COMPLAINTS AND COMPLIANCE COMMITTEE[1]

Date of hearing: 24 October 2007 Case number 9/ 2007

T Cleghorn **Complainant**

vs

Telkom **Respondent**

Complaints and Compliance Committee Panel

IWB de Villiers J[2]	Acting Chairperson
N Ntanjana	CCC Member
D Moalosi	CCC Member
JCW van Rooyen SC	CCC Member[3]

For Complainant

Mr. TG Cleghorn, in person

For the Respondent

NGD Maritz SC instructed by attorneys Kevin, Moodley & Associates

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[1] In terms of s 17C of the ICASA Act 13 of 2000 as amended
[2] Judge of the High Court not in active service.
[3] By virtue of section 17A(1) of the ICASA Act 2000, as amended.

JUDGMENT

IWB de Villiers

[1] This is complaint in terms of s17C(1)(a) of the Act 13 of 2000, as amended that Telkom is contravening s3.4 of the Regulations (referred to below) inasmuch as local bandwidth is being subjected to the cap.

At the hearing of this matter, Mr Maritz, who appeared on behalf of Telkom, raised two objections *in limine*. The first was that the Committee lacks authority and jurisdiction to hear the matter. The objection was, however, withdrawn during the course of Mr Maritz's argument.

[2] The second objection related to the question whether Telkom had been afforded a reasonable opportunity to respond to the complaint and the notice setting out the nature of the alleged non-compliance, in terms of s17C (2)(b) of Act 13 of 2000 ('the Act"). However, during the course of his argument, Mr Maritz asked the Committee not to decide the point, stating that acceptance of Telkom's written representations at the hearing of the matter had afforded it a reasonable opportunity to respond to the complaint. The complainant, who appeared in person did not wish to reply in writing to Telkom's response in terms of S17C (2)(c) of the Act. Accordingly, the hearing commenced in regard to the merits of the complaint.

[3] Mr Maritz elucidated Telkom's written response. Thereafter the complainant gave evidence and was cross-examined by Mr Maritz. Mr Maritz elected not to call any witnesses and argued that there was no factual dispute between the parties and only a dispute concerning the correct interpretation of regulation 3.4 of the Regulations Regarding the Provision of Asymmetrical Digital Subscriber Line (ADSL) Services, General Notice 1112 of 2006 (Government Gazette No 29141 of 17 August 2006).

[4] Regulation 3.4 provides as follows:
"Local bandwidth usage shall not be subject to the cap."

[5] Regulation 3 bears the following heading:
"Consumer Protection Issues".

[6] Regulations 3.1 to 3.3 provide as follows:
"3.1 Subscribers who enlisted for the ADSL service prior to the introduction of the monthly cap shall have an election to abide by, terminate the contract for the service upon notice to Telkom, SNO or ISPs or vary the terms and conditions in relation to the monthly cap.

3.2 Subscribers that have reached the monthly cap shall be allowed to top-up their monthly cap without the need to purchase a new user account. This provision shall not in any way be used to prevent subscribers who choose to purchase new accounts once their monthly cap has been reached from doing so, should they wish to do so.

3.3 Telkom, SNO and ISPs shall inform subscribers, at least on a weekly basis, of their bandwidth usage until the monthly cap has been reached."

[7] In terms of Regulation 1 the expression "Local Bandwidth usage", unless the context otherwise indicates, means "the data that can be transferred from South African based Internet protocol addresses."

[8] There are no definitions in the regulations of the expressions "monthly cap" or "the cap."

[9] *Collins Dictionary of the English Language* provides the following relevant meaning of the noun "cap": "an uppermost surface or part," and of the verb "cap": "to impose an upper limit on the level of increase of (a tax, such as rates): rate-capping".

[10] In view of the fact that regulation 3.1 expressly refers to "the contract for the service" while regulations 3.2 and 3.3 impliedly refer thereto, one would, in interpreting the regulations, to my mind, be entitled to have regard to the meaning

which parties to such contracts have attributed to words like “capping”, “cap period” and “cap”. In my view, the regulations envisage that such words, appearing in contracts between subscribers on the one hand, and Telkom, SNO or ISPs, on the other would bear the meaning assigned thereto in such contracts.

[11] The parties are agreed that the contract entered into between them electronically accords with the contents of exhibit “A”. On page 4 thereof Telkom’s Capping Policy is sent out under the heading “Access capping details” as follows:

“To offer a fair service for all, Telkom Internet currently monitors and tracks all ADSL users’ online usage which, when added up, constitutes your cap or usage. The usage is measured in Gigs.

- **Capping** - Please note we do not monitor what you do or where you go, but how much traffic you produce in your use of the Internet. Your ADSL usage is determined by all traffic you generated by a given user name and includes the upload (sending), download (receiving) as well as network and protocol overheads. The same process applies to both the shaped and unshaped service. The accumulated data can be viewed at HTTP:\\ADSL.telkomsa.net and is updated each day after the forced network timeouts.

- **What’s a Gig** - In short, it is the amount of Bytes or size of a file or application on the Internet. This is approximately 300 songs, 1 500 average MS Word or MS Excel documents or about 10 000 E-mails without attachments.

