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**ISPA Code of Conduct Complaint COC #875
Ruling of the Independent Appeal Panel
Issued 15 April 2016**

ISPA Member	Afrihost
Complainant	Public
Date issued	13 May 2016
Complaint summary	DSL services not performing as advertised
Code of Conduct version	v3.2
Sections considered	Sections C and J (clauses 6, 7, 8, 9 and 28)
Finding summary	Adjudicator’s findings in respect of clause 7 and 9 overturned on appeal; adjudicator’s findings in respect of clauses 6 and 28 upheld

Background to the appeal

1. The complainant lodged a complaint with ISPA against the member on 8 July 2015 relating to the member’s “10Mbps Business Uncapped DSL product”.
2. The essence of the complaint was that the member was not providing this uncapped DSL service at the service levels advertised by the member.
3. The complainant stated that he had experienced a degradation of service over an extended period of time, as evidenced by the number of support tickets that he had opened with the member in the previous 12 months.
4. The complainant alleged that the member had contravened section C of the ISPA Code of Conduct (*Consumer protection and provision of information to customers*) and Section J (*Internet Standards*).
5. In particular, the complainant alleged that:
 - 5.1 The member had infringed its own acceptable use policy either by throttling or limiting connectivity or by failing to ensure that its network infrastructure was able to support rising customer demand for its services, which was in breach of clause 6 of the ISPA Code;

- 5.2 The member had not acted fairly, reasonably and transparently towards its customers in a number of respects after becoming aware of the ongoing IPC, latency and network issues it was experiencing, which was in breach of clause 7 of the Code;
 - 5.3 The member had offered services which were not within its technical and practical abilities, which was in breach of clause 8 of the Code;
 - 5.4 The member had not complied with applicable advertising standards and regulations by continuing to advertise "*reliable and robust*" internet connectivity despite it knowing for some time about the numerous technical problems it was experiencing and the level of service it was actually able to supply to its customers, which was in breach of clause 9 of the Code;
 - 5.5 The member had not paid due regard to established internet best practices in its operations, which was in breach of clause 28 of the Code.
6. An initial attempt was made by the member to resolve the complaint directly with the complainant. The complainant's subscription to the service was cancelled and the member paid a refund equivalent to 2 months' service fees to the complainant.
 7. However the complainant did not believe the complaint had been satisfactorily resolved. He felt that the complaint should be further investigated by ISPA as the service issues he had experienced had also affected a large number of the member's other customers.
 8. The complainant had, in his initial complaint, provided a number of links to media articles and comments posted on public forums about the member's DSL services and the problems being experienced by other customers over the same reported period.
 9. The complaint was then referred to formal adjudication.
 10. In its response to the formal complaint, the member acknowledged that it had experienced a number of technical problems which had adversely affected its services; but the member argued that it had always been honest and transparent in all its individual interactions with its customers and on public forums around these issues.
 11. The member also argued that it had complied with its terms of use, which allowed for a "best effort" service, and that it had tried to resolve all complaints. Allegations made by the complainant that customers struggle to cancel services or get refunds were unfounded.
 12. The member stated that it was developing a new network offering which it believed would resolve the technical problems it was experiencing. But it had always continued to work on improving its current network in the meantime.

Adjudicator's findings

13. The adjudicator reviewed each of the alleged contraventions of the Code separately and made the following findings:
 - 13.1 Regarding clause 6 of the Code, the adjudicator stated that *"clause 6 does not actually enforce the AUP (this is an issue of contract between the client and the ISP). It requires that the AUP exist and be made available to the client before the services start. Nothing before me indicates that this did not occur."*
 - 13.2 The adjudicator found that the member had not breached clause 6 of the Code.
 - 13.3 Regarding clause 7 of the Code, the adjudicator found that it was common cause that the member had experienced technical challenges with its DSL services, but that the member had *"not tried to obfuscate around these challenges as and when they arose"*.
 - 13.4 The adjudicator stated that *"clause 7 addresses the manner in which the member communicates with its customers. The question was therefore whether clause 7 puts a duty on the member to temper its advertising and initial marketing communications in line with these challenges, i.e. should the member be stating, upfront, that it experiences certain technical challenges?"*
 - 13.5 The adjudicator reviewed the member's terms and conditions, and specifically the *"best effort"* clause, and found that the member had clearly communicated upfront that connectivity and speed were not guaranteed.
 - 13.6 The adjudicator also found that *"the member had addressed all complaints regarding its services and delays experienced by customers, in a fair, reasonable and professional manner"*.
 - 13.7 The adjudicator therefore held that the member had not breached clause 7 of the Code.
 - 13.8 Regarding the alleged breach of clause 8 of the Code, the adjudicator referred to a number of admissions that had been made by the member in the media and on its website regarding the ongoing technical difficulties it was facing.
 - 13.9 The adjudicator then considered certain statements made by the member on its website regarding the service levels that it claimed it was able to offer to its customers who subscribed to its uncapped DSL services.

