



# Bitstream Access – Consultation on Licence Modification

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## Consultation Document

### Channel Islands Competition & Regulatory Authorities

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Jersey Competition Regulatory  
Authority 2nd Floor Salisbury House,  
1-9 Union Street,  
St Helier, Jersey, JE2  
3RF Tel: +44 (0)1534  
514990

Guernsey Competition and Regulatory  
Authority Suite 4, 1<sup>st</sup> Floor, Plaiderie Chambers  
La Plaiderie, St Peter Port  
Guernsey, GY1 1WG  
Tel: +44 (0)1481 711120  
Web: [www.cicra.gg](http://www.cicra.gg)

#### **1. Executive Summary / Introduction**

1.1 The telecommunications sector in the Channel Islands is regulated by the Channel Islands Competition and Regulatory Authority (CICRA), comprising the Jersey Competition Regulatory Authority (JCRA) and the Guernsey Competition and Regulatory Authority (GCRA)<sup>1</sup>. **CICRA has an overarching aim to ensure markets work well, protecting the competitive process, for consumers through its range of legal duties.**

The Jersey market is not competitive as the retail prices are the same for all OLOs, plus mines a percent or so, is used to determine the wholesale rates charged by the dominant operator which is JT. Besides pricing, the market is dependent on the dominant operator to determine what packages are commercial in Jersey, especially by what infrastructure JT builds. If BSA is approved, it will take many months if not years arguing what prices should be charged by JT for the BSA. If the past is anything to go by, JT will argue all the way in the courts. Meanwhile the user pays as the user has done since at least 2012 when the Regulator asked for comments on BSA.

True competition needs to be accomplished now and that involves far more than BSA.

1.2 CICRA looks to promote fair competition where this advances consumers interests. The telecoms markets are generally better at meeting consumer demands where competition is effective, and **CICRA has specific regulatory powers that place a duty on it to promote competition in this sector where consumers will benefit.**

While the telecommunications markets could be better at meeting consumer demand, this has not been the case for Jersey. The Jersey market has not kept pace with what users require and expect especially when compared to users globally. Since the Channel Islands market is not competitive and there no BSA the Regulator has no basis for BSA comparables.

**The Regulator has not cut costs wherever possible. The Regulator has not provided users with the same quality of coverage due to the method of frequency allocation and forced separation of networks.**

None of the OLOs including JT will now quote for non standard services. The Regulator has not explained how BSA will produce more and different offerings to the user.

1.3 In response to its duty to promote fair competition, in February 2016, CICRA issued a consultation (the **2016 Consultation**) seeking views on the potential benefit to consumers that the introduction of further fixed line access services might have. CICRA has considered the responses received in deciding on the next steps to be taken for each of the suggested services<sup>2</sup>.

The responses show that BSA has been discussed since 2012 as shown in the replies references. The market has moved on since then. The almost a years gap between BSA being considered for the second time is too slow for an industry which is expanding technically at an exponential rate.

1.4 One of services included in the 2016 Consultation was Bitstream Access (BSA). BSA is where a network provider allows access to high-speed (or internet { internet } ?) access service installed between the network provider and the end customers. This allows an Other Licenced Operator (**OLO**) to provide high-speed services to the end user as well as to introduce features that are not dictated by the network provider's own choice of retail product.

There is not a clear definition of BSA for Jersey in the Regulator's proposal. BSA should not just cover internet if that is the intent. It must cover all JT infrastructure and the other OLO infrastructures. The Regulator needs to confirm that the term BSA includes all present or future improvements to the Jersey **entire OLO and JT infrastructure and not just the JT infrastructure? If the other OLO infrastructures are included then the OLO licenses should also be altered In the same way as for JT.**

The Regulator has not confirmed whether BSA covers wireless to wireline, wireless to wireless or any combination there of? If wireless is included the Regulator must ensure that every island OLO tower is connected to fibre within a short period of time. Hot spot mobile data is an every day feature of every mobile telephone today and is a migration precursor of what will occur with 5G. The use of cloud services for distribution on Jersey should likewise be included in the "infrastructure". **There are unmentioned present and future parts of BSA which could be included depending on what is the next technology.**

While the undefined BSA may be a small step in the right direction, making the Jersey telecommunications market a little more competitive, cost effective and coverage equal for all users, the Regulator needs to go much further. Competitive markets require a totally competitive infrastructure for all the OLOs and this means that the infrastructure for all OLOs needs to be the same and shared. If any portion of a dominant operator's or OLOs network is not covered, then the proposal is much less effective

1.5 This consultation seeks views on the introduction of BSA; in particular, on an additional condition which CICRA is proposing should be introduced into JT (Jersey) Limited's (**JT**) Licence in respect of the provision of BSA.

The BSA proposal does not go far enough to provide proper competition. So long as there is one dominant infrastructure operator there will never be a truly competitive market. The dominant operator always has the commercial incentive to give preference to itself. The Regulator, as good as the Regulator may be, will never be able to monitor totally a dominant operator to provide a truly competitive market for users. Past performance is an excellent indicator what to expect from JT. This is similar to the BT / Openreach delay delay, etc.

