



# Licence Modification for JT (Jersey) Limited, Network Access

## Final Notice

### Channel Islands Competition & Regulatory Authorities

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## 1. Introduction

- 1.1 This paper constitutes the Final Notice (**FN**) of the Jersey Competition Regulatory Authority's (**JCRA**) decision on the licence modification required for JT (Jersey) Limited (**JT**) to introduce Network Access on its telecommunications network in Jersey.
- 1.2 It follows the JCRA's Initial Notice (IN) and Guernsey Competition and Regulatory Authority's (GCRA) Draft Decision (DD) of March 2017 (documents CICRA 17/02 and 17/01, respectively) setting out the proposed new licence condition.
- 1.3 The paper discusses key aspects of the responses and sets out the JCRA's decision to proceed with the introduction of a new licence condition requiring that the licensee shall negotiate with Other Licensed Operators (**OLO**) with a view to concluding an agreement for Network Access, and shall provide Network Access on reasonable request.

### Background

- 1.4 CICRA<sup>1</sup> consulted in early 2016 seeking views on the potential benefit to consumers on the introduction of further fixed line access services (Carrier Preselect, Fixed Number Portability and Bitstream Access) and, as a result, proposed next steps for the three services.
- 1.5 One of the services included was Bitstream Access (**BSA**). BSA is where a network provider allows access to a high speed (or internet) access service installed between the network provider and the end customers. This allows OLOs to provide high-speed broadband-type services to the end user as well as introduce features that are not dictated by the network provider's own choice of such retail products.
- 1.6 In October 2016, a second consultation sought views on the implementation of BSA; in particular, on an addition licence condition in Jersey. This would oblige JT to provide access on reasonable request from an OLO. As no interest had originally been expressed for BSA in Guernsey, the provisional view had been that the new condition would only be introduced in Jersey at that point in time; however the second consultation sought views on this.
- 1.7 The JCRA concluded that it should continue to encourage OLOs to enter into technical and commercial arrangements with JT for Network Access, as these arrangements should rightly be a matter for agreement between the parties involved, allowing them to set product definitions and agree cost allocations between them. In order to support this process, the JCRA sought to introduce the new condition which would allow, if necessary, conditions to be set by the JCRA which are non-discriminatory, fair and reasonable for both parties and offer the greatest benefit to all users.
- 1.8 The Initial Notice issued on 23 March 2017 proposed the introduction of the new licence condition in Jersey, and a detailed response was received from Sure (Jersey) Limited.

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<sup>1</sup> The Channel Islands Competition and Regulatory Authorities (**CICRA**) is the joint name for the JCRA and GCRA.

## 2. Structure of the Notice

2.1 This document is structured as follows:

Section 3	Legal and Licensing Framework
Section 4	Responses to the Initial Notice
Section 5	JCRA consideration of these responses
Section 6	Final Notice
Section 7	Next Steps
Annex A	Licence Modification for JT (Jersey) Limited

## 3. Legislation and Licensing

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.

3.2 The JCRA has granted the incumbent operator in Jersey, JT (Jersey) Limited, 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 includes the power to insert a new condition, as well as amending or deleting an existing condition.

3.3 Before exercising a specified regulatory function, Article 11(1) of the Jersey Law requires the JCRA to give initial notice. Article 11(4) provides that if any representations or objections are made within the specified period, the JCRA shall consider them and give final notice (**FN**).

## 4. Consultation Responses

4.1 Article 11(5)(b) of the Jersey Law requires that an FN shall contain a summary of any representations and objections to the IN. One response was received from Sure (Jersey) Limited, reflecting their response to the Draft Decision issued in Guernsey (CICRA 17/01).

4.2 In summary, the Sure response objects to the introduction of the licence condition into Sure's licence and questioned:

- (i) Whether the licence condition should be brought in for all licensees, however only activated on a finding of SMP
- (ii) Whether the term 'Network Access' should be a defined term with specified scope, rather than wide and non-specific as presently drafted.
- (iii) Whether 'reasonable request' should also be defined

4.3 This response differs from Sure's submission to the 2016 Consultation which supported the introduction of the condition in Jersey.

## 5. JCRA Consideration and Response

5.1 Article 11(5)(c) of the Jersey Law requires that an FN shall include details of the JCRA's response with sufficient content to enable it to be understood and its reasons known.

