the end of that month; and
- if Batelco incurs service credits in greater than 25% of the OLO's service requests in any three calendar month period, then there would be a further aggregate service credit of 75 SCs across all OLO connections from the end of that three-month period.

6. Do you agree with the Authority’s proposed definition and description of the fault management process? Please explain your position.

Comment:

VIVA generally agrees with proposed definition and description of the fault management process.

6.1 Restoration outside working hours

Any restoration outside working hours should be free of charge considering that OLOs are already paying for the service.

6.2 Pro-active notification of faults

The Actual Fault Acknowledgement Time begins when OLO notifies Batelco of a fault, but Batelco should be required to pro-actively notify the OLO of a fault when it discovers it, whether or not first notified by the OLO. As soon as Batelco becomes aware of the fault, for whatever reason, this should signal the commencement of the Actual Response Time and Actual Restoration Time periods.

6.3 Dispute resolution process

As in section 5.3 above, where there is a dispute over whether Batelco has provided the requisite proof that the connection is performing in accordance with the QoS Parameters, then we recommend that the OLO’s decision is given effect to and that, if the dispute is resolved in favour of Batelco, the OLO refund to Batelco any service credits that are applicable, plus interest.

6.4 Responsibility of OLO or End-user

Para 112 (g) discusses the circumstances of “fault falling within the scope of the OLO’s responsibility and reasonable control (or within the scope of the end user’s responsibility and reasonable control)”. This is appropriate where there is a genuine fault that is directly caused by the OLO or end user (and the appropriate level of evidence has been provided by Batelco). We also note that this formulation is narrower in scope than the exclusion of liability under the Supply Terms¹⁶.

The TRA needs to address the risk of finger-pointing by Batelco becoming a common practice for disputes with OLOs. Particularly with a more rigorous service level regime with automatic service credits, Batelco may choose to concentrate its efforts on demonstrating that a fault was not within its responsibility so as to remove or reduce its liability for service credits. Having ambiguity in this area also does not assist OLOs in giving their customers’ certainty over their delivery date. This means it is important for the TRA to clearly set out the areas that fall within Batelco’s responsibility and those within the OLO’s responsibility.

For example, it must be clear that Batelco is responsible for any problem that arises due to matters of network build, lack of engineering resource, Batelco’s contractor issues, road traffic management requests and way leaves. Even though some of these matters are undertaken by third parties (such as contractors, or local authorities if consents are required), these should all be regarded as matters within Batelco’s control and should not be used as an excuse for avoiding liability.

Batelco’s reference offer already has an unusually broad definition of a force majeure event, which we believe the TRA should examine more closely. For example, it would be a force majeure event¹⁷, and so Batelco would not be liable, if there was a supplier failure (“the failure of any supplier to

¹⁶ Clause 12.2, Schedule 9, Supply Terms

¹⁷ Batelco Supply Terms, dictionary definition of Force Majeure Event

deliver equipment at the prescribed time”) or electricity outage (“interruption or failure of utility service (including but not limited to electric power, gas and water”). Batelco has contracts with its suppliers and should be responsible for them and they should have back-up generators in cases of electricity outages, which is a common practice today. These should not be force majeure events.

This has been a particularly contentious issue in the United Kingdom. As Ofcom analysed this issue in its BCMR:

“We propose to include non-customer caused delays in the minimum standards. Our analysis revealed that it is most of these delays are wholly or partially within Openreach’s control, although third parties do contribute to some of the delays. Excluding, or providing relief for, the non-customer caused delays would remove any incentive on Openreach to improve to the extent that issues are within its control. Whilst including the non-customer caused delays within the minimum standard does include some delay not within Openreach’s direct control, we consider that this should incentivise Openreach to manage the process, of interaction and delay relating to third parties better so as to obtain the best outcome. Therefore we have included non-customer caused delays (including Third Party in Openreach/industry terminology) in the metrics we have used and we do not propose to allow any relief against the standards for this cause of delay.”

This is indeed the case in Bahrain. Batelco needs to have the incentives to manage the process of interaction and delay relating to third parties that it has a legal relationship with. The reference offer must be clear that these “non-customer caused delays” should be Batelco’s responsibility.

6.5 Additional activities

The Order should also require Batelco to conduct other additional activities following a service level failure, including performing a root-cause analysis, creating and implementing a remediation plan and updating the OLO of the cause and the steps being taken to remedy the fault.

7. Do you agree with the Authority’s proposed process for the payment of Service Level Penalties? Do you agree that the corresponding rebate(s) shall not be claimed by OLOs but directly reflected by Batelco in the next invoice(s)? Please explain and justify your position.

Comment:

VIVA generally agrees with proposed process for the payment of Service Level Penalties, and that rebates shall not be claimed by OLOs but directly reflected by Batelco in the next monthly invoices.

7.1 Unutilised service level penalties carried forward

Under para 116, “Service Level Penalties shall be directly reflected in the next monthly invoice(s) in the form of rebate(s).” The Order should set out that, if the rebates exceed the amount of the monthly invoice, then any unutilised credits get carried over into subsequent months.

8. Do you have any comments on the Service Level definitions proposed by the Authority? Please explain and justify your position.

Comment:

8.1 Service level requirements rather than targets

The definition of Service Level Terms describes the terms as “targets”, which suggests that it is not a legal requirement for Batelco to meet the terms. The service levels are part of the specifications of the services that Batelco are supplying. The word target is inaccurate and a better term would be “requirements”. That way, if Batelco fails to meet the requirements, they will be in breach.

