

# **The Jersey Competition Regulatory Authority**



## **Procedures under the Telecommunications (Jersey) Law 2002**

### **Response to Consultation and Draft Guideline**

**31 October 2008**

## *Introduction*

1. In April 2008 the JCRA published a consultation document concerning the procedures under Articles 7 and 11 of the Telecommunications (Jersey) Law 2002<sup>1</sup>. That consultation document asked four questions about the JCRA's procedures and invited views from interested parties.
2. The closing date for comments was Friday 6<sup>th</sup> June. Responses were received from three parties namely Jersey Telecom Limited, Cable & Wireless Jersey Limited and Newtel Limited. The JCRA is grateful to the respondents for their views, which have been carefully considered.

## *A draft Guideline on the JCRA's procedures*

3. As indicated in the April consultation, the aim was to produce a draft Guideline for further comment by interested parties. That draft Guideline is attached as Annex 1. It has been drafted in the light of the views expressed by the three respondents, which are included in Annex 2.
4. The JCRA invites comments on the attached draft Guideline.
5. The JCRA intends to publish its final Guideline, in light of any comments received during this consultation, by early 2009. The final Guideline may also reflect any recommendations, as appropriate, that may arise from the current review of the JCRA's powers and resources in telecommunications regulation.

## *Procedure and time-frame for responding*

6. Responses to this consultation should be made to the JCRA no later than **5pm on 5 December 2008**. Submissions may be supplied either in hard copy or electronically and should be sent to:

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<sup>1</sup> Consultation Document 2008-T1 *Procedures under the Telecommunications (Jersey) Law 2002*.

**The JCRA reserves the right to publish on its web-site any responses which it receives in relation to this consultation. Any confidential or commercially sensitive information which a stakeholder submits as part of its response should be clearly marked as such, and a non-confidential version of the response should also be submitted.**

## **Introduction**

1. This Guideline describes the Jersey Competition Regulatory Authority's ("JCRA") procedures with respect to the exercise of its regulatory functions as set out in Articles 7 and 11 of the Telecommunications (Jersey) Law 2002 ("the Law"). The Guideline is the product of a two-phase consultation exercise carried out in 2008 and is published in the interests of transparency, to assist those the JCRA regulates in the telecommunications sector. Whilst the JCRA will normally follow the procedures described in this document, it should be stressed that it is a *Guideline*. If appropriate circumstances merit it, the JCRA may depart from the Guideline. Where it does so it will give reasons why it has done so. Furthermore, the Guideline remains subject to amendment or revocation by the JCRA.

## **The JCRA's duties under Article 7 of the Law**

2. The JCRA has a *primary duty* under Article 7(1) of the Law. That primary duty is to perform its functions in such manner as it considers is best calculated to ensure that (so far as in its view is reasonably practicable) such telecommunications services are provided, both within Jersey and between Jersey and the rest of the world, as satisfy all current and prospective demands for them, wherever arising.
3. Thus, the primary duty is all about ensuring that demands for telecommunications services are satisfied.
4. Article 7(3) of the Law is relevant to the primary duty. That provision states that in considering whether telecommunications services satisfy current and prospective demands, the JCRA must have regard to a number of factors. Those factors include accessibility, affordability, innovation, quality and reliability and certain other matters.
5. Apart from the primary duty, there are a number of *secondary considerations* relevant to the functions of the JCRA. These are set out in Article 7(2). They

apply only to the extent that they are consistent with the primary duty described in Article 7(1). These secondary considerations require the JCRA to perform its functions in such manner as it considers is best calculated to:

- protect and further the short and long term interests of users by, whenever appropriate, promoting competition;
  - promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey;
  - further Jersey's economic interests;
  - impose the minimum of restrictions on telecommunications providers;
  - ensure that telecommunications providers have sufficient financial and other resources to conduct their activities; and
  - have regard to any special needs of persons who are disabled, have limited financial resources, or have particular needs.
6. In the light of that statutory background, the JCRA's procedures under Article 7 start with determining whether the proposed exercise of a function would be best calculated to ensure that demands for current and prospective telecommunications services in Jersey (and between Jersey and the rest of the world) are satisfied, as required by Article 7(1). This determination is informed by the considerations listed in Article 7(3), to the extent that these considerations are relevant to the exercise of the function as proposed.
7. Having considered the primary duty, the JCRA then considers whether the proposed exercise of the function is consistent with each of the factors listed in Article 7(2). In this regard:
- It is possible that one or more of the Article 7(2) considerations may not be relevant to the exercise of the function. In such a case the JCRA takes the view that the proposed exercise of the function would not be inconsistent with that consideration.

- It may be the case that the exercise of a particular function would be consistent with Article 7(1) (as informed by Article 7(3)), but inconsistent with one or more of the secondary considerations listed in Article 7(2). If this is the case, the Law requires the JCRA to proceed with the exercise of the function.
8. The level of detail of the JCRA's procedures under Article 7, as described above, will depend upon, and is proportionate to, the function which the JCRA proposes to exercise.
  9. The matters set out in Article 7 form the basis for the exercise of any function which the JCRA has under the Law. The JCRA cannot undertake a function in its capacity as telecommunications regulator which would be inconsistent with the Article 7(1) primary duty and the Article 7(2) secondary considerations.