5.2 The JCRA's consideration and response are provided below.

### Justification for the Proposed Licence Condition

#### 5.3 Sure Comment

*It is unclear at present whether any party holds SMP in any of the relevant retail or wholesale broadband markets and thus whether CICRA should be considering the imposition of any SMP remedies, including the remedy under consideration here, at all. CICRA should complete its market reviews in Guernsey and Jersey before proceeding with new remedies in the broadband markets.*

*To provide the necessary regulatory focus we would suggest CICRA considers a specific licence condition, which would exist in all licences, but would only be enacted in relation to those operators that are designated as holding SMP. It may also benefit CICRA to give some thought as to how it would intend to define that market – whether bitstream (or Naked Bitstream) is considered a market on its own or whether, more likely, it is treated as a potential remedy in a broadband market (when any SMP designation has been imposed). Of course CICRA is already considering the SMP status of the CI broadband market (re CICRA 16/40), so it appears to be well timed for CICRA to be considering in parallel what potential remedies may be appropriate, should any SMP be established.*

#### 5.4 JCRA Response

As drafted, the Initial Notice proposal was for the licence condition to be brought in for JT in Jersey (and Sure only in Guernsey) rather than introduced for all licensees in Jersey (the relevant condition to be included in that part of the licence specific to an SMP designation). On Sure's proposal, whilst in some circumstances there can be merit in consistency across licences the JCRA does not consider there is any substantive reason for doing so at this time since JT in Jersey is realistically the only party likely to be approached for such access. Consideration may be given in future (as part of a review of telecoms licences generally) to where this condition might

alternatively sit within the licence and whether it should be more generally applied. However this is not considered a reason to delay its introduction in Jersey at this time.

## **Scope of the Proposed Licence Condition**

### **5.5 Sure Comment**

*The Licence Condition proposed is extremely wide and non-specific, and the term 'Network Access' should be a defined term, with specified scope.*

*CICRA has been working since around 2010 to encourage the opening up of the CI fixed line markets across the islands. WLR is testament to the benefits of that process. There appeared to be agreement (between the individual operators and CICRA) that bitstream services would be defined as 'Naked Bitstream', being a consolidation of Naked DSL and bitstream functionality, and yet more recently CICRA has referred only to bitstream. In our response to CICRA 16/03 (Wholesale Access Services) we discussed our confusion and, to be honest, we're still not entirely sure what the proposed definition is. Regardless, we believe that our Jersey customers are keen to access a broadband only (rather than with a fixed line) service and consider that we can prove that there is reasonable demand for JT to develop this service for OLOs. In Guernsey, we are happy to develop the service, if we receive a reasonable request – that is, a request that is backed up with evidence of reasonable demand for the service.*

### **5.6 JCRA Response**

The licence condition as drafted is deliberately wide and non-specific. The 2016 Consultations provided evidence of existing demand from Operators for Bitstream Access, and encouraging indications that discussions have already been taking place between operators with a view to providing such wholesale services. Continued technical and commercial discussions between parties is being supported on the basis of the potential benefit to consumers in Jersey, and direct arrangements between the parties will better allow the setting of product definitions and agreed cost allocation without the need for regulatory intervention.

5.7 In order to support this process and provide a recognisable framework for potential new entrants, the proposal was to introduce a new licence condition providing for non-discriminatory, fair and reasonable conditions for all parties to offer the greatest benefit for consumers. It is not clear why there is any need for the regulator to define the products to be developed in this area in any detail, rather to leave the operators to develop a class of such products for consumers. The JCRA would also have some concern if there is an expectation that those offering such access would have an unfettered entitlement to disclosure of business information from applicants given they are also retail competitors. The JCRA is likely to intervene swiftly should the conditions imposed by Network Access providers go further than absolutely necessary in terms of information disclosure from applicants.

## **Definition of Reasonable Request**

### **5.8 Sure Comment**

*Sure believes that it may be appropriate to recognise an incumbent operator's risk (in terms of the significant development time and resources) for any future wholesale access services. This risk could be appropriately offset by the likes of an upfront development fee, which could be*

*associated with a minimum order commitment. The details of such an arrangement, which should suitably balance the risks of all parties, could be considered once the licensing aspects have been determined. At the same time, it would be useful for CICRA to consider whether it would like to provide any guidance as to what might form a 'reasonable request' (to reduce the risk of ambiguity in this regard).*

#### 5.9 JCRA Response

In line with the comments above, this aspect of the condition is deliberately wide, with the definition of 'reasonable request' being entirely dependent on the particular circumstances, the access request made, and response given by the incumbent operator. The JCRA would wish to maintain suitable discretion to support such requests on their merit with the onus on those providing access to engage positively.

## **6. Final Notice**

6.1 In line with Article 11(5)(e) of the Jersey Law the JCRA intends to exercise the regulatory function by taking the action proposed in the Initial Notice (CICRA 17/02), namely to introduce the condition into JT (Jersey) Limited's Class III Licence in Jersey.

## **Annex A: Licence Condition**

- (1) The Licensee shall, to the extent requested by another OLO, negotiate with that OLO with a view to concluding an agreement (or an amendment to an existing agreement) for Network Access.
- (2) Where an OLO 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.
- (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.
- (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.
- (5) The Licensee shall comply with any direction the JCRA may make from time to time under this Condition.