



Private Circuit Upgrade and Maintenance Charges

Breach of Licence

Final Notice of Decision and Direction to JT (Jersey) Limited

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A. Introduction

1. On 19 September 2011, the Jersey Competition Regulatory Competition Authority (**JCRA**) received a written complaint from Cable & Wireless Jersey Limited (**CWJ**) alleging that JT (Jersey) Limited (**JT**) had infringed Conditions 31, 33.1 and 34 of the licence issued to it by the JCRA (**Licence**) under the *Telecommunications (Jersey) Law 2002 (Law)*.
2. CWJ contended that JT had breached its Licence in two ways:
 - JT provided a quote on 30 August 2011 to an independent IT consultant (the **Consultant**) for the provision of an upgrade of a private circuit from a 2Mbit service to a 10Mbit service to a third party (the **Quote**) at no charge, contrary to JT's published tariffs at that time, being a tariff that other licensed operators (**OLOs**) had to factor in when submitting the Quote; and
 - JT levies charges on wholesale customers for the provision of certain maintenance/support services for private circuits, namely the Ultimate Care Plus Support (**UCPS**)¹ product for private circuits, but often supplies these services to retail customers at no charge.
3. Although JT did not win the contract that was the subject of the Quote,² CWJ was of the view that the alleged behavior was evidence that JT had showed undue preference to its own retail business, which had the potential effect of restricting competition and placing OLOs, quoting for the business, at a competitive disadvantage. CWJ also alleged that JT had failed to comply with Condition 33.1 of its Licence, by failing to publish details of an intended price change.
4. The complaint included copies of emails which indicated strongly that on or before 2 September 2011, JT had advised the Consultant that an upgrade path from 2Mbit to 10Mbit now existed for private circuits, where previously it had been unavailable, and that the connection charge would now be zero.
5. On 7 September 2011, JT published a notice under Condition 33.1 of its Licence, advising of an intention to change the price of private circuit upgrades with effect from 7 October 2011.
6. On 24 October 2011, the JCRA sent a notice to JT under Article 23(1) of the Law requiring JT to produce, among other things:
 - all correspondence (including electronic correspondence) between employees of JT relating to the removal of upgrade charges for existing 2Mbit circuits or the removal of charges for the Ultimate Care Plus Support product for private circuits;

¹ The highest level of maintenance/support services offered on 24 x 7 x 365 days a year basis, with JT's engineer response time within 2 hours and time to fix within 10 hours of fault being reported.

² The contract was won by one of the OLOs.

- JT's wholesale tariff/s for maintenance/support products for private circuit services and information that evidences that this tariff is applied to the retail division of JT; and
 - all quotes submitted by JT during the period between 1 January 2011 and the date of the notice for the provision of upgrades to existing 2Mbit private circuits, even if JT had been unsuccessful in winning the contract.
7. The JCRA considered the information provided by JT in response to the Article 23 notice, along with other material it believed relevant to its consideration of the matter. For the reasons set out in paragraphs 8-30 below, it provisionally concluded that JT had committed a breach of Conditions 31.1, 33.1 and 34.1 of the Licence as part of issuing the Quote. The JCRA also provisionally concluded that JT's supply of UCPS to retail customers at no charge constituted a breach of Condition 34.1 of the Licence. As such, on 21 September 2012, the JCRA issued an Initial Notice (*IN*) setting out the direction to JT in relation to its supply of UCPS at a retail level.
 8. This document constitutes the Final Notice of that decision and the direction under Article 11(4) of the Law.