- **Cap period** - Capping is determined over a given period, normally a calendar month. As such, monthly usage is accumulated during the period and reset according to your service subscription. At the beginning of each period the usage tracker is reset and any restrictions that might have been imposed would be lifted.

- **What is a cap** - A cap is the amount of traffic or Gigs per service a subscriber may use or consume over a given period and is determined by the product you have subscribed to initially. An example would be two, three or four Gig. Capping has no relation to the ADSL speed that you have chosen."

[12] The "monthly cap" referred to in regulations 3.1, 3.2 and 3.3 would, therefore, mean the amount of traffic or Gigs per service a subscriber may use or consume over a period of one month and is determined by the product to which the subscriber has subscribed to initially, e.g. two or four Gigs.

[13] It is also important to note that according to the introductory sentence to the "Access capping details", Telkom Internet currently monitors and tracks **all** ADSL users' online usage which when added up constitutes the subscribers cap or usage, which is measured in Gigs. The word "all" indicates that not just traffic generated from or to South African based Internet protocol addresses are monitored and tracked, but also "all traffic" from or to international protocol addresses.

[14] Mr Maritz submitted that the correct interpretation of regulation 3.4 is that a subscriber's local bandwidth usage may never be capped, i.e. cut off or restricted, but that both local and international bandwidth may be counted and may accumulate for the purpose of calculating the total bandwidth usage and thus determining when the cap (which is to be imposed only in respect of international bandwidth usage) is reached.

[15] Mr Cleghorn agreed with Mr Maritz's interpretation of regulation 3.4, but submitted that Telkom's actions were not in accordance therewith. He asked the Committee for leave to call witnesses to testify that Telkom has indeed capped local bandwidth usage in the sense of cutting off or restricting access thereto. However, the Committee refused to allow Mr Cleghorn to do so since it has never been a part of his complaint that Telkom had done so, and Telkom has never been afforded a reasonable opportunity to respond to such an allegation, as intended by s17C(2)(c) of the Act.

[16] In my view, Mr Maritz's submission in regard to the interpretation of regulation 3.4 is correct. None of the regulations throws any light on the question how the usage which contributes towards the capped amount of data is to be calculated. If the intention of ICASA in promulgating regulation 3.4 was to provide that "local bandwidth usage shall not count towards the cap", it would have been a simple matter to state this in clear and unambiguous terms. ICASA chose rather to use the words "local bandwidth usage shall not be subject to the cap."

[17] In *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd* 1996 (1) SA 1182(A) at 1187I to 1188A the Appellate Division held that the phrase "subject to" has no *a priori* meaning. The court, referring to the decision in *Rennie NO v Gordon and another NNO* 1988(1) SA 1(A) at 21D-22D, pointed out that in statutory contexts the phrase is often used to establish what is dominant and what is subordinate.

[18] Applying this meaning to the phrase "subject to" in regulation 3.4, the regulation means that local bandwidth usage will take precedence over the predetermined cap. The word "cap" as used by the parties to the contract, exhibit "A", is clearly intended to mean the "maximum" data traffic permitted" over a given period. Accordingly, the proper interpretation of regulation 3.4 is that when the total data traffic reaches the amount of the cap, no limit or restriction may be placed on local bandwidth usage, but all other bandwidth usage may be limited or restricted. Local bandwidth usage is accordingly given precedence over the cap, and may continue despite the cap having been reached.

[19] Mr Maritz submitted that regulation 3.4 is clearly ambiguous. He suggested that its other meaning would be that local bandwidth usage should not count towards a cap. On this interpretation, only data transferred from or to international Internet Protocol addresses would accumulate for the purpose of calculating the subscriber's bandwidth usage and thus determining when the cap is reached.

[20] It would appear that this is the interpretation of regulation 3.4 which Mr Cleghorn had in mind when he raised his complaint. See his e-mails dated 27 and 28 March 2007, 29 May 2007, 18 June 2007 (items 12, 14, 3 and 2 annexed to the complaint). Although Mr Cleghorn denied this under cross-examination by Mr Maritz, his denials are unconvincing.

[21] As indicated, Mr Cleghorn no longer supports the interpretation he originally gave to regulation 3.4 and now supports Mr Maritz's interpretation. If regulation 3.4 is ambiguous regard should be had to the equities (*Hansen v Venter and Another* 1957(4) SA 422(O) at 427A). In my view, it could lead to injustice to Telkom if local bandwidth should not count towards the cap. In effect, the subscriber would in such a case not pay for his use of local bandwidth. Probably it was this consequence which led Mr Cleghorn to abandon this interpretation.

[22] Accordingly, the complaint is dismissed.

Committee Members, Councillor JCW van Rooyen, N.Ntanjana, and D.Moalosi concurred.

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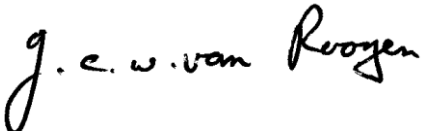
I.W.B. de Villiers (Acting Chairperson)



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JCW van Rooyen

For: ACTING CHAIRPERSON OF THE CCC