



Case T1644G – Wholesale Leased Lines Licence Contravention

Direction to Sure (Guernsey) Limited

Guernsey Competition & Regulatory Authority

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Guernsey Competition and Regulatory Authority
Suite 4, 1st Floor, La Plaiderie Chambers
La Plaiderie, St Peter Port
Guernsey, GY1 1WG
Tel: +44 (0)1481 711120
Web: www.gcra.gg

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1. Executive Summary

- 1.1 Following an assessment, the Guernsey Competition and Regulatory Authority (**GCRA**) has decided that between 1 January 2021 and 31 July 2022 Sure (Guernsey) Limited (**Sure**) failed to comply with the terms of a price control for on-island wholesale leased lines to which it is subject.
- 1.2 Sure's failure to comply with the terms of this price control has led to other licensed telecommunications operators (**OLOs**) being charged prices for wholesale leased lines in Guernsey that are too high.
- 1.3 The GCRA is therefore directing Sure to reimburse those OLOs who paid too much for on-island leased lines between 1 January 2021 and 31 July 2022.
- 1.4 The remainder of this document is structured as follows:
 - a. Background (section 2)
 - b. Assessment of representations made by Sure (section 3)
 - c. Direction (section 4)
 - d. Annexes

2. Background

The 2015 Price Control Decision

2.1 On 19 May 2015, the Guernsey Competition and Regulatory Authority (**GCRA**) issued a document entitled “Review of the price control for wholesale on-island leased lines: Guernsey – Final Decision and Response to Consultation and Draft Decision”.¹

2.2 That document comprised:

- a. A Final Decision (pages 22 – 23) pursuant to condition 31.2 of Sure (Guernsey) Limited’s fixed telecommunications licence (**Sure; Sure Fixed Licence**) directing Sure to comply with a price control on its sales of on-island wholesale leased lines (**Price Control Decision**).
- b. The GCRA’s accompanying analysis and conclusion in respect of representations made in response to the preceding consultation and draft decision on on-island wholesale leased lines (pages 1 – 21), in respect of which the GCRA stated that: “[t]he provisions of the consultation document and this Response to Consultation shall, where appropriate, be construed with this Decision. The analysis set out through the consultation process explains the reasoning behind the proposals and indicates the effects the proposals are expected to have and gives reasons for making the proposal.”²
- c. Three annexes (pages 24-32), one of which (**Annex 3**) explained how discounted retail prices should be taken into account in calculating wholesale prices, how the GCRA would monitor compliance with the Price Control Decision and three worked examples of price control compliance calculations (pages 30 -32).

2.3 The Price Control Decision³ provided, in material part, as follows:

“The price control shall be applied to Sure (Guernsey) Ltd in the wholesale market for on-island leased lines in Guernsey as follows:

- The control shall be set on an *ex ante* basis.
- The control shall apply to all wholesale on-island leased lines.
- The control shall be applied on a product-by-product basis.
- For each retail leased line product offering, a wholesale equivalent product must be offered at a price that complies with the proposed control.
- The control shall be set at retail minus 20%.”

¹ Document No: CICRA 15/16 of 19 May 2015 - <https://gcra.gg/media/2088/t1097gi-price-control-for-wholesale-on-island-leased-lines-guernsey-final-decision.pdf>

² Document No: CICRA 15/16 of 19 May 2015, page 22.

³ Document No: CICRA 15/16 of 19 May 2015, page 22.

