



Sure (Guernsey) Limited and Sure (Jersey) Limited (collectively referred to in this response as “Sure”) welcome CICRA’s consultation on the Future Economic Regulation of the Broadband Market, which was published on the 4th May 2018, as CICRA document 18/21.

This version of our response is being submitted on a non-confidential basis and we are happy for CICRA to publish it on its website.

EXECUTIVE SUMMARY

The increasing importance of broadband for consumers and business customers makes CICRA’s regulation of broadband markets (retail and wholesale) pivotal to the continued existence and future growth of competition in electronic communications across the Channel Islands. Sure therefore welcomes CICRA’s consultation and its recognition of the importance of a robust broadband framework at both the retail and wholesale levels.

Sure is concerned about CICRA’s track record of imposing and enforcing effective pro-competitive regulation in Jersey and hopes that this consultation and the forthcoming market review will mark the beginning of a new and more robust approach from CICRA.

In this response we explain our existing concerns and respond to CICRA’s specific questions. Our comments can be summarised as follows:

Our concerns relating to JT’s plans in Jersey

- In Jersey, CICRA needs to take a more robust approach to regulating JT to ensure that it does indeed offer fair, reasonable and non-discriminatory (FRAND) access to the range of wholesale products that we and other retail providers need access to in order to compete effectively with JT;
- CICRA’s lack of support of Sure’s attempts to stop JT withdrawing its 100Mbps wholesale broadband service causes us to question whether CICRA is supporting the States of Jersey’s Telecoms Strategy, which as well as noting the importance of the FRAND principle also includes the aim of ensuring that market conditions are suitable for differentiated retail competition;
- When reviewing the broadband markets, CICRA needs to take account of the implications of JT’s planned withdrawal of fixed voice-only services in 2019, and its intentions to launch a new fibre access service over which it would be the sole network provider of fixed voice calls. We understand that JT plans to charge customers for a bundled service (broadband and voice) even if they only want a voice-only service;
- Given JT’s plans, Sure will be formally requesting the introduction of Fixed Number Portability (FNP) by JT. We are asking for CICRA’s full support to ensure that this is made available, before JT is allowed to introduce its new fibre access service. This would allow us to provide our own voice services to customers, so as to be able to compete fairly with JT;
- Sure will also be formally requesting that JT provides a “Naked Broadband” service, that would allow it (and indeed, any OLOs) to provide voice services over broadband to Jersey customers,

and a “Bitstream” service that would allow Sure to differentiate its broadband service in terms of the speeds and contention that it can offer;

- These new wholesale services will allow us to fairly compete with JT by offering differentiated retail services that customers want, rather than being restricted to competing with JT on the basis of the limited product sets that JT Wholesale has determined.

Our views on CICRA’s consultation questions

- Sure’s concerns in relation to JT’s past actions and plans in Jersey inform our views and responses to CICRA’s consultation. We urge CICRA to establish clear, unambiguous and robust regulatory remedies at the wholesale level that gives CICRA the ability to constrain JT’s behaviour in the interest of competition, and ultimately, in the interests of end consumers;
- CICRA’s reluctance to enforce regulatory remedies in Jersey is a cause for considerable concern to Sure and it is important that the regulation resulting from the forthcoming market review will provide CICRA with the tools necessary to challenge JT’s behaviour and safeguard a competitive market. This should include CICRA’s enforcement of existing non-discrimination obligations, along with measures to ensure compliance with the policies of the States of Jersey and Guernsey;
- Sure considers it important that some form of economic price regulation is imposed at the wholesale broadband market level. Sure, however, cannot engage in a debate on the type of price regulation to be introduced until market definition and SMP analyses have been completed and any market failures have been identified;
- Sure is concerned that CICRA is proposing that a single 1Gbps wholesale broadband speed in Jersey would be suitable to ensure a vibrant and differentiated retail broadband market. CICRA’s proposal would further JT’s monopolistic aims and prevent OLOs from being able to present a credible competitive threat to JT in Jersey;
- Sure considers that, unless CICRA can create an effective regulatory framework that will prevent JT from its continued anti-competitive behaviour, the States of Jersey should give serious thoughts to the establishment of an independent organisation to manage the JT fibre network, in the interests of consumers, with JT Retail and OLOs having equal and non-discriminatory access to that infrastructure.

INTRODUCTION & CONTEXT

Before responding directly to the questions posed by CICRA within its consultation document, Sure considers that it is crucial to set out the context in which such questions must be considered. JT intends to make fundamental changes to the way in which fixed line services are provided in Jersey, which CICRA must ensure will be undertaken by JT in full compliance with its relevant licence conditions.

JT's plans to move to a single 1Gbps retail and wholesale service and to abolish the landline voice-only service

JT announced to industry stakeholders in February 2018 that it intends to withdraw its landline-only services during 2019, along with an intention to move to a single 1Gbps broadband service at both retail and wholesale levels by 2020. Sure has several concerns regarding both of these; we outline below our main concerns:

Move to a single 1Gbps retail and wholesale service in Jersey

In May this year, JT abolished its 100Mbps service and moved to a minimum speed service of 250Mbps at both retail and wholesale levels. This move was announced in February 2018 and Sure has since then been in discussions with CICRA to try to prevent JT from implementing that change. CICRA has, however, decided not to intervene and so the change was implemented during May 2018.

When analysing JT's rationale and justification for abolishing the 100Mbps service, it is important to recognise that JT acknowledges that less than 1% of Jersey broadband customers (both at the retail and wholesale level) currently use bandwidth of greater than 100Mbps; the change is therefore clearly not a response to consumer demand. JT has also already notified stakeholders that it will be removing both download and upload speed limits (but with no changes to customers' existing inclusive data allowances), for a trial period over the summer. That will result in customers having access a 1Gbps speed, as long as their router is capable of achieving it.