8.2 Ability to claim for damages

Service credits should not be the exclusive remedy for an OLO for service level failure. Instead, the OLO should be entitled to seek damages. This is not currently permitted under the reference offer. The reality is that the OLOs losses could far exceed the caps in the case of a serious service level failure and, in those instances, the OLO should be able to sue for damages. In both the United Kingdom with Openreach¹⁸ and in New Zealand with Chorus¹⁹, service credits are not an exclusive remedy. We also referred to this issue in section 1.5.

Also, loss of profits of OLO’s should not be excluded where these are direct losses of the OLO. This is consistent with the position in the United Kingdom, where loss of profits is not excluded from liability under Openreach’s Ethernet terms and conditions²⁰.

9. Do you agree with the Authority’s proposed creation of a Forum on Batelco’s RO? Please explain and justify your position. According to you, what should be the terms of reference of such forum to ensure its effectiveness?

Comment:

9.1 Ability of TRA to step-in

We generally believe the FRO is a good idea. However, the terms of reference for the FRO should include all regulated products (not just active products).

The establishment of the FRO should not prevent the TRA at any time from stepping in and deciding on a technical or operational matter. The TRA should be able to decide on a matter even if the FRO has not considered the matter, or even if the FRO is currently considering it. This prevents Batelco from gaming the FRO system by delaying determinations through extended and unnecessary debates in that forum.

¹⁸ Schedule 4C, Openreach Connectivity Services agreement

¹⁹ Clause 8.4, Chorus service level schedule

²⁰ Clause 13.3, Openreach Connectivity Services agreement, head terms

10. Do you agree with the Authority's proposed approach aiming at limiting the payment of one-off charges for the deployment of a fibre access? Please explain and justify your position.

Comment:

VIVA generally agrees with the Authority's proposed approach to limit the payment of one-off charges for the deployment of fibre access, but there are other important elements in this section of the draft Order that require submissions.

10.1 Active remedy does not remove the need for effective passive remedies

In para 146 of the draft Order, the TRA refers to its earlier proposal for a dark fibre product and that this may be an alternative to Batelco's existing duct access product. The TRA is reconsidering its position on this and is suggesting that the proposed active products may remove the need for passive dark fibre. Further, in para 168, the TRA states that "the new defined WDC product, once market tested, will also provide a sound alternative to the duct access rental product currently being offered by Batelco".

As further detailed in section 1.3 above, VIVA does not accept that:

- a dark fibre remedy should be an alternative to Batelco's duct access product;
- the proposed active products remove the need for passive dark fibre access; or
- the new WDC product should be an alternative to duct access (in the sense that duct access will no longer be required).

In our view, both duct access and dark fibre access are necessary.

10.2 Examples where passive access is required

Relying on an active product alone will not be sufficient for OLOs. This includes in the critical routes connecting OLO's PoPs and Cable Landing Stations (CLS) and at Batelco's Optical Switching Nodes. We wish to highlight that both duct and dark fibre remedies are required, as well as regulated collocation space and services at Batelco's facilities.

a) PoP to CLS

When the TRA reviewed issues related to Batelco's duct sharing reference offer in 2013²¹ in the context of the Cable Landing Stations, it stated²² that:

"Regarding the various options available to OLOs for reaching the international cable landing points, the Authority remains of the view that access to Batelco ducts is an essential requirement to overcome barriers to entry into the wholesale market for the supply of international capacity from locations within Bahrain..."

Nevertheless, the TRA was optimistic that there would be a satisfactory outcome:

"While the Authority is empowered under Article 57(h) to issue regulations relating to Interconnection and Access requests and guidelines for the resolution of disputes, the Authority does not consider that it is necessary to do so at this stage, given the progress that

²¹ Dominance Determination for Wholesale International Services, Final Determination, TRA 20 February 2013 (Ref: MCD/02/13/016)

²² Paragraph 301

has recently been made in opening up access to Batelco ducts which has enabled Licensed Operators to deploy their own fibre. While Viva and Zain have both submitted that further improvements are required to facilitate access to Batelco ducts, the Authority has monitored progress and has facilitated improved access in a number of ways, including the review of wholesale charges relating to duct access through the Reference Offer process and assisting in resolving the issue around lead-in ducts. The Authority will continue to monitor closely developments relating to duct access.”

VIVA submits that, three years later, this original optimism has proven to be unfounded. We remain subject to a sub-standard duct reference offer, at very high prices and no SLAs. The terms are not fair and reasonable and there is no evidence that they are non-discriminatory.

We have stated in section 1.3 and elsewhere in this section 10 that passive access is important for competition in Bahrain. In the context of cable landing stations, major business customers require standalone services and diverse routes for contingency purposes. Carriers also require resilient routes and mega capacities to access international networks and services. This must be addressed through a fit-for-purpose duct reference offer.

b) Passive access and collocation at OSNs

OLOs should be entitled to collocate their active equipment at Batelco’s Optical Switching Nodes (OSN) and connect this equipment to the dark fibre connections achieved through passive access. Dark fibre could be used to connect the OLO’s PoPs or to larger OLO customers.