- 13.10 The adjudicator found that, although the member was communicating clearly around the technical challenges when raised, it was still offering the service as advertised.
- 13.11 The adjudicator held that the member had breached clause 8 of the Code by continuing to offer service levels that it could not meet.
- 13.12 Regarding the alleged breach of clause 9 of the Code, the adjudicator stated that it was beyond their mandate to apply the Code of Advertising Practice or to make a finding in this regard.
- 13.13 The adjudicator was of the view that this was within the jurisdiction of the Advertising Standards Authority of South Africa (ASASA) or similar forums. They found further that in the absence of a finding by ASASA (or a similar forum), they were unable to make a ruling under clause 9 of the Code.
- 13.14 With regard to the alleged breach of clause 28 of the Code, the adjudicator stated that although the complainant had raised this as a ground in his complaint, he had not given any details of the relevant internet standard/s which he believed the member had failed to adhere to.
- 13.15 The adjudicator found that the complainant had not made out a *prima facie* case against the member in this regard.
14. The adjudicator imposed the following sanctions in respect of the breach of clause 8:
- 14.1 The member was required to make it patently clear on its websites when it was experiencing technical difficulties and when its services may not meet the offered service levels at the time.
- 14.2 This information had to be communicated upfront on the member's website and pro-actively to each existing and potential customer until such time as the service issues were resolved.
- 14.3 To ensure compliance, the member was ordered to pay a fine of R50 000, which was suspended for a period of 24 months and would only become payable if the member was found guilty of a breach of clause 8 of the Code within that 24 month period.

Complainant's Submissions on Appeal

15. The complainant was not satisfied with the adjudicator's findings in respect of clauses 6, 7, 9, and 28 of the Code. He was also not satisfied with the sanctions imposed by the adjudicator for the breach of clause 8.
16. The complainant lodged an appeal with the ISPA Management Committee in terms of clause 12 of the ISPA complaint and disciplinary procedure.

17. The complainant has made a number of additional submissions on appeal, all of which have been taken into account by the panel even though they may not be specifically referred to in this report.

(A copy of the complainant's submissions which were emailed to ISPA is annexed to this report for ease of reference)

18. The main grounds for the complainant's appeal are, *inter alia*, as follows:

- 18.1 The member did not provide proper access to the acceptable use policies of its upstream network provider (in this case, MTN) and therefore had not made all of the applicable acceptable use policies available to the complainant as required by clause 6 of the Code.

- 18.2 The complainant acknowledged that the member offered its uncapped DSL services on a "best effort" basis, but argued that it had still acted unfairly, unreasonably, and unprofessionally towards its customers in one or more of the following ways:

- 18.2.1 It had failed to proactively and transparently disclose to its existing and prospective customers that it was experiencing technical issues after becoming aware of those issues. It was only when articles were published in the media and complaints were posted on public forums that the member issued a statement in this regard;

- 18.2.2 It did not adequately communicate the technical challenges it was facing to its customers through all appropriate channels, including direct email and social media. Instead, the member had opted to post updates on www.mybroadband.co.za, which is a specialist technology website that is not accessed by all the member's customers;

- 18.2.3 It had deliberately made it difficult for existing customers to cancel its services;

- 18.2.4 It had failed to offer full refunds to customers who lodged valid complaints and, instead, offered service credits even though a number of customers wanted to cancel their services;

- 18.2.5 It had failed to provide any information to its customers regarding the nature and timing of the remedial action that it intended to take for customers affected by the service issues; and

- 18.2.6 It had failed to follow the guidelines set out in the Consumer Protection Act for the payment of refunds for services not rendered, and/or for enabling consumers to cancel a service when no service was delivered within a reasonable time.