JT is planning a migration towards offering products that are only available at a 1Gbps speed to all Jersey broadband consumers by 2020, again without any evidence that this is what consumers want or need. As JT's fibre access network can deliver 1Gbps services, Sure understands that JT will want to make that speed available to customers, but we believe it should be provided as an option among other available speeds, rather than the only available service.

Significantly, Sure believes that JT's move to only providing 1Gbps broadband speeds will have negative impacts both on competition and on consumers:

Impact on retail consumers

Retail customers taking either JT's entry level broadband (20GB allowance) or its standard broadband service (100GB allowance) find themselves in a position where they have a limited monthly inclusive-data allowance. With JT having recently increased the entry level speed to 250Mbps, with plans to increase this further to 1Gbps, customers are being encouraged to consume their data allowance much more quickly.

It is worth noting that the average Jersey broadband user consumes 137GB¹ of data per month, so already in excess of JT's standard package data allowance. This figure is rapidly rising on an annual basis and is likely to result in a large number of JT customers being required to buy additional data to be able to use their broadband service for the remainder of the month. As JT has a share of 70% of the retail market this may cause a material impact within that market.

Facilitating differentiated retail competition

Sure is concerned that CICRA has seemingly not yet identified or even acknowledged the above negative impacts on consumers as sufficiently important to intervene. This seems to be at odds with the consumer protection stance that CICRA has taken on other issues and also contrasts with the active role Ofcom has taken in the UK. Sure notes in particular that Ofcom places significant value on the existence of a tariff gradient on electronic communication services including broadband services and leased lines. For example, in the 2016 business connectivity market review (BCMR), Ofcom prioritised the protection of the tariff gradient (by which a range of different speeds of leased lines were available at different price levels) when it considered how a dark fibre product should be priced. Ofcom explicitly rejected pricing options that could result in a collapse of the tariff gradient². On the contrary, CICRA appears to believe that consumers should not retain the right to select the speed of broadband service that best suits them, something that would also ensure that they do not pay for functionality or speed that they do not want or need³.

At this point, it is important to correct JT's misinformation about its perceived need to provide all Jersey broadband customers with a 1Gbps services. The January 2018 Oxera report⁴ 'A telecoms strategy for Jersey', commissioned by the States, sets out the accepted proposal for 'universal access to symmetric 1Gbps speeds on JT's Gigabit network in line with the Digital Policy Framework.' The latter refers to 'ensuring 1Gb/s broadband availability to every premises' [Emphasis added]. JT seems to have misinterpreted both of these statements as requiring it to provide nothing less than 1Gbps speeds to all customers. This is simply not the case, as clarified at Sure's request, in May 2018, by Jersey's Digital Policy Unit. Rather, the requirement is for the option of a 1Gbps service to be made available to every premises, something that Sure fully supports, seeing as JT's fibre network provides that capability by default. The fact that, according to CICRA's 2017 Telecommunications Statistics and Market Report, only a maximum of 1.5% of Jersey customers have had a need, since 2012, for that speed reinforces how inappropriate JT's plans for a standard 1Gbps service is. Sure strongly believes that JT Wholesale should focus on the types of speed that customers do actually need or want (therefore the 99% of customers that currently use less than 100Mbps).

It is therefore evident that JT's and Sure's broadband strategies have significantly diverged, as can be summarised below:

¹ www.cicra.gg/media/597852/cicra-telecommunications-statistics-and-market-report-2017.pdf

² Paragraph 9.124 of Volume 2 of the 2016 BCMR Final Statement: 'We consider that pricing dark fibre on an active-minus basis with reference to BT's EAD 1Gbit/s product (a high bandwidth product) will allow BT the opportunity to preserve some elements of its bandwidth gradient (and demand based pricing) and thereby better supports allocative efficiency than opting for a lower bandwidth (and priced) reference product'.

³ Sure notes that paragraph 5.2 of the consultation document refers to the benefits of consumer choice and that consumers should not pay for services they do not need, but Sure has not yet seen CICRA enforce this principle.

⁴

<https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20A%20telecoms%20strategy%20for%20Jersey%20Oxera%20December%202017%2020180105%20TH.pdf>

JT (Jersey)	Sure (Jersey)
Striving to provide broadband speeds some ten times faster than the market currently requires.	Seeking to provide broadband speeds in line with customers' requirements, with specific recognition of the need for a low cost, entry level option.
<p>By 2020, JT seeks to provide just two consumer speed options, both with 40:1 contention ratio:</p> <ul style="list-style-type: none"> • 1Gbps download / 250Mbps upload • 1Gbps / 1 Gbps 	<p><u>Before</u> 2020, Sure wishes to provide a range of speed and contention variants to much more closely fulfil the needs of Jersey broadband consumers, such as:</p> <ul style="list-style-type: none"> • 50Mbps / 5Mbps / 50:1 (Entry level option) • 100Mbps / 20Mbps / 50:1 • 250Mbps / 50Mbps / 40:1 • 500Mbps / 250Mbps / 40:1 • 1Gbps / 500Mbps / 40:1

Whilst this consultation response was being prepared, Sure received a letter from CICRA⁵ in which it set out its decision to take no action against JT in relation to the latter's removal of a 100Mbps speed option. JT may well interpret that as a sign that CICRA supports its wholesale broadband roadmap plans, however Sure would have great difficulty with that, were that to be the case.