With passive access and associated collocation services, the concerns over junction congestion as alleged by Batelco in para 148(b) (see section 10.3 below) will no longer be relevant. It will be same setup that Batelco are providing but, instead of terminating on Batelco’s active equipment, the fibres are terminating at OLOs active equipment collocated in the same premises.

That same OLO active equipment would be used by OLOs for dark fibre connecting to end-user premises or OLO PoPs.

c) Interconnection and access

Accordingly, OLOs require interconnection and accommodation services from Batelco at its cable landing stations and OSNs for accessing Batelco’s products, including collocation space and services such as power and tie-cables.

These services also have a range of provisioning issues which raise wider competition and discrimination concerns where Batelco does not consume these products itself. Access to Batelco’s space requires an effective service level regime that addresses the timely provision or proactive management of this space by Batelco and this should be set out in the Order. We refer to the views of Ofcom and the European Commission on the importance of suitable collocation services in section 1.3.

As Ofcom states in its BCMR²³:

“Our initial view is that the accommodation service that BT offers in the wholesale leased lines markets would be suitable for the dark fibre remedy. These services allow CPs to rent

²³ Para 9.41, 12.2, 12.20 & 12.33, BCMR

colocation space and associated ancillary services, such as power and tie-cables, so that they can aggregate access segments efficiently.”

“The ancillary services, which include interconnection and accommodation services, are needed in order for CPs to interconnect their networks with BT’s. We therefore consider it necessary to regulate provision of interconnection and accommodation services in order to address BT’s SMP in the relevant wholesale markets.”

“BT is also subject to an obligation to allocate accommodation space on the basis of equivalence of inputs (EOI) and is subject to price controls for accommodation services.”

“Given the importance of accommodation to CPs it is essential that space and power continue to be allocated on a first-come-first-serve basis. For this reason, we propose to set appropriate SMP conditions to require that allocation of space and power is undertaken by BT on an Equivalent of Inputs (EOI) basis.”

OLO’s will have the same requirements in Bahrain for accommodation services at OSNs and CLSs.

10.3 Batelco’s assertions on dark fibre and duct capacity

The draft Order records that, in correspondence with the TRA on 4 August 2014, Batelco asserted issues with database records on fibre availability and usage and shortage of fibre pairs in junction cables linking Batelco’s service nodes. It appears the TRA has not sought to confirm these assertions on Batelco’s part (describing capacity issues as an “apparent” shortage, which “according to Batelco” would cause difficulties in para 166). From the record of correspondence, Batelco’s assertions were quickly followed by an offer by Batelco of the WOBS service and that appears to have been the direction of investigation by the TRA.

We are not convinced by Batelco’s original assertions and nor do we believe they are determinative. Furthermore, we do not believe any past underinvestment by Batelco in its duct infrastructure and monitoring systems should be the *coup de grace* which means passive infrastructure access cannot work now. In any event, we do not believe that unconfirmed claims of database records and shortage of fibre pairs should provide any foundation for the TRA to disregard passive access as a remedy.

Batelco has incentives to argue that its existing duct infrastructure is unable to accommodate OLO fibre (or only to do so at great cost), or to manage these assets in such a way that Batelco is able to favour its own needs over those of OLOs (perhaps by not investing to expand capacity beyond its own needs). In fact, we question how Batelco is able to conduct maintenance of its own fibre cables and extend its fibre to new locations if their database records of fibre availability are as inadequate as they claim.

10.4 Requirements that should be imposed on Batelco regarding ducts

The TRA must, we believe, impose cost-based pricing for Batelco’s duct access charges. They are currently far from being fair, reasonable and non-discriminatory. VIVA has already demonstrated to the TRA that the duct access price should be set at no more than [XXX] fils per meter per month instead of the current 189 fils.

We also believe the TRA must push back firmly in the Order on what Batelco should be required to do about the state of its duct infrastructure and monitoring systems.

a) Upgrade of duct infrastructure

Batelco should be required to invest in upgrading its existing duct infrastructure to ensure that it is in an adequate condition to enable OLO access. The prices which Batelco could charge OLOs should be regulated by the TRA to reflect the incremental costs of these additional investments.

b) Reservation of duct capacity

In respect of potential congestion issues, we note that reserving space in ducts and sub-ducts for other operators is key for reducing uncertainty in the time and cost associated with the physical roll-out. In other countries, infrastructure owners have to reserve a portion of the duct for others and maintain it in a good working order (for example, Spain and Portugal²⁴).

c) Duct repair

We acknowledge that there will be some cases in which it is not immediately possible for Batelco to provide space in ducts. In those cases, Batelco should repair the duct, clear its dead cables, provide an alternate route or provide dark fibre to the OLO. The end purpose is the same: to guarantee space for OLOs to deploy their network.

10.5 Achieving reductions in NRCs

VIVA is concerned with the risk highlighted in para 179 that Batelco does not voluntarily agree to reduce its NRC. The TRA has highlighted the option, in para 179(a), of reducing the unit costs, which we agree with. Ideally, this unit cost reduction would relate to the relevant connection that has been funded by the OLO, but if this is too difficult it may have to be applied universally through some sort of periodic claw back.

Having said that, if Batelco agrees with the solution proposed in para 180, we would find that acceptable.