- 18.3 The complainant therefore argued that the adjudicator had erred in finding that the member had not breached clause 7 of the Code.
- 18.4 Regarding the adjudicator's findings with respect to clause 9 of the Code, the complainant argued that if ISPA did not have jurisdiction to hear complaints about advertising then it was pointless to include such a clause in the ISPA Code and it should be removed.
- 18.5 Regarding the adjudicator's findings with respect to clause 28, the complainant argued that it was self-evident from the numerous other complaints made against the member by other customers that the member was not adhering to internet best practices.
19. With regard to the sanctions imposed by the adjudicator for the member's breach of clause 8 of the Code, the complainant argued that the suspended fine of R50 000 is too lenient if due regard is had to the length of time that the member's services were provided at levels well below those advertised, and the number of customers that were affected.
20. The complainant highlighted the fact that the member had continued to sign up new customers for the same services at the same price and on the same terms despite knowing that it was experiencing serious technical problems and was not able to provide the services at the levels advertised.
21. The complainant is also of the view that such a small fine can be absorbed by a small business and that *"it sends the message to other ISP's that it is possible to provide a substandard service and get away with it"*.
22. The complainant also argued that by listing technical problems on its "Network Status" page on its website, the member had not done enough to comply with the adjudicator's requirement that the member make it *"patently clear"* on its website and to communicate directly to its customers when it was experiencing technical difficulties.
23. The complainant suggested that the member should post a very visible banner notice on each page of its website, as well as communicating that it is experiencing technical difficulties directly to its customers within a specified period of time.

Member's reply to issues raised on appeal

24. The member has comprehensively replied to the further submissions made by the complainant on appeal. Each of the points made by the member has been considered by the panel even though they may not be specifically referred to in this report.

(A copy of the member's reply has also been annexed to this report for ease of reference)

25. The main points made by the member in its reply are, *inter alia*, as follows:
- 25.1 In response to the complainant's allegation that the member had not provided notice and access to the upstream network provider's acceptable use policies, the member provided a copy of the version of its *ADSL Terms of Use* applicable when the complainant subscribed to the service, showing an explicit link to the relevant upstream network provider's acceptable use policy, which was therefore incorporated by reference for legal purposes into the Terms of Use.
 - 25.2 The member stated that information relating to the fair usage policies applicable to its uncapped DSL service were also made available in the "FAQ" section of its website.
 - 25.3 The member denied that it made it difficult for customers to cancel its services. It stated that it offers month-to-month packages which can be cancelled on 1 (one) month's written notice via its *Client Zone*.
 - 25.4 The member also provided a copy of a report of the complainant's usage of the service to prove that the complainant had enjoyed substantial use of the service during the reported period. The complainant's argument that he had received no service at times was unfounded.
 - 25.5 The member also highlighted that the complainant's allegations regarding the member's credit system were at odds with the refund that was offered to and accepted by him. A total amount of R1 994.00 had been paid to the complainant's credit card and proof of payment was provided with the member's reply.
 - 25.6 The member was of the view that provisions of the Consumer Protection Act were not relevant to an adjudication of the member's conduct in terms of clause 7 of the Code. The member stated that the complainant had, in any event, failed to provide any evidence in support of these allegations.
 - 25.7 The member denied that it had not properly communicated with its customers regarding the technical issues being experienced. It stated that it was in frequent communications with its subscribers, both on a push basis through direct email and on a pull basis through its website, client zone, twitter feed, MyBroadband forum and other social media channels.
 - 25.8 The member denied that it does not apply its best efforts to providing ADSL services and argued that the complainant has misunderstood this term as being applicable to the member's service, as opposed to the upstream service which is received by the member on a "best-effort" basis.
 - 25.9 The member also denied that its network status reports were hidden away from customers. It argued that a quick perusal of its home page shows that

the “Network Status” link is clearly visible at the top of each and every page of its website, leading up to the service sign-up pages.