### **The consultation process described in Article 11 of the Law**

10. Article 11 of the Law lays down the procedure which the JCRA must follow when it proposes to exercise a "specified regulatory function". The term "specified regulatory function" is defined in the Law. It covers a number of functions, including: granting or refusing a licence; giving, revoking or refusing a consent or making a determination under licence conditions; modifying or refusing to modify a licence; the giving or refusing to give a direction to comply with a licence condition; revoking a licence; and giving, revoking or refusing various approvals and determinations.
11. Article 11 is quite prescriptive in laying down the procedure to be followed with very little left to the discretion of the JCRA (except on certain aspects of timing). Article 11 essentially establishes a consultation process.
12. Article 11(1) of the Law requires the JCRA to publish an Initial Notice. This must contain certain information including:

- specifying the regulatory function which the JCRA proposes to exercise;
- the reason for this;
- the date when the proposed specified regulatory function will take effect;
- specifying where the document giving effect to the proposed exercise can be inspected;
- and specifying the time period within which written representations or objections may be made. Article 11(3) mandates a minimum period of 28 days within which representations or objections may be made.

13. Although Article 11(1) only requires the JCRA to specify a “reason” for the proposed exercise of the specified regulatory function, the JCRA will normally set out its reasons for the proposed exercise of the specified regulatory function under Article 7 of the Law, as set out above. As noted in Paragraph 8 above, the level of detail in the JCRA’s explanation of reasons shall correspond to the nature of the specified regulatory function under consideration.

14. If the JCRA does receive representations or objections then Article 11(4) requires it to consider those representations or objections and then give a Final Notice in relation to the proposed exercise of the specified regulatory function. The Final Notice must contain certain information including a summary of the representations and objections and details of the JCRA’s response to them as well as a statement of whether or not the JCRA intends to exercise the specified regulatory function.

15. As indicated, when representations or objections are received by the JCRA, Article 11 requires the JCRA to issue a Final Notice, regardless of whether or not, in light of the comments received, the JCRA still intends to proceed with the specified regulatory function as proposed in the Initial Notice. If the JCRA wishes to change its proposal as to the exercise of the function (other than the date when it is to take effect) it must issue a new Initial Notice. In this case, the JCRA shall issue both a Final Notice (closing the first consultation process) and a fresh Initial Notice (starting a new consultation process on the revised procedure).

16. As a general aid to interested parties, and in the interests of transparency, within a week of the close of the consultation period set out in an Initial Notice, the JCRA will publish a statement on its website stating: (1) the number of responses received, (2) the identity of the respondents, and (3) an estimated time-table of when the JCRA intends to publish a Final Notice concerning the matter. In addition to publishing this information on its website, the JCRA shall endeavour to email it individually to each respondent to the consultation.
17. If the subsequent time-frame for the JCRA to publish its Final Notice exceeds the initial estimate, the JCRA shall state, on its website, a revised time-frame, and inform each respondent to the consultation.
18. As part of its Final Notice, the JCRA will publish the full non-confidential texts of any representations or objections which it receives during the Article 11 consultation process. To facilitate this, respondents will be asked to provide a non-confidential version of their representations or objections and to signify their consent to the publication of that version. If no non-confidential version is supplied, the JCRA will review the confidential version, and propose to the respondent excision of any material which is, in the JCRA's view, confidential and may publish the excised version.
19. Furthermore, when the JCRA receives a request to exercise a specified regulatory function, it will publish notice of that fact on the JCRA website (subject only to issues of confidentiality). If it is subsequently decided to exercise the function in question, an Initial Notice will be published in the ordinary way. If it is decided not to exercise the specified regulatory function, notice of closure of the file will be published on the JCRA website.
20. Finally, the JCRA has considered whether, in addition to publishing notices and other documents in the Jersey Gazette and on the website, it would be appropriate to establish an "e-mail alert" service under which interested parties could sign up to receive an e-mail alert immediately something is published on the JCRA website. Based on the estimated costs of setting up such a system, we have decided to not do so now, although this will be kept under review.



## **Annex 2**

Herewith follows the submissions to the first consultation from:

Cable & Wireless Jersey Limited;  
Jersey Telecom Limited and  
Newtel Limited

**THE RESPONSE OF CABLE & WIRELESS JERSEY LIMITED TO JCRA  
CONSULTATION DOCUMENT 2008/T1:**

**JCRA Consultation on Procedures under the Telecommunications  
(Jersey) Law 2002 (the "Law")**

**1. Introduction**

Cable & Wireless Jersey (C&WJ) welcomes the opportunity to comment on the above consultation.

Although it is not stated to be so in the consultation paper, C&WJ understands that the primary reason for this consultation at this time is in response to the Jersey Telecom Notice of Appeal dated 6 September 2007 (as amended on 1 November 2007) (the "Appeal") against the decision of the JCRA, contained within a Final Notice dated 13 August 2007, to (inter alia) require the introduction of Mobile Number Portability ("MNP") in Jersey, to be implemented within 5 months of the decision taking effect and to mandate a third party centralised database solution. In the Appeal Jersey Telecom made various claims and ascertions in respect of the provisions of Article 7 of the Law and in particular as to how the JCRA exercised its powers under that Article in reaching the decision in relation to MNP.

At a meeting of the licensed operators in both Guernsey and Jersey, together with the JCRA and its counterpart the Office of Utility Regulation, in February 2008, agreement was reached for the simultaneous implementation of MNP in both Jersey and Guernsey by 1 December 2008. That agreement has since resulted in the JCRA proposing modified licence conditions, requiring the implementation of MNP by 1 December 2008, by way of an Initial Notice dated 14 March 2008, with those modified licence conditions taking effect on 15 April 2008.

The Appeal has now been withdrawn by agreement between the JCRA and JT, however it is essential that neither this consultation, nor the separate and subsequent 'Phase II' consultation, must in any way be allowed to delay, or give any cause for delay, in the implementation of MNP by 1 December 2008.

