

Decision

COMMUNICATIONS REGULATORY AUTHORITY (CRA)

issued to

Ooredoo Q.S.C (Ooredoo)

in relation to

the request by Qatar National Broadband Network (QNBN) for access to the Qatar Data Centre (QDC)

7 May 2014

Purpose

This Decision sets out ictQATAR's ruling in response to the complaint lodged by QNBN against Ooredoo in regard to access to the Qatar Data Centre on 13 March 2014.

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Background

On March 13, 2014, QNBN filed a complaint against Ooredoo in relation to Ooredoo's refusal to grant QNBN access to the QDCs owned and operated by Ooredoo (**Complaint**).

The Complaint

In the Complaint, QNBN claims that Ooredoo had repeatedly denied QNBN's requests¹ to commence good faith negotiations for various co-location services and access arrangements at the QDC on terms relatively similar to those extended to Vodafone (Q.S.C.) under a facility hosting arrangement and on a similar basis as Ooredoo provides the service to itself.²

The requests by QNBN relates specifically to duct access to QDC-1, QDC-2 and QDC-3; Rack space (2) within each of the premises; Patching to Customers' racks within each of the premises; and access to the premises on a 24/7 basis (the **Request**).

As a result of Ooredoo's action, QNBN asserts that it has effectively been prevented from offering passive retail services to its Customers (who have opted to be located at QDC), therefore, rendering its Passive Fixed Telecommunications Networks and Services License completely redundant.

In view of the above, QNBN alleges that Ooredoo is in breach of:

- i. The obligation to negotiate in good faith under Annexure F of Ooredoo's Public Fixed Telecommunications and Services License (Fixed License);
- ii. Article 24 of the Telecommunications Law – as a dominant service provider, Ooredoo is required to meet all reasonable request for access whenever technically possible on a non discriminatory basis and on the same terms it offers itself;
- iii. Article 41 of the Telecommunications Law – which prohibits service providers from engaging in anti competitive conduct;
- iv. Article 43(1) of the Telecommunications Law – which prohibits a dominant service provider from failing to supply access within a reasonable period of time from a request by another service provider.
- v. Article 3.5 of Annexure I of its Fixed License – its failure to negotiate is considered a refusal to deal by a dominant service provider which tantamount to anti competitive conduct.

Relief Sought

QNBN has asked that the CRA issues interim and final Directions/Orders which compel Ooredoo to provide QNBN access to QDC in line with the Request outlined above.

¹ The requests were made on 14 March 2013, 25 February 2014 and 6 March 2014.

² The requests were made by QNBN in accordance with Articles 18 and 20 of the Telecommunications Law of 2006 (Telecommunications Law) and Annexure F of the Public Fixed Telecommunications Networks and Services (Fixed License)

The Process

The Complaint was lodged by QNBN in accordance with ictQATAR's Dispute Resolution Rules (DRR).

The deadline for resolution of the Complaint was initially set on 10 April 2014 after having to take into account Ooredoo's response to the Complaint and cross submission by QNBN (was due 27 March 2014 and 3 April 2014 respectively).

As part of the investigation process, Ooredoo was also required to provide CRA site access to QDC on 6 April 2014. Ooredoo failed to facilitate the site visit stating that they were unable to arrange for access where private facilities are located. In addition, Ooredoo pointed out that the services under consideration in this dispute are unregulated and therefore, beyond the authority of the CRA.³

As a result, the deadline for issuance of the decision was extended to 1 May 2014 to allow CRA to gather the required information independent of the planned site visit.

QNBN's request for the application of the fast track process for resolution of the Complaint was denied on the basis that the matter in dispute was referred to the CRA approximately a year after the dispute arose, therefore CRA was not satisfied that the dispute posed serious and immediate economic risk associated with the refusal to provide access to warrant the application of the fast track procedures.

Ooredoo Response

Ooredoo has rejected the allegations made by QNBN claiming that the Complaint has no legal merit and should therefore be dismissed on the following grounds:⁴

CRA Jurisdiction, Process and Conflict of Interest

Ooredoo claims that the CRA has no jurisdiction to adjudicate the Complaint under the regulatory framework given that the dispute relates to an unregulated service. Further, Ooredoo is of the view that the process adopted by CRA was flawed given that it was not provided an additional opportunity to submit on QNBN's counter reply and that an accelerated time frame for resolution of the dispute was adopted despite rejecting the application for a fast track process by QNBN.