As CICRA is well aware, Sure has been an avid supporter of the industry-wide considerations of a range of proposed new wholesale access services, having understood the benefits of them (where there is proven demand), as far back as 2010. Whilst Wholesale Line Rental (WLR) has brought very effective competition to the Jersey market, it is clear from JT Wholesale's long-term stance that it does not wish to provide the types of wholesale broadband services that Sure is seeking to procure for its retail customers. CICRA's letter to Sure of 12th June 2018 acknowledges this point, stating that:

'the engagement process between JT Wholesale and Sure Retail may not be functioning as effectively as it could and that it is important that Sure's retail customers can obtain the wholesale services that they require.'

CICRA will find evidence of multiple instances, since JT's inception of its Gigabit Jersey project, where Sure has been side-lined by JT Wholesale from involvement and opportunity for the shaping of JT's broadband services. This has resulted in not only Sure's financial detriment, but also in the inability to provide Sure's customers with the broadband choices that they tell us that they want – at speeds and prices that are not reliant on JT's predetermined and limited product set.

Such differentiated retail broadband services would be possible if JT Wholesale were to introduce a Bitstream service, which would allow the taker of the service (e.g. Sure) to provide a portfolio of different retail services, with different characteristics of speed, contention, data prioritisation, etc.

Sure therefore intends to formally request, via Condition 36 of JT's licence (Network Access), that JT introduces a BITSTREAM service for its Jersey wholesale broadband services.

Impact on competition and wholesale customers

⁵ From Tim Ringsdore to James Williams, 12th June 2018

JT's refusal to continue supplying a 100Mbps wholesale broadband service to Sure (CICRA has been made aware of Sure's requests and JT's refusal to supply) means that it would be very difficult for Sure (and other licensed operators (OLOs)) to continue offering a 100Mbps service that is commercially attractive to consumers. This is because OLOs now have to purchase a 250Mbps wholesale service to deliver a 100Mbps service.

The fact that the new 250Mbps wholesale service is at the same price as its predecessor (the 100Mbps service), could make it appear that those taking this service are being provided with more for the same price; in fact it makes it more difficult for those OLOs who wish to provide a 100Mbps service to compete against JT's 250Mbps retail service. The important fact is that JT is now marketing a retail 250Mbps service at a retail price, based on the 250Mbps wholesale price. The price for JT's wholesale broadband services include speed sensitive components, so when CICRA says that OLOs can simply use the 250Mbps wholesale service to create a 100Mbps service, CICRA is condoning that OLOs (and thus also downstream retail consumers) should pay for functionality and network components that are not necessary for the retail service provided. OLOs have to use the 250Mbps wholesale service to provide a 100Mbps retail service. This gives very limited scope for OLOs to offer sufficient price differentiation for a 100Mbps service to make this commercially attractive to retail customers. To be clear, the principle that we are trying to address is that we should have the ability to provide a range of differentiated retail services, as set out in the above table, of which the 100Mbps is a key part of the range. Price differentiation is made even harder for Sure because its broadband services in Jersey do not include usage limited offers (and therefore Sure's costs are likely to be higher than JT's).

Whilst JT Wholesale is adamant that it, rather than JT Retail, is driving the development of wholesale services, it is patently obvious that there is little benefit to be had by JT Wholesale itself through this speed-obsessive stance.

Sure, as the only other service taker of JT Wholesale broadband services, has had no opportunity to participate in scoping or shaping the broadband services offered by JT Wholesale. This suggests that JT wholesale services are being developed to further the interests of JT Retail only, which is clearly in conflict with the regulatory framework and the strategy of the States of Jersey:

'CICRA should ensure JT supplies other operators with wholesale access to the Gigabit network on a fair, reasonable and non-discriminatory (FRAND) basis, and that wholesale access seekers [e.g. Sure] get access to wholesale products, which allow access seekers to compete based on differentiated retail services' [reference to Sure added].'

JT's plans to abolish its voice-only fixed line services

JT announced to stakeholders during February 2018 that it intends to withdraw Jersey landline-only services during 2019. This would be the most fundamental change in the provision of fixed line telecoms services since the establishment of landlines on the island in 1895. The impact of this change must not be underestimated and Sure encourages CICRA to consider this proactively and as a matter of urgency.

JT plans to require all current landline-only customers to also pay for a broadband service as part of JT's intended replacement service.

We believe that CICRA should, as a matter of priority, require JT to provide a formal assurance that it will take all necessary steps to ensure that it does not breach its telecoms licence.

An excerpt of Licence Condition 32 of JT's licence, relating to Linked Sales, is directly relevant here:

32.1 The Licensee shall not make it a condition of providing any Telecommunications Services, or providing Access that a Subscriber, User or Other Licensed Operator should acquire from the Licensee, or any person specified by the Licensee, any Telecommunications Service or Telecommunications apparatus including CPE, other than the one that is specifically required by the person concerned, unless the Licensee has:

(a) notified the JCRA of its intention to do so; and

(b) has satisfied them that either there are technical reasons why such a bundling of Telecommunication Services and/or Telecommunication Apparatus should occur, or that there is a sufficient economic benefit to Users to justify the bundling.

JT has almost completed its island-wide transition from copper to fibre broadband services in Jersey. These migrated customers have paid for their landline and broadband services separately and should they, at any time, no longer have a requirement for a broadband service, they can cease it, whilst maintaining a voice-only service – either as a retail customer of JT or as a customer of Sure (via Wholesale Line Rental). Thus, JT has clearly proven that a landline only option is technically achievable on a fibre network and has allowed customers to make use of that facility since 2012. Indeed, JT has recently commenced a programme to migrate landline only customers from copper to fibre, and until that project is complete, it would appear that JT is willing to provide landline only services on fibre, without the requirement for an associated broadband service. However, once this migration is complete, JT intends to require all Jersey fixed line customers to take bundled landline and broadband service, rolled up into a new JT 'fibre access service'.