C&WJ also notes that the Minister for Economic Development, Senator Philip Ozouf, is reviewing and considering amendments to the Law, including a proposal of direct relevance to this consultation, "*To allow the JCRA discretion in secondary consultations. At present, if as a result of a consultation the Authority materially changes its proposals it is obliged to start the consultation process again. This we believe is costly in time, resource and good will. We are considering changing the obligatory nature of such a secondary consultation to a discretionary one. This will allow the JCRA to finish a consultation more expeditiously and will not prevent them from consulting further if they or others wish. This proposal will not affect the need for the JCRA to consult on new provisions which will remain in force.*" It is important that this consultation, together with the Phase II consultation is coordinated with and takes full account of the

outcome of the Minister's review to ensure that a coherent, useable and enforceable legislative framework and process is adopted. The JCRA should note however that we are concerned at the reference to "*..consulting further if [they] or others wish*" as we would not consider it appropriate if any respondent could delay a decision simply by requesting that there be further consultation. Rather any further consultation should only be required if there are objective factual reasons.

C&WJ notes that there is to be a 'Phase II' consultation and reserves the right to further address any matters referred to in this consultation and its responses and to raise any issues or make any responses not previously referred to in this response.

## **2. General Comments**

C&WJ believes that the key considerations for a regulator such as the JCRA, in a market such as Jersey, is to ensure a proportionate approach to the regulation of the telecommunications market whilst ensuring clarity and transparency. It is essential that competition is allowed to develop and be maintained and that there is a level playing field to allow consumers to choose on the grounds of quality of service and range of offerings, available from all operators, and not artificially and unfairly restricted by either lack of access or pricing.

Whilst not expressly referred to in either the Questions raised by the JCRA or the supporting commentary, we would comment specifically on Article 7 (3) (e) as follows:

- The JCRA should publish the requirements and obligations for the provision of a universal service, irrespective of whether or not the States prescribe by Regulation that provision (Article 7 (3) (e) (i)); and
- Whilst there may be occasion on which the States may consider it acceptable for there to be cross-subsidisation of any service or tariff (Article 7 (3) (e) (i) and (ii)) in a liberalised and competitive environment it is crucial that the operator enjoying a significant market presence or share is not allowed to unfairly prevent or restrict competition by cross-subsidisation. To ensure transparency and prevent there being any such possibility the JCRA should require JT to publish their regulated accounts. This would also provide greater confidence to industry that no illegal or unapproved cross-subsidisation is occurring.

C&WJ would also like to make the following comments in response to the questions specifically raised in the JCRA consultation:

### ***Q1 – Do respondents have comments on the JCRA's procedures under Article 7?***

C&WJ agrees with the JCRA's interpretation of the Law as currently drafted, in that it's (and the States) primary obligations arise under Article 7 (1) and the provisions of Article 7 (2) are secondary to the extent, if any, that such considerations are inconsistent with Article 7 (1).

It is crucial that regulatory decisions are taken, and directions made, in a timely and appropriate manner in such a way as to best serve the interests of competition and the marketplace.

As the JCRA is aware, regulatory delays prevent planning and the launch of new services, and the regulatory uncertainty created by long drawn out decision making processes deters investment, all of which benefits the incumbent and prevents consumers from enjoying the benefits of competition.

***Q2 – Should the JCRA publish responses received to consultations under Article 11?***

We consider that the current provisions of Article 11 (5) are sufficient and should continue to apply, subject to our comments on confidentiality below.

Transparency in the decision making process is essential if stakeholders are to understand and accept regulatory decisions.

An original consultation document issued by the JCRA should make it clear that any information considered by the respondent to be confidential must be submitted in a separate annex. If this is not practical then a redacted version can be provided. In neither circumstance would this be an unreasonable or unachievable submission by any respondent.

The JCRA should not be concerned about the limits on disclosure under Article 61 - the respondents are providing the information in the full knowledge that it will be published, and hence unless the response is all marked as confidential the respondent is giving their permission for publication.

We agree as proposed by Minister Ozouf that changing the obligatory nature of the secondary consultation would be appropriate to remove unnecessary delay and prevarication. Any amendment to the Law which speeds things up and prevents unnecessary delay, whilst allowing for appropriate consultation, and gives the JCRA greater flexibility, would be welcomed.

***Q3 – How should the JCRA publish notices of proposed regulatory functions to ensure the widest possible consultation?***

The publication of notices is an issue in both Jersey and Guernsey. We believe it is for the regulator in each Bailiwick to consider the wider

picture as it does not only concern the telecommunications industry. C&WJ has not identified a practical solution for consideration by the JCRA.

Having said that we are of the opinion that at a minimum the JCRA must publish these notices on the JCRA's website. This could be complemented with an email distribution list that alerts people when new issues are posted, which would then allow any interested party/citizen to receive direct notification of a matter in which they are or may be interested.

***Q4 – Are there any other measures the JCRA should consider to improve or contribute to the regulatory process under the Law?***

C&WJ has questioned before the interpretation of Article 11 (10) of the Law and whether this requires a fresh initial notice if, after consideration and review of responses, the JCRA is of the view that the proposed exercise of a regulatory function as set out in the initial notice should still be exercised, albeit on a different, normally later, date than that set out in the initial notice. In such circumstances we believe that Article 11 (10) can be interpreted and implemented in such a manner, but to avoid ambiguity or challenge this should be clarified. This would require only a final notice where the only change is a change of date provided that such date complies with the requirements of Article 11 (9) (a).

