

STATES OF JERSEY

Economic Affairs Scrutiny Panel Jersey Telecom Privatisation Sub-Panel

TUESDAY, 8th JANUARY 2008

Panel:

Deputy G.P. Southern of St. Helier (Chairman)
Deputy G.C.L. Baudains of St. Clement
Deputy J.G. Reed of St. Ouen.
Deputy J.A. Martin of St. Helier

Witnesses:

Mr. C. Webb (Executive Director, Jersey Competition Regulatory Authority)
Mr. T. Cassells (Economic Adviser, Jersey Competition Regulatory Authority)

Deputy G.P. Southern of St. Helier (Chairman):

Welcome to this public hearing of the Telecom Privatisation Scrutiny Sub-Panel. If you would, before you start, just introduce yourself briefly so we know exactly what your position is and can minute you properly. I must, before we start, draw your attention to the notice in front of you - I think you have read that before - which gives the terms on which you appear here. Without much further ado, because you are an old hand at this, Chuck, I will let you read your opening statement.

Mr. C. Webb (Executive Director, Jersey Competition Regulatory Authority):

Good morning. My name is Chuck Webb and since October 2007 I have been Executive Director of the Jersey Competition Regulatory Authority. As you know, prior to that I was the J.C.R.A.'s (Jersey Competition Regulatory Authority) Legal Adviser. I am joined today by my colleague Terry Cassells, who is the J.C.R.A.'s Economic Adviser. This is the third time the J.C.R.A. has appeared before the Economic Affairs Scrutiny Panel concerning the potential privatisation of Jersey Telecom. This has proved to be an important and complex issue for Jersey and one that deserves detailed scrutiny and analysis. The current proposition to privatise Jersey Telecom is set out in the 2007 States' Proposition 153. This proposition was due to be debated on 15th January and while this debate has been delayed, 153, as far

as I know, currently remains the proposition on the table. Proposition 153 highlights the critical role played by the J.C.R.A. in regulating Jersey's telecommunications sector. Indeed it is highly unlikely the issue of J.T.'s (Jersey Telecom) privatisation would even be considered by the States, absence the presence of the J.C.R.A. and its regulation of telecommunications in Jersey. Proposition 153 stresses the need for an effective regulatory environment and, to this end, the proposition recommends giving the J.C.R.A. the power to levy financial penalties against telecommunication operators for infringements to the Telecommunications (Jersey) Law 2002. In addition the Steering Group's expert adviser, O.X.E.R.A. (Oxford Economic Research Associates) recommends streamlining the law's required consultation processes. Naturally the J.C.R.A. supports these proposed changes as both the power to levy fines and streamlining the required consultation process would further facilitate our ability to effectively regulate telecommunications in Jersey. It is important to note that O.X.E.R.A. urges that these changes be made regardless of the future ownership of J.T. However, we would like to stress 2 important considerations concerning these proposed changes. First their implementation requires amendments to the Telecommunications (Jersey) Law 2002. While we have been in touch with E.D.D. (Economic Development Department) concerning these proposed changes and we understand E.D.D. also has contacted telecoms licensees concerning them, amendments to the law in Jersey naturally take time. Second, and more fundamentally, the amendments proposed in Proposition 153, while useful, do not address the fundamental issue of fair and equal access to the telecommunications network currently owned and operated by J.T. In Jersey's current regulatory environment, competitors for J.T. in the provision of fixed line telecommunication services rely on J.T.'s network to provide services to their customers. Thus, in vital areas such as fixed line telephony and broadband new entrants are both customers of and competitors to Jersey Telecom. In this current environment it is very difficult to achieve real choice and competition in telecommunication services. Furthermore a dominant incumbent operator like J.T. has a natural incentive to discriminate against new entrants for network access. Problems with network access have arisen in Jersey and indeed such problems have been recently reported in the *Jersey Evening Post* and described to this panel by Newtel. Such problems not only hurt new entrants but directly harm consumers of telecommunication services in Jersey. Restrictions currently mandated by the J.C.R.A., such as equal access provisions in J.T.'s licence

and accounting separation obligations, seek to address issues of access but they cannot remove the underlying incentive to discriminate. It is also important to know that these issues of access and discrimination exist regardless of the future ownership of J.T. Such issues can be addressed with the separation of J.T.'s retail operation to its wholesale network. Now the key concept underlying separation is one of independence, that is independence of the wholesale network from retail operations. Separation can take many forms. In the J.C.R.A.'s view the States of Jersey currently has a unique opportunity to examine structural separation of J.T., the division of retail and wholesale units into separate ownership. We believe that structural separation would be the most effective remedy to ensure the provision of real choice and high quality telecommunication services in Jersey and, indeed, it may even maximise the value of J.T.'s privatisation to the States. Short of structural separation, there can be operational or functional separation; a division of retail or wholesale units but not under separate ownership. For the reasons stated in our report on structural separation, we maintain a functional separation would not be as optimal as structural separation. However, should this panel and the States wish to explore the option of functional separation in greater detail there are various models that could be examined. With these thoughts in mind, Terry and I now stand ready to address any questions you may have.

Deputy G.P. Southern:

Okay, that was a fairly comprehensive summation of where I think we have got to. So congratulations for that. Could we pack up now? No, let us explore some of those in some detail. I think this does point to a good starting point. For example, you use the key phrase "fair and equal access to the network", can you just explore that a bit more for us, and why that is not happening? Why have we not got the level playing field? In particular, in what way that relates to your powers.