10.6 Refund of NRCs if infrastructure used

If the judgement is made that another OLO or Batelco is unlikely to use the new fibre infrastructure in the next 3 years, but it is in fact used, then we submit that Batelco should refund any NRC paid by the OLO to fund the infrastructure, plus interest from that point. This measure is necessary to avoid the risk of gaming by Batelco, who under the proposals in the draft Order will have an incentive to be sceptical about opportunities for other users (and would be motivated to take this view).

More critically, the Order should require Batelco to promptly notify the OLO that paid the NRC and the TRA if the new fibre infrastructure is used within the 3-year period. Failure to notify and pay the relevant refund should be a material breach of the reference offer. Batelco should also be required to certify to the OLO and the TRA each year, where the OLO has funded any infrastructure through a NRC, which it has complied with this requirement to promptly notify and refund.

²⁴ See descriptions of duct access remedies in Spain and Portugal in the 2015 Analysys Mason Report for Ofcom:
http://stakeholders.ofcom.org.uk/binaries/consultations/dcr_discussion/annexes/International_case_studies.pdf

10.7 Limits on time and materials charging

Although we note that NRCs are to be capped, it is important for the TRA to place limitations on what Batelco can recover on a time and materials basis. A cap will be illusory if Batelco can use pumped-up time and materials costs, which means the cap will be reached almost every time.

We submit that rates for technicians and materials should be market-based and approved by the TRA. A standard rate-card should be developed and approved by the TRA periodically. Where appropriate, the TRA should benchmark the rates against similar sectors in Bahrain (such as other utilities) and other similar jurisdictions.

Further, it should be made clear in the Order that NRCs do not apply to any construction work that forms part of Batelco's common network (i.e. any work that can serve more than one end-user site). In other words, it must be truly incremental to the work to serve the particular end-user site.

11. Do you agree with the Authority's proposal to order Batelco to build a centralised database on fibre access and fibre usage in Bahrain? Do you agree that until such time as a database is made available, Batelco should introduce a 2-working-day presale process? Please explain and justify your position.

11.1 Importance of a database

We agree with the proposal to order Batelco to build a centralised database on fibre access and fibre usage in Bahrain. However, we also believe that a real-time business-to-business (B2B) gateway should be the ultimate goal.

A detailed understanding of where existing infrastructure lies and its availability is critical for fast and efficient deployment of fibre networks. Other countries have implemented extranet map databases that contain information about location, status and availability of different types of infrastructure.

The cost and effort to set up and maintain the database is minimal compared to the benefits they provide to OLOs who can plan their roll-outs independently and quickly, and these costs have been recovered through database charges in other countries. Guaranteeing fast and easy access to accurate information for all operators is a key feature of these databases.

Batelco's demarcated downstream units should be required to use the same centralised database as OLOs and should not "by-pass" this process to obtain the information in any other way.

We also believe that this database should be managed by the TRA rather than Batelco. We understand that the management of equivalent databases are the responsibility of an independent party, like the regulator, in some other countries.

11.2 Publication and validation of the database

We believe that, within 30 days of issuance of the revised reference offer, Batelco should publish the database to OLOs, covering at least the current availability of access capacities. The database provided by Batelco should be validated and finalised with the TRA by 31 December 2016.

11.3 Batelco to use same pre-sale process

The pre-sale process may be acceptable on an interim basis, but to ensure non-discrimination, Batelco's demarcated downstream units should be required to use the same process and should not be permitted to use other ways of obtaining this information.

11.4 Validation by joint survey

The pre-sale process should, at the request of the OLO, be validated with a joint-survey (involving Batelco, the OLO and the TRA) if Batelco claims there is no fibre available. There should be no charge to the OLO for requesting this joint survey; the requirement for the OLO to be present for the survey is sufficient incentive to deter spurious requests. If Batelco rejects a Service Request due to "non-availability", the joint survey should take place within a maximum of 2 days.

If this joint survey reveals that there is capacity available, then there should be some penalty on Batelco. This would incentivise Batelco to improve its understanding of its own free fibre capacity and transition quickly to the database solution.

12. Do you have any comments in relation to the speeds for which the WDC should be made available?

Comment:

VIVA generally agrees with the proposed speeds by the TRA for which the WDC should be made available up to 10,000 Mbps.

12.1 Low speed options for WDC

VIVA notices that the low-speed connections will only be available for WLA using copper-based connectivity while low speed options are available for WDC. VIVA believes that this will hinder the OLOs from offering low speed connections using fibre.

This will put OLOs in a competitive disadvantage relative to Batelco in the offering of low speed connections. Therefore, VIVA requests the TRA to mandate the provision of low speed connections for fibre based products as part of both WDC and WLA wholesale products.

13. Do you have any comments in relation to the proposed technical characteristics for the WLA and WDC Aggregation Links?

VIVA partially agrees with the technical characteristics for WLA and WDC aggregation links. In this regard, VIVA requires more information in relation to the loop prevention mechanism/ protocols that will be used by Batelco to assure the links' high availability, particularly for WLA aggregation links.

14. Would you be interested by the introduction of a synchronisation feature for the WLA? Please explain and justify your position.

VIVA considers that the synchronization feature for the WLA should be mandatory as it is crucial to support next generation services such as P2P, LTE TDD, LTE Carrier Aggregation etc., which requires

IEEE 1588v2 (Precision Time Protocol). This should be a fundamental feature of the product, considering that Batelco's network is an advanced MPLS network where this feature is embedded in the new MPLS hardware.