The initial notice should also specify a timetable within which the JCRA will consider all responses and then take the relevant and appropriate next step. This provision should be included in the current Article 11 (4) and will give all interested parties, whether they respond to an initial notice or not, a reasonable expectation of when the final notice/next step on the subject matter of the initial notice will be published and the next stage, if any, will commence.



## **Comments on Consultation Document 2008-T1**

**6<sup>th</sup> June 2008**

## 1 EXECUTIVE SUMMARY

- 1.1 Jersey Telecom welcomes the opportunity to respond to the JCRA's consultation document<sup>1</sup> and looks forward to working with the JCRA to reach a sensible procedural regime that strikes the right balance between ensuring consumers interests are protected and giving an appropriate platform for competition in telecoms to continue.
- 1.2 The correct interpretation of Article 7 of the Telecommunications (Jersey) Law 2002, is fundamental to the regulators and the industry's future growth. Jersey Telecom believes that Article 7 is clear in its provision that any regulatory decision to be made should essentially be "*best calculated*" to be in the best interests of the industry, consumers and the Jersey economy as a whole. The repeated use of this key phrase emphasises the intention of the States of Jersey in creating the Law, to ensure that regulatory decisions imposed are made in a structured, calculated and, overall, a proportional manner.
- 1.3 In order to accomplish this well balanced decision, some quantifiable means of judging the impact of any such decision is necessary. This is provided in the form of best practice in other jurisdictions, more specifically, Regulatory Impact Assessment's ("RIA"), incorporating among other considerations, a Cost Benefit Analysis ("CBA"). The carrying out of a RIA/CBA enables the regulator to establish a better understanding of the impact to the market that a decision will have on the stakeholders. It will allow them to evaluate the impact on the whole market as they are in the unique position of having all the relevant information from each of the stakeholders to hand.
- 1.4 Finally, stakeholders will be able to benefit from the transparent regulatory process and this will enable the market, and ultimately, consumers to benefit from proportional decisions being made.

## 2 INTRODUCTION AND BACKGROUND

- 2.1 On 1st May 2007 a Second Initial Notice concerning Mobile Number Portability ("MNP") was issued by the Jersey Competition Regulatory Authority ("JCRA") under Article 11(1) of the Telecommunications (Jersey) Law 2002 ("the Law"). This Second Initial Notice contained details of the JCRA's intention to modify, under Article 18 of the Law, the Licence granted to Jersey Telecom under Article 14 of the Law ("the Intended Modification"). The Intended Modification was to Condition 19 of the Licence, and provided that Jersey Telecom was required to provide MNP as early as reasonably practicable and in any event within 5 months of the coming into force of the modified Licence. The Intended Modification also mandated the use of a third party centralised database system in order to provide MNP.
- 2.2 Jersey Telecom made several detailed representations to the JCRA regarding the imposition of the Intended Modification, challenging the detail of the specified regulatory function (the "Direction") and detailing serious concerns about the process followed by the JCRA that led to the conclusions reached and the subsequent issuing of the Direction.
- 2.3 After several legal challenges to the manner in which the Intended Modification was issued, the content of the Direction and the process that was adopted which

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<sup>1</sup> Consultation document 2008-T1 Procedures under the Telecommunications (Jersey) Law 2002, 8 April 2008

culminated in the Direction being issued, Jersey Telecom and the JCRA agreed to review the contents of the Direction out of court and subsequently a workable conclusion was reached.

- 2.4 A pre-requisite to this conclusion being attained was the requirement that the JCRA issue a consultation to the industry considering Article 7 of the Law and how the JCRA's duties under this Article should be sufficiently discharged, whilst having regard to input from the industry.

### **3 JERSEY TELECOM'S GENERAL RESPONSES TO CONSULTATION PAPER**

3.1 The Telecommunications (Jersey) Law 2002 provides that:

*"7. Duties of Minister and Authority*

- (1) The Minister and the Authority shall each have a primary duty to perform his, her or its functions under this Law in such manner as each considers is best calculated to ensure that (so far as in his, her or its view is reasonably practicable) such telecommunication services are provided, both within Jersey and between Jersey and the rest of the world, as satisfy all current and prospective demands for them, wherever arising.*
- (2) In so far as it is consistent with paragraph (1) to do so, the Minister and the Authority shall each –*
- (a) perform his, her or its functions under this Law in such manner as each considers is best calculated to protect and further the short-term and long-term interests of users within Jersey of telecommunication services and apparatus, and perform them, wherever each considers it appropriate, by promoting competition among persons engaged in commercial activities connected with telecommunications in Jersey;*
- (b) perform his, her or its functions under this Law in such manner as each considers is best calculated to promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey;*
- (c) perform his, her or its functions under this Law in such manner as each considers is best calculated to further the economic interests of Jersey;*
- (d) perform his, her or its functions under this Law in such manner as each considers is best calculated to impose a minimum of restriction*



*on persons engaged in commercial activities connected with telecommunications in Jersey;*

- (e) in performing his, her or its functions under this Law, have regard to the need to ensure that persons engaged in commercial activities connected with telecommunications in Jersey have sufficient financial and other resources to conduct those activities; and*
- (f) in performing his, her or its functions under this Law, have regard to any special needs of persons who are disabled or have limited financial resources or have particular needs.”*

3.2 Jersey Telecom believes that Article 7 is clear in its provisions. It is undoubtedly a question of balance and a weighing up of all of the relevant information such as the market condition, the cost of investing, the cost of capital, the cost of the regulatory mechanism being considered, the required outcome, etc together with consideration of the benefits. These considerations will enable a calculated, reasonable and balanced viewpoint to be attained.