Mr. C. Webb:

I will try and take that one. To deconstruct the question, Deputy Southern, I think it is useful to differentiate between the mobile sector and fixed line sector of telecommunications. Now, in mobile telecommunications, I think in Jersey today we have, I stress, more of a level playing field and that is because in mobile telecommunications, as you know, we have 3 operators: Jersey Telecom, Airtel and

Cable & Wireless. Airtel and Cable & Wireless to provide their services to customers, do not depend on the network owned and operated by J.T. Let us not forget, going back to fundamentals, the very idea of telecommunications is moving a message from point A to point B. Now in mobile telecommunications you do not rely on J.T.'s network and each network terminates calls on their own network so Cable & Wireless are dependent on J.T. to terminate calls on the J.T. network. In turn J.T. is reliant on Cable & Wireless to terminate calls on Cable & Wireless' network. Now that is not the case in fixed line telecommunications. In fixed line telecommunications we are talking about voice telephony and broadband. In the current Jersey environment other companies like Newtel and Cable & Wireless depend on J.T.'s network for both the origination and termination of calls. Now where they, in theory, make their money or do their business is they rely on J.T.'s network for origination and termination but they try, kind of through arbitrage if you will, to provide retail services more efficiently. But, again, in this situation, as I said in my statement, you have new entrants being both a customer of and competitor to Jersey Telecom. In that situation - Terry may want to add something because economics is all about incentives - the dominant incumbent operator has the incentive to make access harder on the new entrant compared to its own in-house facilities. In relation to the powers, I would be happy to answer more detailed questions about that. But just as a matter of theory I guess in a perfect world -- I am sorry, not in a perfect world, but you could have a situation where we would have a case officer in Jersey Telecom there every day making sure that the Newtels of the world are treated on an equal basis as J.T.'s own internal operations and to try to avoid problems before they arise. But in that situation that is not light handed regulation. That is something, quite frankly, we do not want to do, and something I am sure J.T. does not want us to do. So the power arises from the incentives and with those incentives it makes it very difficult to effectively regulate in that environment because the incentives are there to discriminate. Anything you want to add, Terry?

Mr. T. Cassells (Economic Adviser, Jersey Competition Regulatory Authority):

Yes, I would just like to emphasise that key word "incentives". There is nothing wrong with that, it is within the law. It is their duty to maximise profits and increase revenue. That is fair and square but the trouble is every time a new entrant takes a customer from the incumbent they lose revenue and so it is a natural incentive to try

and stop that loss. I try to liken it to the police force, no matter -- if you could just enact laws, everyone complies with them, that will be fine. There would be no need for a police force. But the trouble is everyone tries to push the envelope to the boundaries and here it is an ongoing problem because no one likes losing revenue if you are in the business of making money. You will pull out all stops within the law to delay, increase costs, and try and make it as hard as possible for the new entrant who relies on your network to deliver telephone services.

Deputy G.P. Southern:

But the problem essentially then is that unless you have got that level playing field, unless you have got fair and equal access, you cannot achieve the benefits that are supposed to come from the free market, from the privatisation.

Mr. C. Webb:

It makes it a lot harder to achieve those benefits because, again, you have a natural incentive to -- the incumbent, as Terry said, has a natural incentive to discriminate against the new entrants. A second potential problem there arises -- sorry.

Deputy G.P. Southern:

Just before you do, you mentioned "light touch" or "light hand", and not wishing to go to some sort of extreme position of having somebody monitoring it on a daily basis, obviously that is not to be welcomed, but it seems to me the whole crux of the issue is how heavy is the touch, how light is the touch? At the moment we have got light touch and it is proving, I will use the word "inadequate" but use your own terms, to free up the market properly.

Mr. C. Webb:

I would agree with that. What we have in place now in terms of the licence equal access obligations and in terms of accounting separation problems ... let us look at accounting separation. I am sure accounting separation for both J.T. and the J.C.R.A. is a lot of work. It is a lot of man hours and a lot of cost. Now the whole reason of accounting separation is to provide greater visibility on this problem of are you allocating your costs correctly between retail and wholesale. That is the principal issue. But, again, that is kind of addressing the problem, putting greater visibility in

the inner workings of the incumbent operator, but it still does not remove that incentive that Terry and I have talked about.

Deputy G.P. Southern:

The example we have received from Newtel recently was a difference in time. “How come you can install for your own branch a new line in 5 days when you can only do it in 10 for us?” That is a clear difference and puts the competitor at a disadvantage and is clear discrimination. My question would be: if that is existing that is horrific. That is clear discrimination. What is to prevent the current regulatory powers, and your powers, stopping that as in tomorrow? Why have we not got that situation, because that is clear discrimination, you should be able to act? Where is it that we are going wrong?

Mr. C. Webb:

Under the Telecoms Law right now our only remedy for a breach of a telecoms licence obligation is essentially a nuclear option of withdrawing Jersey Telecom’s licence. Now Jersey Telecom is the universal service provider, people need telephone service so realistically that is not really an option. The States, in Proposition 153, have proposed that we have the ability to level financial penalties. I think that is needed in the regulatory environment. They have it, say, in Guernsey; they have it in other jurisdictions. But even with that, Deputy Southern, you still have -- even if we had fining ability under the Telecoms Law, it is still an ex-post remedy. The problem happens, consumers get hurt and you punish them afterwards. Now, maybe by punishing them you give J.T. the incentive to be more careful the next time but it is still frankly coming into a room after the bodies are on the ground as opposed to preventing the problem before it arises.