15. Do you agree that Batelco should offer as an option the full end-to-end physical and logical protection of a WLA or WDC Connection for an additional 30% mark-up on top of the applicable MRC? Please explain and justify your position.

VIVA agrees that Batelco should offer the full end-to-end physical and logical protection of a WLA and WDC connection which are standard options and required by OLOs.

However, offering such protection with a premium of 30% mark-up on top of the applicable MRC raises a serious concern from a commercial perspective.

In the case of Aggregation Links, end-to-end physical and logical protection is a basic and essential feature of the service. VIVA believes there is no case for a 30% mark-up on top of the applicable MRC in these circumstances.

For WLA and WDC Connections, VIVA believes that the charges for full protection of a secondary connection should not be charged as a fixed mark-up of 30% on top of the MRC. Instead, there should be cost-based charges for each active equipment under logical protection (CPE and service node) and physical protection (i.e. connection per meter charge). We expect these would be relatively small incremental charges, such as we see in markets such as the United Kingdom²⁵. Further, OLOs shouldn't be restricted to equipment specified by Batelco, so as to avoid over-specification or over-inflated equipment. Instead, OLOs should have the flexibility to use its own CPE, which is consistent with our request for colocation services to be provided by Batelco.

If there is a failure of the primary connection, and the secondary connection is activated, it should be clear that Service Credits continue to apply until the primary connection is reactivated.

16. Do you agree that Batelco should allow the use of a second ingress ports on a CPE provided for a WLA/WDC Connection or a WLA/WDC Aggregation Link? Please explain and justify your position.

Comment:

VIVA agrees that Batelco should allow the use of a second ingress ports on a CPE provided for a WLA/WDC Connection or a WLA/WDC Aggregation Link considering that extra ingress ports provide greater flexibility to OLOs network planning and design to support network migration and expansion. Furthermore, this feature has no incremental cost for Batelco since the standard CPEs have at least 16 ports.

25

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=3kqSLP92Czd70rx0runsWlfQMRjKi2i1NfjZOBUVqcsIMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISqtIFAKw%3D%3D>

17. Do you agree that Batelco should provide a minimum set of information on CPEs used for WLA and WDC Aggregation Links and Connections? Please explain and justify your position.

Comment:

VIVA agrees that Batelco should provide a minimum set of information on CPEs used for WLA and WDC Aggregation Links and Connections, which should include vendor, model, version, switching capacity as well as layer 2 and layer 3 capabilities in order to improve transparency and develop the relevant database.

18. Do you agree that Batelco should continue to be subject to additional QoS reporting obligations for WLA and WDC? Please explain and justify your position.

Comment:

VIVA agrees that additional QoS reporting obligations should be required for WLA and WDC.

18.1 Publication

In para 246, the TRA states that it reserves the right to publish on its website the QoS reports in their entirety or a redacted summary thereof. We believe these reports must be published in their entirety and must be transparently and publicly available.

OLOs suffer reputational damage from Batelco's inability to meet its service promises and therefore it is key that Batelco's actual performance is made public and published regularly so failings by Batelco can be clearly identified and that any reputational damage is squarely passed to Batelco and not the OLO.

The current arrangement with Batelco provides little or no performance information on the connections/links provided.

18.2 Service level performance reporting obligations

Moreover, in addition to our comment in sections 1.2(c) and 18.1 above, we request the TRA require Batelco to provide reports on a periodic basis (i.e. quarterly) to assess its service level performance related to its wholesale and retail segments in comparison to the service levels received by OLOs.

19. Do you agree that Batelco should implement a test based on ITU-T Y.1564 test methodology and systematically provide a copy of test results to the OLO? Please explain and justify your position.

Comment:

VIVA agrees that Batelco should implement a test based on ITU-T Y.1564 test methodology and systematically provide a copy of the test results to OLO to qualify the new services based on the QoS performance parameters indicated in the reference offer and standard SLA for the services.

20. Do you agree that OLOs should have access to Batelco’s BNV system? Should OLO’s customers (i.e. end-users) also have access to such system? Please explain and justify your position.

Comment:

20.1 Access to BNV

We agree that OLOs should have access to Batelco’s BNV system and that this access should be provided for free.

However, we do not believe OLO’s customers (end-users) should have access to that system, considering that the responsibility of any failure might be either on OLOs side or Batelco.

20.2 Batelco to use same system

To ensure that Batelco’s demarcated retail/enterprise units do not gain an advantage over OLOs, these units should have to obtain information regarding OLO connections through the same BNV system that OLOs use and not through any other system.

20.3 Publication of QoS reports

As we set out in section 18.1 above, VIVA believes that the QoS reports shall also be made available in their entirety with the relevant details on each connection and service in the BNV system which must be made available to OLOs and the TRA.

21. Do you agree that penalties should be paid on a per fault basis for failure to meet a maximum restoration time rather than based on percentage of service availability? Explain and justify your position.

Comment:

21.1 Per fault penalties

VIVA agrees that penalties should be paid on a per fault basis for failure to meet a maximum restoration time, rather than based on percentage of service availability. Maximum restoration time is much clearer and fairer than if linked to service availability. In following this approach, Batelco will have less incentives to engage in gaming and delay the restoration of any outage.

21.2 Service Credit for persistent failures

We recommend that a Service Credit be introduced for persistent failure of a connection. Persistent, small failures (“flapping”, which results in the circuit being up and down rapidly) can cause end user disruption in the same way as a large, one-off failure.

