Response by Sure (Guernsey) Limited and Sure (Jersey) Limited to CICRA Consultation 13/27: Variations to fixed-term telecommunications contracts".

Sure (Guernsey) Limited and Sure (Jersey) Limited, collectively referred to in this response as "Sure", is pleased to provide this response to the CICRA consultation 13/27, "Variations to fixed-term telecommunications contracts", issued on the 13th May 2013.

We recognise that this consultation has been prompted by Ofcom's recent consideration of these issues in the UK, and by JT's recent decision in Jersey to simultaneously remove a 100Mb monthly allocation of data from certain pay-monthly mobile contracts, and to increase data download charges (that had previously applied to data usage above the 100Mb monthly allowance) from 1p to 5p per Mb.

Before discussing the two options under consideration by CICRA to protect residential customers of fixed, mobile and broadband products in the Channel Islands, Sure would like to explain how its current practice with respect to price changes already corresponds very closely to CICRA's proposals.

In particular, we would like to highlight that the variation clause in Sure's General Terms and Conditions already applies a "material detriment" test to determine the circumstances under which a customer may terminate a contract before the end of the initial term of that contract. This ensures that the reasonableness or otherwise of any variation is judged in terms of its impact on the consumer. Specifically, Condition 15.3 of Sure's General Terms and Conditions states:

15.3 You may terminate this Agreement by giving written notice to Us of at least one month. If You terminate this Agreement during the Initial Term of service You shall be liable for any outstanding charges at the rate in force at the time. Outstanding rental charges shall not be payable if:

....

15.3.2 We materially change the rental charge or terms and conditions of this Agreement to Your detriment.

We therefore have no difficulty with CICRA's proposal to ensure this principle is applied regardless of whether Option 1 or Option 2 is selected. Before CICRA decides on which of these options it should implement, however, we believe it needs to consider certain factors, which we summarise below.

Fixed term versus minimum (or initial) term

All Sure pay monthly mobile contracts are for a minimum (or Initial) term, and then continue on a rolling monthly basis thereafter. Minimum terms are needed to ensure that handset subsidies can be recovered over the lifetime of the contract but once this minimum term has been completed, the customer is free to cancel his or her contract on one month's notice without incurring a penalty. This is important when, for example, Sure decides it needs to change any of its legacy mobile tariffs and migrate customers onto an equivalent new tariff. Any customer who decides they do not want to be migrated is free to leave (as, being on a legacy tariff, they will be out of minimum term) but Sure retains the flexibility to retire old plans that are no longer suitable for the market.

Similar considerations apply to contracts for certain fixed products and services, such as broadband, where a minimum term may be required to recover equipment costs such as router subsidies.

Sure is pleased to see that CICRA has explicitly recognised, under its discussion of Option 1, that where a customer wants to cancel but is still within the initial term, he or she should be liable for any unrecovered handset/equipment subsidies. This principle should also be reflected in Option 2, should CICRA decide to implement that Option instead. We are a bit unsure about how we could provide customers with detailed information of the calculation of the handset/equipment subsidy without revealing potentially commercially sensitive information on costs, but this is a level of detail that is probably best explored with CICRA once a decision has been made about how it wants to proceed.

Core product charges versus out of bundle charges

Pay monthly mobile contracts will have certain core elements in terms of number of inclusive minutes, number of SMS, and possibly a data allowance. Sure agrees with CICRA that customers should not expect these core terms to change within the minimum contract period and indeed this is Sure's current policy. We therefore agree with CICRA that it was unreasonable for JT to have removed the 100Mb monthly allocation of free data for in-contract customers, and it is quite clear that this was to the material detriment of affected customers.

Where we may disagree with CICRA to some extent is in relation to changes to out of bundle charges within the minimum term. By out of bundle charges we mean charges for calls outside the inclusive allowance, such as international calls, premium and non-geographic rate calls, and per Mb charges that are not within an inclusive allowance, etc. The cost of these elements can vary significantly over a very short time and are often out of the service provider's control. We must have the flexibility to vary these prices even during a customer's minimum term to prevent packages becoming loss-making, so it is important that changes to out of bundle prices do not trigger the right for early termination and are classified as not being to the customer's material detriment.

In the context of the recent JT example, we would have considered a change to the per Mb price from 1p to 5p to have fallen within the out of bundle category, if - and only if – JT had not also removed the inclusive Mb allowance at the same time. That is, if JT had kept the 100Mb inclusive allowance and only increased the per Mb price for any usage in excess of that allowance, we believe that would have been an acceptable out of bundle change. We would highlight that whenever Sure has implemented similar changes to out of bundle data charges we have actively identified customers that would be negatively impacted by such changes. We have then offered migration to more suitable data specific tariffs or highlighted to them how to control future data usage.