Deputy G.P. Southern:

Or perhaps an excuse to find another route to do the same thing in a different way, if we are talking about an incentive. But you then have got back to the other thing we were talking about, a power to determine. So you are given the power to say: “We believe you have broken the law, the rules, you are fined. As from now you have to stop.” That power to determine also you do not yet have.

Mr. C. Webb:

Right, under the Telecoms Law we do not have that power.

Deputy J.A. Martin of St. Helier:

Can I just come in there? At the beginning of your statement you said about the new powers and you mentioned that it would have to go through the States and acts and laws that go through the States take quite some time. Was there any inference there that maybe you would not want P.153 debated until you had these powers? Is it chicken and egg? As you say, it is not going to solve everything but I just got the impression that you did say it would take a long time.

Mr. C. Webb:

Well, Deputy Martin, as you know, I am a lawyer but not one in this jurisdiction. I understand that if you need to amend the law in Jersey, the Telecoms Law, that needs to go through the Privy Council. I understand that takes a process. Now, in P.153 I believe it says, with regard to our ability to fine, that power should be in place prior to any sale of J.T. Now, as a matter to timing, whether they can push an amendment through - of course it requires a consultation process, it requires a legislative process, both here and in London - before the sale goes through I am not qualified to answer that. One thing from the J.C.R.A. perspective that I would like to stress is that O.X.E.R.A. recommends the changes be made regardless of the future ownership of J.T., so from my perspective I think that is our main focus.

Mr. T. Cassells:

Can I just elaborate there on one point? I think there is a solution here which does not involve legislative amendment and that is that in the sale process the option is put forward to sell J.T. separately. Now, Deputy Baudains, I remember in some hearing before you said it seems to be do you want to provide competition or do you want to maximise revenue? Well, I think you can have a win/win here because in increasing reports, and in practice, people are separating their wholesale and retail units because it maximises the value. We have got Eircom in Ireland who are proposing to sell their wholesale and their retail business separately because it maximises the value of both. We had a report by Bear Stearns that if they sold the telecoms in the E.C. (European Community), all of them put together, they would increase the capitalisation of those

telecoms by 124 million euros - sorry, it might even be billion euros, I will just have to check on that. We have a report by Morgan Stanley in Australia, if they separated Telstra Australia it would increase the market capitalisation of both units by 20 per cent. So in practice and in investment reports by investment firms there is a developing trend that: "Hey, you can sell these 2 separately and maximise shareholder returns" and in that process, what we believe is a more effective, competitive regime and all without the need for legislative amendment but just part of the sale process.

Deputy G.P. Southern:

But that has not been put into action yet, so this is in principle sort of research work that is going on?

Mr. T. Cassells:

It has been put into practice in Ireland at the moment. Eircom has made a submission to the Government to sell the 2 units to separate owners. Now they want to maximise value but also it has the flow on benefit of maximising competition too.

Deputy G.P. Southern:

Sure, and could you let us have those 2 reports you have just mentioned?

Mr. C. Webb:

Yes, there is Bear Stearns and, I believe, Morgan Stanley.

Mr. T. Cassells:

We can send you those reports, yes.

Deputy G.C.L. Baudains of St. Clement:

I know you have raised the issue of structural separation when we met previously and again this morning in your statement. Probably a difficult question, I am merely asking if you had any comment to make on it, and that is it does seem to me that it would not only be better from a sale point of view, because there was therefore certainty involved that the purchaser would have, but also an easier life for yourselves if functional separation or structural separation, at least, were sorted out prior to the debate to sell. It does seem to me that there is confusion there. We do not know

whether it will be separated either structurally or probably financially because that decision has not been made. There seems to be resistance to it in some quarters. A purchaser, if he does not know whether it might come further down the line or not may well decide that he would pull back on the amount he would offer for the company. It seems to me we have got a lose/lose situation as long we keep pushing forward a proposition prior to addressing that issue. Do you have any comments on that?

Mr. C. Webb:

This is why I think our report characterises Jersey right now as having a unique golden opportunity to explore this in greater detail because once J.T. is in private hands it becomes a whole lot more difficult to structurally separate or even functionally separate the company. Look at my home jurisdiction, the United States, the Department of Justice had in their case against Microsoft a structural problem with the way Microsoft was set up, the remedy they tried to impose was essentially structural separation. That was shot down in the court and the Department of Justice, the Anti-Trust Division, has roughly 300 people working on the competition law issues. That is why I think in Europe right now, there has been a recent recommendation from the European Commission to provide national regulators with the power to impose functional separation. I think the reason they are going for functional separation as opposed to structural separation is that most of the telcos in Europe are already in private hands. Forget competition law for a second, but as Terry has alluded to when you are selling an asset you may increase the value of the asset by offering at least the option of selling the whole thing or selling one or more or both of the parts. So I think it is an option that should be explored.

Deputy G.C.L. Baudains:

It seems to me it is more an issue of certainty for the purchaser and also, as you have highlighted there, the issue of separation after somebody has bought it is going to be a whole lot more difficult. So your advice, I presume, would then be separate now while we still own it?

Mr. C. Webb:

Yes.

Deputy G.C.L. Baudains:

Either structurally or ...

Mr. T. Cassells:

At least have the option there of potential purchasers buying separated units because if they see there is value to be maximised in separate units they will obviously put their money where their feelings are. Just to clarify, I have just double-checked here, it is 123 billion increased capitalisation of European companies.

Deputy G.P. Southern:

I thought it might be. When we looked at the figures I thought it might be. We are focusing very much on this question of structural or functional separation, when the Treasury first looked at this we found ourselves facing 3 reports: the J.T. report, which talked about how it would organise that as far as management reshuffle is concerned; we had an analysis report, both of which came out against structural separation per se; and your report said: "Go for it" from a regulatory point of view that is a good way forward. Can you just explore what the objections of the other 2 reports were about and how you see this situation now?