Assessment of compliance with Price Control Decision

- 2.4 In Q1 – Q2 2023 the GCRA carried out an assessment of Sure’s compliance with the Price Control Decision in the periods:
- 1 January 2021 – 30 June 2021.
 - 1 July 2021 – 31 December 2021.
 - 1 January 2022 – 31 July 2022.
- 2.5 Following that assessment, on 13 July 2023 the GCRA gave Sure notice⁴ that it proposed to issue a direction to Sure under section 27 of the Telecommunications (Bailiwick of Guernsey) Law, 2001 (**First Proposed Direction; Telecoms Law**). The First Proposed Direction provisionally concluded that Sure had failed to comply with the terms of the Price Control Decision and provisionally directed Sure to reimburse the overcharges it had applied to its sales of wholesale on-island leased lines.
- 2.6 Following representations made by Sure regarding the accuracy of the overcharge amounts specified in the First Proposed Decision,⁵ the GCRA entered into a process of further engagement with Sure to reassess the level of the overcharge for wholesale leased line products that had been applied by Sure (if any), based on the methodology set out in the Price Control Decision and taking into account the representations made by Sure to the extent that these were persuasive. Sure representatives carried out the calculations using the methodology specified in the Price Control Decision and confirmed their accuracy,⁶ save that Sure did not agree with the way in which the methodology applied took retail discounts applied by Sure into account when calculating the appropriate wholesale price.
- 2.7 There were also exchanges of correspondence between Sure and GCRA officers and between Sure’s advocates and GCRA officers regarding the way in which retail discounts applied by Sure should be taken into account under the Price Control Decision for the purposes of calculating the appropriate wholesale price.⁷
- 2.8 Full details of these engagements, including copies of all relevant correspondence, are set out in Annexes 1-12 to this document.
- 2.9 On 15 May 2024, the Guernsey Competition and Regulatory Authority (**GCRA**) gave fresh notice to Sure⁸ that it proposed to issue a direction to Sure under section 27 of the Telecommunications (Bailiwick of Guernsey) Law, 2001 (the **Second Proposed Direction**). Notice was also published in *La Gazette Officielle* on the same date. A copy of the Second Proposed Direction is set out at Annex 3 to this document.
- 2.10 Under the terms of the Second Proposed Direction, Sure would be required to:

⁴ Pursuant to section 27(3) of the Telecoms Law.

⁵ Annex 1 - Email of 8 August 2023 at 15:53 from [redacted] to GCRA Case Team,

⁶ Annex 2 - Email of 21 March 2024 at 12:02 from [redacted] (Sure) to Sonia Ragoopath (GCRA).

⁷ This correspondence is considered more fully below in section 3 at paragraphs 3.35 - 3.41.

⁸ Pursuant to section 27(3) of the Telecoms Law.

- a. Reimburse all its on island wholesale leased line customers that were subject to the overcharges, as set out in tabular form in the Proposed Direction.
 - b. Provide the GCRA with evidence that confirms that those payments had been made.
 - c. Make such reimbursement within two calendar months of a final direction being given by the GCRA.
- 2.11 Pursuant to section 27(4) of the Telecoms Law, the GCRA specified that written representations or objections to the Second Proposed Decision could be made until 4 p.m. on 29 May 2024.
- 2.12 On 17 May 2024, Sure's advocates wrote to the GCRA's Chief Executive to request an extension to the response deadline. The deadline was extended until 14 June 2024.
- 2.13 On 14 June 2024, Sure's advocates wrote to the GCRA Case Team asking for a further extension of the deadline until 17 June 2024. The deadline was extended until 17 June 2024.
- 2.14 On 17 June 2024, Sure made written representations to the GCRA on the Second Proposed Decision.
- 2.15 Pursuant to section 27(4)(a) of the Telecoms Law, the GCRA is required to consider these representations before giving, or not giving, a direction.
- 2.16 The GCRA's response to Sure's representations is set out in the following section 3.

3. GCRA consideration of representations made

3.1 Sure's representations on the Second Proposed Decision (**Sure Representations**)⁹ are summarised in the conclusion of those representations as follows:^{10,11}

- a. The Second Proposed Decision is flawed because the Price Control Decision on which it is based makes it clear that retail discounts for leased lines need not be mirrored for wholesale leased lines. Annex 3(C) of the Price Control Decision, to the extent that it departs from the operative decision, is invalid and of no effect.
- b. The Second Proposed Decision represents a fundamental change in position by the Authority and a departure from its established practice because the Authority, until 2023, had taken no action against Sure on the basis of its non-mirroring of retail discounts for leased lines at the wholesale level.
- c. The Second Proposed Decision inappropriately and unfairly distorts the market to the disadvantage of Sure.
- d. The Authority's approach in taking action now represents a grossly extended timeframe for regulatory action.
- e. The Authority's procedure has been defective because it has failed to provide reasons for the Second Proposed Decision and has not explained why it has rejected Sure's submissions, which means that Sure is unable to respond substantively to the Second Proposed Decision.

3.2 These representations are assessed by the GCRA below.¹¹

The Price Control Decision stipulates that retail discounts for leased lines need not be mirrored for wholesale leased lines

3.3 Sure argues that the Second Proposed Decision is flawed because the methodology on which it is based requires Sure to "mirror" retail discounts at the wholesale level, which is inconsistent with the Price Control Decision which does not require such mirroring. In support of this argument, Sure states that:

- a. In its analysis supporting the Price Control Decision, the GCRA accepted that retail discounts arise from savings made at the retail level.¹²

⁹ Annex 3 – Sure's representations on Second Proposed Direction - Submitted to the Authority on 17 June 2024, see paragraph 2.14

¹⁰ Sure Representations, page 14.