In addition, Ooredoo argues that the CRA is unable to prescribe a fair and non discriminatory decision as a result of its inherent conflict of interest following its affiliation and continued defacto control of QNBN.

Ooredoo has not been declared dominant in relation to its QDC services

According to Ooredoo, the access and services requested by QNBN extends beyond the network boundary point at QDC which remain unregulated and as such, are irrelevant for purposes of this dispute. In this regard, there is nothing in the Market Designation and

³ See email from Munther Al-Borgan (Ooredoo) dated 20th April 2014.

⁴ See Ooredoo response to the Complaint dated 27th March 2014.

Dominance Designation Notice – ICTRA2011/10/31 (MDDD Notice) which deems Ooredoo dominant in a market for data centre services.

Ooredoo notes that the only part of QNBN's Request which relates to access to ducts leading up to the QDC as potentially relevant to this dispute. The access constitutes a physical network infrastructure for purposes of Market 10 in the MDDD Notice.

However, Ooredoo dismisses the point stating that the purpose for requiring such access relates to an unregulated service which it is under no obligation to provide under the regulatory framework. It claims that QNBN has been unwilling to acquire the unregulated services on commercial terms.

The services offered at QDC do not fall within the scope of the Ooredoo Fixed License

On a similar basis as above, Ooredoo argues that the QNBN Request falls outside the scope of its Fixed License. The services sought do not qualify as "Authorised Telecommunications Services" – specifically "data services" which are typically provided by Customers themselves using the infrastructure at QDC.

Towards this end, Ooredoo highlights that data centres such as QDC are not regulated services. Otherwise, MEZZA which is the alternative data centre provider in QATAR would have been subject to a telecommunications license to enable it to operate and manage the site.

Ooredoo also claims that QNBN's characterisation of the Request is misleading. The Request relates to patching and colocation services beyond the network boundary point (the patching services required are between QNBN's proposed rack in the telecommunications room and customer racks within the QDC facility) and not for purposes of accessing a public telecommunications network as would normally be the case.

According to Ooredoo, the services provided at QDC are primarily for the provision of space and ancillary services such as power, temperature control, physical security etc. In this regard, the hosting services provided to Vodafone Qatar have been commercially agreed.

As a final point, Ooredoo argues that the decision whether or not to provide unregulated services to a party lies within its discretion.

QNBN Counter Response

QDC as a "Telecommunications Facility"

In its counter response, QNBN submits that the use of QDC as a "facility", and the operation conducted therein is connected with the transmission of telecommunications services in line with the definition of "telecommunications facility" under the Telecommunications Law 2006.

Accordingly, QNBN argues that its access request to QDC clearly falls within the Wholesale Network Physical Infrastructure Market as defined under ICTRA 2011/10/31 - for which Ooredoo has been designated a Dominant Service Provider (DSP).

In view of the above, QNBN is of the view that Ooredoo is bound by Article 49 of the Executive By-Law for the Telecommunications Law 2009 (Executive By-Law) which among other things, requires a DSP to provide access on a non discriminatory basis and on substantially the same terms as it provides itself and its affiliates.

In addition, QNBN pointed out that Class Licensees have specifically requested that QNBN connect its passive fiber to their network equipment located at QDC. Therefore, by refusing access to QNBN, Ooredoo is preventing QNBN from meeting its current and future contractual obligations and effectively competing in providing passive services.

QNBN has a Right of Access to the QDC Facility

Aside from the above, QNBN argues that by refusing access to QDC, Ooredoo is in contravention of Article 20 of the Telecommunications Law which imposes an obligation on any service provider to enter into negotiations in good faith with a service provider requesting access for the purpose of reaching an agreement to provide access to telecommunications facilities in a reasonable manner in order to enable the service providers to provide their services to their customers. QNBN claims that this obligation is entirely independent of whether it has been found to be a DSP or not as all service providers are so obligated.