Mr. C. Webb:

As I recall the other 2 reports raised issues of cost and issues of is there actually a problem? I would respond that naturally, common sense, there is a problem with, as we said, the incentives to discriminate. We have seen it arise in Jersey. It has just recently been reported in the *Jersey Evening Post*, one example of it. I would also like to stress that since we have come out with that report there has been additional support for the idea, in Europe, of functional separation. Just recently the E.C. has proposed to give telecom regulatory authorities across the entire spectrum of the European Community from states as big as France to small as Malta, the power to functionally separate telco operators. They are doing this to give "more consumer choice through competition." This is the E.C. talking: "Mandatory functional separation ... could serve to enhance competition in an environment where it could be demonstrated that standard remedies were insufficient to improve market failure, where there is little prospect of infrastructure competition within a reasonable time."

That comes from the E.C. not the J.C.R.A. at the beginning of November. I would argue that situation applies directly to a jurisdiction like Jersey.

Deputy G.P. Southern:

That in itself is made more difficult if we sell it first, you say?

Mr. C. Webb:

Yes, again --

Deputy G.P. Southern:

So do it, clarify the situation, get everything in place, then you talk about selling?

Mr. C. Webb:

Yes. It would be much more difficult to impose any sort of separation on a private company once it is in private hands as opposed to now while it is in States hands.

Deputy G.P. Southern:

How much does that reflect the position we put to Lord Kingsland when he presented, about a year ago -- would that pose a problem in the courts if you tried to impose something on the privatised company and they decided to argue, we might face a fairly ... If the U.S. (United States) Government cannot do it and they have got a fair amount of resource, if they cannot compete with Bill Gates then what chance would we stand.

Mr. C. Webb:

If we are looking at structural separation, which is what we have been primarily advocating, I give the example from the United States and Microsoft, and I am not aware in Europe of structural separation being imposed by a national regulator on an already privatised telco. Now, we could try it in Jersey, although - as in my first profession being a lawyer - I naturally do not want to take test cases.

Deputy G.P. Southern:

Sure, enough said.

Deputy J.A. Martin:

Sorry, can I go back? As the regulator, and we are discussing your best way forward, is P.153, in another word, the wrong proposition to be debating at this time? Should it be sorted out first that we either do separate them structurally or functionally and then Treasury brings back the proposition? Because I know it is going to be in 2 parts. The actual proposition P.153 is literally we decide to sell and I know there is an amendment to sell part, but it does not deal with the separation.

Mr. C. Webb:

Deputy Martin, I do not want to say we are opposed to P.153 in its entirety. As I said before we think that the ability to levy financial penalties and the streamlining of our consultation process would make a more effective regulatory environment, and it is needed regardless of the sale of J.T. There are large parts of P.153 which involve employee relation matters that have nothing to do with us and I have no comment on, but I do think inadequate consideration has been given to the idea of structural separation.

Deputy G.P. Southern:

In the context of what you said before, whether it is sold on or not we still have this issue. It is almost as if those are running in parallel, there are 2 issues there. One is sale, one is the right structure. We are concentrating on sale but we should, you are saying I think, be concentrating on the structure of the market.

Mr. C. Webb:

They are related in that the sale presents a unique opportunity to structurally separate and certainly it is a whole lot easier to do this now as opposed to after it is already privatised. But at the end of the day the competition problems we have identified exist whether it is publicly or privately owned.

Mr. T. Cassells:

Can I just elaborate on that. How I understand the current proposition, it is for the sale of 100 per cent of Jersey Telecom as a whole. What we are asking for is to at least have the option there to sell it as separated units. That will require a bit more

work in separating it, the devil is in the detail, but it can be done. It is just a matter of applying resources to the problem.

Deputy G.P. Southern:

That would be quite substantial but you are saying in terms of the market realisation there may be advantage anyway in that.

Mr. T. Cassells:

Exactly, it could maximise the revenue for the States. The only point you mentioned earlier, those 2 reports by O.X.E.R.A. and Analysis that were not too positive at all about structural separation. We have compiled a critique on those 2 reports to our Minister and, in essence, we are basically saying they are biased, they are not objective at all. So we have good solid grounds for criticising those but unfortunately they did not come into the decision making process because we were not on that decision making panel that developed the proposition.

Deputy G.P. Southern:

Sure. Again, it is not being centred on the regulatory issues, it is centred on the sale issues and that is fundamentally what I think is going wrong. In the context of what we have been talking about, structural or functional separation, can you just explore the situation with BT Openreach and the system that they have got. Where do they come in the spectrum of separation and regulation.

Mr. C. Webb:

Terry, do you want to just explain BT Openreach as far as ...