¹¹ Annex 4 - For ease of reference, the GCRA has prepared a version of the Sure Representations with the substantive paragraphs numbered.

¹² Sure Representations, paragraphs 7 – 11.

- b. Paragraph 3.7 of the Price Control Decision records in a text box that retail discounts need not be mirrored at the wholesale level. Sure describes the words contained in this text box as the “substantive decision”, which must take precedence over both the analysis contained in the remainder of paragraph 3.7¹³ and the worked examples set out in Annex 3(C), both of which describe how retail discounts should be taken into account at the wholesale level. Sure describes this reasoning setting out how retail discounts should be taken into account when determining the wholesale as “perverse and plainly wrong”.¹⁴
- c. Mirroring would have required wholesale prices to swing between lower and higher rates on a “moving target” basis, which would have led to material distortions in wholesale prices.¹⁵

3.4 The GCRA does not accept these representations.

3.5 As set out above at paragraphs 2.2 - 2.3, the Price Control Decision required Sure to set the price of its wholesale on-island leased lines at “retail minus 20%”.

3.6 The accompanying analysis in paragraph 3.7 and the provisions of Annex 3(C) set out the reasoning behind the proposals and explain how the “retail minus” control is intended to operate in practice. The wording that appears in the text box referred to by Sure¹⁶ that “retail price discounts and temporary promotions offered by Sure do not need to be mirrored in its retail-minus wholesale level pricing” is entirely consistent with the preceding text set out on pages 13 - 14, which makes clear that while “mirroring” is not required, retail discounts must be taken into account at an aggregate level because the purpose of the price control is to prevent Sure imposing a margin squeeze:

“The price control will oblige Sure to maintain a margin between its wholesale and retail prices, which will prevent margin squeeze on an ex ante basis [.....].

[Sure] will have to comply with the price control at an overall level (product by product) and the wholesale prices offered to other operators will reflect this at an aggregate level. For example, if an operator offers term discounts for its retail leased lines (eg 10% discount for a 3 year period) then it wouldn’t be required to also offer a 3 year, 10% reduced wholesale leased line, but the overall price of equivalent leased lines might be lower than otherwise, to reflect the discount averaged across all of those products, including the discounts. Some examples to demonstrate how the average retail price would be calculated to take into account discounts, promotions or other rebates are set out in Annex 3A.”

3.7 In other words, whilst it is clear that where a particular discount is offered at the retail level (e.g. a 10% discount for a 3 year period) there is no requirement to “mirror” by offering an identical discount (i.e. a 10% discount for a 3 year period) at the wholesale level, this does not mean that retail discounts do not need to be accounted for at the wholesale level at all.

¹³ Annex 4 - Sure Representations, paragraphs 12 – 13.

¹⁴ Annex 4 - Sure Representations, paragraphs 17 -18.

¹⁵ Annex 4 - Sure Representations, paragraph 53.

¹⁶ CICRA Document Review of the price control for wholesale on-island leased lines: Guernsey – Final Decision and Response to Consultation and Draft Decision Page 14.

Rather, in order to prevent margin squeeze, discounts offered at the retail level must be averaged across all equivalent products to determine the average retail price against which the wholesale price will be set (i.e. average retail price minus 20%). The worked examples set out in Annex 3(C) provide some illustrations of how this would work in practice

- 3.8 Sure describes the GCRA's analysis of how retail discounts should be taken into account when determining the appropriate wholesale price, both in the text setting out the reasoning supporting the Price Control Decision¹⁷ and Annex 3(C), as "perverse and plainly wrong" because it considers it to contradict the statement that Sure is not required to mirror retail discounts at the wholesale level. In order to support that conclusion Sure appears to contend that the statement that it is not required to "mirror" retail discounts at the wholesale level means that Sure is not required to take account of the retail discounts applied by it **at all** when setting its wholesale price. As a result of that misinterpretation, it proceeds to argue that whole sections of the GCRA's reasoning and explanation on how retail discounts are to be taken into account in setting the wholesale price are "perverse and plainly wrong" because they are manifestly contrary to the statement that Sure is not required to take account of ("mirror") retail discounts at the wholesale level.
- 3.9 This interpretation of the Price Control Decision, the reasoning underlying it and the worked examples is in the GCRA's view strained and artificial. The correct interpretation of the Price Control Decision is as set out at paragraphs 3.6 and 3.7 above, namely:
- a. The price control is intended to prevent a margin squeeze.
 - b. Retail discounts reflect savings made at the retail level and there is no requirement that retail discounts be "mirrored" at the wholesale level (i.e. where a discount is offered at the retail level an identical discount does not need to be offered at the wholesale level).
 - c. Retail discounts must be taken into account on an overall (per product) basis in order to calculate the average retail price, which is then used to calculate the applicable wholesale price (average retail price minus 20%), examples of which are set out in Annex 3(C).