Changes to fixed tariffs that meet price cap compliance

CICRA will need to clarify to customers what its proposals would mean with respect to any changes that are made to price-capped fixed services, where across the board price changes are allowed and will impact customers both within and outside minimum terms. For example, under the rollover of the price cap in Guernsey, Sure was recently able to increase line rental charges for all its fixed line customers but only by making other changes to call charges such that overall, Sure complied with the price cap constraint. Because these price changes were compliant with the price cap, customers cannot argue that the changes are to their material detriment and therefore should have no right to cancel their fixed line. This applies even if an individual customer makes no calls over that fixed line and so cannot benefit from reduced call charges.

Non-price changes or core network changes

There may also need to be some clarification of certain non-price changes that would not be considered to be of material detriment. For example, changes to the technical specifications of products (provided they do not result in detrimental effects to customers such as degradation to quality); download caps on existing products that could become necessary to deal with network congestion; the introduction of restrictions to certain web sites or content such as illegal download sites or explicit pornography, or the change in technical specification to allow migration to future NGN networks that will no doubt remove some historic service functionality, etc.

Given the above factors, we would make the following observations on the two options identified by CICRA:

Option 1

a. Sure accepts the need for transparency with our customers and agrees that *significant* changes to non-price terms and conditions, and any changes to prices should be notified to customers. For example, from time to time we will improve the wording of our terms and conditions to make them clearer but such changes would not be considered a material change. Administrative updates, including mundane changes to correct spelling mistakes, should not qualify as needing to be notified to the customer unless they had a material detriment to customers.

b. We agree that the core elements of fixed term contracts such as the number of inclusive texts or data applied should not be changed for the duration of the fixed term. However these should be distinguished from changes to “out of bundle” prices such as individual call charges, international calls, roaming charges etc. The OLOs do not offer these call types as part of the inclusive element of the contract because they cannot control the charges, which can be increased with very short or even no notice from third party suppliers.

We note that Section 3(d) of the CICRA consultation states that Ofcom in principle accepts that price increases passed through from third parties should not entitle a customer to terminate a fixed term contract before the end of the minimum term. We also note that Ofcom has stated "*Where possible, providers should be able to make well-informed and unbiased forecasts of their wholesale costs and factor these in when setting their retail prices.*"[1] We would emphasise that whilst we always endeavour to do this, we cannot have complete control over charges arising from third party suppliers.

As already noted above, we agree with CICRA that any customer that does terminate a contract within its minimum term would still be liable for any unrecovered handset/equipment subsidy. The means by which the amount of this subsidy can be communicated to customers will need to be discussed in more detail to ensure that operators are not required to disclose potentially commercially sensitive cost information.

Option 2

Sure already has terms and conditions that closely mirror the position of Ofcom's General Condition 9.6. We do not currently have an express commitment to tell customers of their right to terminate if terms are changed to material detriment but in practice, we would usually be in discussions with our customers at this stage to discuss their termination options.

If CICRA were to decide to proceed with this Option it would need to ensure that the Licence Condition was specific regarding the right for operators to charge the customer for any unrecovered handset/equipment subsidies.

Conclusion

Sure recognises and is supportive of CICRA's consumer protection objectives and has no objection in principle to CICRA's proposals. Indeed, Sure's terms and conditions already include variation rights that are subject to the test of material detriment. However, whilst it is important for consumers to be protected and treated fairly, equally operators must not be unfairly burdened as this will only increase costs that will eventually flow back to the customer. We agree that any directions from CICRA should only apply to residential and domestic customers and not business customers.

Sure would ask CICRA to clarify certain aspects of its proposals in terms of the distinction between the core and out of bundle elements of a product. In addition, that it would not consider some changes to terms and conditions – such as changes to correct spelling mistakes or to simply provide greater clarity – to be material and require direct notification to customers. This would ensure that customers are protected but not bombarded with changes to terms which have no impact or relevance on the quality of their customer experience. We also seek

[1] Paragraph 5.33 of Ofcom consultation "Price rises in Fixed Term contracts

clarity and further discussion on technical changes to products or services that may remove certain functions or restrict services in the future.

Sure believes that CICRA should favour the approach that gives the greatest amount of certainty to customers as well as regulatory certainty for operators. We are therefore inclined to agree that the introduction of a new Licence Condition (Option 2) is likely to be the better option, although the actual text of this Licence Condition will need to be agreed to ensure that it reflects operators' rights to recover handset/equipment subsidies.

Sure would be happy to discuss any of the above in more detail with CICRA.

Sure (Guernsey) Limited and Sure (Jersey) Limited
10th June 2013