- 25.10 The member confirmed that if service difficulties were being experienced, these would be clearly communicated on its website as required by the adjudicator.
- 25.11 In response to the allegation that it had failed to operate with due regard for established Internet best practices, the member argued that the technical challenges it faced had been experienced to a lesser or greater degree by all South African ISPs.
- 25.12 It stated that the best-effort nature of upstream services and the lack of competition in the provision of such services continued to create significant challenges to the growth of ISPs.
- 25.13 The member did acknowledge that it had experienced massive growth in subscriber numbers and bandwidth demand and that it had experienced difficulties in managing this growth which led to the service provision problems raised by the complainant.
- 25.14 However the member stated that these service issues were experienced across the entire industry and that similar criticism and a similar adverse finding could have been made against a number of other ADSL providers who are ISPA members.
- 25.15 The member stated again that it was confident that its new ADSL network has addressed the problems experienced on the old network.
- 25.16 The member also referred to the fact that it has been voted as the My Broadband ISP of the year for four years running, namely in 2011, 2012, 2013 and 2014, as ample evidence of its commitment to service excellence and customer support.

Sections of the ISPA Code of Conduct considered

26. The following sections of the ISPA Code of Conduct have been considered by the appeal panel:

26.1 *Section C: Consumer protection and provision of information to customers*

26.1.1 *Clause 6 - ISPA members must have an Acceptable Use Policy (AUP) for their Internet access services. This policy must be made available to customers prior to the commencement of any such service agreement and at any time thereafter, on request.*

26.1.2 *Clause 7 - In their dealings with consumers, other businesses, each other and ISPA, ISPA members must act fairly, reasonably, professionally and in good faith. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.*

26.1.3 *Clause 8 - ISPA members may only offer service levels which are reasonably within their technical and practical abilities.*

26.1.4 *Clause 9 - ISPA members must comply with all compulsory advertising standards and regulations.*

26.2 *Section J: Internet standards*

26.2.1 *Clause 28 - ISPA members must operate with due regard for established Internet best practices, as set out in the various request for comment (RFC) documents and as mandated from time to time by established and respected Internet governance structures.*

Appeal Panel's Findings and Ruling

27. When a complaint is referred to an appeals panel by the ISPA Management Committee in terms of clause 13 of the ISPA complaint procedure, the panel must consider the complaint afresh, taking into account the findings of the adjudicator who reviewed the original complaint, and the further submissions made by the complainant and the member on appeal.

28. Following the approach taken by the adjudicator, the panel has considered each of the alleged contraventions of the Code separately.

29. *Member's alleged contravention of clause 6*

29.1 It is evident from the copy of the member's *ADSL Terms of Use* provided by the member that a clear link to a copy of the upstream network provider's acceptable use policy was included.

29.2 The panel is satisfied that the requirements of section 11(3) of the Electronic Communications and Transactions Act, 2002 relating to the incorporation of legal documents by reference have been met, and that adequate notice and access has been given to the member's customers of all the acceptable use policies pertaining to its DSL service.

29.3 The panel therefore upholds the adjudicator's finding that the member has not breached clause 6 of the Code.

30. Member's alleged contravention of clause 7

- 30.1 In considering whether the member had acted in accordance with the requirements of clause 7 of the Code, the adjudicator confined their enquiry to the manner in which the member had communicated with its customers around the technical problems it was experiencing with its services.
- 30.2 Although the manner in which a member communicates with its customers is important, clause 7 must be applied widely to *all* of the member's dealings with its customers.
- 30.3 The member also expressed the view in its reply that the provisions of the Consumer Protection Act, 2008 ("CPA") are not applicable to adjudications under clause 7 of the ISPA Code.
- 30.4 This is not correct. Section C of the ISPA Code (including clause 7) must, at all times, be read with and subject to the provisions of the CPA when a complaint applies to a customer/s who falls within the definition of a "consumer" under the CPA.
- 30.5 The complainant in this matter is a consumer.
- 30.6 In terms of section 54 of the CPA, when the member undertakes to perform any services for or on behalf of a consumer, the consumer has a right to:
- 30.6.1 the timely performance and completion of those services, or timely notice of any unavoidable delay in the performance of the services; and
- 30.6.2 the performance of the services in a manner and quality that customers are generally entitled to expect.
- 30.7 If the member fails to perform a service to these standards, customers may require the member to either:
- 30.7.1 remedy any defect in the quality of the services performed; or
- 30.7.2 refund to the customer a reasonable portion of the price paid for the services performed, having regard to the extent of the failure.
- 30.8 Section 54 also provides for the circumstances of the supply of the services to be taken into account, as well as any specific criteria or conditions agreed between the member and the consumer before or during the performance of the services.
- 30.9 In the present matter, the following provisions of the member's "*ADSL Terms of Use*" are relevant:

- 30.9.1 ***“Uncapped DSL - Fair Use Policy***
In order to ensure quality of service and experience across Afrihost’s customer base Afrihost employs throttling based on monthly usage. Further details in respect of each of the Uncapped DSL profiles are set out in the FAQ section and incorporated by reference herein.
- Afrihost reserves the right to amend its management of its Uncapped DSL services although a cap will not be applied.”*
- 30.9.2 *“The provision of the Afrihost DSL service is subject to:*
- *The provision of upstream and network services;*
 - *Network availability;*
 - *Distance of the applicant from the local exchange;*
 - *Copper quality as provided by Telkom; and*
 - *Line sync speed limitations as may be applied or incurred through Telkom.”*
- 30.9.3 ***“Indemnity***
THE CUSTOMER INDEMNIFIES AND HOLDS HARMLESS AFRIHOST IN RESPECT OF ANY DAMAGES, LOSS OR COSTS OR CLAIMS INSTITUTED AGAINST AFRIHOST ARISING FROM ANY APPLICATION OR SUBSCRIPTION TO OR USE OF THE SERVICE OR BREACH OF THE TERMS AND CONDITIONS APPLICABLE TO IT.”
- 30.9.4 ***““Best effort” service***
Due to the fact that Telkom currently only offers DSL access services as a “best effort” service, Afrihost’s DSL service is likewise also a “best effort” service and no guarantees or warranties whatsoever are provided on throughput or any other aspect of the service, including but not limited to warranties in respect of merchantability, non-infringement of third party rights, freeness from errors or interruptions or availability, other than set out in these terms and conditions.
- Due to the fact that Telkom cannot guarantee the bandwidth throughput achieved when subscribers access the Internet utilising a DSL access line, Afrihost can likewise also not offer such a guarantee.*
- Please note that DSL is an access medium to the Internet and accordingly remains subject to any bandwidth related constraints which may apply to or be experienced in the use of the World Wide Web (WWW).”*

- 30.10 Proper notice of these terms of use was given to the complainant before he subscribed to the service in question and he is deemed to have accepted those terms.
- 30.11 It is self-evident from the wording of the above terms of use that member did not guarantee the performance of its DSL services.
- 30.12 However, these terms of use cannot be viewed in isolation. The member also made a number of further statements regarding the performance characteristics, benefits, uses, and qualities of its uncapped DSL services on other pages of its website.
- 30.13 In particular, the panel has taken note of the following statements published on the member's website:
- 30.13.1 *"Unshaped, Unmetered, Prioritised Perfect for the office, or for the power internet user! No shaping (guaranteed) and prioritised for the best performance with unique features to protect your business!";*
- 30.13.2 *"Business DSL offers Premium, unmetered, unshaped and prioritised bandwidth 24 hours a day! It's the performance of a capped account combined with the simplicity of an uncapped account - it's the best of both worlds!";*
- 30.13.3 *"Uncapped products are advertised as semi-shaped on all our marketing material, including our website, but you can be assured that you will get premium real time services (as opposed to throttling down your entire linespeed like in the past or what our competitors do), no matter what time of the day or how much bandwidth you've moved"*
- 30.13.4 *"Does Afrihost have enough capacity to satisfy its client's needs? - We currently maintain multiple IPCs across the country - divided into the North, East and South regions. We actively monitor and upgrade our IPC capacity to ensure that our clients have access to the best possible internet experience and value for their money."*
- 30.14 Giving these statements their ordinary meaning, a customer subscribing to the member's Business Uncapped DSL service would be reasonably entitled to expect that:
- 30.14.1 The member does not employ "traffic shaping" on its uncapped DSL service;
- 30.14.2 The service is suitable for customers who have high internet usage, including for business use;