Unlike the interpretation put forward by Sure, this (correct) interpretation is internally consistent. It is also the basis on which the GCRA has consistently explained the Price Control Decision.

- 3.10 The GCRA also observes that the interpretation of the term "mirroring" for which Sure is now contending (i.e. that retail discounts do not need to be taken into account at all when calculating the wholesale price) is inconsistent with the way in which Sure itself has previously interpreted the terms of the Price Control Decision. Submissions made by Sure between Q3 2015 and Q2 2017 to demonstrate its compliance have typically been accompanied by a statement that:

“[r]evenue is the net revenue received for the products active during the relevant period, ie, income received from the products less any special offers or rebates made to customers of those products, but not connection or one off upgrade charges”.

Although the exact level of discount taken into account was not immediately clear from Sure's submissions, the GCRA considered the above statement from Sure to confirm that Sure had appropriately taken account of retail discounts for leased lines when setting its prices for the corresponding wholesale products.

- 3.11 Sure's assertion that “mirroring” in the sense in which Sure has understood it would have required the wholesale price to change on a “moving target” basis is not supported by any evidence and, on the basis of the reasoning set out above, is in any event essentially a ‘straw man argument’; the Price Control Decision requires Sure to offer a wholesale price that is based on the average retail price and not to amend its wholesale prices to offer an identical wholesale discount each time the level of retail discount changes.

The Second Proposed Decision represents a fundamental change in position by the Authority and a departure from its established practice because the Authority, until 2023, had taken no action against Sure on the basis of its non-mirroring of retail discounts for leased lines at the wholesale level

- 3.12 Sure argues that the Second Proposed Decision constitutes a fundamental change of position by the Authority, which had previously taken no action against Sure on the basis of its non-mirroring of retail discounts for leased lines at the wholesale level. In support of this argument, Sure states that:

- a. Sure has offered retail discounts since at least 2008.¹⁸
- b. It was a clear and fundamental finding of the BCMR that the retail market was no longer part of any regulatory controls, whereas the wholesale market would be regulated.¹⁹
- c. Sure was informed by a GCRA Case Officer that it did not need to mirror retail discounts at the wholesale level.²⁰
- d. Sure submitted multiple returns to the GCRA that demonstrated that it was not “mirroring” retail leased line discounts at the wholesale level. It should have been obvious to the GCRA that Sure was not doing so and the GCRA's inaction in that regard created a legitimate expectation on the part of Sure that the Authority would not consider a failure to mirror to breach the terms of the Price Control Decision.²¹

- 3.13 The arguments set out at subparagraphs a. and b. are nothing to the point.²² As has already been explained to Sure, the Price Control Decision does not prohibit retail discounts or the

¹⁸ Annex 4 - Sure Representations, paragraph 4.

¹⁹ Annex 4 - Sure Representations, paragraph 6.

²⁰ Annex 4 - Sure Representations, paragraphs 19 – 25.

²¹ Annex 4 - Sure Representations, paragraph 26 – 40; paragraphs 51 -55.

²² Paragraphs 3.12a - 3.12b.

offering of retail discounts.²³ Rather, it requires Sure to adjust its wholesale pricing in the way prescribed by the Price Control Decision to take account of the fact that such retail discounts have been applied.²⁴

3.14 As to the points set out at subparagraphs c. and d.,²⁵

- a. It is correct that Sure is not required to “mirror” retail leased line discounts at the wholesale level, where “mirroring” is interpreted in line with the rationale of the Price Control Decision (to prevent Sure applying a margin squeeze) and consistently with the reasoning supporting it as set out at paragraph 3.9. The Authority does not consider a failure to “mirror”, as that term is correctly understood, to breach the terms of the Price Control Decision.
- b. However, and for the reasons set out above, the Authority does not agree that because the Price Control Decision does not require mirroring, it follows that retail discounts do not need to be taken into account when calculating the regulated wholesale price for leased lines (the interpretation of “mirroring” now apparently being applied by Sure). Sure has produced no evidence to demonstrate that a GCRA Case Officer previously communicated to Sure that it need not take retail discounts into account in the way that Sure is now suggesting. Even if such a statement had been made (which, given the absence of contemporaneous evidence from Sure, the GCRA does not accept), it would have been clearly contrary to and not capable of overriding the clear terms of the Price Control Decision as well as being inconsistent with Sure’s previous compliance submissions to the Authority in which it clearly stated that retail discounts (referred to by Sure as “special offers”) had been taken into account when calculating the regulated wholesale price.²⁶