Mr. T. Cassells:

Yes, that is a good example, if you like, of functional separation. It is under the common ownership of BT but there is a wholesale arm, Openreach, and there is the BT retail service providers who use the wholesale infrastructure of Openreach. Now that in my mind, personally speaking, is a halfway house between accounting separation which we currently have and full structural separation. The reason why I think it is a halfway house, with common ownership you still have that incentive problem. The shareholder up the top will push as hard as possible - I say "he", it

could be a “she” - always to favour its own because it has got to protect its market share. It has got to protect its revenue in the interest of shareholders. With the separated ownership there is not that continuing problem. There are continuing problems with the Openreach. The regulator has put out 2 reports now talking of continuing problems with the implementation of that process. Cable & Wireless, one of the major competitors to BT in the United Kingdom, has called for the full structural separation of BT in light of these problems. The other major problem with the Openreach or functional separation option is it is a heavy regulatory burden, ongoing, continuing burden. Whereas if you have structural separation in a way it is very much self regulating and you can pull back and have light touch regulation. It took 230 undertakings negotiated over a couple of years to put in place this Openreach. It has set up a separate monitoring body to monitor the implementation of those undertakings. So you have got a new bureaucracy, you have got 230 undertakings which have done the lawyers very good but I do not know about the consumer at the end of the day, and still you have continuing problems. I know somewhere the Treasurer said something about the Openreach model might not be suitable for Jersey and I can fully agree with him because the resources of such a model would be -- we would have to double the size of our organisation just to monitor it. That is in my personal opinion.

Deputy G.C.L. Baudains:

You refer to the accounting separation and we know that it currently exists with Jersey Telecom, in fact the last time we interviewed them they were complaining about the level of work they had to put into that. But it does occur to me that even with that you are not able to achieve the level playing field which you would like to see for the benefit of competition and the ease of operation of other competitors. Presumably that is through lack of powers which you referred to in your opening statement. How important is it that you get these powers before the company changes from what I presume you would look at as a fairly benign company at the moment to one that might be more aggressive if it is owned by a multinational or larger organisation?

Mr. C. Webb:

Deputy Baudains, I disagree with your last statement there about J.T. currently being benign compare to a privately owned organisation. We can talk about that in more detail if you wish. But in response to your question there are, I think, several responses. First, the power to levy financial penalties is needed and is necessary regardless of the future ownership it may take. Let us look at it in terms of Telecoms Law. If through the analysis of the separated accounts we come across a violation of Jersey Telecom's licence, which does not raise to the level of a competition law violation on which we do have current fining ability, we currently do not have really an effective remedy against that. So I think the ability to level financial penalties is necessary regardless of the sale. So whether it comes in before or after the sale that question goes out -- we need it now because after the sale it really is inconsequential from my perspective. Going back to the problem we were talking about through structural separation, I mean again the incentive to -- all that kind of separation gives you is a just a spotlight into J.T.'s internal workings and then a possibility of taking ex-post action whether financial penalties, directions, et cetera, to remedy past violations. That gives structural separation. This is an idea to basically in an ex-ante form avoid future problems. In that case, if you are going to go down the structural separation route, as we said earlier, it is a whole lot easier to do it practically speaking before privatisation as opposed to after.

Deputy G.C.L. Baudains:

If I may expand on that a little. Assuming that the company was not separated and was sold, I am surprised that you do not necessarily consider Jersey Telecom to be benign compared with a large organisation, I was thinking of the greater financial clout it may have, the possibly greater difficulty you could have getting to the bottom of its account and such like. I thought it would be more difficult for you to regulate a multinational company than the present Jersey Telecom.

Mr. C. Webb:

If I can read a quote that Jersey Telecom's Chairman, John Henwood, make on 20th September 2006, before this very panel, and this was concerning the decision we had a while ago about stopping J.T. from implementing longer term mobile telecoms contracts prior to new entrants. Mr. Henwood, this is in reference to our decision: "You know if a rule is handed down and you cannot see any good reason for it you

resist it, but in the interests of the company we decide the costs and the time expense on senior management challenging this issue was not justified by the amount of income, if you like, at stake. If you were to say: 'Well, on that basis you will never challenge anything' I will simply say, 'No.' On the first occasion that an issue occurs where we deem that the cost and time associated with the challenge is less than the potential damage to the company by accepting the ruling we will push it." Now, by raising that statement --

Deputy G.C.L. Baudains:

I remember that.

Mr. C. Webb:

That is not an unreasonable position to take. When I was a private attorney I would advise a client to take the exact same position. But I am stressing that that is the position of a private commercial entity acting in its own interests. It is not the issue of we are going to act for the better good of the Jersey people just because we are a publicly owned company. It is J.T. acting in its own interests.

Deputy G.P. Southern:

In that sense the incorporation of the company has already done that, that company is behaving in a very commercial way. The question in comparison between a global operator and Jersey Telecom is one of size and resource lying behind that threat.

Mr. C. Webb:

Dealing with multinationals, the J.C.R.A. on the competition law side, we have dealt with them frequently. and we have had ... ESSO comes to mind, British Airways, Autogrill we just fined £10,000 for breach of the merger violations. In those situations, looking back in those cases, we have never really had a problem gathering information from them, the required information we need to make determinations. Although recognising that right now the Autogrill decision is within its appeal period, so we will see what happens with that. We have never been to court against one of these big multinationals. In the administrative side, we have not had an information gathering problem with them and we have -- I think they are pretty successful dealings with large multinationals. Although in one last thought, as statistics go, we

looked back yesterday at Jersey versus Guernsey because at roughly the same time when J.T. was corporatised Guernsey Telecom was privatised and the jurisdictions have faced similar issues since 2001 in telecoms. The O.U.R. (Office of Utilities Regulation) I believe has faced now 3 appeals, the J.C.R.A. has faced only one, the one dealing with M.N.P. (Mobile Number Portability). Now, whether the more frequency of appeals in Guernsey as opposed to Jersey is a result of Cable & Wireless controlling Guernsey Telecom, I do not know, but there has been more appeals in Guernsey as opposed to Jersey.