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<sup>1</sup> All references in this document to CICRA should be read as references to each of the GCRA and the JCRA, unless the context otherwise requires.

<sup>2</sup> The consultation (CICRA 16/03), responses and a letter from CICRA to respondents (16/42) can be found in the telecoms publications section of the CICRA website.

1.6 This additional licence condition will require JT to provide network access upon reasonable request from an Other Licenced Operator (**OLO**). This network access shall be provided as soon as practicable and on fair and reasonable terms, conditions and charges, and on such terms, conditions and charges as the JCRA may from time to time direct.

As mentioned above the OLO licenses should included and also be altered.

Large business users, in order to promote and not restrict businesses and employment in Jersey, should be able to have the ability to act as an OLO at the same pricing as the JT OLO since this will make Jersey businesses more competitive and create employment.

There is no specific need for an intermediary OLO for a business. In order not to prejudice any OLO all the OLO infrastructures should be merged.

While there is an incumbent dominant operator providing the BSA, the market will never be truly competitive. A good example of this is the BT/OpenReach situation. The BT dominant operator is and was not providing the Regulator required services when and where they are and were required. If it did provide them, BT/Openreach did it artificially slowly to preserve BT's current commercial position and to have a head start in new services. For example if the dominant operator does not build out and improve their infrastructure meeting the needs of other OLOs, especially at other OLOs potential quality and speed, the dominant operator cannot be forced to provide these additional services to the OLOs or to further improve the network until the dominant operator is ready to do so. The dominant operator should not be allowed to slow down the implementation of market advances, especially if it is for the dominant operator's advantage.

The UK regulator has been trying for years to rectify the BT/Openreach similar situation in the UK without significant success. The UK regulator in the end came to the conclusion that the Regulator could not get BT to implement the changes necessary to create a competitive market and consequently, so it ordered BT/Openreach to be physically split.

**The Channel Islands Regulator, for the very same reasons, should hive off the JT infrastructure, to include the frequency allocations, to a separate company.** It should also order the OLOs to transfer their infrastructure and frequencies to the proposed infrastructure company to ensure the most competitive Channel Islands communications market.

The Regulator should, instead of using BSA to make the market more competitive, be looking at the separation of the JT and OLOs infrastructure into a separate Jersey government owned entity which will provide Jersey infrastructure to all OLOs including JT OLO on an equal basis and in such manner as to reduce costs to Jersey users and to provide a better service to all users equally. **BSA may be a small partial step forward** but it does not go far enough to lead to a truly competitive market at the lowest cost and equal service for all users.

1.7 No interest in BSA has been expressed in Guernsey to date, therefore CICRA's provisional view is that this new licence condition is only introduced in Jersey at this point in time, but CICRA is keen to hear the views on this issue as well.

BSA access for all Jersey OLOs to include JT, should mean that the Jersey operators should have access to all other Channel Island telecommunications markets. For example Sure is the dominant operator in Guernsey, so the other Jersey OLOs to include JT or Airtel etc. should have access to the BSA in Guernsey. BSA in one market is unfair (a one way street) if the same BSA does not apply in another joint market, especially when there are different dominant operators and some OLOs that are not dominant operators,

The JT submission could be as a result of JT not being able to compete profitably in Guernsey and or the Guernsey dominant operator wishing to maintain its competitive position.

BSA should really be between all the Channel Islands OLOs and users, especially between each island and their respective Tier 1 connections (i.e. Jersey on/off island BSA goes through Guernsey in some cases. The reverse may also be true

1.8 Respondents are asked to comment on:

- *Do you agree with CICRA's approach i.e. that it should support commercial negotiations between parties by way of the proposed licence condition in Annex B? If not please set out what alternative would you propose and why?.*

*The respondent does not agree with the Regulator's "cautious" approach as it still does not make Jersey and the rest of the Channel Islands a competitive market nor does it more importantly place Jersey in the best position to enable it to grow its GDP.*

**The best solution is to eliminate the need for the OLOs to negotiate with an OLO which is also a dominant operator in order to provide a more competitive market (see above).**

Part of the dominant company's (JT) business is selling telecommunications services to OLOs, and "other users". It receives an income for these services in addition to acting as an OLO itself. This means that JT has two income streams which are from the JT OLO and also JT infrastructure business. This is not competitive since the OLOs, which are not dominant operators, cannot derive the same level of income and profit as the dominant operator. This lack of two revenue streams lessens the OLOs competitiveness compared to the dominant operator. The statement in the JT / Airtel merger document states that AirTel cannot be competitive and make a profit with a dominant operator. **Does this not prove the point?**

The infrastructure of the Jersey Dominant company's business is to build an island fibre infrastructure replacing the copper cables to provide the OLOs a new infrastructure.

