

TELECOMMUNICATIONS (JERSEY) LAW 2002

INTERACTIVE ONLINE LIMITED

FINAL NOTICE

CICRA 13/50

The Jersey Competition Regulatory Authority (**JCRA**), having received an application from Interactive Online Limited for a Class I telecommunications licence, issued an initial notice in respect of this application on 30 September 2013 (CICRA 13/42).

In that notice the JCRA expressed its opinion that the grant of this licence was appropriate and would be in accordance with the JCRA's statutory duties.

In the initial Notice, the JCRA invited representations from interested parties and such a representation was received from JT (Jersey) Limited (**JT**).

As a result of those representations, the JCRA has decided to issue a Final Notice closing the original Initial Notice and issue separately a new Initial Notice in regard to the Licence application (CICRA 13/51).

In its representation, JT raised a selection of issues under a range of headings. These are addressed below under the same sequence of headings used by JT. A copy of JT's letter is provided on CICRA's website: www.cicra.je.

A. Relevant Background

JT raises concerns that important background information was not included in the original Initial Notice, including the lack of a reference to a telecommunications licence previously held by the company, which expired on 2 January 2009, lack of reference to the company's ownership and shareholding, and lack of reference to previous changes in the company name. Nor does the application set out what telecommunications services it intends to provide or offer a brand identity.

While the JCRA notes that the original Initial Notice (CICRA 13/42) was in the standard format used on many occasions previously by the JCRA when issuing new telecommunications licences, the JCRA's view is that additional information about the background to the Licence application and the Licensee should be included to enable respondents to make an informed response to the Initial Notice.

It is accepted that it is relevant that the company has previously held a licence, and that it is part of a larger corporate group.

The JCRA recognises that setting out the extent of the telecommunications services that the applicant intends to supply can be helpful to respondents. However, the JCRA also recognises that some issues, such as the precise nature of the services which the applicant intends to provide, may be a matter of commercial sensitivity, and that disclosure, particularly to a potential competitor which holds a position of significant market power in the relevant market or connected markets, may seriously harm the commercial prospects of a potential licensee. The JCRA also notes that there is no obligation on existing licensees to disclose the nature of their business or areas of the market which they intend to enter in order to allow other parties to make representations as to whether or not such changes would be appropriate and within the constraints of their licence. It would seem to be an unreasonable barrier to entry to impose a stricter requirement to disclose information on a new business than on an existing one.

B. Initial Notice and Consultation Process

JT notes again the lack of reference in the IN to a previous licence or to the cessation of that licence.

Nothing has been set out by JCRA, Newtel or Interactive Online as to what has changed factually or legally since 2009 such that IOL now requires a licence and no public information as to what services IOL intends to provide or why the services cannot be provided through Newtel and its Class II licence.

JT goes on to comment that “it will be difficult, if not impossible for the public to provide any or any proper response to the Initial Notice. In our view the IN therefore needs to be revisited in order to provide a more complete set of information”.

As previously noted, the JCRA agrees that the previous licensing of IOL is relevant, but there is no requirement to set out the history behind decisions which have led the business to now decide to request a Telecoms Licence.

C. Transparency

JT highlights a lack of open source material available in relation to IOL and comments on corporate machinations in relation to changes of name and the “brand value” of the applicant.

The JCRA does not require applicants to provide open source material about their business in order to apply for a telecommunications licence, nor is it in a position to comment on corporate machinations. This and other issues behind corporate name changes are matters on which JT is entitled to speculate. The JCRA recognises that businesses change their plans and are entitled to change their corporate identity or branding as they wish, that there is no obligation on licensees to consult on such matters and it would be unreasonable to impose such an obligation.

D. Financial Resources

*From JT's perspective as largest supplier to Newtel Limited (**Newtel**), transparency is a key concern and one which will impact on JT's willingness to trade with it.*

JCRA is aware of recent issues JT has experienced in recovering outstanding debts.

JT would have expected clarity as to the controls (including capital and/or other requirements and financial controls...) which the JCRA intends to impose on IOL and/or its owner Newtel.

This is an issue for the commercial relationship between JT as supplier and Newtel as its customer. The JCRA understands that these issues have been resolved commercially to JT's satisfaction and that the two parties continue to trade.