Deputy J.G. Reed of St. Ouen:

Yes, I would just like to take on the discussion regarding structural separation and the fact that obviously the Island is a small jurisdiction. I am pleased to note that you do speak about Guernsey because here is an issue with certain operators operating in both Islands. You also speak about cross-subsidisation and the 2 different sectors, the mobile sector and fixed line sector. Concerns have been raised about how we maintain and improve perhaps our infrastructure as related to our fixed line network, which is a far more expensive type of operation than the mobile operation. I would like to know your thoughts on how confident you are that we are able to protect and improve and develop that infrastructure if we follow increased competition and even functional or structural separation.

Mr. C. Webb:

Deputy Reed, I am going to sound like a broken record here but I think if the goal of the States is to protect their vital infrastructure, telecommunications, the best way to do that is through structural separation. Let me explain. Probably the most conservative approach would be if you went structural separation but the States maintained ownership, or at least a controlling interest of the infrastructure. That is one way to do it. Another way to do it is if you privatised the wholesale network, the new company that owns the wholesale network they have an incentive now to (a) provide the best network possible and (b) sell it to as many people as possible. Let us use the analogy of a highway if you will. Let us say you own a highway and you have a toll booth in the middle of the highway. You have 2 incentives. You want to have the best possible highway behind that toll booth and you want to run as many cars through that toll booth to earn as much money as you can. I think that is the same

analogy I would like to give for a privately owned telecoms network separated from the retail business. I think if sanctity of the network is a concern, structural separation addresses that.

Mr. T. Cassells:

If I could just add a contrast with the present, back in the *Jersey Evening Post* on 5th December we had a man who was living in Kenya and he compares Kenya to Jersey. “Why, oh why, can we not have decent telecoms access in Jersey.” So the point I am making is it is not necessarily that we have good access at the moment. One of the reasons why is it is in a dominant position in relation to providing broadband access to, for example, where I live up in St Lawrence, there is no competition or effective competition up there and so they have got no incentive to improve access to my residence where I cannot use voice over internet telephony. There is no incentive for them to give me that service while there is no competition and no one threatening to come in and provide that service to me.

The Deputy of St. Ouen:

Is it not a fact though that there is a limited amount of customers, customer base, and if you are right and say that J.T. and every other telephone operator is a commercial enterprise and there are financial incentives and benefits of heading down and providing improved facilities, the question must be asked why are they not doing that? One of the issues that has been raised is that it is the cost, the overall cost of providing that facility and how it is paid for. I am also aware that in the law you have got a duty to ensure that the infrastructure is maintained. If you are going to stop cross-subsidy does it follow that the cost of access to the fixed line would increase, or could increase?

Deputy G.P. Southern:

Certainly there is the tale in many places where you are free of the market, business and core charges go down but line rentals tend to go up. Some people win, some people lose out of that process.

Mr. T. Cassells:

Can I come in there, as an economist, one of the ways structural separation will help there, as Chuck said, you will have a separately owned wholesaler rolling out the network. How are you going to make that network a cash cow? How are you going to make it operatingly positive in revenue terms? You expand the market, you get more customers on to that fixed investment and that is how you improve your services because you have got that incentive on that fixed investment, is a huge up front fixed investment, and the way you pay for it is to expand the market, get more people on to that network and the incentives are there when you have got a separately owned wholesale unit. As I said, at the moment there are some ...

Deputy G.P. Southern:

But that is not particularly attractive to the little old lady out in St. Ouen who wants to make 6 phone calls a week to her daughter, and that is the sum of the extent to which she uses her phone. She is rather out of that loop of expanding the market. How many services can she use?

Mr. T. Cassells:

There is that at the margin but by and large for the critical mass of people in Jersey, they will get an improved service. If we are worried about that little old lady pensioner who makes 6 calls a week, that is where the universal service obligation comes in.

Deputy G.P. Southern:

Continuing around the same thing, about protecting the network that we have, can you talk about the part of P.153 which talked about gearing and protection against excessive gearing. Now we are told that obviously you can put anything into a licence. What are your feelings about that gearing and over gearing in particular, and protection of what we have got?

Mr. C. Webb:

Here is our thoughts on the gearing issue. I do not want to say the issue is not important, I think it is important but it is important on a political level. Let me explain. I do not believe the J.C.R.A. has the inherent ability under the law to itself regulate gearing levels or prescribe a no-go in gearing. Let me tell you why. Let us

just take another hypothetical example. Let us just say Jersey Telecom in 2015 wants to roll out the next next generation network and it is going to provide a whole bevy of services, great services that people are demanding but to do so it needs to highly leverage itself. Now under the Telecommunications (Jersey) Law our primary consideration is the satisfaction of demand for telecom services, that includes considerations such as is there innovation in telecom services. Now there is a secondary consideration of do the providers of telecom services have sufficient financial resources to provide those services. But in the situation I raise I am not sure we have the legal basis to say you cannot go above a certain level of gearing to roll out a new service. That is why I think it is a political question. If there is a political reason that a certain level of gearing is unacceptable the law has the facility through Article 8(2) to provide us guidance on that. Guidance that we can observe. We have had preliminary discussions both with E.D.D. and Treasury on this. We would be more than willing to work with E.D.D. and Treasury on defining what those levels can be. It is not our direct area of expertise but there are examples from the U.K. (United Kingdom) we can go to, you can define it in terms of a debt to equity ratio or in terms of keeping a certain credit rating. I think also, frankly, J.T. should be involved in those discussions as well. J.T. is the one that after all runs the business in Jersey. But at the end of the day I think if there is a certain level of gearing which is an unacceptable risk to Jersey, the mandate is going to have to come from the States via guidance.

Deputy G.P. Southern:

You seem to be saying there that there is more work to be done?

Mr. C. Webb:

Yes.