JT has indicated to Sure that it intends to apply a total monthly rental charge similar to the total price of the two individual services, so, at current charge levels, that would be £38.75, rather than £12.50 for customers who only require a voice-only service. If this is true, then it appears to be a brazen attempt by JT to increase its revenues for purely commercial gain and there would certainly be no 'sufficient economic benefit to Users' to justify tying the two services. This would be counter to the requirements of Condition 32.1(b) of JT's licence and, due to the enormity of the impact to consumers, we urge CICRA to act swiftly to ensure that JT actions are constrained to those that are fully compliant with the its licence conditions.

Impact on wholesale and retail markets

Should CICRA be minded to allow JT to bring its plans to fruition, then CICRA must also consider the likely impacts in the relevant retail and wholesale markets.

JT Wholesale has informed Sure that, although its intended 'fibre access' service would become a new wholesale equivalent to its existing landline and broadband services, it has no intention of allowing any party other than its own network to provide voice calls over that service. JT is quick to emphasise that the voice element is to be provided using VoIP technology, rather than any legacy TDM network, but as such, fails to acknowledge that it is therefore a service that could equally be provided directly by OLOs. There appears to be no valid technical reason why JT should remain the sole calls provider over any new fibre access service and Sure therefore requests that CICRA closely scrutinises JT's plans to ascertain whether regulatory intervention is required to correct JT's potentially material anti-

competitive plans. It is critical that such issues are resolved before the new retail service is introduced as to do otherwise would be in conflict with the principle of non-discrimination.

JT has suggested that the fixed voice market is small and declining and therefore OLOs are not disadvantaged by not being able to offer that service. CICRA's 2017 Telecommunications Statistics and Market Report, however, reveals that the average monthly Jersey fixed line call usage (165 minutes per month) is still in excess of both Postpay and Prepay call mobile minutes (131 & 64 minutes, respectively). As there is no doubt about the benefits of competition in the provision of mobile voice services, the same must surely be true for fixed voice services. Further, VoIP is meant to be a technical facilitator for effective competition, not a tool for an incumbent operator to repress competition. Sure believes that, as VoIP removes all technical obstacles to the provision of fixed voice services by OLOs, JT should be required to implement Fixed Number Portability (FNP) on its network in time for the implementation of this new fibre access service. To do otherwise would enable JT to further entrench its dominance and would be in direct conflict with the principle of non-discrimination.

Sure therefore intends to formally request that FIXED NUMBER PORTABILITY be implemented in Jersey before JT be allowed to launch its new fibre access service.

The resultant opening up of the fixed voice market in Jersey, through the introduction of FNP, would negate the need for dial tone to be provided by JT over its wholesale fibre access services. Its removal would very much align with JT's own plans for its fibre access service to be a 'service-agnostic pipe'. As JT pointed out within its Wholesale Broadband Roadmap 2018 – 2020, 'in a full fibre world the connection to the subscriber is a data line and voice is delivered by VoIP'.

JT has the almost immediate ability to create a 'Naked Broadband' architecture (a fibre line without dial tone – equivalent to Naked DSL in a copper-based network). It already carries voice services as data over its fibre broadband network, meaning that there is no longer a need to generate legacy style dial tone. This type of VoIP solution is what JT had proposed to implement across the island as its original Gigabit Jersey strategy. At the time, this had been blocked by OLOs (with CICRA's assistance) due to JT's refusal to commit to also provide FNP, thereby rendering any Naked DSL/broadband service materially unfit for purpose at that time. If FNP is implemented then that obstacle would be removed.

Sure therefore intends to formally request, via Condition 36 of JT's licence (Network Access) that JT introduces NAKED BROADBAND as the means of customer connectivity for Jersey broadband services. This should be introduced no later than the time of the introduction of the new fibre access service.

Sure is willing to take the initiative to progress the above matters with JT, but CICRA must not adopt a position of 'wait and see', as has happened in the past. Only with CICRA's support and clear commitment that the new fibre access service cannot be launched before FNP and NAKED BROADBAND are implemented will it be possible for Sure to progress negotiations with JT in a meaningful way. CICRA's wait and see approach to JT's Gigabit Jersey project, resulted in OLOs being unable to offer services on JT's new fibre infrastructure for a whole year after JT retail had launched its fibre-based services. This is a clear example of a breach of the principle of non-discrimination.

An associated matter, and one that must form an important part of CICRA's considerations is how JT's plans will affect its future compliance with its fixed line Retail Price Control. As CICRA is aware, the regulatory framework for Price Control covers landline and fixed voice services, but not broadband.

Therefore, any price compliance blurring caused by JT's merging of landline with broadband would need to be reviewed in detail. It cannot be ignored, given its multi-million pound value and impact on Jersey retail customers. JT's Licence Condition 33.2 is relevant in this regard and Sure requests that CICRA engages with JT on this issue in a proactive manner, rather than being reactive, as it appears to have been in relation to JT's strategy to date.

Although it may be considered contentious, it could be viewed that, since the inception of its Gigabit Jersey project, JT has had almost free rein from CICRA to define, develop and launch its chosen fixed line telecoms services. CICRA would, no doubt, be keen to state that it is not its role to place limitations on the commercial strategy employed by any of its licensed operators, however Sure believes that there is a history of CICRA's lack of timely engagement in relation to the many regulatory issues which occurred during the earlier years of JT's Gigabit project. One of the most noticeable regulatory injustices was that ability of JT Retail to launch and supply fibre broadband services to its customers more than a year in advance of making a wholesale service available. Despite protests from Sure, CICRA refused to recognise that JT Wholesale had not made the required wholesale broadband connectivity services available to OLOs to be able to launch their services and was therefore discriminating against OLOs in favour of its own retail business.