The Second Proposed Decision inappropriately and unfairly distorts the market to the disadvantage of Sure

3.15 Sure argues that the Second Proposed Decision inappropriately and unfairly distorts the market to the disadvantage of Sure. In support of this argument, it states that:

²³ Annex 5 - Letter from Michael Byrne (GCRA CEO) to [redacted] and [redacted] (Sure) of 17 November 2023. Addressing arguments made by Sure that the GCRA considered retail discounts to be incompatible with the terms of the Price Control Decision or that the offer of retail discounts by Sure is not compatible with the Price Control Decision, it was explained that: “The wholesale leased line price control decision that Sure is currently subject to explained that retail term discounts reflect saving at the retail level. There is no suggestion in that decision that such savings at the retail level could not be passed on in the form of retail discounts. **The issue, rather, is whether Sure adjusted its wholesale price to other licensed operators by reference to the appropriate retail level, not whether Sure can offer retail discounts.**” (P.3 – emphasis added.)

²⁴ I.e. apply the retail minus 20% price control where “retail” means “average retail price”.

²⁵ Paragraphs 3.12c – 3.12d

²⁶ Paragraph 3.10

- a. Enforcement of the Price Control Decision will not benefit end users because it does not require OLOs to pass on reimbursement of overpayments by Sure to those end users.²⁷
 - b. JT's view was that there should be no "mirroring" so to accept reimbursement from Sure of overpayments would be contrary to JT's principles.²⁸
- 3.16 The GCRA does not consider these objections to be relevant to the issue of whether or not Sure has complied with the Price Control Decision.
- 3.17 The complaint referenced at subparagraph a. above is an objection to the terms of the Price Control Decision itself rather than a complaint that the Second Proposed Decision incorrectly applies the Price Control Decision to Sure. As such, it is not admissible; if Sure objected to the terms of the Price Control Decision, the proper course of action would have been to appeal against the Price Control Decision. Sure did not bring such an appeal and cannot now seek indirectly to challenge the terms of the Price Control Decision by arguing that the GCRA is not entitled to enforce it.
- 3.18 The GCRA does not consider that JT's view on mirroring (which term, as explained above, Sure in any event appears to be misinterpreting) is material to the question of whether or not Sure has breached the terms of the Price Control Decision.

The Authority's approach in taking action now represents a grossly extended timeframe for regulatory action

- 3.19 Sure argues that issuing the Second Proposed Decision now represents a grossly extended timeframe for regulatory action because the Authority has changed its position on how the Price Control Decision should be applied on an "entirely retrospective basis and at a distance in time which is significantly removed from the periods in question".²⁹
- 3.20 In the first place, for the reasons set out above, the Authority does not accept that it has changed its position on how the Price Control Decision should be applied.
- 3.21 Second, the Authority does not accept that enforcement action has been taken "at a distance in time which is significantly removed from the periods in question", as demonstrated by the timeline set out below.
- 3.22 On 1 July 2022, GCRA officers formally requested compliance data from Sure, requiring the submission of certified wholesale and retail leased lines data, along with commentary, in accordance with the attached pro-forma return. This request covered the following periods:³⁰
- 1 January 2021 to 30 June 2021;
 - 1 July 2021 to 31 December 2021;

²⁷ Annex 4 - Sure Representations, paragraph 51.

²⁸ Annex 4 - Sure Representations, paragraph 52.

²⁹ Annex 4 - Sure Representations, paragraph 50.

³⁰ Annex 6 - Letter from Michael Byrne (GCRA CEO) to [redacted] (Sure) of 1 July 2021 [2022].

