# Sure's response to the JCRA's Business Connectivity Market Review Draft Decision

Sure (Jersey) Limited ("Sure") is pleased to submit this response to the Jersey Competition and Regulatory Authority's ("JCRA's") Non-Statutory Draft Decision in relation to its Business Connectivity Market Review ("BCMR"), issued on 26th October 2020, as document JCRA 20/20[1].

This version of our response is non-confidential and we would welcome publication of it on the JCRA's website.

## *Executive Summary*

Sure welcomes the BCMR Draft Decision and believes that, on the whole, the proposals set out in the Draft Decision will help open the leased lines markets in Jersey up for more effective competition. The introduction of a cost-based dark fibre remedy will enable other licensed operators (OLOs) to compete more effectively with JT and across a wider range of parameters, including product specifications, quality of service and pricing structures.

We do, however have some concerns relating to the JCRA's market analyses, including:

- The JCRA's finding that JT does not significant market power (SMP) in the retail on-island leased lines market in Jersey, and
- The JCRA's proposal that dark fibre should not form part of the relevant market for wholesale on-island leased lines in Jersey.

JT has SMP in the retail on-island leased lines

Sure believes that the JCRA needs to reconsider its finding that JT does not have SMP in the retail on-island leased lines market. Our reasons for this are that:

1) an increase of just 5% on OLO market share over a 5-year period is not sufficient to conclude that the market is not characterised by significant and enduring barriers to market entry and growth; and

2) there are two sub-sections to the on-island leased lines market, namely on-island leased lines sold in combination with off-island leased lines and on-island leased lines that are sold as stand-alone services, independently from off-island leased lines.

Sure operates mainly in the stand-alone on-island leased lines market and has lost market share over the period since the last market review, whereas the other main OLO in Jersey, Newtel, operates mainly in the off-island leased lines market (which by definition are sold together with an on-island leased lines tail) and Newtel has built a significant market share in that submarket. Sure believes that Newtel's success is, however, not a reflection of the conditions in the on-island market, but of the conditions in the off-island market. It is essential that the JCRA recognises this and if excluding on-island leased lines sold in combination with off-island leased lines, Sure is confident that the JCRA will find that the OLO share of the stand-alone on-island leased lines market has dropped over the past 5 years.

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[1] www.jcra.je/media/598280/t-012-business-connectivity-market-review-draft-decision.pdf

Dark fibre access should be included in the relevant market for on-island leased lines

The JCRA proposes to exclude dark fibre access from the relevant market for on-island wholesale leased lines. Sure disagrees with that conclusion for the following reasons:

- OLOs are sophisticated wholesale customers and the need to add our own electronics to dark fibre connections does not create a sufficient obstacle for the product to not be a demand-side substitution for active wholesale leased lines.
- The JCRA expects all current regulated active wholesale leased lines to be substituted for dark fibre access connections during the period covered by the review. As the market review is forward-looking, it is clear that the dark fibre pricing will be a constraint on commercial wholesale active leased lines during the period of the review.
- Inclusion of dark fibre access in the relevant market would ensure that appropriate costing and market data is collected for JCRA to make informed decisions.
- Dark fibre access is clearly an easy supply-side substitute for active wholesale leased lines.
- There are risks associated with the *exclusion* of dark fibre access from the relevant market, but Sure has not been able to identify any risks related to their *inclusion* in that market.

In addition to these main concerns, Sure has identified risks relating to the scope and implementation of the new dark fibre access remedy. They include:

- The scope of the dark fibre access remedy could be defined too narrowly, and this would reduce the effectiveness of the remedy and enable JT to provide services in locations and at cost levels that could not be replicated by OLOs. There is current evidence of BT engaging in this type of behaviour in the UK.
- The migration process could be defined such as to actively harm the ability of OLOs to retain current customers and gain new customers:
    - If JT Retail is not subject to the exact same transition processes as OLOs migrating from active wholesale leased lines to dark fibre access (for example, having to disrupt service to install electronics on the dark fibre access product) then JT could use the migration process to win customers from OLOs by promising no disruption, and
    - If JT Retail can use the existing electronics from the active wholesale leased line, but OLOs have to purchase new electronics (without being able to charge a new installation charge), then this would give JT a significant cost advantage.
- If the active wholesale leased lines remedy is withdrawn 12 months after the imposition of the new dark fibre access remedy, this would not allow for an orderly transition. It is important that consumers are protected during that process and 12 months is unlikely to be sufficient. Sure proposes that the fully regulated active wholesale leased lines remedy be retained for a period of 36 months after the introduction of the dark fibre access remedy. Further, Sure proposes that a wholesale active leased lines remedy, regulated only to prevent discrimination, so not with explicit price regulation applied, is retained for the duration of this review period. This is to ensure that carrier diversity can be provides where requested by end customers.
- JT is not subject to an obligation to produce audited regulatory accounts. This could open the opportunity for JT to allocate costs to the dark fibre access product that should rightly be recovered in other markets. Sure urges the JCRA to use extreme caution when using costing information.

[✂]

## The JCRA's overarching approach

**Question 1: Do you agree with the Authority's proposed approach to market definition and the use of the three criteria test to determine whether a relevant market is susceptible to *ex ante* regulation? If not, what alternative do you suggest?**

Sure agrees with the proposed overarching approach of following the widely accepted rules and guidelines developed by the European Commission and BEREC for market definition and SMP analysis. With regards to the latter, Sure considers that the JCRA should consider the specific characteristics of the Jersey market. We describe the specific relevant parameters later in this document.

**Question 2: Do you agree with the Authority's proposed approach to competition/SMP assessment and remedies? If not, what alternative do you suggest?**

Sure agrees that it would be appropriate for the JCRA to identify and impose high-level remedies as part of this consultation process and to issue subsequent consultations to determine the detailed specifications of such remedies.

With regards to the potential remedies available to the JCRA, to prevent abuse of a position of significant market power (SMP), Sure also agrees that, whilst the list of potential obligations stipulated in the European Electronic Communications Code (EECC) is a good base and starting point, it should be treated as guidance only, allowing the JCRA the necessary flexibility to apply the remedies it considers best suited to address the potential market failure resulting from abuse of SMP in the Jersey leased lines market.

In table 4, the JCRA identifies the remedies it would use to address particular competition problems and which licence conditions (LC) the JCRA considers will enable the application of those remedies. The table is reproduced below:

***Table 4: Potential Competition Problems and Remedies***

| Competition Problem | Appropriate Remedies | Class III Licence Condition |
|---|---|---|
| Refusal to supply | Obligation of access and use of specific network facilities<br>Obligation of transparency | LC25<br>LC33 |
| Price and non-price discrimination | Obligation of non-discrimination<br>Obligation of accounting separation<br>Functional separation | LC31<br>LC30 |
| Excessive pricing | Price control and accounting obligations | LC30 |

[✂]

## Retail Market Definition

**Question 3: Do you agree with the Authority's preliminary definition of the product market for retail leased lines as summarised below?**

• The retail leased line market comprises both AI and TI lines.

Yes.

• All bandwidths used for delivering leased lines are in the same market.

Yes.

• The retail leased lines market does not include business or residential broadband.

Yes.

• The retail leased lines market should not be broadened to include downstream services such as VPNs.

Yes.

• The retail market should not be broadened to include off-island leased lines.

Yes.

Our considerations:
Sure agrees that there is a single retail leased lines product market in Jersey and that this market includes all types of leased lines in terms of speed and/or technology used to provide the leased line. It is also clear from the analysis presented by the JCRA, that there is still a significant price and product specification difference between 1Gbps broadband services and Fibrelink 1000, so Sure further supports the JCRA's proposed conclusion that broadband services and leased lines services are in separate markets.

With regards to whether the leased lines market should include managed services solutions that include leased lines components, Sure once again agrees with the JCRA's analysis and conclusion that this should not be the case. Leased lines are upstream inputs to managed services solutions and the provision of managed solutions involves a number of other complex software and electronics components and are therefore not substitutes for leased lines.