3.3 It could be said that Article 7 facilitates choice and competition. The repeated reference to “**best calculated**” in Article 7 shows that account must be taken of the extent to which it achieves choice and competition, against the costs involved. If the proposed service has only a relatively minor impact or provides a very small benefit in comparison with those costs, then imposing the service is not “**best calculated**” to achieve choice and competition. In addition, if the service proposed is only one means of achieving the Article 7(1) objective, then Article 7(2) applies to the choice of means.

3.4 It is Jersey Telecom’s further understanding that Article 7(1) requires the JCRA to consider the provision of new types of telecommunications services in Jersey if there is sufficient demand for them.

3.5 It does not, however, compel the introduction of any service simply because potential consumers have expressed a desire for such a service – this would not be “best calculated” in any respect. Rather, Article 7(2) clearly requires the JCRA to consider the costs and benefits of introducing any service that will be imposed upon the industry as a result of a regulatory determination.

3.6 Regulators are generally required in markets as a remedy to support market failure, or in the case of recently liberalised telecommunications markets, they are able to facilitate the adoption of a level playing field for new entrants, until such is created naturally through the development of competition in a market. Article 7 emphasises the importance of competition as a means to achieve the various objectives of the regulator, rather than competition being an overriding end in itself.

3.7 Turning to the specific’s of Article 7(2), it states that the JCRA must consider whether:

- 3.7.1 Any regulatory function is “**best calculated to protect and further the short-term and long-term interests of telecommunications users in**

**Jersey**". This clearly requires some form of calculation to have taken place prior to the issue of a specified regulatory function. Consideration as to how the decision will impact the market in the short and long-term must be performed. The industry already utilises RIA's for other matters, such as when a new Operator's Licence is being considered for issue. In such cases the applicant must show that they are a serious and sustainable Operator with a clear strategy for market entry. In doing so they must show what the impact of their entry is to the market and how their entry will affect others already present in that market. RIA's contain, as a fundamental part, a CBA which enables specific calculations to be made as to the costs versus the benefits of any decision, prior to it being implemented. In the case of RIA's, they are already extensively used in other jurisdictions and there should be no difficulty in applying a similar structure to address any Jersey market needs;

- 3.7.2 The competitive impact of a decision was appropriate. In attaining such a response the JCRA is required to consider whether the introduction of the service in question would be appropriate to promote competition. In order to reach this decision an evaluation of the costs and benefits and the impact to the marketplace would need to be carried out to determine the efficiency and proportionality of such a decision; such as is provided for in a RIA;

The specified regulatory function was "**best calculated to promote efficiency, economy, and effectiveness in commercial activities connected with telecommunications in Jersey**". Again, to ensure that this duty was discharged, some form of assessment of the costs, benefits and market status would need to be carried out in order to ensure that the impact of any Direction to the industry and ultimately, to consumers was fully considered. It is necessary to consider the alternatives to any proposed services and to weigh-up whether they are best placed to address consumer needs in a proportional manner. This is particularly important in a market the size of Jersey, where EU solutions that succeed well in a macrostate environment when applied in a microstate environment may not succeed.

- 3.7.3 The decision was "**best calculated to further the economic interests of Jersey**". This again raises the issue of the proportionality of the decision against the size of the marketplace. It is important that regulators in small states do not simply replicate regulation and competition policy designed for macrostate environments. Professor Michael Gal argued in the paper "Applying the EU Regulatory Framework in Microstates"<sup>2</sup> that:
- 3.7.4 "the effect of small size is similar to that of a magnifying glass: special market phenomena become more significant as extremes become the rule. This requires small economies to change the focus of their competition laws to regulate their markets efficiently"; and
- 3.7.5 The decision was "**best calculated to impose the minimum of restriction on persons engaged in commercial activities connected with telecommunications in Jersey**". As stated above, whilst competition is clearly important to the market, it should not be the end goal – it is a mechanism to achieve more effective and efficient organisations, thereby

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<sup>2</sup> "Applying the EU Regulatory Framework in Microstates: A report to the CYTA, EPT and Maltacom by Ovum and Indepen" June 2005

allowing consumers to benefit from lower pricing and a greater level of choice, it should not, however, be the end goal without any consideration of the aim that it is trying to achieve.

- 3.8 Where a significant regulatory decision is to be made, Jersey Telecom believes that a considered information gathering exercise must be undertaken in order to fully establish the impact of the introduction of the regulatory burden and also to ensure that all costs and benefits are considered. It further believes that consideration for the above-mentioned should be achieved at the same time as the consultations are being carried out by the JCRA and that any such process should be transparent, in a similar way to that conducted by the Office of Utility Regulation (“OUR”) in Guernsey or the Office of Communications (“Ofcom”) in the UK.
- 3.9 It is also Jersey Telecom’s belief, that a prudent regulator will wish to adopt best practice methodology in any such cases. It is inappropriate to assume that the introduction of a regulatory measure alone will ensure greater competition, particularly where the costs are significant and will inevitably filter through to the consumer at some stage.
- 3.10 Comments should be invited from the stakeholders at the earliest opportunity. A pre-determined viewpoint should be avoided as it is the comment of the stakeholders that should enable the regulator to achieve and adopt a balanced and transparent decision, having taken into account the commercial, technical and operational considerations from the industry.
- 3.11 Jersey Telecom has previously brought to the JCRA’s attention the fact that RIA’s are commonly used as a regulatory tool throughout the EU and UK. It has also drawn to the JCRA’s attention comments contained within Ofcom’s statement of 21<sup>st</sup> July 2005 in their paper *Better Policy Making*<sup>3</sup> which stated that:

“1.1 The decisions which OFCOM makes can impose significant costs on our stakeholders and it is important for us to think very carefully before adding to the burden of regulation. One of our key regulatory principles is that we have a bias against intervention. This means that a high hurdle must be overcome before we regulate. If intervention is justified, we aim to choose the least intrusive means of achieving our objectives, recognising the potential for regulation to reduce competition. These guidelines explain how Impact Assessments will be used to help us apply these principles in a transparent and justifiable way.