CRA Jurisdiction, Process and Conflict of Interest

QNBN highlights that there is nothing in the existing regulatory framework which limit the CRA's purview and jurisdiction in the narrow and singular manner suggested by Ooredoo. The existing regulatory framework is extremely broad and provides the CRA with an extensive purview of all matters related to the telecommunications market. QNBN referred to Articles 18, 19, 20, 24 and 25 as specific examples of CRA's powers which relate to access regulation.

In addition, QNBN is of the view that there should be no procedural requirement for Ooredoo to counter reply QNBN's counter response in the absence of new matters arising.

QNBN also dismisses Ooredoo's claim on the conflict of interest between CRA and QNBN as being repetitive (Ooredoo has raised this issue in relation to other prior matters) and superfluous in light of the CRA's establishment as an independent regulatory body.

Legal Framework

The following legal provisions provide a basis for this Final Decision, but not exhaustively:

Article 4(4) of the Telecommunications Law empowers ictQATAR to set and enforce the appropriate remedies to prevent service providers from engaging in anti-competitive practices;

Article 4(8) of the Telecommunications Law empowers ictQATAR to ensure the Law, Executive By-Law, regulations and decisions are complied with;

Article 11 of the Telecommunications Law permits ictQATAR to monitor the compliance of Licensees and execute any decisions to ensure compliance;

Article 19(4) of the Telecommunications Law requires ictQATAR to ensure that the interconnection and access agreement meets the requirements of the Telecommunications Law, Executive By-Law and any regulations, rules or orders applicable to interconnection and access;

Article 20 of the Telecommunications Law provides that any service provider must upon receiving a written request from another service provider in respect to interconnection and access, enter into negotiations in good faith with the service provider requesting such interconnection and access for the purpose of reaching an agreement on interconnection or

access to interconnect networks and/or to provide access to telecommunications facilities including central offices, other sites for equipment, emergency, towers, poles, telecommunications lines or and underground facilities, whenever necessary, in a reasonable manner in order to enable the service providers to provide their services to their customers.

Article 22 (1) of the Telecommunications Law provides that the following acts and practices shall constitute a breach of the obligation to negotiate in good faith regarding interconnection and access, hindering or hampering negotiations or failing to exert reasonable efforts to resolve outstanding disputes.

Article 41 of the Telecommunications Law provides that ictQATAR may determine whether the conduct of the service providers constitutes an abuse of dominance and where ictQATAR decides that certain conduct is as such, it shall take all the measures it deems appropriate;

Article 43 of the Telecommunications Law prohibits a dominant service provider from engaging in the prescribed activities or conduct that constitutes abuse of dominance;

Article 44 of the Telecommunications Law provides that dominant service providers shall offer equivalent terms and quality of service for all customers including tariffs, and the General Secretariat may permit differing terms if such terms are objectively justified based on differences in supply conditions including different costs, traffic volumes, or shortage of available facilities or resources. In addition, the dominant service provider must submit to the General Secretariat sufficient justifications regarding any discrimination and must cease the discrimination upon receipt of a notice in this regard from the General Secretariat;

Article 45 of the Telecommunications Law provides that no person shall engage or participate in any practices that prevent or substantially lessen competition in the telecommunications market;

Article 6 of the Executive By-Law for Telecommunications Law (Executive By-Law) enables the Secretary General of ictQATAR to take measures including decisions it deems appropriate for the implementation of the provisions of the Decree Law and Telecommunications Law 34 of 2006. Article 5 of the Telecommunications Law confers the same power, specifically in relation to regulating the telecommunications sector.