There should be an additional level of compensation for OLOs where there are repeated instances of faults, for example three or more total losses of service in a three-month period. Where this occurs, the monthly rental charge may be waived until the circuit has been free of further faults for a period of 12 months.

21.3 Planned outages

We do not believe that all of Batelco’s “planned outages” should be taken into account when considering its performance against fault service levels. Under the current reference offer, planned outages impact on availability service levels²⁶.

Planned outages can be inappropriately used by Batelco in various ways to defeat the service level regime. An outage may be characterised as a planned outage when it is in fact triggered in response to network instability and so reducing exposure to service credits. Or, planned outages may be unreasonably long, again reducing exposure to service credits.

We submit that any planned outage should be announced at least one month in advance and conducted after midnight during off-peak hours for no more than 3 hours in total. If these requirements are not met, or if there are more than two planned outages per year, then Service Credits should apply.

22. Do you agree with the Authority’s proposed introduction of a ‘Premium Support’ service for an additional 20% premium on top of the applicable MRC? Please explain and justify your position.

Comment:

We disagree that the “Premium Support” service should be offered at an additional 20% mark-up on the applicable MRC, considering the small area of Bahrain and the fact that Batelco downstream units enjoy at least this level of support. If a robust non-discrimination regime is introduced as we propose, then Premium Support will become the baseline of support going forward for OLOs and Batelco’s demarcated downstream units.

In these circumstances, we do not believe that there should be an extra 20% premium for this baseline level of support.

23. Do you agree with the Authority’s proposed Service Level Terms and Penalties for the WLA and WDC products and services? Please explain and justify your position.

Comment:

23.1 Penalty for failure to acknowledge and confirm Service Request

In para 269 and 271, the TRA sets out the Maximum Time for Service Request Acknowledgement at 15 minutes and Maximum Time for Service Request Confirmation at 2 working days, with no service level penalty in case of breach. VIVA believes that there should be a penalty of 5 SC for each ½ hour imposed for failure to comply with the Maximum Time for Service Request Acknowledgement, and 10SC for each working day for failure to comply with Maximum Time for Service Request Confirmation.

²⁶ For example, see clause 3.6 Schedule 1: SERVICE DESCRIPTION 2-16: WHOLESALE LOCAL ACCESS SERVICE (WLA): “Notwithstanding the above, Batelco may suspend any WLA Service in order to carry out planned or emergency maintenance.”

23.2 Changes to Maximum Delivery Time service levels

In para 279 (b), the TRA sets out the Maximum Delivery Time (WLA/WDC). Maximum Delivery Time is critical for the customer switching process as prolonged waits for this work to be undertaken causes many customers to abandon their intended switch. For customers that have a poor experience during their switch – including long waits, missed appointments, new services not working or becoming faulty soon after installation – they will be deterred from switching again in future and may deter others from switching by relating their poor experience.

We believe changes should be made to these Maximum Delivery Time service levels as follows:

- For a soft Upgrade/Downgrade Request, the Maximum Delivery Time is 2 WD;
- For transfer, the Maximum Delivery Time is 10 calendar days;
- For a New Connection Request, or a Migration Request:
 - The Maximum Delivery Time should be 5 working days when fibre is available for a new Connection. This compares to 5 working days in the Chorus bitstream General Terms and 3-5 working days for standard (fibre available) delivery in the Nucleus Connect RIO;
 - the Maximum Delivery Time should be [15 calendar days] when a fibre is not available for a new Connection but there is sufficient duct space to pull an additional fibre access cable. This compares to 13 working days for non-residential, non-standard delivery in the Nucleus Connect RIO²⁷; and
 - the Maximum Delivery Time should be [30 calendar days] when new ducts must first be installed before deploying a new fibre access cable.

23.3 Co-ordination time period

In para 280, the TRA states “In cases of Transfer Requests and Migration Requests, Batelco shall coordinate the deactivation and activation of the Connection on the same day to ensure minimum service disruption”.

We believe there need to be more stringent requirements around Transfer Requests and Migration Requests. There should be a service level requiring coordination by Batelco within 2 hours (Maximum Transfer Time) to ensure a seamless service. Failure to meet this service level should result in a service credit of 10 SC per hour for each hour after the Maximum Transfer Time.

Incidentally, we also believe that, in the case of a Transfer Request, the external relocation from a customer to another customer should be priced at a lower NRC rate than for a new connection.

23.4 Penalty for failure to acknowledge and respond to fault

In para 288 (a) and (b), the TRA sets the Maximum Acknowledgment Time at 15 min and Maximum Response Time at 2 hours for standard support and 1 hour for premium support, but with no service level penalty. Even though there is a service level penalty for failure to notify the Expected RFT and RFS Dates, we believe there needs to be a sufficient incentive for Batelco to meet these prior service levels. In line with our proposals to match the United Kingdom standard for restoration time service

²⁷ Appendix 1, Nucleus Connect General Terms

credits in section 23.6, VIVA believes a proportionate penalty would be 15 SC per hour for each ½ Hour after the Maximum Acknowledgement Time and Maximum Response time to fault.