It is evident from all of the above that CICRA's oversight and control will be critical to the effective and fair outcome required by all Jersey broadband service providers and, ultimately, their customers.

SUMMARY OF REQUIRED JERSEY-SPECIFIC NETWORK ACCESS SERVICES

- **Fixed Number Portability** – required due to JT’s intended removal of landline services, including calls;
- **Naked Broadband** – required to provide a means for OLOs, using their own network, to provide calls to their customers, in the absence of Jersey landlines;
- **Bitstream** - required to provide QoS (prioritisation of voice calls over a broadband service) and a range of differentiated ‘fibre access’ services, needed to:
 - Allow for a low-cost voice-only solution (to fill the gap left by JT’s removal of landlines);
 - Allow OLOs to provide an independent range of broadband service variants (including, again, a low-cost option), with self-management of speeds and contention ratios (so as not to be bound by JT’s intended enforced 1Gbps only speed in 2020).

Sure wishes to make absolutely clear that the reason that it requires the introduction of the above three Network Access services in Jersey, via an urgent product development programme, is specifically because of JT’s intended actions in relation to its fibre network. The fundamental flashpoint will be the removal of landline only services (and associated voice call functionality), planned for 2019. In addition, JT’s refusal to deviate from its plan to provide all consumer broadband services at only a 1Gbps speed by 2020 is totally unacceptable and leaves customers with the very absence of choice and differentiation. **This is totally at odds with the States of Jersey Telecoms Strategy.** As can be seen from Sure’s answer to CICRA’s Question 6 (below), unfortunately, we cannot support CICRA’s alternatively proposed standard 1Gbps symmetrical service, which appears to only take account of JT’s strategy, rather than facilitate any OLOs’ strategies. Indeed, we do not believe that it could provide a suitable solution to these issues - in fact it has the potential to exacerbate the problem.

We cannot stress how important it is, based on JT’s highly contentious intended actions, for focus to be provided by all relevant stakeholders on the Jersey market only in the development of these Network Access services. No-one can fail to acknowledge the long-drawn-out negotiation process that both CICRA and Sure had to endure with JT over the pan-islands development and implementation of WLR; primarily as the result of the legal challenge by JT.

It is pertinent to note that take-up of that first new Network Access service has been minimal in Guernsey and yet, it has been a resounding success in Jersey. Sure is always eager to champion competition, but it must not come at the expense of a vast investment in wasted resources, as was the case for Sure in relation to WLR in Guernsey. We have absolutely no plans to remove any landline services from the market (at either the retail or wholesale level) at any time in the foreseeable future and so no valid reason to take the necessary focus away from the urgent developments required in Jersey.

Looking at Sure’s broadband services in Guernsey, it is evident that we support a wide range of speeds and we intend to expand this range further in 2019. This is in direct contrast to JT’s plans to remove any speed option for Jersey consumers by 2020. Thus, there is a long-term stability and certainty to Sure’s fixed line product set in Guernsey and a defined development plan for an expanded range of broadband services. Should any reasonable requests be made for the further development of services we would be happy to fulfil them, as long as each request is backed up with evidence of reasonable demand for the service, so as to avoid a repeat of the failed WLR service in Guernsey.

RESPONSES TO QUESTIONS SET OUT IN CICRA'S CONSULTATION DOCUMENT

Now that Sure has been able to set out its position, above, in relation to the numerous deficiencies and risks of the Jersey broadband market (based on both current and future intended outcomes), we will respond to the specific questions posed by CICRA within its Consultation Document on the Future Economic Regulation of the Broadband Market.

Question 1: Does the respondent agree with CICRA's provisional view relating to the Channel Islands' broadband markets set out above? If the respondent has alternative views or relevant evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform CICRA's consideration and next steps.

Although Sure supports certain aspects of CICRA's provisional view, we have material concerns in relation to CICRA's self-perceived constraints in its ability to effectively manage the regulatory framework under which it envisages the development of the broadband market to occur.

We need look no further than the very recent engagement with CICRA in relation to our attempt to require JT to continue to provide a wholesale 100Mbps broadband speed option in Jersey. As recently as June 2017, CICRA added a specific Network Access condition into the licences of JT (Jersey) Limited and Sure (Guernsey) Limited. The aim was to provide CICRA with specific powers to be able to regulate the fixed line operator with SMP in each island with regard to any reasonable requests for wholesale Network Access received from an OLO. Within those licences:

- 'Network' is defined as set of interconnected devices across which a telecommunicated message can be passed; and
- 'Access' is defined as the ability to obtain a required service, facility or function.

CICRA was keen to point out to Sure at the time that the definition was deliberately broad, so as not to limit the type of products and yet, on the very first occasion when the validity of this new licence condition has been tested, it appears to have failed. As a reminder, Sure did not request that JT should not be allowed to introduce a 250Mbps service; only that in doing so it should maintain a wholesale 100Mbps speed option, which therefore would have allowed Sure to create differentiation in the market and fulfil the existing needs of its broadband customers.

To reiterate a key point, CICRA set out very clearly, within its current broadband consultation document, that a key activity had been allocated to it by the States of Jersey, within its Telecoms Strategy, that:

'CICRA should ensure JT supplies other operators with wholesale access to the Gigabit network on a fair, reasonable and non-discriminatory (FRAND) basis, and that wholesale access seekers get access to wholesale products, which allow access seekers to compete based on differentiated retail services'.⁶

If CICRA does not believe that it has the regulatory powers, using the Network Access Condition (36) of JT's licence, to require JT to fulfil Sure's reasonable request for a 100Mbps broadband speed option, so as to allow Sure to provide that differentiated retail service then, understandably, its ability to ensure the appropriate regulatory outcomes for major Network Access projects such as FNP, Naked Broadband and Bitstream could be called into question.