Jersey, for some inexplicable reason, allowed the three mobile networks to build and own sole use towers. This makes the overall tower infrastructure several times more expensive than it should be increasing the costs to the users. It also provides sub-optimal coverage and signal propagation and at a much greater cost. This is detrimental to all customers / users in terms of both cost and service. This is not an efficient way of achieving lower infrastructure cost. It means a more expensive network than is required. **This is contrary to the Regulator's legal remit.**

It is too easy for a dominant operator to load general OLO costs to the infrastructure costs thereby "increasing" wholesale BSA costs to the other OLO while decreasing JT's OLO costs. Even if the accounts were split into two sets of accounts (infrastructure and OLO accounts), it is not possible for any Regulator to ascertain the cost basis for the access charges. This may be a way of ascertaining BSA or other such prices, but it is not ideal or the best way of ascertaining infrastructure pricing.

To resolve some of the current competition problems, the Regulator is attempting to make the market more competitive by changing the dominant company's license through the control of the an undefined BSA while ignoring the fact that the other OLOs

have some infrastructure. The Regulator admits in this document that this is a “slow” approach to answer the problem the Regulator has noted. **The Regulator is not empowered by the legislation to take a “conservative slow approach”.**

The suggested BSA changes do not prevent the dominant operator from **not** building infrastructure required to meet the other OLOs requirements. It does not set the dominant operator depreciation and does not cap the return allowed on investment. The Regulator and the OLOs do not have access to the dominant operator’s accounts in detail. The JT accounts are not in the format needed for the Regulator to assess the infrastructure costs. The JT accounts are published redacted short form so no one other than JT can determine what is fair or not fair and certainly not the Regulator or the users.

It is suggested that the Regulator make JT an OLO like the other OLOs and order JT to hive off the infrastructure of the dominant company (JT) into a separate company 100% owned by the Jersey government. This would resolve most if not all existing competition problems as all OLOs, including JT OLO, would then be charged and treated the same. The Regulator's job would be greatly simplified. The Regulator would only have to deal with the infrastructure company, not the OLOs, whose detailed accounts can be made public (not redacted) and structured in a way that easily allows the regulator, the OLOs and the Users to “see” the infrastructure company's costs and charges if appropriate. Depreciation charges and rates of return could then easily be set by the Regulator. Costs would be reduced as one entity would be investing in infrastructure rather than three entities.

All OLOs, and perhaps the government and large businesses, should be able to connect to the new infrastructure company’s infrastructure on an equal basis. The OLOs could be charged on a simple unit connection basis plus a competitive use charge sufficient to maintain and improve the infrastructure. The connected unit fixed charges could be set in the beginning at the present landline rate and adjusted as required. The fixed charges and infrastructure use charges would depend on the cost of constantly updating and maintaining the system. There would also be an agreed rate of return set by the Regulator. **The new infrastructure company could be made to refund to the OLOs prorata excess profits – i.e. the infrastructure company would be an enabling company.**

**The Regulator is not presently making full use of cost reductions which the Regulator is required to make.** For example the dominant operator and the OLOs are building their own towers. This means several times the cost of only one tower being used by all in each area. This will become very important from an aesthetic standpoint when 5G arrives. Estimates for 5G towers is between four and nine times the number of present towers to cope with the increased data. The present system of each OLO having its own towers would mean up to 9 times 3 (27) more towers in each area for the 5G system as a whole. If the present towers were reduced to one instead of three plus, then the increase in towers could be as low as 4 times the one operator towers. It is not economic to operate as Jersey is presently doing with each OLO owning towers. Tower sharing is a partial cost reduction answer. It makes economic sense to order the OLOs to transfer all of their Jersey towers to the one independent infrastructure company. **THIS MEETS THE REQUIREMENT THAT THE REGULATOR MUST REGULATE TO REDUCE COSTS.**

Another example of the benefits of a separate infrastructure company is the use of frequencies. **Since each OLO has approximately 25% of the Jersey frequencies, each user will not get the same reception in all areas.** The user may be with an OLO that does not have the best “golden” frequency for a specific area of Jersey (not good reception) while another OLO does have the best frequency. There is also the 25% of frequencies which are not used because they are being held for any new market entrants. The present structure prevents the optimal use of the allocated frequencies.