23.5 Maximum Restoration Time

In para 288 (c), the Maximum Restoration Time for Standard Support should be 4 hours (double) and not 6 hours (triple) of Premium Support. Four hours is a very reachable level given the size of the country and Batelco's network. [Singapore is a very similar sized country to Bahrain and the Nucleus Connect RIO provides for a 3-hour service level (mean time to repair)²⁸.

23.6 Restoration Time Service Credits

In para 288, it is proposed that Restoration Time penalties are set at 10SC for failure to meet the Maximum Restoration Time and 5SC for each hour thereafter (and double that for Premium Support). Also, these Service Credits are capped at 300 SC per Connection and per month.

As noted in section 1.5, this is considerably less favourable than the United Kingdom model, which requires 15% of one month's line rental per hour up to 200 hours for faults not repaired within 5 hours²⁹.

We therefore propose that the Restoration Time penalties align with the United Kingdom levels, which we suggest would require:

- for Standard Services, 15SC per hour for each hour after the Maximum Restoration Time (and double that for Premium Services); and
- for Standard Services, a monthly cap of 3000SCs per Connection (and double that for Premium Services).

23.7 Alignment with comparator countries

In para 290, we note the TRA's comment that the proposed service levels are less stringent than in the United Kingdom or France, yet they also note that the geographic areas in those countries are much larger than in Bahrain. We consider this a reason for making the service levels in Bahrain more stringent, not less stringent, than these comparators.

23.8 On par treatment relative to Batelco Enterprise customer service level

In considering the service level under the reference offer, we believe the TRA should investigate the service level that Batelco makes available to its enterprise retail customers. If this level is more favourable to Batelco's enterprise customers than the equivalent in the reference offer, this is a strong indication of discrimination operating in practice and the TRA should adjust the draft Order so that OLOs are not receiving a lesser standard of service and should require Batelco to submit to the TRA its Enterprise customer service level on periodic basis.

Review of the price terms applicable to the WLA and WDC products and services

Although there are no specific questions related to chapter 6 of the draft Order, given the significance of the costing information provided by Batelco, we request that the TRA disclose the costing elements of Batelco's network that it has used in its analysis to ensure transparency and so

²⁸ Clause 9.9, Nucleus Connect General Terms

²⁹ Schedule 4C, Openreach Connectivity Services agreement

that we can assess the TRA's and Batelco's calculations in the cost stacks and suggested mark-ups. At the moment, these are invisible to us.

We will agree to reasonable confidentiality protocols for handling of this information within VIVA. We note that the accounting separation regulations and international best practices contemplate appropriate disclosure of regulatory accounts to the public and similarly accounting information may be disclosed by NRAs under the EC Access Regulation³⁰.

24. Do you agree with the Authority's proposed modifications of the Bitstream service description? Please explain and justify your position.

VIVA agrees with the TRA's proposed modifications to the Bitstream service description.

25. Do you agree with the Authority's proposed Service Level Terms and Penalties for the business Bitstream product and services? Please explain and justify your position.

Comment:

We generally agree with the TRA's proposed service level terms and penalties. These are approximately the same as for the WLA and WDC products. To the extent that our comments in the sections above address the same issue, then we make the same comment in relation to the Bitstream product.

26. Do you agree with the Authority's proposal to freeze the charges applicable to the business Bitstream and business WDSL? Please explain and justify your position.

Comment:

We are concerned with the TRA's statements in para 404 that Batelco could have ordered lower MRCs for the business Bitstream product in the region of -10% to -25%. Yet, the TRA proposes to freeze business Bitstream and business WDSL charges due to some increased costs that Batelco will incur, the sufficiency of margin for OLOs and the need to promote fibre access roll-out.

We have commented in greater detail in section 30.2 below in relation to a pragmatic approach to cost mark-ups. We are uncomfortable accepting at face value what could be a 10-25% uplift on costs where part of the justification for this is some additional costs that Batelco will incur in meeting the stronger requirements in the reference offer. Our approach is that these costs should be investigated by the TRA before it can consider such a cost uplift.

On the final point of promoting fibre access roll-out, we are also conscious of this, but we are also aware that we are all waiting for the Government's NBN policy. It seems inconsistent for the TRA to be cool on the idea of passive access due to the potential policy, yet allow Batelco an uplift on Bitstream charges in anticipation of the policy. We suggest that on this issue the TRA disregards any uplift to take into account NBN roll-out incentives and then revisits the issue when the Government's policy is released.

³⁰ Article 9 of the EC Access Regulation (DIRECTIVE 2002/19/EC as amended by Directive 2009/140/EC)

27. Do you agree with the Authority's proposal to freeze the charges applicable to the ISI and CSI link services? Please explain and justify your position.

VIVA believes that the cost of interconnect links between Batelco and OLOs should be shared between both parties based on the traffic carried from each party on pro rata basis.

28. Do you have any comments in relation to the Authority's review of the other wholesale services (emergency call access, DQ assistance, inter-operator transit, and CPS services)? Please explain and justify your position.

Comment:

For emergency call access service, these charges should be aligned with fixed termination rate. For CPS call origination, these should be aligned with fixed termination (1.9 fils per min). Further, the fixed one-off charges for CPS of BD10K should be removed.

29. Do you have any comments in relation to the Authority's decision to review the duct access product as part of a separate proceeding? Please explain and justify your position.

Comment:

We do not see a strong case for reviewing the duct access product as part of a separate proceeding, but now that the TRA has begun the draft Order it should proceed to complete its work as soon as possible (particularly taking into account our submissions on duct access in section 10.4).