B. Legal background

9. JT has been found by the JCRA to have significant market power (*SMP*) (i.e. to hold a dominant position) in the provision of On-Island Wholesale Leased Lines³ (i.e. private circuits), and OLOs are dependent upon JT for the provision of leased line products and services for resale, including their maintenance/support services.
10. As a result of having SMP in a number of markets in which it operates, including fixed lines and private circuits, JT has certain additional conditions in its Licence which do not apply to non-SMP operators.
11. Under Condition 31.1 of the Licence, JT must not exercise unfair discrimination against any OLO regarding the provision of any telecommunications services. JT is deemed to be in breach of this Condition if it favours any business carried on by it so as to place OLOs competing with that business at an unfair disadvantage in relation to any licensed activity.
12. Under Condition 33 of the Licence, the JCRA can regulate or make directions in respect of the prices charged by JT for certain telecommunication services. Under Condition 33.1 of the Licence, where JT intends, amongst other things, to introduce new prices for any telecommunications services, it is obliged to publish notice of this at least twenty one (21) days prior to the new prices coming into effect, and provide full details of the same to the JCRA. Under Condition 33.3 of the Licence, JT must ensure that all published prices, discount schemes and special offers introduced under Condition 33.1 of its Licence are transparent and non-discriminatory.
13. Under Condition 34.1 of the Licence, amongst other things, JT must not engage in any practice or enter into any arrangement that has the object or the likely effect of preventing, restricting or distorting competition in the provision of telecommunication services. Condition 34.1(c) allows the JCRA to issue a direction to JT *“for the purpose of preventing any market abuse or any practice or arrangement that has the object or effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of Licensed Telecommunication Systems or the provision of Telecommunication Services”*.
14. Condition 33.4 of the Licence, provides that, in the event that the JCRA, after consulting JT and such other persons as it may determine, is satisfied that any published price, discount scheme or special offer of JT is in breach of the Law or the Licence, the JCRA may, by issuing a direction, require JT to bring the relevant prices, discount schemes or special offers into conformity with the Law and/or the requirements of the Licence.

³ JCRA, *Response to the Consultation Paper 2009 – T3 “Review of the Telecommunication Market in Jersey” and Decision on the Holding of Significant Market Power in Various Telecommunications Markets*, 19 April 2010.

C. The complaint and the chronology of events

15. CWJ asked the JCRA to investigate its complaint that it had been placed at an unfair commercial disadvantage following what it alleged was a deliberate attempt by JT to secure business by reducing the price of a regulated service before the price change had been published and notified to the JCRA and OLOs. CWJ believed that the evidence provided to the JCRA demonstrated that JT failed to follow the process stipulated in its Licence for notifying price changes and that JT then attempted to cover this up when it realised its attempts to circumvent the process had been uncovered.
16. Prior to 2 September 2011, no direct upgrade path from a 2Mbit to a 10Mbit private circuit existed as part of JT's retail or wholesale product range. Any customer request for such an upgrade was treated by JT as a request for a new service, and was therefore subject to a one-off connection charge applied to new private circuits of £2,500 (JT's retail price) or £2,255 (JT's wholesale price, charged to OLOs).
17. On 30 August 2011, JT submitted the Quote to the Consultant, who was an IT consultant conducting procurement of a private circuit upgrade on behalf of a commercial client. In the Quote, JT's retail division stated that no upgrade charges would be applied should a retail customer wish to upgrade a 2Mbit private circuit service to a 10Mbit service. Further, the Quote offered the maintenance/support package UCPS to the Consultant's client at no charge, despite the fact that this was a product that OLOs are required to pay for if they wish to procure it at a wholesale level for sale to their customers.
18. The JCRA notes that the Consultant, when requesting quotes from three telecom providers⁴ to upgrade two 2Mbit private circuits to 10Mbit circuits, advised that "*it is anticipated that the supplier will be chosen largely on price.....It is anticipated that the circuits will be required for the end of September.*"⁵ This information and JT's actions in submitting a quote before the end of September 2011, with no upgrade charges or maintenance charges included, contrary to its published tariffs, strongly suggests that JT tried to create an unfair advantage for itself and then tried to manipulate the approved process for notifying price charges for regulated products.
19. On 2 September 2011, the Consultant emailed the other two telecom providers, Newtel Jersey Limited (*Newtel*) and CWJ (with the e-mail copied to JT), to ask them to revise their quote because "*I now understand from JT retail that such an upgrade is available and that the connection charge would be zero.*" On the same date, JT's Head of Carrier Relations, Mr. Peter Le Chevalier, emailed his counterpart at CWJ as follows: "*To confirm our conversation, with immediate effect there will be no charge for the upgrade of 2Mbit circuits...The LC33 will be issued in due course...*"⁶ The JCRA observes that it was not notified by JT of this incident, and only became aware of the incident later when contacted by the relevant OLOs.

⁴ Newtel Jersey Limited, CWJ and JT.

⁵ Email dated 22 August 2011.

⁶ The JCRA has seen both email chains, neither of which were provided by JT in response to the Article 23 notice.

20. Five days later, on 7 September 2011, JT notified the JCRA, by way of publication of a notice under Condition 33.1 of its Licence (***LC33 Notice***), of its intention to amend its on-island private circuit product range, by offering to allow both wholesale and retail customers who wished to upgrade to a 10Mbit, 100Mbit or 1000Mbit Fibre LAN Link to do so at no additional one-off connection charge. The LC33 Notice stated that the change would be effective from 7 October 2011.