The Regulator should order the OLOs and JT to transfer all frequencies to the new infrastructure company. This would allow all users handsets and connections to utilize the best frequency in every area to communicate with the applicable tower and cost savings will be made. The 25% unused frequencies would not have to be held for future use, as they can be used by all OLOs. Under the present system there has to be “spacing” between frequency allocations which are larger than they need to be since there are three/four companies controlling the frequencies. One company controlling the frequencies will inevitably do a better job of using the frequencies applicable to each tower. **The gain for the OLOs and Users would be a significant improvement both of coverage and capacity. With fibre connected towers, all users would have equal reception and transmission speeds. The Regulator must ensure that all towers are fibre connected and microwave is phased out (not as fast or as resilient as fibre).**

*At present the Dominant Operator through the Jersey Government is funding all the installation costs “up front”. With a separate infrastructure company all the OLOs would be funding the infrastructure proportionately to their users. It is suggested connection and use charges would allow the infrastructure company to pay for the Jersey infrastructure capital costs instead of the solely by the Dominant Operator/ Jersey Government as is the present case. The infrastructure company could borrow some or all of what is required to finance the maintenance and improvement of the infrastructure. This is an important consideration for the Jersey government. The Jersey Government is presently reducing its costs so there is less money for infrastructure investment which in turn is delaying the essential infrastructure installation Latest announcement 2019). The Jersey Government would need a dividend on its investment. Ultimately the Jersey Government should be repaid its current investment (@£80+ m as of end 2014 and growing by now to over £125,000) which has come from the M&I fund and Jersey government and JT itself. If a new infrastructure company were independent, it could be self financing. Over a short period (say under 5 to 10 years) the Jersey government could be repaid the funds it invested - the M&I account borrowings, Preference shares, and its dividend.*

**A separate infrastructure company would then allow the new JT OLO to be floated on the stock market or perhaps sold to a new OLO entrant.** *This would return money to the Jersey Government and at the same time provide true competition. **The Jersey government could recoup early than the 5 to 10 years some or all of its investment at this point.***

*The new self financing infrastructure company would be owned solely by the Jersey Government giving it control of Jersey Telecommunications without being involved in the OLO services. This would get the Jersey government out of the telecommunications business into only an infrastructure company. It would be possible to “float” a minority interest (keep control of the Jersey destiny) without losing control of the infrastructure company. Alternatively the infrastructure company itself could borrow. Splitting JT into OLO and infrastructure company, would remove the Jersey Government from the Telecommunications business partially while creating a totally competitive OLO market.*

*The on/off island connections should also be transferred to the new infrastructure company as this would further reduce future costs since it would be dealing with the*

*entire infrastructure to an off Jersey Tier 1 operator (larger data demand leads to reduced overall prices). It may be possible for the new infrastructure company to itself become a Tier 1 operator further reducing costs. This would make Jersey just as competitive as other financial centres such as Switzerland's Tier 1 financial centre in Zurich and other such Tier 1 operators giving Jersey the basis of growing its existing online financial and other businesses as well as attracting new industries increasing its taxable GDP.*

*The long term aim of Jersey, and the rest of the Channel Islands, should be creative and consumption oriented rather than just consumption only oriented. This would require the up speeds to be the same or closer to the download speeds (different packages. Some current business is being "missed" such as cloud photograph storage, backup services and gaming. The present OLO offerings do not cater to these newer services. Such services are growing rapidly and should be pursued. This cannot be accomplished if the investment funds are not available.*

*The new 5G will require financing and it will require new structures to provide the finance. Sure's Graham Hughes stated (JP 23 November) "How the network is built , who pays for it and who owns it is a unique challenge." New technology for small islands will need a rethink of how to get value for money (smart thinking). The Channel Islands could be a test area for the new technology – this could reduce costs if the Channel Islands is used as a test area.*

*If Guernsey does not wish to participate, this would not be a reason for Jersey not going ahead with a telecommunications infrastructure company separate from Jersey OLOs.*

- *Do you agree that there is no requirement to introduce the same condition for the incumbent operator in Guernsey at this time? If you disagree, please set out the reasoning behind your response. If appropriate this could usefully include an evidence based submission on the potential demand for BSA in Guernsey.*

*The reason for applying a similar solution to Guernsey etc is that the communications systems on and off both islands are the same for Guernsey as well as Jersey. Some of the Jersey access to a Tier 1 operator is through the Guernsey infrastructure. Users in both islands will benefit by all the proposed changes. OLOs and users in the Channel*

*Islands would be treated equally. There are also economies of scale if done on a pan Channel Island basis.*

*One seems to be forgetting the user is the primary payer and user of these services . The user should be helped to gain an up to date communications system at the most competitive cost as soon as is possible. It is not the OLOs which should solely be the reason for changes nor should the OLO requirements dictate to users. Users in both islands would benefit if accomplished together.*

## **2. Structure and Timetable for Consultation**

2.1 This consultation is structured as follows:

Section 3: Legal Background and Regulatory Framework

Section 4: Bitstream Access

Section 5: Proposed New Licence Condition

Section 6: Next Steps

Annex A: Consideration under Article 7 of the Telecommunications (Jersey) Law

2002 Annex B: Proposed Licence Condition

2.2 Responses to this consultation should be submitted in writing and should be received by CICRA before 5 pm on 07 December 2016. Submissions can be sent by email to [info@cicra.je](mailto:info@cicra.je).

2.3 In accordance with CICRA's policy, non-confidential responses to the consultation will be made available on CICRA's website ([www.cicra.je](http://www.cicra.je)). Any material that is confidential should be put in a separate annex and clearly marked as such.