**Question 4: Do you agree with the Authority's preliminary conclusion that there are no particular areas within Jersey where the conditions of retail competition are such that they may constitute separate geographic markets? If you do not agree you should provide all of your analysis and assessment.**

Yes. Sure agrees that there is a single geographic market for retail leased lines in Jersey.

The internationally accepted criteria for defining separate geographic markets are set out in the EC SMP guidelines: an area in which the conditions of competition are sufficiently homogenous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.[2]

[2] https://ec.europa.eu/digital-single-market/en/news/communication-smp-guidelines

The two market characteristics that could cause such different competition conditions in the retail leased market would be:

- The existence of competing infrastructure to enable an OLO to compete independently with JT, set prices differently from JT and offer differentiated products from JT, or
- The achievement by an OLO of such market share in a specific geographic location (through the use of regulated access or own infrastructure) that JT no longer could be said to have SMP in that specific geographic location.

JT has the only ubiquitous network in Jersey and no OLO has sufficient on-island network infrastructure or market share in a specific geographic location to satisfy the criteria to the existence of separate geographic markets.

Sure also agrees that the fact that JT has uniform retail prices for leased lines across Jersey is a strong indication that there are no separate geographic markets in which JT faces significantly different competition conditions.[3]

### *Retail three criteria test*

**Question 5: Do you agree that the retail market for leased lines does not meet the three criteria test and so no further analysis is required? If you do not agree you should provide all of your analysis and assessment.**

No, Sure does not agree.

The JCRA concludes that, as the OLO retail leased lines market share has increased from 30% to 35% in the 5-year period from 2014 to 2019, the market is not characterised by high and non-transitory barriers to entry and expansion. Therefore, the market fails the three criteria test and is not susceptible to ex-ante regulation.

The JCRA bases its conclusion on the statistic showing that the overall market share in the retail leased lines market by competing providers has increased by 5% in the past 5 years.

Sure considers that an increase in competitor market share of 5% over a 5-year period is insufficient evidence that the market is not characterised by such barriers. Sure also considers that the JCRA needs to analyse the market in more detail to understand the underlying reason for the (small) increase in competitor market share. As submitted in our January 2020 response to the JCRA's request for information, Sure has lost market share in the Jersey retail leased lines market since 2014, primarily due to the structure of the JT wholesale leased lines product and pricing structure[4] and the lack of transparency of the market to supply the States of Jersey.[5] Sure has been actively pursuing business in the on-island retail leased lines market, but is often unsuccessful in doing so, despite willingness to offer pricing that would leave little retail margin for Sure. Sure considers this to be evidence that there were high and non-transitory barriers to entry and expansion in the retail leased lines market in Jersey in the past 5 years. As the three criteria test is performed at the outset of the market definition process, it is not appropriate to consider the impact of new and future remedies as part of that assessment.

[3] Draft decision paragraph 5.28.

[4] The JCRA will be familiar with the consequences of the 300 meters rule that was included in the JT wholesale leased lines products until very recently.

[5] Sure explained these points in its response to the JCRA's BCMR Request for Information in January 2020.

Sure sets out in some detail in its response to the JCRA request for information, some of the competition issues it faces in Jersey and believe that these are evidence of high and non-transitory barriers to competition and expansion. We summarise those issues below:

a. The States of Jersey generally appears unwilling to use other suppliers from JT;
b. JT's historical 300m price differentiation had made it almost impossible to compete against JT Retail, based on both price and the locations at which JT had chosen to site its remote multiplexer equipment, such that it suited the connectivity needs of its own retail customers; and
c. Sure has observed that JT appears to be able to obtain planning permission more quickly in Jersey than Sure can.
d. JT's retail data centre to data centre connectivity services are provided below current wholesale prices.

Those factors will have had a similar impact on all JT's competitors in the Jersey on-island leased lines market, with the potential exception of the market for providing on-island leased lines in combination with the provision of off-island leased lines. In that market it would be natural for a customer to purchase both segments from the same supplier, so if an OLO was successful in the off-island market it would be likely to also attract corresponding business in the on-island market. In fact, Sure is not aware of how a customer would purchase off-island and on-island leased line elements from different providers, as this would require access/colocation to the landing site of the provider of the off-island connection, and that is not available in Jersey.

As there are only two main competitors to JT in the Jersey retail on-island leased lines market (Sure and Newtel), and Sure has lost market share, we make the assumption that Newtel's market share must have increased. We are aware that Newtel has a particular focus on the off-island leased lines market, and that it has been successful in that market, for which an associated on-island leased line is a necessity. We therefore ask that the JCRA consider whether the increase in competitor market share of on-island leased lines may be linked to the supply of off-island leased lines and therefore not indicative of the lack of barriers to competition in the stand-alone on-island leased lines market. Sure is concerned that the top-level market share numbers may have led the JCRA to an erroneous conclusion and that not recognising JT's SMP at the retail level could cause significant consumer harm over the period of this review and could compromise the success of any new remedies at the wholesale level.

In any event, Sure does not agree that an increase of 5% in competitor market share over a 5-year period is evidence that the market is not characterised by high and non-transitory barriers to entry and expansion, and we urge the JCRA to reconsider its proposed conclusion that this market fails the three-criteria test.

**Competition issues in the retail on-island leased lines market**

JT has a history of pricing its retail services in a manner that results in a margin squeeze for its competitors. Whilst it would be possible to investigate margin squeeze using the wholesale market SMP, the additional transparency and other standard SMP remedies in the retail market would help substantially in the identification of any such behaviour and thus make it more difficult for JT to engage successfully in such (and other anticompetitive) behaviour.

Sure would not advocate that JT should be subject to direct retail price regulation in the retail on-island leased lines market; only that standard transparency and reporting remedies be applied, alongside non-discrimination remedies. Sure considers this to be an appropriate balance in the anticipation that the introduction of more effective wholesale remedies (cost-based dark fibre access in particular) could render the retail market competitive.

Complete reliance on the impact of the improved wholesale remedies, before those remedies have been implemented and proven to be fit for purpose would, in Sure's view, be inappropriate and against the interests of consumers in the market. Sure believes that, once on-island circuits related to off-island connections are removed, JT's position as having SMP will be even clearer and it is important that JT does not have the scope to behave anticompetitively in the retail market to frustrate the intended market impact of the new improved wholesale market remedies.

## Wholesale Market Definition

**Question 6: Do you agree with the Authority's preliminary definition of the wholesale leased lines product market as summarised below?**

**Issue 1 - Mirroring:**
Sure agrees with the JCRA that the retail market definition is to an extent mirrored in the wholesale market. This applies to the market including all speeds; both AI and TI (and wireless) technologies; and that wholesale broadband services should not be included in the wholesale leased lines market). Sure also agrees with the JCRA's reasons for not including downstream VPN-type services in the wholesale market and for excluding off-island wholesale leased lines.

Sure, however, believes that the wholesale leased lines market definition should be considerably broader than the corresponding retail market. This is because point-to-point connectivity is used for a wide range of purposes in addition to the provision of retail leased lines, and the wholesale leased lines market should be defined to include all such use cases. We expand on this later in this document but wish to make it clear at this point that it is critical that the wholesale leased lines market is not limited to specific purposes or use cases. It should include all point-to-point connectivity regardless of where the two ends are and which purpose that connectivity is used for. We note later in this response (and agree with the JCRA's conclusion) that the wholesale leased lines market should include self-provision. It therefore follows that the market should include all purposes for which JT self-provides point-to-point connectivity (including for its own network purposes and to connect its data centres to each other and to other sites) as well as all purposes for which OLOs need point-to-point connectivity (including for OLO's own network purposes).