1.2 Impact Assessments form a key part of best practice policy making, which is reflected in our statutory duty to carry them out. They provide a way of considering different options for regulation and then selecting the best option. In selecting and analysing options, the need to further the interests of citizens and consumers is of paramount importance.

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**1.7 ... in carrying out Impact Assessments, we will be guided by the**

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<sup>3</sup> “better Policy Making, Ofcom’s Approach to Impact Assessment, 21 July 2005, [http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf)

***principle of proportionality. This means that a decision which is likely to have a wide-ranging impact and/or impose substantial costs on stakeholders will have a more comprehensive Impact Assessment than a decision which will have a less significant impact.[emphasis added]***

...

2.1 *An Impact Assessment is an essential part of considering different options for regulation, including alternatives to formal regulation, and then, using objective criteria, selecting the best option. Subject to the principle of proportionality, an Impact Assessment will generally:*

- *identify the impacts of each option on the interests of particular groups of stakeholders;*
- *identify any impacts which each option would have on competition;*
- ***identify and, where possible, quantify the costs and benefits flowing from the impacts which each option would have;****[emphasis added]*
- *assess the key risks associated with each option.*

...

2.4 *Impact Assessments should enable OFCOM and our stakeholders to see more clearly the costs and benefits associated with different policy options. They will therefore be able to comment on our proposals more easily and as a result, consultations should be more effective.”*

3.12 Jersey Telecom agrees with Ofcom’s view that: -

- impact assessments are a key part of best practice policy making and are an essential part of considering different options for regulation;
- a decision which is likely to have a wide-ranging impact and/or impose substantial costs on stakeholders (such as the Intended Modification) should have a more comprehensive impact assessment than a decision which will have a less significant impact;
- an impact assessment must identify the impacts of each option on the interests of particular groups of stakeholders and must identify and, where possible, quantify the costs and benefits flowing from the impacts which each option would have; and
- impact assessments should enable the regulator and stakeholders to

see more clearly the costs and benefits associated with different policy options, so that they are able to comment on the regulator's proposals more easily and as a result, consultations should be more effective.

- 3.13 It may be noted that the requirement on OFCOM to conduct impact assessments before taking important policy decisions is enshrined in section 7 of the Communications Act 2003 (which, by virtue of article 6 of the Communications (Jersey) Order 2003, extends to Jersey, with modifications to insert "Bailiwick of Jersey" in addition to "United Kingdom" wherever it appears). OFCOM therefore carry out impact assessments in relation to matters where they have regulatory functions in Jersey.
- 3.14 As for the EU, the Commission is committed to conducting impact assessments in relation to all its major initiatives; see its 2002 Communication on Impact Assessments COM (2002) 276 final.
- 3.15 The JCRA itself accepts the importance of impact assessments in relation to proposed grants of licences under the Law; see its document Competitive Impact Assessment, which requires the applicant and existing licensees to prepare a competitive impact statement in relation to any such proposal. It is wholly unclear why the JCRA believes that impact assessments are appropriate in relation to the grant of licences but not in relation to the modification of licences.
- 3.16 Moreover, in other regulatory contexts the States of Jersey has recognised that impact assessments are a required regulatory tool.
- 3.17 The duty to prove that such a measure will generate net benefits in terms of economic welfare rests properly on the JCRA, not least because in its capacity as regulator, it is in a unique position to obtain all the information required to make that assessment.
- 3.18 OFCOM's willingness to expose their detailed reasoning to public scrutiny, and willingness to consult the parties concerned on the costs and benefits of their proposal appears to sit in contrast with the current JCRA consultation regime. However, Jersey Telecom is hopeful that following this consultation a more transparent and robust process will be fashioned.