Looking at CICRA's Question 1 in more detail, Section 3.1 of its the consultation refers to the fact that broadband is the go-to method to provide an increasing number of digital products and services. Sure

⁶ Paragraph 1.2

agrees with this high-level view. Broadband provides the key building block for a range of innovative retail services and facilities. Many of these are reliant on the underlying network provision of FNP, Naked Broadband and Bitstream. Ideally, CICRA would have been more explicit about the need to consider these specific types of services within this Broadband consultation, as there is a risk that other respondents may assume that they are outside the scope of this particular review. This could therefore set different expectations amongst operators as to CICRA's intended next steps. We do recognise, however, that CICRA has stated its considerations are still at an early stage and that further opportunities for stakeholder engagement will follow over the coming months.

Section 3.3 refers to tools such as wholesale price controls, within the framework where the retail sector is supported. Sure is concerned about how CICRA may intend to achieve such a price control mechanism, in the absence of incumbent operators' separated accounts and the underlying cost models used to create them. CICRA took the unusual step of removing the requirement for both JT (Jersey) and Sure (Guernsey) to submit annual separated accounts, Despite Sure questioning the appropriateness of that move. Without externally audited costing data, neither JT nor Sure will have verifiably and reliable financial inputs for use for wholesale broadband price control purposes. Based on Sure's studies to date of the inappropriateness of benchmarking of its wholesale services' costs against those of much larger operators in non-island jurisdictions, Sure would certainly have reservations as to the validity of such results.

Question 2: Does the respondent agree with CICRA's statement relating to best practice regulatory framework? If the respondent has alternative views or evidence the respondent is asked to explain those and provide all of its analysis and assessment relating to this matter to inform CICRA's consideration and next steps.

CICRA lists the potential remedies that can be applied to a provider found to have SMP in a relevant market and Sure agrees that these are all remedies that could be applied and which have proven successful in a large number of markets and jurisdictions across the world.

It is, however, important to have clarity with regards to three critical criteria:

1. Firstly, the overall regulatory principles applied when determining which remedies to apply in SMP markets;
2. Secondly, the type of competition that is pursued, and
3. Thirdly, compliance and enforcement actions available to the regulator.

Regulatory principles

When considering the regulatory principles used by CICRA in the past, as well as the statements of principle and intent included in this consultation, Sure has a number of concerns. Two principles that Sure consider to be critical to ensure an equitable outcome of regulatory action are equivalence and replicability, and Sure has concerns that CICRA is not embracing these principles sufficiently.

With regards to equivalence, we have set out in the introductory section to this response that JT was able to offer fibre-based broadband services in Jersey for a full year before a wholesale service was made available that allowed OLOs to compete with the JT fibre-based service. This is an example of allowing an SMP provider to launch a service before a suitable wholesale service is available and is entirely contrary to the principle of equivalence. Many examples of JT Wholesale refusing to engage with Sure and OLOs when developing new wholesale services are further evidence that the current regulatory interventions/remedies do not deliver equivalence. Even if CICRA applied the less stringent principle of non-discrimination, JT's behaviour is clearly non-compliant. Sure therefore requests that

CICRA confirms its commitment to regulating the broadband markets in accordance with the principle of equivalence and for it to make this an explicit commitment.

As for replicability, again this is a fundamental principle that should guide the selection and formulation of remedies where SMP is found in a wholesale market. At present, SMP remedies issued by CICRA do not explicitly require replicability (that is, the ability of OLOs to replicate JT's services at the same time as JT) and Sure considers this to be a significant weakness which should be rectified in the remedies applied as part of the forthcoming wholesale broadband market review.

Defining the type of competition to encourage

CICRA states in the consultation document that it is unlikely to be feasible for operators to build competing access networks in the Channel Islands. Sure agrees that this is certainly true for commercially owned operators, but there is clear evidence that this is not applicable to JT. CICRA therefore needs to make sure that its regulatory interventions do not assume that there will be no access network duplication, as doing so would not serve the interests of furthering competition nor of end consumers. In particular for Guernsey, CICRA needs to be cognisant of the ongoing investment by JT in new fibre infrastructure and the ability of JT - as a States' owned entity - to be able to operate outside the normal constraints of a commercial operator, which by contrast, must demonstrate to its shareholders a return on investment within a reasonable period of time.

With regards to the regulatory interventions that may be applied (if SMP is found) to further service competition, Sure believes that it is important that these are designed bearing in mind the size and nature of the Channel Islands' markets. It would not be in the medium to long term interests of consumers to encourage arbitrage-based market entry, which could leave the market with less choice and competition once that arbitrage opportunity has been exhausted.

Clarity of compliance and enforcement

Whilst the remedies set out by CICRA in principle should provide the necessary tool box for CICRA to impose effective remedies in SMP markets, Sure has concerns that when it has presented clear and unambiguous evidence to CICRA of non-compliance with such remedies and with licence conditions, CICRA has, on occasion, not felt able or empowered to take action to enforce the relevant obligations. A further example of non-enforcement is the ability of an SMP operator to simply refuse to implement a specific wholesale access remedy or to be allowed to drag out the development and implementation process, with the single objective of preventing or delaying the ability of OLOs to compete effectively. An example of this is when JT refused to develop a WLR service in Jersey. Sure therefore requests that CICRA designs remedies that empowers it to take effective action in cases of non-compliance.