Sure notes that the JCRA appears to agree with this position as set out in the Draft decision:
*"Wholesale leased lines used for mobile backhaul and other connectivity services are essentially the same product: a lit fibre connection between two locations along a dedicated path."*[6]

**Issue 2 - Dark fibre:**
Sure has significant concerns in relation to the JCRA's proposal to exclude dark fibre from the leased lines market definition. We set out our concerns below.

Sure agrees that commercial supply of dark fibre in Jersey is currently at a very low level and that JT (as far as we are aware) does not offer dark fibre. Thus, for a hypothetical monopolist test at present, we agree that dark fibre would not have a material effect. In line with best regulatory practice, the market review should, however, be forward-looking, and we believe that the supply of dark fibre will become very significant during this market review period, should the JCRA's proposals be implemented. As such,

[6] Draft decision paragraph 6.11.

the JCRA should seriously consider the extent to which the supply of dark fibre would constrain the supply and pricing of wholesale leased lines both during and at the end of the review period.

Sure notes that the JCRA anticipates that the introduction of the dark fibre access remedy will have the effect of "*a rebalancing of the prices for the retail active products*"[7]. Sure agrees with this and believes that this constitutes the imposition of a price constraint on active wholesale and retail leased lines by the dark fibre access product.

With regards to the level of substitution between dark fibre and active wholesale leased lines, Sure considers that they are more readily substitutable than the JCRA appears to believe. We agree that the use of dark fibre involves the installation of the wholesale customer's own equipment, but (as the JCRA points out) this tends to happen in some instances when using active wholesale leased lines anyway. In any case, as telecoms operators, the incremental hurdle of installing our own equipment and managing the performance and repairs of that equipment is not significant. Sure considers dark fibre to be a close and very good substitute to active wholesale leased lines, and we have a strong preference for dark fibre in place of active leased lines. Sure therefore disagrees with the JCRA's assessment that dark fibre is not a substitute for active wholesale leased lines and, in our view, dark fibre should be included in the relevant market for wholesale leased lines in Jersey.

Sure also notes that the JCRA assumes that all wholesale leased lines currently in use in Jersey will be substituted for dark fibre access connections during this review period. This suggests that the JCRA expects OLOs and other wholesale customers to be able to readily substitute the existing active wholesale leased lines connections for dark fibre connections. Sure considers this inconsistent with the JCRA's view that dark fibre access is not a good substitute for active wholesale leased lines.

In its preliminary conclusion, that dark fibre should not be included in the market definition, the JCRA appears to propose that the relationship between dark fibre and wholesale active leased lines is similar to that between active leased lines and duct and pole access. Sure does not share that view. The incremental activities required for an OLO to use duct and pole access are significant (including capital investment in ducts and fibre), whereas that is not the case for dark fibre. Therefore, it would not be reasonable to conclude that dark fibre should not be part of the wholesale leased line market, just because duct and pole access should not. In our view the two scenarios are fundamentally different. Sure agrees that duct and pole access should not be part of the leased lines market, but believes strongly that dark fibre access should.

With regards to the impact of excluding dark fibre from the market definition, the JCRA states that it means dark fibre provision will not be taken into account for the SMP assessment. Sure agrees that excluding dark fibre from the market definition would not have a material impact on the SMP assessment at this time. We do consider, however, that there would be benefits from including dark fibre in the market definition; [✂].

Inclusion of dark fibre in the wholesale leased lines market definition would ensure continuity of market measurements and analysis throughout the review period and provide the optimal background for the next market review. Additionally, costing models and financial analysis of the relevant market would be designed to include dark fibre in a manner that may not be the case if dark fibre is only considered a remedy, but outside the relevant market definition.

[7] Draft decision paragraph 8.26.

Significantly, we have not identified any risks or negative consequences associated with the inclusion of dark fibre in the market definition.

It is Sure's opinion that dark fibre should be part of the wholesale leased lines market because dark fibre should be considered to be a substitute to leased lines. We do not consider the need for OLOs to add their own electronic equipment to be a sufficiently significant difference or barrier to substitutability between what is effectively active and passive leased lines. We have summarised above some of the benefits we see from the inclusion of dark fibre in the market definition and we have not been able to identify any drawbacks.

In the UK, Ofcom conducted a BCMR in 2018/19[8], in which it found dark fibre to be part of the relevant market for leased lines. Additionally, in its current wholesale fixed telecoms market review (WFTMR)[9], Ofcom continues to find that dark fibre is part of the relevant wholesale leased lines market. We set out below Ofcom's rationale for this conclusion.

Demand side substitution: here Ofcom's research shows that dark fibre is unlikely to be a substitute for low speed active leased lines (up to and including 100Mbps), but that around 20% of customers in the survey considered dark fibre to be a substitute for higher speed wholesale leased lines. It should be noted that, in the UK, there is a commercial dark fibre market that is targeting the market for very high speed connections, seeking to replace them with dark fibre. The pricing of dark fibre is therefore set at a level that would not make it commercially viable to substitute <1Gbps active leased lines with dark fibre connections. Ofcom is now proposing to mandate cost-based dark fibre access in rural parts of the UK. That product will likely mean that the demand substitutability will increase to also cover lower speed connections.

Supply-side substitution: here Ofcom found that dark fibre is a close supply-side substitute when the customer is already fibre connected[10] and also that where suppliers (providers) are not already connected, dark fibre providers are equally able to supply leased lines access services as other leased lines suppliers (providers)[11].

On the basis of those findings, Ofcom concludes that dark fibre forms part of the relevant wholesale leased lines market.

Given that JT currently has ubiquitous fibre coverage across Jersey, and therefore supplies dark fibre to itself for leased lines and other forms of connectivity across the island, it is our view that it would be both appropriate and important to include dark fibre in the relevant product market.

Further, Sure notes that the JCRA proposes to introduce dark fibre access as a remedy in the wholesale leased lines market, and to withdraw the obligation on JT to provide active wholesale leased lines. This means that all current users on active wholesale leased lines will have to either substitute those leased lines for a dark fibre based equivalent service or purchase commercial unregulated active leased lines. Thus, it would seem that the JCRA considers that dark fibre is in fact a good substitute for wholesale leased lines. Sure agrees with this and therefore urges the JCRA to reconsider its product market definition to include dark fibre.

[8] www.ofcom.org.uk/__data/assets/pdf_file/0025/124729/llcc-bcmr-2018-volume-1.pdf
[9] www.ofcom.org.uk/__data/assets/pdf_file/0037/188956/wftmr-volume-1-overview.pdf
[10] 2018 BCMR para 4.72 onwards.
[11] 2018 BCMR para 4.75 onwards.

**Issue 3 - Market narrowing:**

With regards to whether the wholesale market should be divided based on different uses of leased lines, such as for example for mobile backhaul, Sure believes this to be unnecessary at this point in time, but it is something we encourage the JCRA to keep on its agenda for future review, should market conditions change.

In the UK, Ofcom has consistently found that point-to-point connections for the purpose of mobile backhaul are part of the overall wholesale leased lines market. Mobile network operators in the UK have lobbied hard for the creation of a separate mobile backhaul market, but Ofcom has found that the competitive conditions for the supply of mobile backhaul are not sufficiently different from those in the wider market for the supply of wholesale leased lines.[12]

In the UK, Ofcom has defined separate access and trunk markets, but that reflects the size of the jurisdiction and the network topology designed to deliver services across a country that size. In Jersey there are no separate trunk and backhaul markets, so the JCRA has (correctly) defined a single market including terminating segments, inter-exchange connections and (importantly) all other types of point-to-point connections.
It is, however, critical that the wholesale market explicitly includes all forms of connectivity, not only (for example) connections to end users or connections for mobile backhaul; the market in its entirety should include connections between any A and B ends and regardless of what those connections are used for.[13] Sure urges the JCRA to make all efforts to avoid the possibility of JT refusing supply or imposing unreasonable pricing on connections to certain locations or types of locations.