## **3. Legal Background and Regulatory Framework**

3.1 The Telecommunications (Jersey) Law 2002 (the **Jersey Law**) prohibits a person from operating a telecommunications system in Jersey unless that person has a telecommunications licence. The body authorised to grant telecommunications licences in Jersey is the JCRA. Such conditions may be included in a telecommunications licence as the JCRA considers necessary and desirable.

The Jersey Telecommunications Law 2002 only applies to Jersey allocated frequencies. The law does not and cannot regulate worldwide unallocated free frequencies as these are available to any OLOs anywhere in the world. It cannot regulate Satellites either. There will shortly be a new technology which will utilize geostationary low altitude balloons (latency much reduced). This is similar to the floating radio stations which operated off shore to the UK. The UK could not regulate these sea based radio stations. Jersey cannot regulate other than its own frequencies on land only. A Jersey example is the fact that French OLOs signal is received in the north of Jersey.

3.2 The Law requires the JCRA to carry out its functions in a certain manner. The duties prescribed are considered in more detail in Annex A.

3.3 The JCRA has granted the incumbent operator in Jersey, JT, a telecommunications licence with specific conditions applicable to licensees deemed to hold a position of significant market power in certain markets. Article 18 of the Jersey Law provides that the JCRA may modify any condition contained in a licence. The power to modify a licence including the power to insert a new condition, as well as amending or deleting an existing condition.

3.4 Article 16(4) provides that Conditions contained in a licence may relate to, or impose requirements about –

- Competition in relation to telecommunications services, telecommunications systems, apparatus and telecommunications equipment (16(4)(a));
- Providing telecommunications services for or on behalf of other providers of telecommunications services, whether the latter run telecommunications services or not (16(4)(e));

This should allow companies/businesses to act as their own OLO which would act as a magnet for new business in Jersey.

- Co-location and sharing of, and access to, facilities, telecommunications systems, apparatus and telecommunications services (16(4)(f)).

As mentioned above simple things like one tower used by all OLOs instead of three will reduce costs and all OLOs using the entire frequency spectrum etc. would improve all user connections. This has not been implemented.

When 5G is implemented it is estimated will require 4 to 9 times additional tower for each present tower. The need to combine services electronically on towers will have to be made before implementing 5G.

## 4. Bitstream Access

4.1 JT currently controls and maintains the fixed network which supports broadband and landline voice provision and (JT also controls the fibre to and from wireless) as a result OLOs can only supply services offered wholesale by JT.

The regulator should change the JT license whereby JT can only operate OLO services as is the case for the other OLO providers (the other OLO licenses will also need to be altered). The regulator should then issue an infrastructure license to a new company which would provide all Jersey infrastructure services. JT and the other operators would then be required to transfer their on/off island infrastructure and frequencies to the new infrastructure company in return for the infrastructure company providing the necessary services to the OLOs who would pay the new infrastructure company for each connection and an appropriate use fee for infrastructure maintenance and upgrading.

4.2 BSA is a form of wholesale network access in that a network provider allows access to high-speed (voice should be added or internet) access service installed between the network provider and the end customers. This allows an OLO to provide alternative high-speed services to the end user as well as introduce features that are not dictated by the network provider's own choice of retail product.

While this is true for fibre systems, the 4g wireless systems operated by the OLOs also provides mobile broadband services but may use JT for delivery from the towers to the OLOs infrastructure. It is beneficial to the user to have fibre connected to towers to ensure the optimum capacity and resilience and ongoing costs will be reduced. There are many other services other than internet and provision should be made for these and future developments.

4.3 A form of BSA could be introduced in a portfolio alongside existing services such as Wholesale Broadband Access and Wholesale Line Rental which would allow OLOs to have a choice of taking a service from a network provider through any of these services.

The JT/Airtel merger documents signed by JT, the dominant operator clearly state that Airtel cannot make a profit under the present circumstances so the introduction of the BSA will mean that the Regulator will have to have access to the JT accounts and in reality the Regulator will not have the means to decide what is the proper charge for BSA access. The Regulator will need to order JT to categorise their accounts and even if JT does this, there will be arguments and or resorting to the courts about costings. A new infrastructure company bypasses this problem and gives the Regulator better control of the cost of the BSA services provided.

4.4 The 2016 Consultation asking for the views of respondents on the implementation of BSA in Jersey and, in particular, a) what benefit there would be to consumers, b) estimated take-up, and c) types of services that would be enabled.

The Regulator should allow any user to ask for a service not provided by JT or the OLOs and the Regulator should have the power to instruct the dominant and license holder provide the service in a timely manner. The users need to be informed of how to request services not offered and a copy of all requests should be sent to the Regulator, at least in the initial 5 years to ensure the requested services are provided in a timely manner and reasonable cost. This means that the Regulator requires and needs to make provision for a real time dashboard of request status.