With regards to the list of remedies listed by CICRA, Sure notes that CICRA has already removed the opportunity for applying two of them; namely accounting separation and cost accounting. Whilst Sure welcomes the reduction in its cost of demonstrating regulatory compliance, Sure has made it clear that it could limit CICRA's ability to regulate effectively without these two remedies in place.

In conclusion, therefore, whilst CICRA has listed a standard set of regulatory remedies, this does not in itself demonstrate regulatory best practice. Best practice is manifested in how these remedies are applied and enforced, both of which are areas where Sure considers that CICRA has not generally demonstrated best practice regulation. Sure therefore recommends that CICRA focuses on those aspects when conducting the wholesale broadband market review for the Channel Islands.

Question 3: Do respondents consider there is appropriate access and reasonable control over the wholesale network elements listed above by retail broadband providers? If these descriptions are

ambiguous or would benefit from further elaboration in terms of their definitions respondents are asked to set out their views in as much detail as feasible.

and

Question 4: Are there additional wholesale network elements that have not been identified that have a material bearing on the ability of broadband retailers to provide services? If so respondents are asked to set these out fully?

Sure notes the network elements listed in Section 4.10 of the Consultation and in very broad terms agrees with what is shown. However, it should be noted that the functionality of a B-RAS (Broadband Remote Access Server) is now more commonly provided by a BNG (Broadband Network Gateway).

In addition, one specific component missing from the relevant list of Jersey related network elements is JT's ONT (Optical Network Termination) device. This equipment is located within each Jersey fibre customer's premises and serves multiple functions, including (based on the limited information provided to Sure by JT):

- A fibre network termination/demarcation point;
- An ATA (Analogue Telephone Adaptor) function and VoIP phone line ports – for either direct connection of a telephone or for connecting to the existing internal wiring/sockets of the premises;
- A broadband line speed synchronisation capability, allowing the data port to 'auto-negotiate' the suitable speeds for the customer's router.

That being the case, this needs to be included as a relevant wholesale network element for the Jersey broadband market, as it forms part of the wholesale broadband service.

The key consideration is picked up by CICRA in Section 4.11, through the recognition that downstream service providers (such as Sure in Jersey) would have the ability to differentiate their services to a greater extent if they have control over (or access to) the relevant network elements of the incumbent's broadband network.

Unlike JT in Jersey, Sure In Guernsey, has no plans to fundamentally change the way in which landline and broadband services are provided to its customers. We already provide end users (via their chosen retail service provider) with a variety of speed options – currently as 'up to' 20, 40, 60 and 100Mbps services. In addition, Sure is currently testing a further, high-speed, variant (in the region of 300Mbps), which it expects to add to the Guernsey portfolio during 2019 - thereby expanding the choice of speeds available to all Guernsey broadband customers. This recognition of the differentiation in customers' needs simply does not exist in JT's retail or wholesale broadband portfolios in Jersey and JT could not have been clearer to date about its intention to not account for such needs. A strong example of this is JT's (mis)interpretation of the States of Jersey's Telecoms Strategy framework that all Jersey broadband customers must have a 1Gbps connection within the next two years.

Further, the enormity of the detrimental impact of what JT intends to impose on its customers (at both the wholesale and retail levels), by withdrawing voice-only services, and instead requiring customers to take a bundled fixed line and a broadband service, should not be underestimated.

As stated elsewhere in this submission, CICRA is required to support a States of Jersey policy principle that JT must supply other operators with wholesale access to JT's fibre network on a fair, reasonable and non-discriminatory basis (FRAND). Whilst CICRA may view this as a new requirement, it is already a long-standing element of the requirements of JT's Telecoms Licence; in particular:

- Condition 31 (Undue Preference and Unfair Discrimination);

- Condition 34 (Fair Competition) and, more recently,
- Condition 36 (Network Access)

Collectively, these already provided CICRA with the required powers to ensure that ‘wholesale access seekers get access to wholesale products, which allow access seekers to compete based on differentiated retail services’⁷.

Question 5: Do respondents consider there is a need for economic regulatory intervention of the wholesale charges by the monopolists who control access to the networks elements above or any additional elements respondents have identified?

The charges on which wholesale access services are available are one of a number of critical aspects of the wholesale service. As mentioned under Question 2, CICRA has determined to no longer impose obligations of accounting separation and cost accounting, so, the regulation of wholesale charges is by necessity less transparent and less likely to deliver the pro-competitive outcomes Sure assumes CICRA would like to see.

The application of a margin squeeze test is only appropriate if either the regulator is not concerned about potential excessive retail pricing or if there is a regulated anchor wholesale product which prevents the SMP provider from setting excessive charges. CICRA’s reference to Ofcom’s use of margin squeeze (footnote 4) omits to note that in addition to the VULA margin squeeze test, BT was subject to cost-based charge controls for access to its copper local loop. Thus, if BT has priced the VULA product excessively, it would have deterred migration to the VULA service as copper-based services remained available to OLOs on a cost-based basis.

Sure considers that, if SMP is determined in the forthcoming wholesale broadband market review, CICRA needs to consider carefully what type of charge control would be most suitable. Sure does not believe that the market could function in the absence of some form of charge control for wholesale broadband access.

What exact type of charge control would be most suitable would depend on the market failures identified. Sure has set out in other parts of this response that it considers it critical that a number of new wholesale products/interfaces are developed for the Jersey market, so the wholesale charge controls would need to take into account the different levels of investment associated with the access products offered. Sure looks forward to participating actively in the analysis and discussion of potential wholesale charge control options as part of the forthcoming wholesale broadband market review.