## 4 JERSEY TELECOM'S RESPONSES TO THE QUESTIONS POSED

### Q.1 Do respondents have comments on the JCRA's procedures under Article 7 ?

- 1.1 Jersey Telecom believes that the JCRA's procedures under Article 7 do not go far enough to ensure that they have adequately captured the impact of their regulatory decisions upon the marketplace. As specified above, Jersey Telecom believes that a RIA (containing a CBA) should be conducted where a decision which is likely to have a wide-ranging impact and/or impose substantial costs on stakeholders (such as the Intended Modification) should have a more comprehensive impact assessment than a decision which will have a less significant impact. The impact assessment must identify the impacts of each option on the interests of particular groups of stakeholders and must identify and, where possible, quantify the costs and benefits flowing from the impacts that each option would have. Finally it should enable the regulator and stakeholders to see more clearly the costs and benefits associated with different policy options, so that they are able to comment on the regulator's proposals more easily and as a result, consultations should be more effective.
- 1.2 The JCRA states in its consultation that whether the demand is reasonably practicable, is of primary concern. As Jersey Telecom has stated above, demand should be considered in proportion to the costs and impact to the marketplace and the industry. It is not sufficient to state that there is simply demand for a service and therefore the JCRA's obligations in terms of carrying out a RIA are discharged. Jersey Telecom draws the JCRA's attention to the statement issued by Ofcom, detailed in section 1.15 above. Furthermore, Jersey Telecom believes that the industry can work jointly with the JCRA in order to obtain the necessary information to easily carry out a CBA. The JCRA is in the unique position of being able to gather all the information together and then to draw a conclusion based on the facts, rather than what it assumes to be true.
- 1.3 This viewpoint is consistent with the JCRA's statement on page 4 of the Consultation document<sup>4</sup> which states that the JCRA must have regard to the considerations contained within Article 7(3) and these considerations should be read in conjunction with Article 7(1) "... *These factors include accessibility, **affordability**, innovation, quality and reliability...*"
- 1.4 The JCRA states on page 5 of the Consultation document, that its start point is to determine whether the exercise of the specified regulatory function would be best calculated to ensure the needs for current and perspective demand is met and that this determination is informed by the aforementioned considerations of Articles 7(1), 7(2) and 7(3). Jersey Telecom would wholeheartedly agree that in determining whether a specified regulatory function is issued, consideration should be given to the contents of these Articles in the form of a RIA (encompassing the CBA). The complexity of which is determined by the importance the industry places on the matter and the potential cost versus benefit of implementation. First and foremost should be the information gathering stage. The information gathering stage will enable a RIA/CBA to be completed quickly and a draft proposal can then be issued as a result (prior to which the JCRA should contact the relevant parties to discuss the points that have been raised in consultation responses in order that they have clearly understood any concerns/questions raised and verified any costings submitted. Most importantly, they should ensure that they have correctly interpreted each parties

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<sup>4</sup> Procedures under the Telecommunications (Jersey) Law 2002, Consultation Document 2008-T1, 8<sup>th</sup> April 2008

point, it is not sufficient or acceptable to simply disagree with a particular viewpoint from a party without first understanding on what basis that view has been attained).

- 1.5 In regard to Article 11 of the Law, whilst Jersey Telecom agrees the Law provides that the JCRA should state where the document giving effect to the proposed specified regulatory function is to be found, it suggests that the JCRA should make it standard practice that in terms of publication the said document should be posted onto the JCRA's website in its final form. It is out of step with the industry for hard copies to be made available at the JCRA's offices only and incomplete documents to be posted via the website. This is not helpful to the industry and is an inefficient use of resource if the only complete and true copy is to be found at the JCRA's offices.
- 1.6 Finally, the JCRA's consultation process should include a transparent roadmap that will ensure sufficient time is given for responses by all parties. All parties will then also be aware of when a further response will be delivered by the JCRA. Currently, the parties are given a varying length of time to respond to consultations and have no idea when a matter will be concluded by, if at all. A more preferable position would be a roadmap outlining the length of the consultation process together with a date upon which a draft response will be issued and a further time period to respond to such draft response (as is the case with the Office of Utility Regulation ("OUR") in Guernsey). This allows work to be scheduled more efficiently and matters to be concluded within a reasonable timeframe.

**Q.2 Should the JCRA publish responses received to consultations under Article 11?**

- 2.1 Jersey Telecom believes that the JCRA should request full and redacted versions of any responses, in order that responses can be published.

**Q.3 How should the JCRA publish notices of proposed regulatory functions to ensure the widest possible consultation?**

- 3.1 Jersey Telecom believes that whilst publication via the website is necessary for easy access by the industry, it may not be as appropriate for members of the public who may not check the website in the absence of a Gazette Notice.
- 3.2 Responses to the parties should be concise, but contain all the relevant facts in a non-biased manner.
- 3.3 Jersey Telecom believes that publication via the Gazette and website and provision of the information to each of the relevant parties is sufficient.

**Q.4 Are there other measures the JCRA should consider to improve or contribute to the regulatory process under the Law?**

- 4.1 A key consideration of the effective regulation of the telecommunications market should be transparency. It is not sufficient or acceptable to Jersey Telecom for decisions to be made in the absence of dialogue with the relevant parties prior to the issue of specified regulatory functions. Meaningful dialogue ensures that issues are addressed, considerations are deliberated and costs are proportional. Effective

dialogue should be the first step in any regulatory process. In the absence of dialogue costly legal challenges will follow.

- 4.2 As mentioned in Q1, a roadmap of timings should be provided when a Consultation is issued in order that all parties are able to schedule work efficiently. The OUR's process works well and could be used as a reference on this point.
- 4.3 In addition, matters should always be brought to a conclusion and all parties should be advised of the conclusion, whether this is in the form of a Final Notice, in the case of a specified regulatory function, or other means.





6<sup>th</sup> June 2008

Jersey Competition Regulatory Authority  
Telecommunications Case Officer  
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1-9 Union Street  
St Helier  
Jersey JE2 3RF

Attention Graeme Marett Esq

Dear Sirs

Re: Procedures under the Telecommunications (Jersey) Law 2002 – Consultation Document 2008-T1

We refer to the above Consultation Document, published on 8<sup>th</sup> April 2008. We are pleased to comment on the JCRA's proposal to produce guidelines for the procedures that the JCRA should follow under the Telecommunications (Jersey) Law 2003, with particular reference to Articles 7 and 11.

We acknowledge that the JCRA has "specified regulatory functions" which include the issuing of licences to providers of telecommunication services (under Article 14), modifying licence conditions (Article 18), issuing directions to comply with licence conditions (Article 19), and revoking licences (Article 20).

In this respect, whilst we believe it to be important for the JCRA to publish a guideline on procedures under Articles 7 and 11, we are equally concerned to understand how the JCRA can exercise its powers under Articles 18 to 20. In our view there are a number of pertinent questions that need to be addressed including the following:

- A. What is the core intent of the Law?
- B. What is the intended objective of licensing alternative operators?
- C. How can competitors be protected from the effects of licence breaches, including potentially anti-competitive behaviour, by Jersey Telecom ("JT"), the incumbent operator?