Deputy G.P. Southern:

You have got assurances we can do something about gearing, we are not going to get a bankrupt company 10 years, 20 years down the line and yet you are saying: "Well, hang on, yes it is possible but we need to work on it"?

Mr. C. Webb:

We need some work on it and I would also like to stress that if you want to get something in Jersey Telecom's licence on gearing, despite the work that -- let us just say we form a working group on it, J.C.R.A., E.D.D., Treasury, J.T., at the end of the day a licence modification has a required consultation process, goes out to initial notice with comments from public and potential purchasers. So it may be unlikely that you would have someone objecting to it but at this point I cannot guarantee what is going to go into the licence because we have a consultation process.

Deputy G.C.L. Baudains:

You were saying that in your opinion gearing is more of a political issue. As a panel we were looking, or it was brought to our attention some time ago, that there was a danger in a company which may not start out over geared but will end up that way to be able to capture the regulator because what happens is you have very little room for movement. If you fine them they will go bankrupt, if you order them to do this or that they cannot so basically there is nothing you can do with them. You end up in a scenario where basically you cannot regulate and that was our concern. Do you have any views on that?

Mr. C. Webb:

Deputy Baudains, I have had no direct experience of that although I do not mean to disagree with your view.

Deputy G.C.L. Baudains:

I believe that was the situation in Italy, was it?

Deputy G.P. Southern:

At Telecom all over. You are just nodding there, Terry, do you want to just come in there?

Mr. T. Cassells:

The Italian experience?

Deputy G.P. Southern:

No, you nodded when Gerard was speaking.

Mr. T. Cassells:

Yes, I think to just reiterate what Chuck said there. Also we are a competition authority. We are not experts at issues of equity and debt. We would have to acquire that expertise and those resources.

Deputy G.P. Southern:

Or rely on somebody to indicate what would be reasonable. Again, it would need some work in that sense. Okay, you just mentioned competition there. Under Telecoms Law any cost that you incur you can recharge through the licence fee, whereas if you take the case under the Competition Law it is dependent on the public purse to back you if it comes to challenge or goes to court or whatever. I am just thinking about one of the cases, suppose you are regulating and you are under challenge for a particular decision under Telecoms Law you can raise the licensing fee, that ultimately is likely to end up being recharged again to the consumer. So you are in an awkward position there that your powers say: "We can charge you if you want to challenge us" but ultimately that goes back down the consumer and it is a strange position to be in. What do you think about that? We have just seen a case of mobile number portability get withdrawn from a legal challenge and hopefully we have got another year. It has taken 3 years now to do that. What is the role of a legal challenge in your position, because if you recharge you are going to pass that on to the consumer, where is the benefit for the consumer?

Mr. C. Webb:

That is a difficult issue, Deputy Southern. In terms of mobile number portability, as you know, we have had a litigation process with that. The process right now is essentially kicked to touch which may lead to a settlement or it may not, I would be happy to explain the current situation there if you would like. But, as you said, the law says that we can recover the costs of regulating through licence fees. Unfortunately, very likely when we pass those charges on to licensees the charges will eventually be passed on to consumers. In terms of M.N.P. we think on a pretty solid basis that the benefits to accrue to society make the challenge worth it and I would think I would never see us defending a court case where that was not the case. That is

the way the Telecoms Law is structured, it is the way it is structured in other jurisdictions as well.

Deputy G.P. Southern:

Could you just briefly touch on the possible solution that we have or not on M.N.P.?

Mr. C. Webb:

Sure. Where we are on M.N.P. is that the case was scheduled -- let me step back for a second, we mandated in August 2007 that the operators implement M.N.P. by February 2008. J.T., as it has rights to do, sought judicial review of that. The hearing was scheduled for basically the middle of December. Now, on the very eve of that hearing the J.C.R.A. and J.T. agreed that there may - and I stress may - be a potential way forward on implementing M.N.P. both in Jersey and in Guernsey and we could do that without litigation. M.N.P. would probably come in faster that way than going down the litigation route. So in those circumstances, speaking from the J.C.R.A.'s perspective, we thought it was at least worth a shot to see if we can get -- given the extra expense of litigation, and that expense ultimately to consumers, it is at least worth a shot to see if we can get this in without the court process. I frankly hope it works out. But it is not guaranteed. We are right now exploring a potential solution for a pan-Channel Islands solution that has to be acceptable not only to J.T., not only to the J.C.R.A. and O.U.R., but also to Cable & Wireless and to Jersey Airtel. If that works out, great. If it does not the case has not been thrown out, it is just the hearing has been put off until, I believe, some time in March to allow the parties to see if the solution works out.

The Deputy of St. Ouen:

I am interested to just explore a bit further the issue with Guernsey which you raised with regards to number portability. In your opinion do you believe that there is an advantage to working with the regulators in Guernsey and to what extent would you like to see that develop? Whether it is in a telecom area or elsewhere.

Mr. C. Webb:

I think my own personal preference, now that I am Executive Director, I would like to see more co-operation between Jersey and Guernsey in terms of telecommunications,

potentially postal and competition law. Guernsey does not have a competition law as of yet. But I think just going back to my experience of advising private companies, companies that operate in both jurisdictions, I think it is not efficient, to say the least, to have 2 sets of rules in 2 different jurisdictions. So I think I would like to see even closer co-operation if we could between Jersey and Guernsey. My kind of catch phrase is let us not get -- there is 800 years of history there, let us not get history in the way of efficiency.

The Deputy of St. Ouen:

How realistic is it to believe that greater co-operation can develop?