D. Article 23 notice and JT's response

21. As noted in paragraph 6 above, the JCRA sought a response from JT to the CWJ complaint by way of a notice issued to JT under Article 23 of the Law. A response to the Article 23 notice was received from JT on 4 November 2011. The response stated that the emails that were submitted were "*extracted from the mailboxes of those individuals known to provide customers with quotations for 2Mbit private circuits and support services or who are responsible for placing orders on the system and maintain the private circuit portfolio [...] were extracted on the basis of a keyword search of [three search phrases were listed]*".
22. The JCRA observes that none of the email chains referenced in paragraph 15 above were provided by JT in response to the Article 23 notice, and neither were the internal emails that must have been generated as a result of JT deciding to issue a LC33 Notice. In addition, the JCRA notes that the mailboxes of the sales coordinator and the senior business relationship manager for the third party account, referred to in JT's response to the Article 23 notice, were either not searched and/or did not produce any emails under the three search headings that JT chose.
23. JT had also been asked for copies of all quotes submitted for an upgrade of a 2Mbit private circuit between 1 January 2011 and the date of the Article 23 notice (i.e. 24 October 2011). In relation to the Quote, JT admitted in its Article 23 response that an error was made by the account executive, who used a historic tariff that was listed in the tariff book and thus was "*available for her selection.....then used the pricing from the free upgrade in her quote to the customer*". JT also admitted that this error was brought to its attention by the customer. "*This error was alerted to us by [customer] on 2nd September 2011 who also advised the other wholesale private circuit resellers bidding for the [third party] business. As soon as the error was realised an email was sent on 2nd September 2011 to wholesale private circuit resellers advising them that we would provide upgrades...free of charge.*"
24. JT asked the JCRA to appreciate that the error occurred due to poor housekeeping of the retail tariff book and that "*this issue is being addressed internally*". JT's response to the Article 23 notice also stated that it recognised that as an organisation it "*had a requirement to enhance its billing platform, which includes the tariff book and maintenance of such.*" The submission also detailed that a project was underway to replace the JT billing system and that JT was "*confident that this will remove the likelihood of a reoccurrence of such an error going forward.*" JT stated that it took the relevant steps to mitigate the issue and "*provide the opportunity to [OLOs] to offer their customers an upgrade...*", once it was aware an error had been made.
25. As part of its response to the Article 23 notice, JT also provided two earlier quotes for private circuit products which indicate that JT does not always charge customers for supply of the UCPS service. By contrast, OLOs have told us that they must pay JT a separate wholesale fee if they wish to provide this product to their customers. We understand that JT does not deny that it has offered the UCPS service to retail customers for free, but charges for the service when supplied at a wholesale level to

OLOs. JT has claimed that the UCPS offers were made on a commercial basis, taking into account the worth of the business and duration of the contract term. However, in the JCRA's view, such practices, when performed by a dominant undertaking, can have the effect of distorting competition.

E. The JCRA's Findings

26. OLOs are almost entirely dependent on JT as the fixed-line incumbent provider in order to offer their customers fixed-line products (including private circuits). The JCRA notes that some OLOs may have the ability to offer certain fixed-line products (including private circuits) to their customers without being dependent on JT. However, at present, such ability to offer competitive products is very limited and does not obviate JT's ability to use its market power and to behave to an appreciable extent independently of competitors and customers in the relevant market for On-Island Wholesale Leased Lines. Accordingly, Licence breaches by JT, such as failing to notify changes in prices and products and/or exercising unfair discrimination against OLOs, greatly disadvantages the latter, who are both customers and competitors of JT.
27. The JCRA considers that, in order for competition to be effective, it is imperative that all retailers (i.e. OLOs and JT's retail business) should have access to the same wholesale products, services and prices, so that they are able to compete equitably and be in a position to offer the best deals to consumers.
28. A finding of a breach of JT's Licence does not require the JCRA to undertake an enquiry into the effect on competition or OLOs of JT's conduct; nor is it necessary that a finding of an infringement be dependent upon an outcome from which JT profited or benefited.
29. Without access to any internal JT emails in relation to the Quote and the subsequent actions taken by JT once the Consultant alerted it to the 'error', it is impossible for the JCRA to assess the motivation of JT in submitting the Quote before issuing a LC 33 notice, or the extent to which JT tried to cover up the Licence breach.
30. However, on the basis of JT's response to the Article 23 notice, in which it admitted the error, the Quote submitted by JT on 30 August 2011, and the emails attached to CWJ's complaint, and taking account of the fact that the LC33 Notice was notified to the JCRA on 7 September 2011, the JCRA is satisfied that:
 - a) JT, by its own admission, breached its Licence by submitting a quote on 30 August 2011 to the Consultant, offering unapproved pricing of a regulated service to a retail customer, in addition to offering a free maintenance/support package for private circuits, whilst at the same time JT wholesale was charging OLOs for the upgrade and maintenance/support services, thus placing the latter at a competitive disadvantage. In respect of maintenance/support services, OLOs cannot compete with JT unless they buy JT engineer time if there is a fault on a private circuit, due to JT's ownership of the fixed line. Therefore, they can never offer the maintenance/support services at zero charge, except if offering such a product at a loss.
 - b) JT showed a preference to its own retail business, and placed OLOs competing for the third party business at a competitive disadvantage, by advising JT's retail