- 1 January 2022 to 31 July 2022.
- 3.23 Sure submitted the required compliance data in September 2022.
- 3.24 In December 2022, the GCRA engaged an external consultant, Frontier Economics, to conduct the compliance review.
- 3.25 In January 2023, the GCRA sought clarification from Sure regarding the retail product grouping and discount data included in its submission. Sure provided the requested clarifications in February 2023.
- 3.26 GCRA officers requested additional clarifications from Sure later that month, which Sure also provided within the same timeframe.
- 3.27 In March 2023, Frontier Economics requested and received further information from Sure pertaining to its submissions.
- 3.28 On 20 March 2023, a GCRA officer communicated the results of the compliance review to Sure, indicating non-compliance with the 2015 Wholesale On-Island Leased Line Price Control. Sure was asked to provide feedback by 11 April 2023, but due to time constraints, submitted its feedback on 24 April 2023.
- 3.29 Between April and mid-July 2023, correspondence occurred between Sure representatives and GCRA officers regarding the overcharge amount.
- 3.30 On 13 July 2023, the GCRA issued the First Proposed Decision, specifying an overcharge amount of £113,817.
- 3.31 Following the issuing of the First Proposed Decision, and Sure’s representations on it, GCRA officers engaged with Sure on an ongoing basis between July 2023 and March 2024 to discuss those representations via e-mails, online meetings and letters. Additionally, between January and March 2024, a GCRA officer and a Sure representative held several bilateral meetings, during which certain representations made by Sure were outlined, considered, and subsequently accepted by the GCRA.
- 3.32 Following these meetings and email exchanges, the final overcharge figures were provided by Sure³¹, resulting in the Second Proposed Decision which was published on 15 May 2024. The Second Proposed Decision provisionally found that Sure had applied an overcharge of £115,361 (a difference of £1,544 from overcharge provisionally found in the First Proposed Decision).
- 3.33 In summary, the GCRA considers that its officers acted in a timely way both in detecting that the Price Control Decision might not have been complied with, with investigations into the

³¹ Annex 2 - Email from [redacted] (Sure) to Sonia Ragoopath (GCRA) on 12 March 2024 @12:02.

compliance period ending on 31 July 2022 beginning during that compliance period,³² and in their engagements with Sure to calculate the level of the overcharge.

- 3.34 Third, and in any event, the Authority does not accept that any delay in this case would be a ground for appealing against the Second Proposed Decision.

The Authority's procedure has been defective because it has failed to provide reasons for the Second Proposed Decision and has not explained why it has rejected Sure's submissions, which means that Sure is unable to respond substantively to the Second Proposed Decision

- 3.35 Sure argues that the Authority's procedure has been defective because the Second Proposed Decision did not record on its face the reasons why the Authority had not accepted Sure's interpretation of the Price Control Decision regarding the treatment of retail discounts.³³

- 3.36 On 8 August 2023, Sure wrote to GCRA Officers³⁴ expressing concern that the methodology used by the GCRA in reaching its conclusions in the First Proposed Decision appeared to demonstrate that the GCRA did not consider Sure's retail discounts for leased lines to be compliant with the terms of the Price Control Decision.³⁵ GCRA Officers responded, stating that Annex 3 to the Price Control Decision explained how retail discounts were to be treated for the purposes of calculating the appropriate wholesale price under the Price Control Decision. They further stated that unless Sure was able to be more precise about the source of its confusion as to how the Price Control Decision should be applied to retail discounts, they had nothing more add.³⁶

- 3.37 On 19 September 2023, Sure made representations to the Authority in respect of the First Proposed Decision. The majority of these representations focussed on the issue of retail discounts and again set out Sure's view that the GCRA had concluded that the Price Control Decision prevented Sure from offering retail discounts.³⁷ On 17 November 2023, the GCRA's CEO wrote to Sure,³⁸ explaining that the Price Control Decision did not prohibit Sure from giving retail discounts. The issue was rather whether Sure had adjusted its wholesale price to other licensed operators by reference to the appropriate retail level, not whether Sure could offer retail discounts. The letter went on to explain, as GCRA Case Officers had done, that Sure had been given the arithmetic approach for calculating its wholesale prices to comply with the Price Control Decision and, as GCRA Case Officers had done, referred to Annex 3 of the Price Control Decision as follows:

³² Annex 7 – Annex 7 - Email with Letter with compliance data request attached from Michael Byrne (GCRA CEO) to [redacted] (Sure) of 1 July 2021

³³ Annex 4 - Sure Representations, paragraphs 43 – 45.

³⁴ Annex 1 - Email from [redacted] (Sure) to GCRA Case Team of 8 August 2023 @15:52

³⁵ "The adjustments section of the GCRA's methodology appears to finally provide informal clarity, at least, of the key question that we have repeatedly asked, but which has been repeatedly unanswered by the GCRA, as to whether our retail term discounts are compliant, from a wholesale on-island leased lines price cap compliance perspective."