4.5 A full copy of the responses is available on the CICRA website, which provides evidence of an existing demand by OLOs. In its response to the 2016 Consultation, JT provided documentation to support its claim that it had not received requests for this product despite having sought requirements from OLOs for wholesale broadband products.

The documentation provided by JT could have just as easily been as a result of the average user not realizing what could be requested.

I also cannot understand these comments as I know of several potential users that were met, when they asked for services, with the comment that JT and the OLO did not provide the requested services. When some OLOs were asked they never answered the request but simply referred to the existing packages. Rather than speculate as to why these answers were received, let us just say that they occurred.

In my contact with financial institutions and other businesses, the kindest remark made was that what was on offer did not meet their current business requirements. Most were surprised to learn that the minimum legally guaranteed speeds were 0.75 MB. **The legal minimum speed should be raised.** Most users did not understand that “up to” did not necessarily mean that the user may would get anywhere near the quoted “up to” speeds.

CICRA should change the licenses so that the sales literature and offerings (contracts) should be on the basis of “no less than” speeds to the closest or best off island Tier 1 operator (JT and the OLOs are not Tier 1 Operators) which is similar to the UK, US, etc.

The Regulator should change all licenses so that literature and promotional statements about **speed tests** by OLOs (to include JT) should be prohibited. Speed tests, if they are to be used, should be from the Jersey user to an off Jersey Tier 1 operator and this should include the relevant latency figures. No such literature should be used unless first agreed in advance by the Regulator.

4.6 CICRA is encouraged that these discussions are taking place and CICRA places an emphasis on such commercial negotiations running their course rather than leading with a prescriptive regulatory intervention for this product. There is however an additional level of support that CICRA can provide for such negotiations, in the

form of a new Licence Condition, given the imbalance in negotiating power between OLOs and the incumbent.

The Regulator admits that there is an imbalance in negotiating power between the OLOs and the incumbent (JT), so there is no use in requiring the OLOs to negotiate with the dominant operator (JT) as the Regulator will have to intervene constantly. The question is whether the Regulator will be in a better position than the OLO? The respondent thinks not.

The respondent suggests that the Regulator considers a separate infrastructure company where the regulator does not have to be involved in what BSA charges are to be provided and negotiated between the OLOs and JT. It is far simpler and preferable to simply “hive off “ the JT and OLO infrastructure and to place all OLOs including JT in an equal position. The Regulator then need only to look at the infrastructure company BSA etc costs. The infrastructure company would have separate infrastructure accounts and it would be easier for Regulator to understand what the costs are and what the “hived off” infrastructure company should charge all OLOs to include JT as an OLO. THIS SUGGESTION RESOLVES THE IMBALANCE IN NEGOTIATING POWER BETWEEN THE OLOs AND THE INCUMBENT DOMINANT OPERATOR – JT and provides the maximum competition possible.

## **5. Proposed new licence condition**

5.1 As discussed above, CICRA will continue to encourage OLOs to enter into technical and commercial arrangements with JT for BSA, as these arrangements should rightly be a matter for agreement between the parties involved, allowing them to set product definitions and agree cost allocation between them.

See above. While this allows the Regulator to arbitrate, it does not solve the dominant JT situation and the requirement for the Regulator to be involved in the BSA as far as the OLOs are concerned. The Regulator has not covered JT negotiating for itself. As seen from the past JT has a tendency to delay and/or use the courts to delay (i.e.the

13% percent currently ordered cost reductions) by appealing to the courts or otherwise.

5.2 In order to support this process, CICRA is considering introducing a new condition into JT's licence. This will allow, if necessary, conditions to be set by CICRA which are non-discriminatory, fair and reasonable for both parties and offer the greatest benefit to all users.

[See above.](#)

5.3 This Consultation seeks comments on the proposed new condition which CICRA may introduce into Jersey Telecoms' (JT) Licence. The proposed new Licence Condition is attached at Annex B.

## 6. Next Steps

6.1 Once this consultation has closed, CICRA will review responses and consider whether the proposed licence condition should be introduced into the licence granted to JT.

[Consideration should also be given to any alternative suggestions made by a respondent.](#)

[All the licenses should be changed – JT and the OLOs – as it is not just JT which has infrastructure which can make some OLOs partially a dominant operator.](#)

[Since these proposals and comments will undoubtedly affect Jersey users and government for decades, a final draft should be published by the Regulator. This should include the Regulator's reasons for pursuing the BSA suggested.](#)

The decision and the respondent's recommendation involves both the Regulator and the Jersey government. Therefore the Jersey government should be involved before the Regulator proceeds.

6.2 In the event that a proposed licence condition is considered appropriate, the final form of the proposed licence condition will be formally published in due course in the form of an Initial Notice in Jersey, and a Draft Decision in Guernsey (if appropriate)

## Annex A – Consideration under Article 7 of the Telecommunications (Jersey) Law 2002

1.1 The Law requires the JCRA to perform its functions in a manner consistent with the considerations set forth in Articles 7(1), 7(2) and 7(3). The JCRA's consideration of these factors is detailed below.