division of the amended upgrade charges in advance of notifying the OLOs of this change.

- c) JT failed to provide the specified advanced notice to the JCRA and OLOs of the amended upgrade charge, as required under LC 33.

31. With regard to allegations by JT that certain offers of UCPS service at no charge had been made “*on a commercial basis taking into consideration the worth of the business and length of contract term*”, the JCRA notes that such tailored offers of maintenance/support services are:

- a) difficult to replicate by an OLO unless it has the possibility to offer the service independently of JT, a situation which in the JCRA’s view is likely to occur in very limited circumstances;
- b) likely to create a margin squeeze which may prevent fair competition for the provision of the UCPS service; and
- c) unfair and discriminatory, due to the fact that JT’s wholesale division has provided the relevant wholesale input to JT’s retail division on different, and thus more favourable, pricing terms compared to other OLOs.

F. Summary of representations

32. In the IN, the JCRA proposed the issuance of a direction that “JT must charge all new retail customers for UCPS and any other maintenance/support services relating to private circuits, at a cost no lower than the wholesale tariffs charged by JT to OLOs.”
33. The JCRA received submissions from three parties: Jersey Airtel Limited (*JAL*) CWJ and Newtel.
34. Newtel queried whether the term “new retail customers”, as it appears in paragraph 38 of the IN, was sufficiently well defined and was concerned it allowed JT to offer existing customers, who do not currently receive UCPS and any other maintenance/support services relating to private circuits, these services for free or at a cost lower than the wholesale tariffs charged by JT to OLOs.
35. CWJ questioned whether the term “new retail customer” would allow JT to waive the upgrade charge for existing JT customers, whose contract for UCPS and any other maintenance/support services relating to private circuits was about to expire; thus continuing to negate the ability of OLOs to compete for that business. CWJ proposed the insertion in the direction of the term “all new *and existing*⁷ retail customers”.
36. The JCRA notes the comments made by Newtel and CWJ, but is of the view that if it directed JT to start charging existing retail customers who currently receive UCPS and any other maintenance/support services relating to private circuits for free or at a cost lower than the wholesale tariffs charged to the OLOs, this would unfairly disadvantage those customers who have entered into contracts with JT in good faith and perversely would deliver a windfall to JT.
37. However, the JCRA accepts that the direction should be worded more explicitly so as to avoid any doubt about what it considers constitutes “a new retail customer”.
38. *JAL*’s submission and certain matters raised in other submissions considered matters that did not directly go to the substance of the IN, and so have not been addressed in any more detail in this Final Notice.

⁷ Emphasis added

G. Determination

39. For the reasons set out in the IN and the paragraphs above, the JCRA has decided to issue the following direction to JT under Conditions 33.4 and/or 34.1(c) of the Licence:

Where, on or after the date that this direction takes effect, JT (Jersey) Limited or any of its subsidiaries (*JT*) enters into a new contract, or exercises a right to, or agrees to, renew an existing contract for a further term, and that contract involves or includes the retail supply of the Ultimate Care Plus Support (*UCPS*) service and/or any other maintenance/support services relating to private circuits in Jersey, the price charged by JT for the supply of all such services must be of an amount equal to or greater than the wholesale price charged by JT to other licensed operators for the equivalent service/s.

40. This direction shall take effect on 24 December 2012.

23 November 2012

By Order of the JCRA Board