³⁶ Annex 8 - Email from GCRA Case Team to [redacted] (Sure) of 1 September 2023 @14:55

³⁷ Annex 9 - Sure Response to First Proposed Decision, 19 September 2023.

³⁸ Annex 5 - Letter from Michael Byrne (GCRA CEO) to [redacted] and [redacted] (Sure) of 17 November 2023.

“The wholesale leased line price control decision that Sure is currently subject to explained that retail term discounts reflect savings at the retail level. There is no suggestion in that decision that such savings at the retail level could not be passed on in the form of retail discounts. The issue, rather, is whether Sure adjusted its wholesale price to other licensed operators by reference to the appropriate retail level, not whether Sure can offer retail discounts.

[.....]

Sure was given the arithmetic approach for calculating its wholesale prices to comply with the final price control decision. Annex 3 of that decision gave a worked example for compliance where retail discounts are offered. It is explicit in that worked example that the weighted average retail price on which the equivalent wholesale price should be based was an average that took account of the discounted prices. The worked example clearly shows that 80% of the standard retail prices was not the correct arithmetic approach for Sure to take. Despite the guidance provided, Sure’s 19th September response does not refer to Annex 3; it instead cites a paragraph in the decision, paragraph 14. The paragraph says that the price control is not intended to require Sure to offer the same discounts for every wholesale product that it offers when it sells an equivalent retail product at a discount. It also observes that when an average retail price for a given leased line is calculated where some of those retail lines are discounted, the average might be lower than when there are no discounts. Sure’s explanation for its position relying on paragraph 14 is therefore not understood and its submission would benefit from an explanation as to why it chose to do so when Annex 3 gave an unambiguous explanation of what was required.”

3.38 On 19 January 2024, Sure’s advocates wrote to the GCRA’s CEO, again addressing the issue of the required treatment of retail discounts under the Price Control Decision.³⁹ On 26 February 2024, the GCRA’s CEO replied to Sure’s advocates, referencing the GCRA Case Team’s e-mail of 1 September 2023 (cited at paragraph 3.36 above) and his letter of 17 November 2023 (cited at paragraph 3.37 above) and stating that GCRA Officers had already responded to Sure explaining how the Price Control Decision required retail discounts to be taken into account when determining the wholesale price. He further stated that unless Sure wished to raise any further points (i.e. points that had not been dealt with by GCRA Case Officers), the GCRA considered the matter to be closed.

3.39 On 17 May 2024, following service of the Second Proposed Decision on Sure, Sure’s advocates wrote to the GCRA’s CEO stating that the Second Proposed Decision did not explain why Sure’s submissions on retail discounts had not been accepted by the GCRA and arguing that this deprived Sure of the right to make a meaningful response to the Second Proposed Decision.⁴⁰ On 22 May 2024, the GCRA’s CEO responded to Sure as follows:

“The issue of retail term discounts has been addressed by the GCRA on several occasions and was addressed specifically to Carey Olsen in the letter of 26 February 2024 as well as:

³⁹ Annex 10 - Letter from Advocate [S<] (Carey Olsen LLP) to Michael Byrne (GCRA CEO) of 19 January 2024.

⁴⁰ Annex 11 - Letter from Advocate [S<] (Carey Olsen LLP) to Michael Byrne (GCRA CEO) of 17 May 2024.

- 1 September 2024 via email sent to Sure’s regulatory team;
- 17 November 2023 via letter sent to Sure’s regulatory team.

In any event, communication from Sure’s counsel at this point is in my view not the appropriate way to submit views on the Proposed Decision. A consultation process is provided for that and it is in Sure’s interests to use that process to provide its representations on the issues that it considers are relevant, and to facilitate those representations expeditiously.”⁴¹

3.40 In the light of the correspondence detailed above, in which the GCRA has repeatedly explained to Sure how the Price Control Decision requires retail discounts to be taken into account, the GCRA does not consider it to be credible for Sure now to argue that it is unable to exercise a meaningful right of response to the Second Proposed Decision because it does not understand why the GCRA does not agree with Sure’s interpretation of how the Price Control Decision requires retail discounts to be taken into account. The GCRA’s position on this point must have been abundantly clear to Sure. Had the GCRA repeated in the Second Proposed Decision the explanations it had already given to Sure, Sure would have been no better able to respond to the Second Proposed Decision. A further repetition of those arguments would have added nothing to Sure’s understanding; a failure to repeat them again could not have hindered Sure’s exercise of its right to make representations.