Analysis and Findings

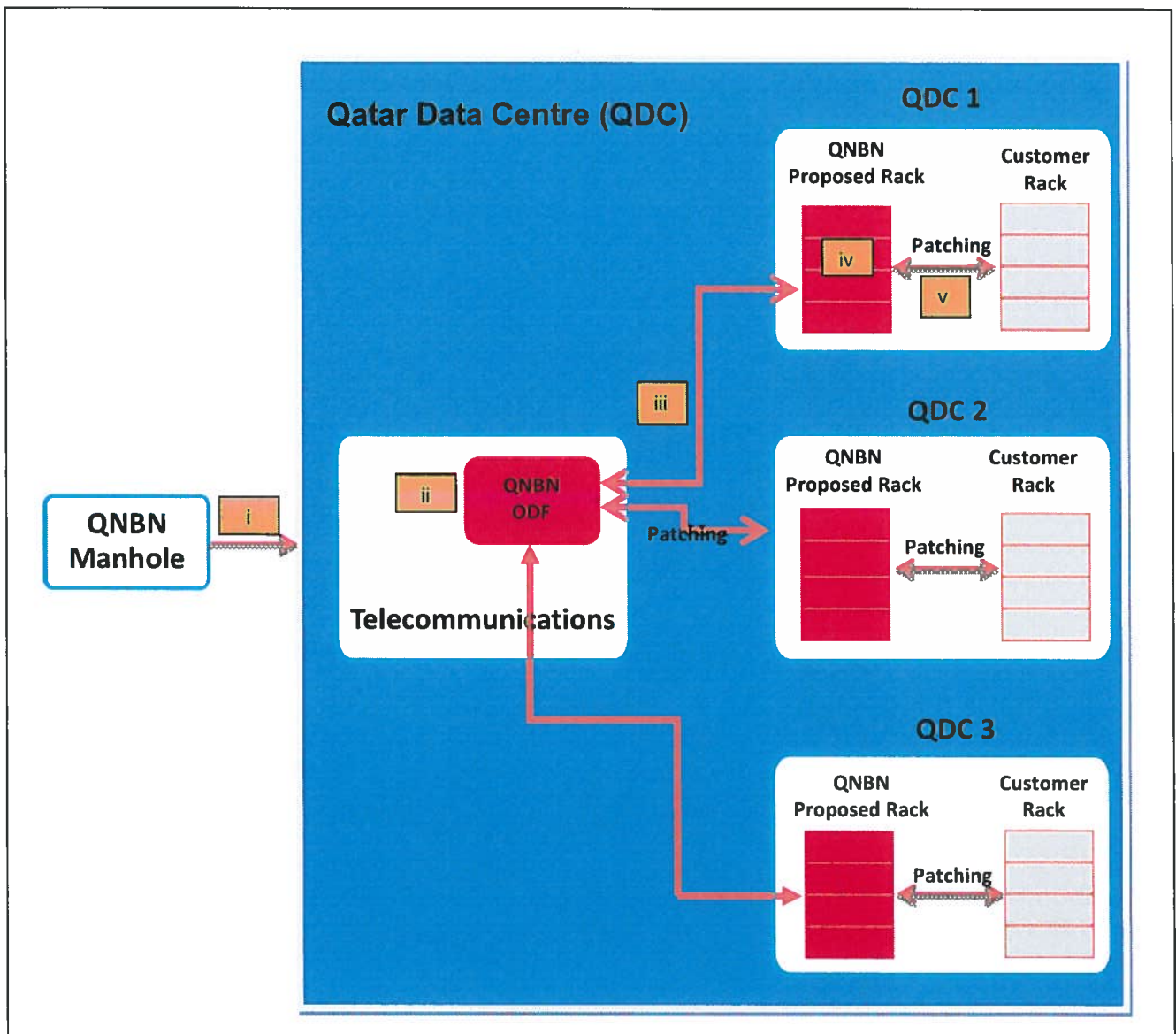
The scope of the Request covers:

- i. Duct access from the QNBN manhole outside the QDC Facility to the Telecommunications Room within the QDC Facility;
- ii. Access to the Telecommunications Room for placement of QNBN's Optical Distribution Frame (ODF);
- iii. Patching services from QNBN's ODF in the Telecommunications Rooms to QDC 1, QDC 2 and QDC 3 within the QDC facility;
- iv. Co-location services for placement of QNBN's racks in QDC1, QDC 2 and QDC 3;
- v. Patching services from QNBN's racks to its Customers' racks in QDC1, QDC 2 and QDC 3.

1. Commercial Negotiations

From the submissions, received, CRA is satisfied that QNBN's attempts to enter into commercial negotiations with Ooredoo to enter into an agreement for access to QDC have failed.