1.2 The JCRA has a **primary duty under Article 7(1)** to perform its functions in such manner 'best calculated to ensure that (so far as reasonably practicable) such telecommunications services are provided... as to satisfy all current and prospective demands for them, wherever arising'.

The BSA change proposed does not meet the above requirement in that it does not consider all current and prospective demands as it only considers BSA which is not as yet clearly defined. There are numerous current and prospective demands that are not being met. It also does not resolve the Dominant Operator (JT) situation.

1.3 Having consulted with OLOs in February 2016, there is a clear demand conveyed that OLOs would respond and develop products for customers as an alternative choice to the incumbent in Jersey. This demand is also reflected in the policy adopted by the States of Jersey **to liberalise Jersey's telecommunications markets and thereby 'to abolish the exclusive privilege of the States in telecommunications'**<sup>3</sup>.

The proposal will not totally as stated above “liberalise Jersey's telecommunications markets and thereby “abolish the exclusive privilege of the States in telecommunications”. This will not be accomplished by the proposed BSA – the position will remain that JT is the dominant operator.

Senator Gorst, during the last Institute of Directors dinner, stated that “the government has no intention to sell JT”. This is obviously contrary to the legislation cited by the Regulator. Clarification is needed.

BSA will not reduce costs or improve the frequency spectrum use.

1.4 It is apparent from other jurisdictions that BSA is likely to bring benefits to consumers in terms of increased choice, innovation and lower prices. Consumers will also have the opportunity to choose alternative suppliers who provide combined access and call services. The benefits arising are likely to be enjoyed by all consumers in Jersey since the benefits of choice and more competitive offers will be available to all consumers in Jersey regardless of whether they individually switch away from the incumbent since the incumbent will need to respond to competition elsewhere.

The above is hopeful rhetoric and the respondents experience is that all three OLOs (JT included) offer the similar packages not different ones or different pricing as other OLOs are base line restricted by JT's wholesale negotiated price. The BT/Openreach situation is similar in that BT is the dominant operator. The UK regulator was unable to resolve the BT/OpenReach dominant operator situation other than BY ORDERING BT AND OPENREACH TO BE SPLIT INTO TWO SEPERATE ENTITIES.

While BSA may, if regulated properly, bring benefits to consumers it is unlikely to produce a truly competitive market place. If the dominant operator does not have the capability the Regulator has not done enough to ensure that the dominant operator does what any OLO or user wants. This would require the regulator to become very involved in the operation of the dominant operator. This is most unlikely as this is a full time job and not with in the Regulators remit.

PLEASE DO NOT FORGET THE USER. THE USER NEEDS TO BE ABLE TO OBTAIN PACKAGES THAT THE OLOs DO NOT OFFER. THE USER MAY NOT KNOW WHAT IS POSSIBLE. THE

RESULT IS NO COMPLAINTS ARE RECEIVED BY THE REGULATOR. THE REGULATOR NEEDS TO EDUCATE THE USER, WHICH THE REGULATOR IS NOT DOING, WHAT IS POSSIBLE. THERE THEN MAY BE MORE COMPLAINTS AND REQUESTS FOR NEW SERVICES.

Business needs to input its requirements. They are not business communications experts so they must be educated.

The funding problem for fibre and the future 5G will not be resolved as the Jersey government is highly unlikely to be able provide further funding when it is trying to cut costs and the current structure is not suitable.

1.5 Under Article 7(2)(a), the JCRA has a duty to perform its functions in such manner as it considers 'best calculated to protect and further the short term and long term interests of [telecommunications] users within Jersey...' and to perform them, wherever it considers appropriate, by promoting competition between telecommunications operators in Jersey. Telecommunications users in Jersey will benefit in terms of price, quantity, quality, variety and innovation arising from the competition between telecommunications operators. Operators will be able to have access to components of the telecommunications infrastructure that they can offer their customers, whether residential or business.

6.3

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<sup>3</sup>Telecommunications (Jersey) Law 200

The Jersey users will not benefit from the BSA proposal as costs are not reduced, quality is not increased as it would be if users could use the entire Jersey frequency spectrum.

See comments in 1.5 above, especially in introducing products let alone existing pricing. This proposed alteration to the license will not accomplish the above stated aims nor provide a totally competitive market.

1.6 Article 7(2)(b) places a duty on the JCRA to perform its functions in such a manner as it considers 'best calculated to promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey'. This decision fulfils

this duty in that it is generally recognize that competition serves to increase productivity, dynamic and allocative efficiencies. The JCRA has adopted a cautious approach to imposing obligations on JT. The JCRA is of the view that its regulatory intervention is proportionate and the least intrusive given the clear benefits from the introduction of access products and the demand from other operators.

A cautious position by a regulator will seldom provide a competitive market place. The Regulator legally is required to provide benefit for the users and products that are required to place the user in the best competitive position as is possible. Demand from the other operators and users is not being met nor will they be met with just the BSA proposal.