**Issue 4: Self supply:**

Sure agrees with the JCRA that self-supply should be included in the wholesale leased lines market. Not doing so, risks underestimating the market power of the dominant provider, if that dominant wholesale provider also has a significant market share in the related retail market(s), as is the case for JT in Jersey. As the JCRA points out, the inclusion of self-supply also ensures a more consistent view of the total wholesale market in the case that market shares at the retail level change over time and if other providers build their own infrastructure to serve their retail customers. Inclusion of self-supply is also consistent with international good practice and in accordance with BEREC recommendations, as pointed out by the JCRA.

Sure believes that the inclusion of dark fibre access in the relevant market would help ensure that JT cannot attempt to exclude certain use cases from its obligations imposed under this market review. Dark fibre is completely use-case-agnostic and its inclusion in the relevant market supports the intended universality of the remedies imposed on that relevant market, regardless of the downstream use of the connectivity.

**Question 7: Do you agree that there are no particular areas within Jersey where the conditions of wholesale competition are such that they may constitute separate geographic markets?**

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[12] 2020 Wholesale Fixed Telecoms Market Review consultation paragraph 6.71 c) - www.ofcom.org.uk/__data/assets/pdf_file/0029/188822/wftmr-volume-2-market-assessment.pdf.

[13] In the UK, BT has recently exploited the Ofcom leased lines access market definition to double prices for active wholesale circuits to competing operators' aggregation points and to refuse the use of the new dark fibre access remedy for those types of connections as well. https://www.ispreview.co.uk/index.php/2020/12/fury-as-alternative-uk-fibre-networks-hit-by-new-openreach-fee.html

Yes. With regards to defining the geographic market for wholesale leased lines, Sure agrees with the JCRA that the limited existence of competing infrastructure in Jersey does not cause there to be sufficiently different supply and demand conditions, in locations where such infrastructure exists compared to the remainder of the island, to justify the finding of one or more separate geographic markets. Therefore, the geographic market should be the whole of Jersey.

The States of Jersey has financially supported JT's deployment of fibre across the entirety of Jersey and the island consequently enjoys a position of having ubiquitous fibre coverage. This is very unusual and offers the possibility that this fibre infrastructure can be the basis on which a thriving, competitive and innovative telecommunications industry can be built, attracting business to Jersey and maximising the benefits of connectivity to citizens and businesses alike.

The existence of the ubiquitous fibre network makes it extremely unlikely that competing operators will invest in substantial competing infrastructure. Sure notes that this is entirely consistent with the telecommunications policy of the States of Jersey, which focuses on the ability of competing operators to offer differentiated and innovative services across the existing infrastructure. These unique characteristics of Jersey means that Sure cannot foresee a time when there is likely to be a justification for finding separate geographic markets for fibre-based services in Jersey.

**Question 8: Do you agree that the wholesale market for leased lines does meet the three criteria test and so is susceptible to *ex ante* regulation?**

Yes, Sure agrees that the wholesale leased lines market (with or without the inclusion of dark fibre) meets the three criteria[14] test and therefore is susceptible to ex-ante regulation.

The barriers to entry and expansion in the wholesale leased lines market in Jersey are substantial and, as mentioned above, there are no incentives for competing operators to duplicate the infrastructure already funded by the States of Jersey. Sure therefore cannot foresee a time when the market would tend towards competition. Further, it is generally recognised that competition law is not appropriate to address competition in network-based industries, where there is dependence on access to a single existing infrastructure that is unlikely to be replaced in the short to medium future.

## SMP Analysis

**Question 9: Do you agree with the Authority's proposal that JT should be designated with SMP in the market for wholesale on-island leased lines for the reasons set out above?**

Yes, Sure agrees with the JCRA that JT's very high and stable market share in and of itself is sufficient evidence that JT has SMP. The additional analysis performed by the JCRA further backs up this conclusion. Sure therefore agrees that JT has SMP in the relevant wholesale leased lines market.

## Proposed scope of remedies

**Question 10: Do you agree with the Authority's preliminary view that dark fibre access to the JT network will deliver significant benefits to end-customers and these benefits will outweigh the risks?**

[14] Please note that we believe there is an error in Table 7 which states that the wholesale market does not satisfy the three criteria test.

Yes, Sure agrees with the JCRA that dark fibre access would be an effective and proportionate remedy in the wholesale leased lines market. We are, however, concerned that the JCRA may be unintentionally limiting the scope of the dark fibre access remedy as well as proposing to remove the wholesale active leased lines remedy too quickly. These aspects of the JCRA's proposals could have unintended consequences. We set out below our analysis to support this position.

*The suitability of a dark fibre access remedy in Jersey*

As explained above, Sure considers that dark fibre is a good substitute for active wholesale leased lines. This is primarily because OLOs are more sophisticated customers than retail customers and have the technical and logistical competencies and infrastructure to replace the use of active leased lines with passive dark fibre links. For any wholesale customers that may find the use of dark fibre access a barrier to doing business (such as some of the smaller service integrators), Sure is interested in offering commercial wholesale leased lines (using either its own infrastructure, JT dark fibre, or a mix of the two to best serve those wholesale customers' needs) and it is likely that other operators (including JT itself) will look to offer commercial wholesale leased lines too. We believe that this adequately addresses one of the potential risks associated with the introduction of the dark fibre remedy (or more specifically with the withdrawal of the price regulated active wholesale leased lines remedy).

Sure agrees that there will be substantial benefits from dark fibre access in its ability to enable carrier diversity, thus making it possible for customers to rely on the active service of two separate providers for their connectivity, thus substantially reducing the likelihood of service loss. This, however, is reliant on JT allowing non-discriminatory access to an active wholesale leased line product (served via dark fibre). We discuss this later in this response, proposing that an obligation to provide active wholesale leased lines is retained but with no specific price regulation applied.

Sure notes that, in Guernsey where JT does not have SMP and so is not regulated, JT has on several occasions refused to supply wholesale leased lines to Sure when we have requested this in order to provide carrier diversity to our retail customers.

Additionally, the incremental benefits of a dark fibre access remedy over a wholesale leased lines remedy are substantial. Dark fibre access will allow operators to innovate both in technical specification of services and in pricing and commercial structures offered to meet individual (retail or wholesale) customer needs.

Also, as identified by the JCRA, in some instances, the use of active wholesale leased lines means that there can be duplication in electronics, with both JT and the wholesale customer attaching electronic equipment in order to deliver and monitor the relevant wholesale and retail services. Two sets of electronics also cause more potential points of failure and could increase latency. This would not be the case with dark fibre as only the wholesale customer would be connecting wholesale equipment. Sure welcomes the removal of those inefficiencies.

Sure further agrees with the JCRA that the dark fibre access remedy enables and encourages OLOs to climb the 'ladder of investment', which results in more sustainable competition due to OLOs having increased investment in the market.

With regards to whether a cost-based active wholesale leased line remedy could offer the same or similar benefits to those identified for the dark fibre remedy, Sure also agrees with the JCRA that such a remedy would only increase competition on price, but not enable innovation on technical specifications of customer solutions, nor innovation in pricing structures offered to leased lines customers (wholesale or retail).

A cost-based active wholesale leased lines remedy would also not lessen the current reliance by all operators on JT's active leased line equipment, the major failure of JT's core active equipment having been a material factor in the significant jump in retail customers' requests for OLOs to provide carrier diverse connectivity solutions. At present it is only possible to provide carrier diversity within the small footprint of Sure's and Newtel's own leased line networks, leaving an unfulfillable demand for as long as JT remains the only ubiquitous supplier of active leased lines on its fibre network.

*Risks associated with a dark fibre access remedy*

The JCRA has identified three potential risks associated with the introduction of the dark fibre access remedy, namely that JT may risk not recovering its relevant and efficiently incurred costs; that JT may be left with stranded assets from where it has previously provided active services; and that there may be an impact on quality of leased lines provided, due to JT no longer having the ability to monitor the connections (as a result of it having no electronics attached to the dark fibre connections). We address each of those in turn.