Mr. C. Webb:

That is a very good question, Deputy Reed. It is something that I am personally interested in. Now from the Guernsey side, I think you need to ask our friends over in St. Peter Port.

The Deputy of St. Ouen:

I am just wondering what experience have you had to date with regard to number portability? One can see J.T.'s point of view that to be forced to do something here yet unable to compete or unable to enjoy the same facility elsewhere in a sister Island would be frustrating. What is your experience to date with O.U.R.?

Mr. C. Webb:

We have a very good relationship with the O.U.R.. Currently we are working closely on this potential M.N.P. solution because it is a potential Channel Islands solution. We also meet regularly with the O.U.R. on other issues. We generally have had, I think, regular quarterly meetings with the O.U.R., switching back between Jersey and Guernsey and we have very good communication with them.

The Deputy of St. Ouen:

So basically what you are saying is that if there is political will it pretty much can happen.

Mr. C. Webb:

I think so.

Deputy G.P. Southern:

That is pretty much a level of politics, Gerard, that is down to us.

The Deputy of St. Ouen:

I will rephrase my question. Do you think that greater co-operation could happen without the political support?

Mr. C. Webb:

Speaking frankly, Deputy Reed, in the Competition Law Jersey has followed the suit of a full blown competition law based on E.C. precedents. Guernsey to date has not. So that limits the co-operation I have with my friends at the O.U.R. on, say, competition matters. I make one key caveat, if you will, that at the end of the day our responsibilities under Jersey's Telecommunications Law are with respect to the Bailiwick of Jersey not the Bailiwick of Guernsey and the same with the O.U.R.. I have no power of direction over the O.U.R. and they have no power of direction over me. But still, I think, co-operation is in everyone's interests.

The Deputy of St. Ouen:

Thank you.

Deputy G.P. Southern:

But politically it is an election wish. You stand on the platform and say: "I want co-operation. Yes, I will support it." But what happens in the end, I do not know. There are 2 other areas I just want to cover briefly because if I do not ask them I will go away and think I should have done. In talking about efficiency, one of the ways in which any company becomes efficient is by getting more out of its staff, reducing its staff. In particular we have got a concern about the skills base in Jersey, the technical skills. We have got a good training system through J.T. Is there any way in which you interface with R.U.D.L. (Regulation of Undertakings and Development Law) regulations over maintaining a skills base in Jersey in the telecoms area, in order that the telecom service should be properly provided, or is it otherwise?

Mr. C. Webb:

We do not directly interface with R.U.D.L. I think Adam Smith's visible hand of the market doctrine is that if you face competition you have a natural incentive to have the best in-house skills base that you can to make your product better than the next guy's. But in direct response to your question, no we do not interface directly with R.U.D.L.

Deputy G.P. Southern:

Okay, and finally in terms of powers, we are talking about powers to fine, powers to determine, there is another level that was suggested to us, a power to separate which need not be used but immediately makes all the participants sit up and say: "Right, I think we better co-operate, you will get much more co-operation from us just having the power to separate", and is that a power still waiting to be enabled?

Mr. C. Webb:

Sure. First of all, if you go back to the structural separation where the States structurally separates J.T., you do not even need that power. But if you do not go down that route and functional separation comes up then, yes, there are powers that can be incorporated in the laws, the very powers that the E.C. are right now proposing to incorporate in all the national laws across the European Union. It is something that, if asked, we can explore that area and say: "These are the powers we would need. Here is the text of the statute, if you will." We have not been asked that to date and it is not in Proposition 153 but there are examples of other jurisdictions to follow.

Deputy G.P. Southern:

I did say 2 but it has turned into 4, I will make them as quick as I can. I hope the answers are quick as well. Access to financial accounts, the level of information and the timing of the access to J.T.'s finances and accounts, are you currently totally satisfied with certainly the timeliness of it at the moment, or are you looking at past accounts and you do not know what is going on on the ground?

Mr. C. Webb:

As you know, Deputy Southern, we have a direction on J.T. on accounting separation. I can tell you that to date J.T. has complied with that direction and we have no

complaints with J.T. on compliance with accounting separation direction. We are currently undertaking a detailed analysis of their accounts but to date we have no complaints in that area.

Deputy G.P. Southern:

Okay. Then finally you presumably have seen the terms of reference. They are still in draft form but the terms of reference for a review of your powers and resources. Are you satisfied that will go ahead in a timely manner? What sort of time scale are you looking for that review to take place in?

Mr. C. Webb:

Going ahead in a timely manner, I really cannot give any indication of that because the review is a joint review by the Chief Minister and the E.D.D. so really the timing is up to them. I can tell you that we had serious reservations about the terms of reference as originally drafted.

Deputy G.P. Southern:

So did we. They were meaningless.

Mr. C. Webb:

But we have been in communication with E.D.D. on that, on how we think the review should go. So we have been in discussion with E.D.D. over the terms of reference but the actual timing of the review, I think you have to ask E.D.D. and the Chief Minister's Department.

Deputy G.P. Southern:

We received a draft on 14th December, have you seen that draft of the terms of reference, that is what is going ahead? It is very much more concentrated on your powers as a telecoms regulator.

Mr. C. Webb:

I have not seen that draft.

Deputy G.P. Southern:

I am sure when the Minister gets back from his break it will be on your desk pronto. It certainly should be. Anything further to add? Okay. Thanks that was very efficient to use your term and very effective.

Mr. C. Webb:

Just for our homework, we need to get you the Bear Stearns and Morgan Stanley report on structural separation. Okay.

Deputy G.P. Southern:

Thank you, and thank you for your time.