It is our understanding that the intent of the Telecommunications Law (Jersey) 2002 was to establish a base for competition to JT in the interests of both business and residential consumers in Jersey. Clearly, it was recognised at the time that without an effective regulatory framework communications companies in Jersey would not have the confidence to invest to meet the significant growth in demand for more capacity and the introduction of the new services required to maintain Jersey's competitiveness.

Against this background, we would like to make some comments on the competitive environment in Jersey to provide a framework for our answers to the questions posed in the consultation document.

As you will be aware, Newtel currently serves over 12,000 business, government and residential customers in the Channel Islands. We provide a range of hosting, private circuit, Internet, broadband, voice and cable television services. In some cases, these services are provided over Newtel's own network infrastructure but, in most cases, Newtel's provision of these services is dependent upon the company having fair access to JT's network via JT's wholesale products.

Consequently, JT's behaviour in the marketplace and its compliance with its Licence conditions under the regulatory framework is critical to Newtel's ability to compete effectively. This is why we believe it to be equally important for the JCRA to produce guidelines in relation to Articles 18-20 as well as Articles 7 and 11. We believe that it is difficult to consider Articles 7 and 11 in isolation.

We recognise that the current regulatory framework has been developed by adopting many of the common principles that have been applied in other jurisdictions. However, with the benefit of over five years of operation, we have to question whether the resulting framework is fully 'fit for purpose' for the Jersey market.

In terms of the JCRA's responsibilities under Article 7, and also the Minister's responsibilities, we recognise that there is a choice that has to be made between encouraging competition in the provision of network infrastructure, both on and off-Island, or to encourage competition in the provision of services. In this respect, whilst Newtel has invested in off-island infrastructure, the probability of Newtel or any other Licensed Operator duplicating JT's on-Island infrastructure is low. Therefore, the most likely competition model is one of active services competition. This emphasises the degree of dependence that Newtel and other competitors to JT will always have on JT's wholesale products.

In turn, this requires the JCRA to have the appropriate powers to require JT to provide wholesale services to competitors on fair, reasonable and non-discriminatory terms and to control the potential abuse of dominance by JT.

Under the current framework, JT's Licence requires it to treat competitors fairly and to offer services on non-discriminatory terms. If JT breaches any of its Licence conditions related to fair trading, the JCRA can direct JT to correct the breach. If JT does not correct the breach, the JCRA has the ultimate sanction of revoking of JT's licence but, in our view, this is a highly unlikely scenario. Therefore, the only route the JCRA has to address any concerns regarding anti-competitive behaviour is to apply competition law. This is not a step that smaller players can take without very careful consideration.

This suggests that there needs to be a step between Licence revocation as a penalty and the alternative of competition law proceedings. At a minimum, this

should involve a provision where the JCRA has the powers to require JT to desist from any potential or actual anti-competitive behaviour until proven otherwise.

We are unclear about the strength of the JCRA's enforcement powers and we believe that this should be an integral part of the current review. In summary, we believe that the current provisions under the Law, and the licensing regime, may require modification to ensure that they are sufficiently robust to enable the JCRA to effectively regulate and, particularly, to address current and potential abuses of dominance.

In relation to the specific questions in the consultation document, we would comment as follows:

1. Do respondents have comments on the JCRA's procedures under Article 7?

It would appear that Article 7 controls how the JCRA exercises its specific regulatory functions under the Law as it stands. However what is not clear, for example, is how the requirement of Article 7 (2) (c) aligns with how the economic interests of Jersey can benefit from effective competition. It is also not clear how the JCRA can exercise powers under this Act (such as under Articles 18 to 20) or under competition law to ensure that those benefits are achieved.

2. Should the JCRA publish responses received to consultations under Article 11?

In our view, the actual publication of responses to consultations is helpful to the participants and the public at large. However publication is not the most important issue although we accept that Article 11(5) of the Law requires, in a Final Notice, that the JCRA must summarise comments received and to provide its responses to them. In practical terms, to require both confidential and non-confidential versions of submissions is probably of little value. The important point is that the JCRA should receive responses in confidence and act accordingly in the interests of encouraging effective competition and to make clear in any Notice the basis for drawing its conclusions and proposing any regulatory action.

3. How should the JCRA publish notices of proposed regulatory functions to ensure the widest possible consultation?

We are not sure that the use of measures other than those currently used (i.e. publishing notices of its proposed regulatory functions in the Jersey Gazette and on its website, in addition to serving copies on parties involved) would add great value.

4. Are there other measures the JCRA should consider to improve or contribute to the regulatory process under the Law?

We support the stated JCRA core values of fairness, accountability, proportionality and efficiency. However, for various reasons, we are not sure that the JCRA is able to apply these core values consistently to the telecommunications market. As mentioned above, we believe that a review of the JCRA's enforcement powers is

required as part of the current review, particularly since the ultimate sanction of licence revocation is an unlikely prospect. Therefore, we see a need for procedures that will allow the JCRA to use its existing powers more effectively or, if this is not possible, for a revision of the Law that will increase its powers to take action against licence breaches.

We thank you for your consideration and we would be pleased to discuss any of our comments further.

Yours faithfully  
NEWTEL LIMITED

MALCOLM TAYLOR  
REGULATORY ADVISOR

MT/jk

cc Peter Funk – Newtel  
Nick Hutchinson - Newtel  
Jeremy Swetenham – Newtel  
Gary Whipp - Newtel