<u>Risk to JT cost recovery</u>: As the JCRA points out, it plans to set the pricing for dark fibre access to cover all of JT's relevant and efficiently incurred costs – including provisions for cost of capital and to cover common and shared costs. In principle, therefore, Sure does not consider there to be a substantial risk that JT cannot cover its costs.

Sure does have some concerns in relation to the quality and transparency of the costing data the JCRA will rely on for setting the dark fibre access pricing, though. In 2016 the JCRA removed the obligation on JT to produce and publish regulated accounts. Although JT may have continued to maintain such accounts and may also have cost modelling information that the JCRA could use for its price-setting, Sure is concerned that such accounts and/or costing models have not been subject to the appropriate scrutiny (for example, having never been externally audited) and as such may not be fit for the purpose for which the JCRA now intends to use them. Sure therefore urges the JCRA to be extremely cautious and to request sufficient data to ensure it understands how costs are allocated by JT across its entire network, before relying on data supplied by JT for just the dark fibre related element of its wholesale leased lines product. We address these concerns again later in this response in respect of the scope of the dark fibre remedy.

<u>Risks of stranded assets</u>: It has not yet been established how wholesale customers will migrate from the use of active wholesale leased lines to using dark fibre lines, for existing connections. It may be possible to consider the option of JT 'handing over' the active leased line to the wholesale customer (priced as a dark fibre plus a standard depreciated sum for existing electronics in use[15]), allowing the wholesale customer to either continue using the JT electronics or to swap them out in due course, ensuring minimum impact and disruption for the end customer. If this option were to be made available, then it could substantially reduce both the costs and complexity of migration and the likely stranded costs for JT. Sure would certainly be amenable to the consideration of such an outcome.

In any event, Sure agrees with the JCRA, that the probability for stranded costs is limited and that JT's capital costs would likely already be recovered in the initial contract period. It is Sure's understanding that JT recovers all or the majority of electronics costs in the up-front installation charge.

<u>Risks to Quality of Service</u>: as a JT wholesale customer, Sure would provide active leased lines (wholesale and retail) using the JT dark fibre access product and attach its own electronics to those dark fibre connections to create an active leased line in the same way as we do for active leased lines provided on

[15] We note that, as JT is likely to have already recovered the costs of electronics, it should be considered whether JT should be mandated to hand over the electronics free of charge, if so requested by the OLO.

our own fibre network. Sure agrees with the JCRA that it will be in our interest to offer the best Quality of Service possible, in order that we can differentiate our services on that criterion, alongside pricing levels and structure and technical product specification.

We also note that to the best of our understanding, JT does not today offer any monitoring of on-island Ethernet leased lines, whether retail or wholesale.

Sure does not agree that there are any incremental risks to quality of service for connections provided using JT dark fibre connections, compared to using active wholesale leased lines provided by JT.

*International lessons and precedents*

The JCRA presents international precedents for where dark fibre access has been mandated, showing that only a small number of jurisdictions have done so. Sure believes it is important to expand on this section to explain that, in many cases, jurisdiction have not implemented dark fibre because they have instead implemented duct and pole access.

The European regulatory framework for electronic communications (and the soon to be implemented European Electronic Communications Code (EECC), encourage regulators in member states to focus regulatory intervention as far upstream as possible. This means that there is a natural preference for duct and pole access over dark fibre access. Additionally, no European member state already has 100% fibre coverage, so the imposition of a duct and pole access remedy has the purpose and benefit of reducing barriers to fibre deployment by competing providers. Those objectives are not relevant in Jersey, where JT already has 100% fibre coverage.

The imposition of both dark fibre and duct and pole access can give rise to arbitrage opportunities and, in any case, is often considered disproportionate. Sure certainly agrees that a regulatory requirement in Jersey for both types of remedy would be disproportionate.

Sure also agrees with the JCRA that the imposition of a duct and pole access remedy would have been disproportionate, given that JT has already deployed fibre across the whole island and also that doing so would have been in conflict with the Jersey Government's telecoms policy.

Thus, Sure considers that international precedents support the introduction of a dark fibre remedy in Jersey as the most appropriate, proportionate, and effective upstream passive remedy to facilitate increased competition both at the active wholesale level and at the retail level.

## Proposed remedies in the wholesale market

The JCRA proposes a set of remedies, grouped into three categories, and presents an overview in tabular form, which we have replicated below for ease of reference.

***Table 9: Summary of competition issues and proposed remedies for JT in the wholesale market for on-island leased lines***

| Competition issues | Remedies | Further detail |
|---|---|---|
| Refusal to supply | • Obligation of access to dark fibre and copper based wholesale leased lines<br>• Transitional arrangements for existing fibre based wholesale leased lines<br>• Obligation of transparency | See paragraphs 9.2-9.21 |
| Price and non-price discrimination | • Obligation of non-discrimination<br>• Obligation to maintain accounting records and provide on request | See paragraphs 9.2-9.3 and 9.22-9.31 |
| Excessive pricing | • Obligation of cost accounting<br>• Separate price controls for dark fibre and copper based wholesale leased lines. | See paragraphs 9.2-9.3 and 9.32-9.42 |

Below we discuss the proposed remedies under each of those headings.

### *Refusal to supply*

In this category, the JCRA proposes three remedies, namely an access remedy; a remedy to cover the transition for active leased lines to dark fibre provision; and a transparency remedy.

The JCRA's proposals are as follows:

1. An obligation to provide access and offer the use of specific network facilities under Licence Condition (LC) LC25, which will differ according to whether the leased line is based on fibre or copper; and
2. An obligation of transparency under LC 26 and LC33.

<u>Obligation of access: Fibre leased lines</u>

**Question 11: What are your views on the potential design parameters for a dark fibre access remedy as discussed in Box 3? In particular, what type of circuits do you think dark fibre should be available on (end-to-end, tail circuits, inter-exchange) and how should a co-location remedy be structured if needed?**

We set out our detailed deliberations on these points below.

[✂]

**Scope of the remedy:** Sure believes that the new dark fibre access remedy should have the widest possible scope. Restricting the use of a passive remedy runs counter to the very principle of imposing a passive remedy – namely that the wholesale customer can use that passive input to deliver any services they wish and which customers demand. It should also be possible to use the dark fibre remedy to connect sites in each OLO's network, including sites that may not be exchanges but aggregation points, for example, so not directly 'inter-exchange circuits'[16].

[16] See the wholesale market definition above for more detailed concerns regarding the scope of the remedy.

Sure agrees with the recommendation of SPC Network in its supporting dark fibre paper[17] in which it states as follows:

*"SPC Network recommends that there should be no constraint on the purposes for which the OLO uses the dark fibre. Thus, for example, it could be used to connect two customer sites, mobile base stations to a core network or two Points of Presence (POPs) of the OLO. This approach allows OLOs to gain access to wholesale products allowing them to offer a differentiated service."* [18]

Sure therefore strongly urges the JCRA to not impose, or allow JT to impose, restrictions of any kind on how the new dark fibre access remedy can be used and which types of locations it can be used to connect. Doing so could be to the detriment to customers and consumers in Jersey and to the overall Jersey economy.

Additionally, Sure believes it is important that the JCRA makes it clear that the dark fibre access remedy applies to the entire JT fibre network, not a subset that JT may consider to constitute its leased lines network. For the dark fibre access remedy to have the desired effect of opening the Jersey leased lines market to competition and maximising dynamic efficiency, as well as static (allocative and productive) efficiencies, it is important that OLOs are able to access the entire fibre infrastructure to enable leased lines products across the entire island and to all types of customers.[19]

Dynamic efficiency is optimised when consumers benefit to the maximum extent from competition, as firms will have the incentive to compete more rigorously through technological innovation, quality of service improvements, process innovations and price reductions. Enabling OLOs to access all of the JT fibre estate should enable OLOs to serve customers at a lower cost and likely also more quickly than would be the case if only the 'leased lines' fibres were to be subject to the dark fibre requirements.