- 30.14.3 The bandwidth offered is the best and is available 24 hours a day and no matter what time of the day it is used or how much bandwidth has already been used on the customer's account;
 - 30.14.4 The member's uncapped products will provide customers with access to premium real time services;
 - 30.14.5 The member will not employ throttling down the customer's entire line;
 - 30.14.6 The member has enough capacity to satisfy its customer demand;
 - 30.14.7 The member ensures that its customers have access to the best possible internet experience and value for their money.
- 30.15 The member has acknowledged that its DSL services, including its Business Uncapped DSL service, did not perform at these advertised levels over an extended period of time during 2014 and 2015.
- 30.16 The member therefore had a positive duty to:
- 30.16.1 Take reasonable steps to inform its customers about the technical problems being experienced and what steps were being taken (if any) to remedy the problems; and
 - 30.16.2 If the problems could not be remedied within a reasonable period of time, to refund a reasonable portion of the price paid by the relevant customer, having regard to the extent of the failure.
- 30.17 The panel agrees with the adjudicator's finding that the member did try to communicate with its customers during the reported period when it was experiencing technical difficulties.
- 30.18 The member may not have communicated immediately on becoming aware of the technical issues it was experiencing, but the panel is prepared to accept the member's explanation that it required time to investigate and gain a better understanding of the problems before it communicated with its customers.
- 30.19 However, it is evident from the statements made and replies posted on various threads set up on MyBroadband by the member during the reported period that the member could not offer its customers any assurance as to when (or even if) the technical problems would be fixed and/or when (or if) normal service levels would be resumed.
- 30.20 It was on this basis that the adjudicator found that the member did not have the technical ability or capacity to supply its Business Uncapped DSL service at the levels and standards advertised by it during the reported period.

- 30.21 The member has offered a number of different explanations at different times for the degradation in its services. While certain problems may possibly be attributed to the member's upstream network provider, it is apparent from the further admissions made by the member that it could not cope with the growth of its customer base and their new usage patterns on its network over that period.
- 30.22 The member should have immediately stopped promoting its services at the advertised levels and standards stated on its website to new customers, and some form of reasonable refund should have been offered to its existing customers.
- 30.23 Instead, the member continued to offer the same services at the same price to existing and prospective customers.
- 30.24 Although the panel does not believe that the member intentionally misled or deceived its customers, the member has failed to meet the standards of fairness, reasonableness, professionalism and good faith as required by clause 7 of the ISPA Code.
- 30.25 The adjudicator's finding in this regard is therefore overturned and replaced with a finding that the member did contravene clause 7 of the Code.

31. *Member's alleged contravention of clause 9 of the Code*

- 31.1 The panel disagrees with the adjudicator's view that a finding cannot be made in terms of clause 9 without an antecedent ruling from ASASA or a similar forum.
- 31.2 While the adjudicator was correct that ISPA does not have the jurisdiction to enforce the provisions of the Code of Advertising Practice, it can certainly be guided by it when making a ruling in terms of clause 9 of its own Code.
- 31.3 Furthermore, Part E of the CPA, which deals with the manner and form in which a supplier must advertise and market its services to consumers, must be applied in determining whether clause 9 of the ISPA Code has been breached.
- 31.4 In terms of section 29 of the CPA, the member must not market its services:
- 31.4.1 in a manner that is reasonably likely to imply a false or misleading representation concerning those services; or
 - 31.4.2 in a manner that is misleading, fraudulent or deceptive in any way, including in respect of:

- 31.4.2.1 the nature, properties, advantages or uses of the services;
 - 31.4.2.2 the manner in or conditions on which those services may be supplied; or
 - 31.4.2.3 any other material aspect of the services supplied.
- 31.5 In terms of section 41(1), the member must not, by words or conduct:
- 31.5.1 directly or indirectly express or imply a false, misleading or deceptive representation concerning a material fact to a consumer;
 - 31.5.2 use exaggeration, innuendo or ambiguity as to a material fact, or fail to disclose a material fact if that failure amounts to a deception; or
 - 31.5.3 fail to correct an apparent misapprehension on the part of a consumer, amounting to a false, misleading or deceptive representation.
- 31.6 In terms of section 41(3), it is a false, misleading or deceptive representation to falsely state or imply, or fail to correct an apparent misapprehension on the part of a consumer to the effect, that:
- 31.6.1 the member's services have performance characteristics, uses, benefits, or qualities that they do not have;
 - 31.6.2 the member's services are of a particular standard or quality;
 - 31.6.3 the necessary service is readily available for or within a reasonable period;
 - 31.6.4 a specific price advantage exists; or
 - 31.6.5 the consumer will derive a particular benefit from using the services.
- 31.7 The panel is of the view that the statements published by the member on its website (see paragraph 30.13 above) falsely states or implies that the member's Business Uncapped DSL service would perform in a certain manner, and/or would have certain benefits and uses, which it did not have during the reported period.
- 31.8 The panel is also of the view that the member has used exaggeration, innuendo or ambiguity to advertise its Business Uncapped DSL service on its website in a manner which may be misleading.

31.9 The adjudicator's ruling in this regard is overturned and replaced with a finding by the panel that the member has contravened clause 9 of the ISPA Code.

32. *Member's alleged contravention of clause 28 of the Code*

32.1 There is no evidence before the panel to support the allegation that the member has contravened clause 28 of the Code.

32.2 However, the panel is of the view that it should not be left to consumers to investigate whether an ISPA member is paying due regard to internet best practices in its operations.

32.3 Consumers often do not have the necessary technical expertise and understanding of what these best practices are and whether they are being applied.

32.4 This aspect of the complaint should therefore be referred back to the ISPA Management Committee to investigate further.

32.5 If there are indeed grounds to support the allegation that the member has not paid due regard to internet best practices in the provision of its services, a further complaint can be lodged against the member.

Amended sanctions

33. When considering the sanctions imposed by the adjudicator, the panel views the following as factors in aggravation:

33.1 The degradation of service levels provided by the member continued over a period of at least 12 months, and affected a considerable number of customers;

33.2 While it is clear that the member did try to communicate effectively with its customer base during the reported period, it continued to advertise its uncapped DSL services in the same way, using the same language regarding performance, reliability and consistency, when it clearly knew that it was not able to meet these levels of service;

33.3 The member was obliged to offer a reasonable refund to affected customers when it became clear that it could not remedy the defects in its services, instead it continued to benefit financially by charging the same price for the same services and by signing up new customers to its network.

34. Based on the foregoing, the sanctions imposed by the adjudicator are replaced by the following sanctions:
- 34.1 Within 30 (thirty) days of the date of publication of this report, the member must provide proof to the ISPA Management Committee that it has removed all statements published on its website or elsewhere in its advertising and marketing material relating to its Business Uncapped DSL service which state or imply that this service has performance characteristics, uses, benefits, or qualities that it does not have;
- 34.2 The member must highlight the “best effort” clause in its *ADSL Terms of Use* in a conspicuous manner and form, so that the clause is likely to attract the attention of an ordinarily alert consumer before that consumer enters into a service agreement with the member, or before any payment is accepted from the consumer for such services.
- 34.3 The member is fined the following amounts, which are payable immediately to the ISPA Management Committee on receipt of this report:
- 34.3.1 The sum of R24 000.00 for its breach of clause 7 of the ISPA Code;
and
- 34.3.2 The sum of R6 000.00 for its breach of clause 9 of the ISPA Code.
35. The panel has taken into account the **Table of Suggested Fines for breaches of the Code of Conduct** which has been published on the ISPA website. Although the panel acknowledges that these suggested fines are intended as a guideline, it is comfortable in light of the findings above to impose the maximum fine stated in the table.
36. The panel has found no reason to amend the sanctions imposed by the adjudicator in respect of the member’s breach of clause 8 of the ISPA Code and this sanction therefore remains in effect from the date of publication of the adjudicator’s report.

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