A schematic diagram of the access request within the QDC facility based on the scope outlined in the diagram below



2. Access to Ducts and Telecommunications Room (i and ii)

Ducts

In order to provide connectivity to its Customers within the QDC facility, QNBN requires duct access to deploy its fibre network from the manhole outside the QDC facility to the Telecommunications Room within the QDC facility. Accordingly:

CRA considers that duct access falls within the scope of Wholesale Physical Network Infrastructure Access market.

Ooredoo (then QTel) has been designated as a dominant service provider in the Wholesale Physical Network Infrastructure Access market on 31 October 2011. As a dominant service provider, Ooredoo is subject to special obligations to provide access, and use of specific network facilities within the designated market.

For Ooredoo to be in breach of the Applicable Regulatory Framework, CRA must satisfy that it has abused its position as a dominant service provider in the relevant market. The conduct against which this assessment is made relates to the refusal to supply duct access - a conduct prohibited under Article 43(1) of the Telecommunications Law. Ooredoo is the only provider of telecommunications duct infrastructure in almost all of Qatar. A refusal by Ooredoo to allow QNBN access to its duct infrastructure constitutes a barrier to entry as QNBN is unable to supply its services without such access and duplication would be impractical or unreasonable.

As a result, the refusal to supply is likely to impair competition in the fixed line market to the detriment of QNBN, and its Customers reliant on QNBN's network.

As a dominant service provider, Ooredoo is required to provide access on the same terms and quality it provides to itself, its affiliates and all other Service Providers. The refusal to supply QNBN access to its ducts is therefore discriminatory in nature and a clear violation of Article 24 of the Telecommunications Law.

Ooredoo's conduct is also captured under Article 20 of the Telecommunications Law which places an obligation on all Service Providers, not just DSPs to provide access to telecommunications facilities which include sites for equipment and underground facilities whenever reasonable to enable service Service Providers to provide their services to their customers.

In this regard, Ooredoo has failed to establish that QNBN's Request is unreasonable except to state that it is related to an unregulated service which it argues is outside the scope of the regulatory framework.

CRA rejects this justification. The QDC facility is in line with the definition of a "telecommunications facility"⁵ prescribed in the Telecommunications Law. The facility is being used for the transmission of telecommunications services.

While data centres are regulated via a Class License (Ooredoo was incorrect to claim that data centres are unregulated), the scope of that regulation is limited to cover the provision telecommunications services as part of the data center activity. Access to the facility by other

⁵ "Telecommunications Facility" – defined as any facility, apparatus or other used or capable of being used for transmitting telecommunications services or for any operation directly connected with the transmission of telecommunications services.

Service Providers is a separate consideration altogether which attracts the application of the obligation outlined under Article 20 above.

Telecommunications Room

On the same basis as above, CRA considers the Telecommunications Room within the QDC site a “telecommunications facility”. Accordingly access to the facility is a mandatory requirement.

In order to facilitate Customer choice, the regulatory framework enables Customers to have the right to access the Service Provider of their choice in all situations. The CRA notes that the nature of the Telecommunications Room placed within a building allows Service Provider’s to use another Service Provider’s existing facilities to access their Customers. In order to ensure that these principles are observed, the requires as a condition of providing service, that a Service Provider operating a facility must ensure that all other Service Providers are able to have access, under reasonable terms and conditions, to services provided at the facility. In this regard, the CRA considers that, in order to promote competitive entry and foster Customer choice, it was reasonable to mandate that Customers be permitted to connect the to the network of any other Service Provider where the Customer is situated.

This situation is analogous to the arrangements in relation to the Small-Office Home-Office (SOHO) and Residential Services - Internal Cabling Guidelines. The guidelines provide that the ability of all Service Provider to have access to the in-building wiring in an MDU was central to the implementation of its policy of Customer choice, and therefore found it appropriate that to require building owner's to make such the necessary facilities available on reasonable, non-discriminatory terms and conditions.

QNBN's Customers

A key consideration in this Decision is the fact that QNBN's Customers have opted to have their equipment located at the QDC site and have presumably entered into contractual agreement with Ooredoo to that effect. The Customers have also opted to have their services connected by the QNBN network which Ooredoo is likely to be aware of at the point of entering into such contracts with the Customers.