Question 6: What do respondents consider are the appropriate investment incentives that an economic regulatory framework should provide to both support investment upstream in the wholesale network as well as support innovation and choice by competing retailers? The respondent is asked to set out the alternatives it considers feasible and its evidence and reasoning for those its supports and those it does not.

Sure agrees with CICRA’s view that ex-ante regulation is more appropriate for network industries such as electronic communications. Sure does, however have concerns at CICRA’s track record in terms of clarity of remedies and effective enforcement of non-compliance.

Sure welcomes CICRA’s focus on encouraging investment at both upstream and downstream levels in the market. It is essential that an appropriate balance is struck in this regard and Sure understands the issues at both levels well, given that Sure operates at the upstream infrastructure level in Guernsey

⁷ Paragraph 1.2 of CICRA’s Consultation

and at the downstream retail level in Jersey (and Guernsey). When considering investment incentives, it should, however, be noted that JT appears to not be subject to standard commercial investment constraints and is apparently rather operating as the implementation function for the connectivity policy designed by the States of Jersey. Sure, on the other hand, is very much subject to commercial investment constraints and this should be recognised by CICRA in its regulatory interventions in Guernsey in particular.

With regards to CICRA's initial proposals as outlined in section 5 of the consultation document, Sure has severe concerns. Our concerns fall into two main categories:

- a) CICRA's objective of reducing barriers to entry as much as possible, and
- b) CICRA's suggestion that a single 1Gbps wholesale interface would be an effective and reasonable approach to broadband wholesale access.

Reducing entry barriers

Sure agrees that regulation should seek to remove or reduce barriers to market entry and the further development of effective competition, but regulation should be designed with the long-term interests of consumers and the overall economy of the Channel Islands in mind. As such, Sure disagrees that CICRA should seek to reduce barriers as much as possible and believes that CICRA should instead target its efforts to ensure that existing competition can grow and become sustainable in the long-term. This will not exclude new market entry, but Sure considers it inappropriate if the CICRA interventions consider as a primary objective that they should encourage further market entry. Sure would welcome CICRA's confirmation that it is concerned with the development of long-term sustainable competition across the Channel Islands.

1Gbps as a single wholesale interface

CICRA is proposing that a single 1Gbps wholesale service could be a 'one size fits all' solution which operators could use to generate a range of retail services at varying speeds, with and without symmetric upload and download speeds.

CICRA's proposal sounds alarmingly like the JT proposal (as explained in the introductory section to this response) and appears not to take into account the likely impact on the market of such a solution.

If an upstream SMP operator were to offer a single 1Gbps symmetrical wholesale product, CICRA is suggesting that OLOs could use that product to offer lower speed and non-symmetric services to retail customers. There are, however, a number of significant flaws in that proposition, including:

- a) The price for the 1Gbps symmetric product would reflect the costs of providing that product (assuming that wholesale charges are cost-oriented) and would therefore include costs that would not be incurred for a lower speed non-symmetric service⁸. Thus OLOs using that service would be paying for a service that they do not use.
- b) If the upstream SMP operator uses its own 1Gbps service in the downstream retail market and offers only a 1Gbps retail service (as is the declared plans of JT), then it would likely price the retail service in a manner to be competitive with any OLO also offering a 1Gbps retail service based in the 1Gbps wholesale product. This means that the SMP operator would not leave substantial additional headroom in its retail 1Gbps pricing, after accounting for its retail costs. In that case, it is not at all clear how CICRA expects an OLO to offer a variety of speeds

⁸ This is because the wholesale service includes the use of parts of the SMP operator's network that are usage sensitive.

and symmetric/asymmetric services at lower prices than the 1Gbps service, as the wholesale price remains unchanged and only some parts of the retail costs would differ according to the speed of the retail service (primarily backhaul to the internet).

Based on the simple analysis set out above, it seems very clear to Sure that a single 1Gbps symmetric wholesale product would likely result in a single 1Gbps symmetric retail product, or at most very limited alternative retail offerings, with limited price differentiation.

Further, Sure notes that Ofcom puts significant weight on the availability of different speeds of services and differentiated prices (tariff gradient at both retail and wholesale levels) for broadband and leased lines services. In the 2016 business connectivity market review (BCMR), Ofcom made the continuation of differentiated speeds and pricing in leased lines a critical factor in its decision on how a new dark fibre product should be priced and rejected certain pricing options because there could result in a collapse of the tariff gradient. Sure urges CICRA to consider the impact on consumers if a single 1Gbps wholesale service were to be provided.

Sure is strongly opposed to CICRA's suggestion of a single 1Gbps symmetric wholesale broadband service and encourages CICRA to reconsider its position. Sure would be pleased to participate in an effort to define a more appropriate outcome that would support competition and the interests of consumers.

CONCLUSION

Sure has strong reservations concerning CICRA's willingness to challenge JT's consistently monopolistic and anticompetitive behaviour and apply the necessary regulatory remedies to ensure a vibrant competitive broadband market in Jersey.

JT's narrow-minded and dogmatic approach to imposing the 250Mbps service on all broadband users in Jersey, contrary to the actual needs of the tens of thousands of Jersey broadband customers, leads Sure to question whether, in fact, JT is the correct guardian of the fibre telecommunications network in Jersey. There is clear evidence, over a considerable number of years, that JT refuses to act in anything other than a monopolistic.

Sure's serious consideration is that, if JT does not materially deviate from such a proven long-term monopolistic strategy and CICRA does not consider that it has the will to require it to do so, then JT should be required to relinquish its fibre broadband network. It could then become a key asset of a suitably equitable 'Netco' business, for the benefit of the whole island, which would serve the needs of all providers (and their end users), without discrimination, undue preference and unfairness.

Submitted by:

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15th June 2018