Allocative efficiency is maximised when the prices charged to the customer reflect the marginal costs of production. Making dark fibre available and avoiding duplication of electronics, any resources used by JT to deploy such electronics, and reducing mark-ups on those costs will help to increase allocative efficiency and bring it as close as possible to the maximum level in the market for leased lines in Jersey. Ensuring that OLOs can access dark fibre and that this is available across the entire fibre estate in Jersey will ensure that these benefits are available across all of Jersey and to all providers of telecommunications service in Jersey, not just JT, resulting in improved distribution of benefits across users of leased lines services in Jersey[20].

Productive efficiency is optimised when firms have the right incentives to ensure that output is produced at the lowest possible costs[21]. Reducing the duplication of efforts and equipment between JT and its wholesale customers therefore increases productive efficiency over the alternative access remedy of active wholesale leased lines. And as with allocative efficiency, ensuring that dark fibre access is mandated across all JT's fibre infrastructure will further increase productive efficiency as it will facilitate greater competition, which will then incentivise firms to reduce costs.

[17] www.jcra.je/media/598281/t-012-business-connectivity-market-review-draft-decision-dark-fibre-supporting-paper.pdf

[18] Page 26.

[19] Sure notes that JT presently treats its leased lines and broadband fibre networks as separate networks. However, as the 'broadband network' is already being used for leased lines by JT and in a dark fibre environment is likely to be used so by OLOs as well, the JCRA needs to consider carefully how to best allocate costs of those assets between broadband and leased lines use.

[20] In fact, the benefits will be distributed beyond leased lines customers as the use by OLOs of dark fibre to extend their own networks and connect existing network will increase the OLOs' ability to serve all sectors of the market.

[21] In its strictest economic sense, optimal productive efficiency is achieved when average total costs equal marginal cost.

Whilst, in theory, static efficiencies in sectors characterised by significant fixed and sunk costs (such as telecommunications) are typically maximised by there being a single provider, there is substantial evidence that this is not the case in practice as monopolists rarely have the same incentives to operate efficiently as those operating in competitive markets. Ex-ante regulation in the telecommunications sector seeks to enable competition to protect consumer interests and maximise the total benefits to consumers and the economy.

Historically, the ability of OLOs to compete effectively with JT in the on-island leased lines market was constrained by the 300m rule in the JT wholesale leased lines product. It is important that the structure and scope of the new dark fibre access remedy does not impose similarly arbitrary constraints that limit the scope of competition and thus the benefits to end users.

In that regard it is important that the JCRA recognises that, 'fibre is fibre'. By that we mean that, whilst JT may argue that it has a dedicated leased lines fibre network (that is separate and distinct from the broadband network), that differentiation has no meaning in practice. A service is not defined by the particular fibre strand it is being carried over; it is only defined by the equipment placed at the ends of that strand. JT already uses fibres from its Gigabit fibre network (which it, however, brands as being for broadband only) for leased line purposes and it is important that OLOs must have full and equivalent access to fibres in that network. Not doing so would result in JT being able to deliver leased lines solutions to locations and at price levels that cannot be replicated by OLOs, thus hampering competition, to the detriment of consumers.

Sure holds email evidence[22] of JT's use of its Gigabit broadband fibre network for point-to-point leased line purposes, but publicly available evidence is provided in a JT promotional video[23], where JT talks about providing its own mobile network with leased line connectivity via its Gigabit fibre, along with a statement about its ability to run multiple one Gigabit connections to each of its mobile sites. We are also aware that JT is making use of its Gigabit fibre network to provide the backhaul leased line connectivity for its retail SIP voice services. OLOs currently have no such equivalent access. This is clearly discriminatory and Sure urges the JCRA to prevent this practice from being carried forward into the new regulatory remedies. The new dark fibre remedy (and ongoing active wholesale leased lines remedies) should be applicable to all of JT's network.

Given that it may be some time before this BCMR is completed (Sure is aware that the JCRA is planning follow-up consultations), Sure also urges the JCRA to review whether it would be possible to issue a clarification to the scope of current remedies in the wholesale leased lines market to stop this discriminatory practice in the short term.

[✂]

**Co-location:** Co-location is a necessary ancillary service for some uses of dark fibre. As the JCRA points out, dark fibre cannot be used for tail circuits without the existence of co-locations facilities to enable the wholesale customer to access the end of the circuit that is located at JT's premises. The siting of an OLO's co-location equipment, and therefore the physical point of connection, should not be limited to JT's voice-related exchange locations, or even other designated JT inter-operator connection sites. JT's leased line related core network multiplexer equipment is situated at numerous locations around the island (including within some of its retail customers' premises) and OLOs should have the opportunity to co-

[22] Email from JT to Sure, 13 December 2018.

[23] www.youtube.com/watch?v=1Oe0OSUPZPI&feature=youtu.be at 2'45"and 7'54".

locate their own multiplexer equipment at any suitable location within JT's network footprint (subject to relevant permissions), including JT's data centres. Condition 27.1 (b) of JT's licence provides for the JCRA to require JT to provide interconnection 'at any technically feasible point' on its network.

Sure proposes that the provision of co-location should be completely unrestricted. The remedy should require JT to provide a list of its core network multiplexer equipment locations and for OLOs to list locations where they have identified they are likely to require co-location (Sure will provide more details of its co-locations requirements in its response to the relevant follow-up consultation). There should be a general obligation to provide co-location where technically feasible, allowing for the identification of additional co-location requirements by OLOs.

In order for OLOs to be able to identify the most appropriate co-location points and design the most efficient use of the JT fibre assets, they need visibility of JT's fibre routes. Sure therefore recommends that the transparency provision be worded to specifically provide for the availability of that information for OLOs.

More specific considerations must include the likes of co-location equipment rack sizing and power requirements. OLOs must have the opportunity to help shape such proposals to ensure that any of JT's proposals are fit for purpose, fair and proportionate. In addition, to help ensure the minimum downtime for network faults, co-location facilities should include a 24x7 unsupervised access option. This may not be feasible to provide at all potential co-location sites, but Sure would certainly be amenable to the likes of an external 'meet-me' cabin, if it facilitates this requirement for independent access.

**One and two fibre circuits:** Increasingly, single fibre use is the standard configuration and Sure would view this as the sensible default position, but we believe that there should also be an option for a two-fibre circuit, as this may be a technical requirement for an OLO (or JT Retail) in certain circumstances.

**Provisioning, repair and service migration:** It is important that fair, reasonable and non-discriminatory processes and conditions for provisioning, repair and service migration are established in such a manner that end customers suffer the minimum disruption and the wholesale customers can offer as seamless a migration as possible. Anything less could result in an increase in JT's retail market share, as a complex migration, that exposes end customers to service discontinuity, could cause customers to cancel their proposed migration from JT to an OLO in order that the existing connection and electronics can be left in place. Sure has direct experience of customers quoting the risk of loss of service as a reason for not switching supplier.

An increasing number of retail customers make use of real-time applications and transactions and a framework would need to be established for the fair migration of such customers' leased lines. This is to avoid JT being able to hold the threat of downtime as a reason why the customer should not move to another provider. A solution to this scenario could be that JT makes available a second fibre (or second fibre pair in the case of two fibre circuit) for the duration of the migration process. The customer could then be provided with dual-running for a short period of time to test and cut-over to the dark fibre-based service with minimal disruption.