In so far as the financial resources of the business are concerned, the JCRA does not impose specific financial controls on licensees with market dominance, except to the extent that (i) it regulates prices; or (ii) it requires commitments to deliver investment (as, for example, in the case of the roll out of mobile networks). The application from IOL is considered on its merits by the JCRA.

E. Consumer Rights and Competition

JT comments that transparency extends beyond issues of mere corporate identity and notes that terms and conditions applicable to Newtel and/or Y:Tel are not available on their website.

And that of greater concern is the impact that an increased number of licensed entities under common ownership would have on competition and regulation and goes on to list 4 questions.

Consumer rights and the provision of the correct information to customers are matters for existing licensees and their customers, rather than part of the licence application process.

It is up to individual businesses to determine the corporate structure which is most appropriate. There is no bar to holding more than one licence within a group structure and indeed Newtel would not be the first business to hold more than one Jersey telecommunications licence within its corporate structure.

In answer to the specific questions, the JCRA will ensure that any new licensed entities conform to the requirements of their licences in the same way as existing licence holders. As with existing service providers, the terms and conditions of any service should set out clearly which entity is contracted to provide the service. The JCRA does not at present test existing licensees to determine whether or not they remain a going concern, so it would seem unreasonable to impose this burden on a new entrant or new licensee. Compliance with licences will be treated in the same way for new entrants as for existing licensees.

F. Consistency

JT notes that Y-Tel operates through a brand and a visible retail presence but is not separately licensed. JT assumes that Y-Tel's operations are covered by Newtel's licence, but seeks confirmation that this is so.

JT goes on to highlight what it views as an inconsistency in approach.

The JCRA confirms that JT's assumption is correct, but is not relevant to IOL's licence application.

While JT believes that this is inconsistent, the JCRA reiterates its view that while a second licence may be granted, it is not required. If, for example, JT were to wish to separate its mobile from its fixed line business, then the JCRA would either allow the subsidiary businesses to operate under JT's existing licence, or (on application and approval) to operate under separate licences.

G. The Regulatory Requirements

JT states its view that the grant of a licence to IOL is unnecessary and could have significant and detrimental unintended consequences for the island, consumers and OLOs alike. Nothing in the IN addresses these issues or sets out how the JCRA is going to mitigate these risks.

Granting of multiple licenses to entities within the same group causes obfuscation and opacity which would limit JCRA's ability to control the licensee.

In JT's view "it is difficult to see any basis on which the grant of a licence to IOL would meet the criteria set out in articles 7(1) 7(2)(a) 7(2)(b) or 7(2)(d) of the 2002 Law or indeed any of them"

The JCRA understands and has considered JT's comments on the granting of multiple licenses to entities within the same group but has concluded that there is no bar to separate entities each having their own licence, and that the opportunity for additional competition and services to be offered to the market in innovative ways means that such licence arrangements should not be prevented.

H. Conclusion

JT goes on to conclude that to licence an entity in a factual vacuum is clearly inappropriate and detrimental to consumers, OLOs and the island and that it undermines the consultation process.

As set out above, the JCRA accepts a number of JT's comments, but rejects a number of others and intends to issue a new Initial Notice in respect of Interactive Online Limited's application for a class I telecommunications licence.

There is a limit to the amount of information which new entrants and new licensees in the telecoms market should be required to make available to competitors, particularly where one or more of those competitors hold SMP in one or more of the associated telecoms product markets. The JCRA does not believe that it is in the interests of consumers or the island to introduce additional barriers to market entry.

Nevertheless, there is some information which it would be helpful to provide to enable comment, such as the history of previous licence holding, revocation of licences or previous failure to comply with licence conditions.

The JCRA also recognises concerns that there needs to be an appropriate process for dealing with circumstances where a licensee cannot fulfil its obligations. However, this applies equally to existing licence holders as to new entrants, and to place a disproportionate burden on small businesses and new entrants would be unreasonable. As this is an industry-wide issue, the JCRA will give consideration to the means by which the financial failure of a licensee could be addressed as part of its proposed general review of licence conditions in 2014. The risks inherent in the supplier-to-purchaser wholesale arrangements highlighted by JT are commercial risks which are best managed through commercial agreement and market mechanisms than through scrutiny of initial licence applications.

It is also arguable that the consequences for the island and for consumers would be far greater in the case of a similar issue for an existing Class II or Class III licence holder with a substantial market position than for a new entrant yet to establish a sizable business.