The Regulator is not empowered to be cautious. This may be the Regulator's choice but the Regulator must resolve problems promptly as they arise – not be cautious in choosing a “part solution” rather than an entire solution otherwise the interests and users within Jersey will not be met.

1.7 Article 7(2)(b) places a duty on the JCRA to perform its function in such a manner as it considers best calculated to further Jersey's economic interests. The absence of bitstream access has in the view of the JCRA placed the OLOs at a disadvantage, and consequently consumers have not benefited from competition to the extent possible.

The lack of a 1 GB up and down symmetrical communication fibre broadband system places Jersey businesses in a position of having to compete with for example the Swiss and other financial centres Tier 1 symmetric connections whereas Jersey is nowhere near providing such a service. The Jersey offerings of less than one-tenth “upward” speeds as opposed to the “down” speed means that any Jersey business is at a distinct disadvantage with businesses outside Jersey. The packages offered also do not guarantee the package speeds. It is understood that 0.75 MB is the speed the OLOs must provide which is no minimum that could be acceptable to any user anywhere. The regulator should increase the minimum speed to the offer speed. The Regulator should also order that “no less than” speeds the OLOs must provide be changed to “No less than speeds”. Any caution by the Regulator is not legal as the Regulator has no discretion as to what is required – not being cautious. Any caution to the OLOs and the Dominant operator is at the expense to the Users. The Regulator must act for what is best for the users not the OLOs. The

Regulator should order the OLOs and JT to offer packages of 1:1 speeds up and down in at least 50 MB, 100MB, 500 MB and 1 GB in their sales “packages” This leads to more choices for the users.

1.8 Article 7(2)(d) places a duty of proportionality on the JCRA, namely to ensure that the minimum of restriction is imposed on telecommunications operators in achieving its legitimate policy objectives. The proposed licence condition satisfies this duty since further access would not be achievable without the JCRA taking this decision. Proportionality issues have been considered previously, and the JCRA takes the view that it has adopted the minimum level of regulatory intervention in this area of telecommunications market at this stage.

As stated above the Regulator is not empowered to adopt a “minimum level” of regulatory intervention, especially when it is obvious that other regulators such as the UK regulator has not succeeded and has had to order the break up of BT and OpenReach.

9.1 Article 7(2)(e) requires the JCRA to have regard to the need to ensure that telecommunications operators have sufficient financial and other resources to conduct those activities. The JCRA has placed emphasis on commercial negotiations running their course rather than lead with a prescriptive regulatory intervention with this product. In the first instance, the arrangements should be a matter for agreement between the parties involved, allowing them to set product definitions and agree cost allocation between them.

There will be more financial resources by utilising the respondent’s suggestion of a separate infrastructure company.

Regulatory intervention is not applicable to the respondent’s suggested separate infrastructure company.

The BT/OpenReach demerger order shows that negotiations between a dominant operator and OLOs do not work. The Regulator should not take this approach.

1.10 Article 7(3) requires the Authority to have regard to a number of matters. Some specific issues are particularly relevant to this consideration. The introduction of BSA **is expected** to result in keener competition which is expected to improve affordability, either through driving down prices and/or improving quality of service.

The Regulator needs to back up the Regulator’s statements with facts. This has not been done.

BSA is not the way to change JT and OLO pricing (published retail less an amount agreed by JT and the OLOs and the Regulator's agreement = a monopoly market). The Regulator should determine the exacts JT costs. This in the Respondent's opinion cannot be determined by the Regulator unless the Regulator was to run JT and maybe not even then. What provision is made for cost saving not made by JT?

## Annex B - Licence Condition

6.4

The proposed addition to JT's licence will be Licence Condition 36 as follows:

### **Condition 36: Network Access**

- 36.1 The Licensee shall, to the extent requested by another OLO or user, negotiate with that OLO with a view to concluding an agreement (or an amendment to an existing agreement) for Network Access.
- 36.2 Where an OLO or a user reasonably requests in writing Network Access, the Licensee shall provide that Network Access. The Licensee shall also provide such Network Access as the JCRA may from time to time direct.
- 36.3 The provision of Network Access shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as the JCRA may from time to time direct.
- 36.4 Where the Licensee acquires information from another OLO before, during or after the process of negotiating Network Access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiations or arrangements, the Licensee shall use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. Such information shall not be passed on to any other party for whom such information could provide a competitive advantage. This does not apply to the passing of information to the JCRA where the JCRA requires that information in order to carry out its functions.
- 36.5 The Licensee shall comply with any direction the JCRA may make from time to time under this Condition.

This is far too complicated a license which will continually be the subject to delay, litigation etc. The respondents suggestion eliminates OLO negotiations with the

dominant operator – a negotiation which a non dominant operator will never win. This leaves open subjecting the OLOs and the users to higher costs.

If the suggested structure of separating the infrastructure is not adopted, it is suggested that the Regulator sets the BSA pricing.