<u>Circuit routing</u>: As mentioned above, retail customers increasingly use time-sensitive applications and some are extremely sensitive to even very slight delays in message communication, known as latency. Those customers often demand that two sites are linked by the shortest possible and most direct route, rather than through the existing network (which often go via exchange sites and other network nodes). It is important that an OLO is able to specify such routing and that JT's obligation to provide includes provision of such connections. Sure recognises that this may involve excess construction charges, but the

nature of the retail client requirements are such that those costs would likely be acceptable, providing the pricing is capped at a level comparable to self-build by an OLO.

Likewise, some retail customers require physical redundancy with no single point of failure for their connectivity. Like for the specific routing for latency-sensitive customers, the scope of both active and passive remedies in the wholesale leased lines market must be defined to include satisfaction of such requirements.

If the remedies were to be defined to exclude one or both of the above two scenarios, then this would result in a significant competitive advantage to JT, as JT would be able to provide those solutions to its own retail customers but have no obligation to make the same available to its wholesale customers. In order to avoid uncertainty and unnecessary disputes, the JCRA should seek to clarify that the requirements set out in the response, and any subsequent legitimate and reasonable requirements arising through the ongoing consultation process, are within scope of the remedies to be imposed.

**Migration:** Sure agrees with the JCRA that the switch from the wholesale customer using an active wholesale leased line to using a dark fibre access connection, should be implemented in such a way to ensure that the wholesale customer can continue to provide seamless service to its end customers.

The JCRA states that, for this reason, the withdrawal of active wholesale leased lines should not take place until such time that a fit-for-purpose dark fibre access remedy is in place. Sure does not believe this to be a sufficient safeguard. It is likely to take time to migrate all the current wholesale active leased lines to dark fibre connections. This will involve discussions with end customers to manage any service discontinuity risk and also complex scheduling challenges for both JT and its wholesale customers.

We note that the Authority intends to set out proposals for the transitional arrangements as part of a separate consultation document, but we have taken the opportunity to provide our summary considerations at this stage. Although Sure assumes that active wholesale leased lines already in place will have to be continued until their contractual end point, this could still prove troublesome at the retail level, where contract durations can be significantly longer than the default 12 months' wholesale level term.

For certain industries, any break in their connectivity service can have significant operational consequences (as witnessed during JT's full network outage) and we request that the JCRA impose a period of at least 36 months from when the new dark fibre access remedy is introduced to when JT is no longer obliged to provide active wholesale leased lines on regulated terms and conditions similar to those imposed at the moment. The significant resourcing requirements to migrate retail leased lines from active wholesale services to passive dark fibre services must not be underestimated, with material manpower implications likely within each provider's team (including JT's own) to undertake that swap-out and service testing required for every wholesale circuit purchased by an OLO.

It is important to recognise that, whilst Sure strongly welcomes the introduction of the dark fibre remedy, the transition from active to passive wholesale services could cause potential service disruption of OLO retail customers, just to stay with their existing provider.

It is important that JT Retail is subject to the same migration processes and costs as OLOs. This means that, if the migration involves the removal and replacement of the electronics, this must also apply to JT's retail business. Conversely, if JT Retail can continue using the existing electronics, then that option must be available to OLOs as well on identical terms to those offered to JT Retail.

It is for these reasons that it is critical that the JCRA puts in place both a period and rules for transitioning from active wholesale leased lines to dark fibre that provide the maximum possible protection for customers as well as OLOs.

**Parity with wholesale active products:** As explained above, Sure believes that a period of minimum 36 months is required during which JT should still have an obligation to offer and maintain fully regulated active wholesale leased lines. This will also allow for teething problems with the dark fibre product to be overcome and all parties to develop sufficient confidence in the new product and its supporting ancillary products and processes to ensure that this change will not have adverse impacts on end customers.

After the expiration of the 36-month period, Sure believes that an obligation on JT to provide active wholesale leased lines should remain in place, but that the pricing of that product should be subject to less strict regulation. This is to ensure that OLOs can offer carrier diversity to leased lines customers across Jersey.

<u>Obligation of access: copper leased lines</u>

Sure agrees that it is appropriate to leave the pricing of copper-based leased lines on a retail minus basis. Whilst copper based leased lines will be gradually phased out, it is important that regulation is not removed until they have been completely discontinued. OLOs need to be able to offer copper based leased lines to customers in the same manner that JT can.

<u>Transitional arrangements for existing fibre-based wholesale leased lines</u>

**Question 12: Do you agree with the Authority's preliminary proposals for the set of regulations to be imposed on JT?**

Sure has considered the JCRA's proposals in detail and sets out its view on the full set of remedies below.

Above, we have discussed the need for a 36 month overlap, where the provision of both dark fibre access and fully regulated active wholesale leased lines should be mandated on JT. In addition to that, Sure is concerned that, if the obligation to provide active wholesale leased lines were to be removed entirely, JT could refuse to supply active leased lines to locations where Sure or another OLO is seeking to serve a customer that wants carrier diversity. If no other provider has network to connect that site, JT could make it impossible for an OLO to provide carrier diversity and thus make it impossible for an OLO to meet that client's needs.

To ensure the availability of carrier diversity, proven critical to many customers as a result of JT's major network outage last summer, we strongly recommend that the JCRA mandates an obligation to provide active wholesale leased lines for the duration of this review period.

There is, however, the possibility that imposing regulated access at several levels of the value chain, could give rise to inconsistencies – particularly in the regulated charges for such access. To avoid that, Sure recommends that the JCRA not set a regulated charge for the active wholesale leased line products after the expiration of the 36-month parallel running.

Instead, Sure proposes an obligation to provide such access on fair, reasonable and non-discriminatory terms (which could be interpreted as retail minus, but which does not involve the JCRA in the setting of such charges). This style of access should help ensure the availability of carrier diversity and would have the additional benefit of ensuring that those providers that find it too complex to move across to using dark fibre access in the short term would have a fall-back option available to them (in addition to the option of Sure and other OLOs using JT dark fibre to provide a commercial active wholesale product).

Obligation of transparency

The JCRA proposes that JT should be subject to a transparency remedy, imposed using LC 26 of JT's licence, including an obligation to produce and maintain a reference offer and publish performance data on agreed service levels and KPIs. Sure proposes that the information to be made available by JT should include details of its fibre routes as JT's retail business has access to that information and Sure would consider it discriminatory if it were not also to be made available to OLOs.

Sure agrees with these proposals, including the proposals for change notification and fibre routes information, to be imposed under LC 33 of JT's licence. Sure also proposes that the JCRA consults on the detailed structure and requirements for the reference offer in its follow-on remedies consultation.

### *Price and non-price discrimination*

Obligation of non-discrimination

Sure agrees that JT should continue to be subject to non-discrimination remedies under both LC 28 and LC 31. Sure suggests that, in order to assist in ensuring that the new dark fibre remedy has its intended effect of opening the downstream markets to competition and innovation, the JCRA should interpret the non-discrimination obligations for dark fibre access as meaning equivalence of inputs (EoI).

EoI helps ensure that not just the final product is non-discriminatory, but also that the ways the product is ordered, maintained, repaired, etc. are the same for OLOs as for JT. The introduction of a new product like dark fibre access provides the unique opportunity of introducing EoI, as JT will need to establish new processes and systems to manage the consumption of the product.

Whilst EoI could be complex to implement, it should be considerably less complex for an entirely new product. The JCRA should impose EoI, perhaps with the provision that JT could request exemptions for specific interfaces that prove too costly or take too long to implement. If the EoI principle is the overriding approach, then it is more likely that a fit-for-purpose product will be delivered – simply because JT itself would have to use the same processes and systems as OLOs. To avoid delays to the introduction of the dark fibre remedy, the JCRA could stipulate that full EoI compliance should be delivered within 12 months of the dark fibre access product launch.

Obligation to maintain accounting records and provide on request

The JCRA proposes that the current provision in LC 29 of JT's licence is sufficient for the JCRA to be able to obtain the necessary costing data to investigate cases of alleged cross-subsidy or other inappropriate pricing behaviour.