By not providing QNBN access to the QDC facility, QNBN's is unable to obtain an essential connection to its Customers' through an arrangement with Ooredoo to enable it to compete with Ooredoo in the fixed retail market. Accordingly, Ooredoo's denial of access to QNBN is likely to have the effect of foreclosing QNBN from competing in the fixed retail market.

3. Access from the Telecommunications Room to and within QDC1, 2 and 3 (including co-location space for placement of racks)

The principle outlined above in regard to access to the QDC facility would apply to the remaining aspects of the site – i.e. access to, colocation and patching services within QDC 1, 2 and 3. However, CRA is cognisant of the fact that access to QDC 1, 2 and 3 is a highly secure environment with various and multiple Customer equipment being housed therein; access may in such circumstances be restricted or prevented to avoid the occurrence unwanted incidences.

Taking the above into consideration coupled with the point that the provision of services by QNBN to its Customers at the QDC facility are telecommunications services, CRA is of the view

that Ooredoo is required to provide the necessary connectivity for QNBN (without necessarily allowing QNBN physical access) consistent with international standards such as the Telecommunications Infrastructure Standards for Data Centres – TIA-142

4. CRA Jurisdiction, Process and Conflict of Interest

CRA is of the view that the applicable regulatory framework applies to matters beyond the scope of regulated services as demonstrated in this Decision. To further illustrate, an earlier Decision on misleading advertisement is again not based on a regulated service, but a general aspect of telecommunications market.

CRA is also of the view that given the submissions received, no procedural requirement was warranted for Ooredoo to counter reply QNBN's counter response in the absence of new matters arising. Further, this matter was not raised by Ooredoo when the process and timelines were discussed and set on 20 March 2014.

Additionally, given CRA's establishment as an independent authority on 20 February 2014, we wish to put on record that there is no basis to the claim that its decisions have been or could be influenced by an association with QNBN.

Decision

Based on the findings that:

1. Commercial negotiations failed - Ooredoo had stalled commercial negotiations with QNBN to facilitate access to enable QNBN to connect to its Customers;
2. Duct access is within the scope of Wholesale Physical Network Infrastructure Access market for which Ooredoo has been designated dominant;
3. The QDC site which comprises (for purposes of this Decision), the Telecommunications Room, QDC1, QDC2, and QDC 3 are "telecommunications facilities"
4. The services which QNBN intends to provide is Customers at the QDC site are telecommunications services;
5. QNBN's Customers are unable to connect to QNBN's network at QDC;

CRA considers Ooreedo to:

1. to have abused its position as dominant service provider in the Wholesale Physical Network Infrastructure Market. This conduct is contrary to Article 41 of the Telecommunications Law which prohibits a dominant service provider from abusing its dominant position in a one or more telecommunications market. In the absence of any objective justification, Ooredoo's conduct is caught under Article 24 of the Telecommunications Law which relates to:
 - Failing to supply access facilities to other service providers within a reasonable period of time from their requests;

- Failing to supply access related facilities to other service providers on the same terms as it provides such services to itself;
 - Performing any actions that have the effect of substantially lessening competition in any telecommunications markets.
2. to have breached Article 20 and 22 (1) of the Telecommunications Law for failing to negotiate in good faith for access to telecommunications facilities, particularly by hindering or hampering negotiations or failing to exert reasonable efforts to resolve outstanding disputes;
 3. engaged in anti competitive conduct under Article 41 of the Telecommunications Law.

In view of all above, **CRA orders Ooredoo, with immediate effect** to provide QNBN:

- i. Duct access from the QNBN manhole outside the QDC Facility to the Telecommunications Room within the QDC Facility;
- ii. Access to the Telecommunications Room for placement of QNBN's Optical Distribution Frame (ODF) and Rack space;
- iii. Access from QNBN's equipment in the Telecommunications Room to QNBN's Customers Rack(s) in QDC 1, QDC 2 and QDC 3 hosting facilities.

Signed by:



Saleh Al Kuwari

Chairman of the Communications Regulatory Authority Management Committee

Dated: 8th May 2014