3.41 Support for this conclusion can be drawn from the content of the Sure Representations themselves. These run to some fourteen pages, are almost entirely focussed on the issue of retail discounts and to some extent attempt to address the explanations given by the GCRA in the above correspondence by shifting the focus of complaint from an argument that the GCRA does not consider that retail discounts are permitted under the Price Control Decision to an argument that “mirroring” is not required by the Price Control Decision. This is a direct response to the point made by the GCRA’s CEO in his letter of 17 November 2023, the material passages of which are cited at paragraph 3.37 above. Thus, Sure has been well able to, and has as a matter of fact, put forward its position on retail discounts in its representations and has addressed the explanations given by the GCRA in correspondence without the need for the GCRA to have repeated those explanations in the Second Proposed Decision.

⁴¹ Annex 12 - Letter from Michael Byrne (GCRA CEO) to Advocate [redacted] (Carey Olsen LLP) of 22 May 2024.

4. Direction

- 4.1 Having followed the procedure prescribed by section 27(3),(4) of the Telecommunications (Bailiwick of Guernsey) Law, 2001, pursuant section 27 of that Law the GCRA hereby gives the following direction to Sure (Guernsey) Limited:

Direction to Sure (Guernsey) Limited under section 27 of the Telecommunications (Bailiwick of Guernsey) Law, 2001

1. In this direction, the following terms have the following meanings:
 - a. **“GCRA”** means the Guernsey Competition and Regulatory Authority.
 - b. **“Price Control Direction”** means the determination made by the GCRA on 19 May 2015 pursuant to condition 31.2 and direction given pursuant to condition 5 of the Sure Fixed Licence in the following terms:

“The price control shall be applied to Sure (Guernsey) Limited in the wholesale market for on-island leased lines in Guernsey as follows:

 - The control shall be set on an *ex ante* basis.
 - The control shall apply to all wholesale on-island leased lines.
 - The control shall be applied on a product-by-product basis.
 - For each retailed leased line product offering, a wholesale equivalent product must be offered at a price that complies with the proposed control.
 - The control shall be set at retail minus 20%.”
 - c. **“Sure”** means Sure (Guernsey) Limited.
 - d. **“Sure Fixed Licence”** means the licence to provide fixed telecommunications services issued to Sure by the GCRA on 1 October 2016.
2. The GCRA has found that in the period 1 January 2021 – 31 July 2022 Sure failed to comply with the Price Control Direction in respect of six wholesale leased line products as set out in Table 1 below:

Table 1

Period	No. of Non-Compliant W/S Leased Lines Products	Overcharge Value (£)
1 Jan 2021 to 30 Jun 2021	6	34,849.97
1 July 2021 to 31 Dec 2021	6	36,059.84
1 Jan 2022 to 31 Jul 2022	6	44,450.96
TOTAL OVERCHARGE FOR THE PERIOD 01 JAN 2021 TO 31 JULY 2022		115,360.78
AVERAGE OVERCHARGE FOR THE THREE PERIODS		38,453.59

3. The GCRA directs Sure to refund the overpayments, which are based on calculations provided by Sure to the GCRA in correspondence dated 21 March 2024, to its wholesale leased line customers as specified in Table 2 below:

Table 2

Wholesale leased line customer account:	1 Jan - 30 Jun 2021	1 Jul - 31 Dec2021	1 Jan - 31 Jul 2022	Total
C5 IT Services (Guernsey) Ltd	869.85	368.13	58.29	
C5 IT Services (Guernsey) Ltd DataCentre	330.12	335.12	398.49	2,360.00
Guernsey Airtel Ltd	2,733.81	2,832.90	3,060.57	8,627.28
JT Global Ltd	2,232.08	2,264.77	2,684.13	
JT Group Limited - Ex-Newtel Services	2,241.23	2,993.56	5,819.28	
JT Group Limited BSSS Re-sale Services	13,124.40	12,618.51	15,153.65	
JT (Guernsey) Limited	-	177.76	-	
JT Guernsey Ltd PO8006313	4,355.21	5,132.98	6,220.96	75,018.52
Logicalis Gsy Ltd	2,281.78	2,294.32	2,547.05	7,123.16
Newtel Ltd	6,681.49	7,041.79	8,508.54	22,231.83
TOTAL	34,849.97	36,059.84	44,450.96	115,360.78

4. The refunds specified in paragraph 3 above must be made on or before 01 December 2024.
5. Within one week of the specified refunds being made, Sure must provide to the GCRA satisfactory evidence of the same, the manner and form of which will be communicated to Sure by the GCRA.