Sure has often expressed its concerns at the JCRA's decision to no longer require SMP operators to provide separated accounts. Whilst the obligation to maintain accounting records would be of assistance to the JCRA, those records may not provide the full insight necessary to verify whether the correct costs have been allocated to different parts of the network and subsequently to JT's wholesale and retail products. In addition, we note that the JCRA had never required JT to have its annual separated accounts externally audited, thereby allowing JT to make numerous subjective decisions, without material questioning in relation to the treatment and apportionment of costs within its financial model. [✂]

### ***Proposed remedies to address potential for excessive pricing***

Cost accounting and price controls: general

Sure understands from the JCRA's general proposals, that the new dark fibre access remedy will be subject to a cost orientation obligation. Sure agrees that this is the most appropriate pricing approach for a passive remedy.

Price control: dark fibre

Sure notes that the JCRA proposes to issue a separate consultation for the setting of the dark fibre access charge to cover (as a minimum):

- The appropriate costing methodology;
- The appropriate asset lifetimes;
- The appropriate annualisation approach, and
- The allocation of costs within the model so the services costed only include efficiently incurred and necessary costs and enables recovery of efficient costs.

Sure agrees that this would be appropriate, but urges the JCRA to also include the following parameters:

- Cost allocation between fibres used for leased lines and FTTP broadband provision

- Pricing structures
  - Installation and other one-off charges;
  - Distance related elements (including how to calculate distance – for example, as the crow flies or according to the JT network routing);
  - Pricing of ancillary services; and
  - Pricing of new network build/excess construction activities.

**Cost allocation:**
As outlined elsewhere in this response, Sure has concerns in relation to how costs of the 'broadband network' would be recovered when those fibres are used to deliver dark fibre connections. It is imperative that cost allocation is undertaken in a transparent and fair manner and that access to those fibres cannot be used by JT to push substantial costing elements from the broadband market to the leased lines market. Sure will engage actively with the JCRA once the costing and pricing consultation is issued and urge the JCRA to construct its proposals with this risk in mind.

**Structure of dark fibre charges:**
If the dark fibre access pricing will be distance-related, it is critical that OLOs can calculate the distance they will pay for. This could be achieved in two ways:

1. The distance could be calculated 'as the crow flies'. Whilst that will not represent the actual length of fibre used, the pricing can be set up in such a way as to compensate for that (e.g., for each metre as the crow flies, there is 1.3m actual fibre used[24]), or
2. OLOs should be given access to JT's network routing information so that they can calculate the actual fibre length.

Option 1 would provide OLOs with the easiest means of calculation and would also ensure that there is no discrimination in how charges for dark fibre to OLOs are calculated, compared to how charges for JT itself to impute into its cost stack are calculated.

[24] Please note that this ratio is only illustrative. Sure has no knowledge of what that ratio should be.

Although using the actual distance of each line would arguably be more accurate, this is likely to be very complex and increases risks a lack of transparency as well as potential for discrimination between self-provision and provision to OLOs.

Sure favours option 1.

With regards to the pricing of excess construction works, Sure recommends that the JCRA ensures that such charges be set based on evidence of external quotes and are reconciled to JT's internal construction costs.

Approach used in the UK

The JCRA may, however, decide that it is simpler to set a fixed fee for the dark fibre access tail, regardless of distance but with a maximum distance applied. That is the approach adopted in the UK (for both active and passive wholesale leased lines remedies), where Ofcom imposes a fixed fee for the access tail (between site A and a BT exchange) and a distance-related 'main link' component between BT exchanges.

In Jersey, it is unlikely to be appropriate to introduce the principle of inter-exchange 'main link' components, as the distances are relatively short and leased lines routing does not necessarily go via exchange sites. It may, however, be useful to explore whether the simplicity of a fixed charge for a dark fibre circuit would be the most appropriate and practical approach for the new dark fibre remedy.

In the UK, the fixed fee is set based on the average circuit length and the fixed charge also includes an average excess construction charge element up to a pre-set limit. This means that an active wholesale leased line or dark fibre connection can include up to a certain pre-determined distance of excess construction charges without the need for payment of a separate excess construction charge element.

This charging structure was arrived at based on seeking consistency, practicability, and transparency. Sure would welcome the JCRA's evaluation of whether this approach could be appropriate for Jersey.

In the context of setting the dark fibre access pricing, the JCRA needs to be cognisant that the current tariff gradient for active leased lines may mean that the current prices for lower speed lines may be at or below the fully allocated costs of providing those products. Thus, it may not be financially viable to replace an existing low speed active wholesale leased line purchased from JT with a dark fibre and for the OLO to add its own electronics.

Until the full costing model has been completed, it is not possible to know how the cost-based pricing of a dark fibre connection compares with the current prices for active wholesale leased lines at different speeds. The JCRA therefore needs to remain flexible in terms of how it can best support the introduction of the dark fibre access remedy. It would be unfortunate if this change at the wholesale level were to cause a shock-effect to retail pricing for lower speed products[25]. It is possible that the JCRA should consider the option for a glide-path on active wholesale leased lines pricing, should this become necessary to avoid a price-shock in the market.

**Validation of network costs and other costing elements**

This is particularly an issue if the JCRA is planning to use fully allocated (efficiently incurred) cost. The absence of fully published separated accounts (especially detailed network costs) had always made it

[25] Many critical functions use lower speed leased lines for connectivity, including cash dispensers, closed circuit TVs, and other important infrastructure that is critical for the functioning of the wide society.

difficult to ascertain whether JT's costs had been allocated appropriately, particularly as we note that there is no current mention of a requirement for any future JT cost accounting outputs to be externally audited. Without such independent scrutiny JT would have the opportunity to materially skew its results, for its own commercial benefit. The GCRA had required Sure in Guernsey to have an external audit performed on its costing system during every regulatory accounting period and we very much recognised the benefits of that independent process, particularly the sense checking of calculations and chosen methodologies. Over the years, we have repeatedly flagged our concerns about the potential for game-playing on JT's part – something that it understandably denies – but for all stakeholders to have the required comfort and confidence in the outputs of JT's future cost-based charges we strongly believe that its costing system methodologies must be externally scrutinised. The costing values relevant to the wholesale leased lines market are too large to take at face value from JT; particularly with its proven history of previous price distortions through margin squeeze practices[26].

In the absence of the intention to reintroduce published separated accounts (which should be audited), Sure recommends that, as a minimum, the JCRA should perform benchmark-based cost validation to ensure that cost elements claimed by JT are proportionate to the activities and components they are intended to cover.

Price control: copper leased lines

In line with our earlier comments on copper services, we support the continuation of a retail minus 20% wholesale pricing methodology. These are primarily legacy-based circuits, which the JCRA notes are likely to be removed from the market during the period of this review.

In conclusion, Sure welcomes the JCRA's proposals and considers the dark fibre access remedy to be a proportionate and appropriate remedy to address the clear competition issues in the Jersey leased lines markets.

Sure has set out in this response its concerns relating to some of the JCRA's underlying analyses and has highlighted the risks of not correcting the JCRA's proposals. We have also highlighted the importance of ensuring that the new dark fibre access remedy is implemented in a manner that does not offer opportunities for JT to favour its own retail business over other wholesale customers. We have provided proposals for how to define the scope of the remedy to ensure that the maximum economic benefits result from its introduction and we look forward to working with the JCRA and other stakeholders on the follow-up consultations to define the remedy in detail and set cost-based charges based on transparent costing analysis.

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We look forward to the opportunity to provide further input on this important topic, during the next stage of the JCRA's considerations.

**Sure (Jersey) Limited**

15 January 2021

[26] Including, 2016 contravention: t1209j-direction-jt-JerseyJersey-ltd-contravention-of-licence-condition-34.pdf (jcra.je) & 2020 contravention: final-notice-of-a-direction-to-jt-JerseyJersey-limited.pdf (jcra.je)