Nevertheless, the TRA should proceed quickly with the duct access product review as well. In sections 1.5 and 10, we have gone into some detail why duct access is such an important service for OLOs.

30. Do you have any other additional comments with regard Batelco's RO? Please explain and justify your position.

Comment:

30.1 WLC/WDC MRC charges

We note that Batelco uses different cost-stacks to calculate the MRC charges for WLA and WDC active products. While VIVA acknowledges that WLA and WDC networks might be built using different network components (Ethernet over MPLS vs. SDH/DWDM), VIVA disagrees with the TRA in considering, in the draft Order, two sets of MRC charges for the same speeds provided over WLA and WDC respectively.

The MRC charge differences, particularly for the 300 Mbps, 400 Mbps, 500 Mbps and 1 GB speeds are as follows:

- 300 Mbps speed WLA is 13% more than WDC
- 400 Mbps speed WLA is 16% more than WDC
- 500 Mbps speed WLA is 19% more than WDC
- 1 GB Mbps speed WLA is 25% more than WDC

VIVA believes that the MRC charges of Batelco's WLA active products should be reduced to align with similar speeds for WDC active products, considering that OLOs are requesting the active products based on available speeds rather than the type of network components deployed by Batelco.

Moreover, VIVA believes that the increase in the MRC charges for speeds higher than 1 GB is unjustified in the view that the hardware required to support higher speeds is minimal (i.e. only install additional card interface in the same network component used to deliver circuits with lower speeds). Hence, VIVA believes relevant MRCs charges should be adjusted based on forward-looking costing principle.

30.2 Uplift on WLA/WDC charges

We note that para 341 refers to an additional mark-up of 20% on the WLA and WDC charges. This appears to refer to an uplift on the cost adjustments made by the TRA earlier – and does not relate to Premium Support. In para 342, the TRA elaborates on additional costs that Batelco will incur in complying with the strengthened reference offer and that the 20% uplift is intended to cover these costs.

We accept that there may be justification for passing through some of these costs to OLOs. Proper cost allocation would require:

- the costs to be truly incremental costs of Batelco's upstream business unit (and not, for example, costs that benefit other parts of Batelco);
- The costs to be efficiently incurred; and
- Adjustments made to reflect any cost savings from replacement of legacy systems and processes.

We don't have an issue *per se* with a percentage mark-up. It may be a pragmatic way of dealing with additional costs incurred by Batelco without going through a full costing process. However, the difficulty that we have with a 20% mark-up is we don't know whether this would be consistent with such a proper cost allocation or whether it is a lavish over-inflation. We have already raised our concerns with the level of proposed WLA and WDC prices (see section 1.6) and so an additional 20% uplift appears very generous to Batelco. Hence, we recommend that the TRA investigate this matter further with a view to satisfying itself that 20% is a reasonable approximation of these costs.

30.3 Impact of forecasting

Under Batelco's current reference offer, OLOs are required to provide a rolling monthly 12-month forecast. The significance of this requirement is really felt in the service level regime. Under the reference offer, there will be no service credit if actual service requests are less than 70% of the OLO's forecast or greater than 130%³¹.

We ask the TRA to consider whether this tight reliance on a long term forecast is appropriate. Indeed, it is Batelco that has the best appreciation of likely uptake in demand overall for new connections. It has the largest retail presence and is the wholesale provider to all OLOs. It therefore has the largest dataset overall and, although it may not know what a particular OLOs demand is likely to be, it has the best view of the market as a whole.

³¹ Annex 3, SERVICE DESCRIPTION 2-16: WHOLESAL LOCAL ACCESS SERVICE (WLA)

From the OLOs point of view, it has far less visibility of the market as a whole, with substantial adverse consequences if its forecast is inaccurate. The service credits, which are required to ensure that Batelco meets the delivery service levels, will turn out to be no incentive whatsoever if the OLO is inaccurate in its forecasting.

We recommend either removing entirely the linkage between forecasting and payment of service credits or allow for a much greater tolerance.

30.4 Suspension rights

Batelco's current reference offer permits it to suspend service to an OLO for material breach. This is a heavy-handed and unjustifiable approach, giving Batelco far too much power over an OLO.

Allegations of material breach are easily made and where the consequences of suspension are so severe for the OLO, we believe that Batelco not be able to suspend for material breach unless it first obtains the prior consent of the TRA. This is not currently the case under clause 13 of the Supply Terms.

30.5 Exclusion of liability

The exclusions of liability for Batelco under the reference offer are extensive. For example, in clause 10.9, *"The Access Provider shall have no liability (including liability to credit any Service Rebate) for any failure to meet a Service Level where that failure has been caused or materially contributed to by: ... (a) any acts or omissions of the Access Seeker"*.

The same issue arises in clause 12.2: *"the Access Provider will not be responsible to the Access Seeker or any Access Seeker Customer for any failure or delay in provision of a Service where such failure or delay is caused by or contributed to by any action or inaction of the Access Seeker or of any Access Seeker Customer"*.

It is unclear what "acts or omissions" or "actions or inactions" means. Does it mean where the OLO is in breach or is negligent? If not, it is not clear what the OLO is supposed to have done, or not done, to avoid Batelco slipping out of its responsibilities. The exclusion should only apply to any acts or omissions where the Access Seeker is in breach or is negligent.