

## **Ruling on Internet Service Providers dispute on services offered by Telkom Kenya Limited - 6th August 2004**

### **Background**

A dispute was lodged with the Communications Commission of Kenya (hereinafter referred to as the Commission) by representatives of Internet Service providers (hereinafter referred to as ISPs) on 15th June 2004, citing issues concerning the following products offered by Telkom Kenya Limited:

1. Asymmetrical Digital subscriber line (hereinafter referred to as ADSL)
2. Analogue Private Wire (hereinafter referred to as APW) service
3. 944 Dialup Internet services

The Commission held separate bilateral meetings with ISPs (14th June 2004) and Telkom Kenya Limited (hereinafter referred to as TKL) representatives (5th and 9th July 2004) and a tripartite meeting (20th July 2004) with a view to verifying and gathering information on the dispute submitted to the Commission. In addition the Commission attended the meeting between TKL, ISP representatives and the Cyber Café Association of Kenya (CCOAK) held on 28th July 2004, as an observer.

From the discussions held at the various meetings, the Commission has analyzed and summarized the complaints presented by ISPs and responses from TKL as follows:

1. Provision of direct Internet access to end-users by TKL:
  - Provision of ADSL service
  - Provision of 944 national dialup Internet access service
2. Pricing of services:
  - Price increases on APW
  - Cross-subsidization on 944 national dialup and ADSL
3. Quality of service:
  - Quality of Service (QOS) on Jambonet
  - Timely service delivery and measures for ensuring reliable access to services

### **Provision of direct Internet access to end-users by TKL**

#### **1. The Legal Framework**

The Telecommunications and Postal Sector Policy 2001 and the Kenya Communications Act (hereinafter referred to as KCA) and the Kenya

Communications Regulations guide licensing of communication services in Kenya.

Section 24 of the KCA states that: "No person shall operate a telecommunication system or provide any telecommunication service except in accordance with a valid licence granted under the act".

The sector policy provides for the licensing of Internet node and backbone services and value added services (hereinafter referred to as VAS) for example, electronic mail, voice mail, store and forward fax, Internet services provision, video conferencing, Electronic Data Interchange among other services.

## **2. Regulatory Provisions**

Guided by the provisions of the KCA and the sector policy the Commission in 1999, licensed TKL to provide several services including Internet node and backbone and VAS. The VAS licence granted to TKL provides rights "to offer value added voice and data services defined as all telecommunication services, not including basic voice services to the public, telex and telegraph services, either mobile or fixed and is authorised by this licence, to provide the services in Kenya".

Additionally the Commission granted TKL a licence to provide International Internet Backbone services for a five (5) year term commencing from the July 1999. The licence is renewable for further five (5) year terms subject to compliance with the terms of the licence among other factors.

TKL's Jambonet licence limits the connection of the international Internet backbone to ISPs only. Reference to condition 4: "International Data Gateway Links: The Licensee should make international data gateway access available to ISPs, on a first come-first served, non-discriminatory and tariffed rate basis"

Condition 4 of the licence, as quoted below, also provides for the licensee to operate an ISP under a separate licence.

"If Licensee offers Internet Services to the public under an ISP license, the cost of the associated Internet Backbone Service shall be reflected in the ISP company's books at a rate no lower than the rate it charges to its most preferred ISP customers."

From an analysis of pricing for Internet access using ADSL presented by ISPs, a disparity in pricing is evident taking into consideration the cost associated elements of Internet access, local loop and costs relating to provisioning, administration, marketing, maintenance and the margin contribution.

## **3. Market structure**

The Commission in 2002 developed the Telecommunication market structure guided by the sector policy; clarifying the various categories of licences and

opportunities available for investment in the telecommunication sector.

The structure provides for the following licences under Internet facilities and services:

- Public Internet Access services (ISP)
- Internet backbone services (IBS) and
- Internet exchange point (IXP)

Based on this structure the Commission has to date licensed 76 ISPs including Jambo Telkom Limited (herein after referred to as JTL) a 100% fully owned subsidiary of TKL.

#### 4. **ISP licence**

The market structure provides for the licensing of Internet service provision under an Internet service provider licence. The ISP is required to lease capacity from licensed network operators including TKL and Public data network operators.

TKL applied for an ISP licence vides their letter dated 17th March 2000. In its response the Commission vides a letter dated 6th April 2000 noted with concern that TKL had been exclusively granted an Internet Backbone systems and service Licence and consequently TKL could not offer similar services in competition with licensed ISPs. TKL was advised to establish a subsidiary in order to be licensed to provide Internet services.

TKL then, formed a subsidiary, JTL and applied to be licensed as an ISP in a letter dated 2nd October 2001. The intention to licence JTL was published in the Kenya Gazette dated 9th November 2001. This notice received objections from Telecommunication Service Providers of Kenya (TESPOK) based on the fact that JTL was 100% owned subsidiary of TKL and that TKL had exclusivity in the provision of Internet backbone services. Subsequently, and in cognizance of objections received JTL was granted an ISP licence on 8th April 2002 with strict conditions to prevent cross subsidy, control monopolistic tendencies and maintain fair competition given that TKL has monopoly and exclusivity in the provision of access infrastructure and the International Internet gateway.

The following clause was included/inserted in the JTL licence

10. Prohibition of cross-subsidies: The licensee shall not give subsidies or cross-subsidies or permit itself to be subsidized or cross-subsidized or give or receive undue preference to or from as the case may be any of its associated business or persons as concerns:

- the provision of internet services
- any other licences granted to the licensee by the Commission

10.1 That the licensee shall ensure that records of any transfer of monies between any part of the licensee's business and of the business mentioned in paragraph 11 (provision of information) are maintained.

10.2 The Commission may at its discretion request the licensee to submit other information related to the licensed business to satisfy the Commission that no cross-subsidy is taking place".

ADSL and dialup are Internet access infrastructure comparable to digital leased lines. Based on an analysis of the submissions given by ISPs and TKL, it is the view of the Commission that the 'bundling' of Internet access services through 944 dialup and ADSL services has resulted in cross-subsidization between the provision of the local loop infrastructure and the provision of Internet access to end-users and has therefore distorted the Internet services market segment.

### **Status of Jambo Telkom licence**

It is noted that JTL, has not operationalized its ISP licence nor paid the annual licence fees. Additionally JTL requested for an extension of ISP service commencement date to 1st July 2003. The Commission in a letter dated 10th March 2003, granted the extension up to 18th July 2003, however there has been no response from JTL since.

The Commission requires that JTL remedy the following contraventions on the ISP licence to enable provision of Internet access services to end-users:

1. Failure to commence of service provision within the stipulated time-frame
2. Non-payment of outstanding annual operating fees

The Commission further notes that in a letter dated 27th May 2004; the Commission notified TKL of the contraventions on the licences and required that TKL remedy the infringements in thirty (30) days. A response to this notice was communicated at meetings held between the Commission and TKL and a written response dated 19th July 2004 was received by the Commission on 20th July 2004. The response stated that TKL's position regards the provision of Internet access services to end-user utilizing ADSL and 944 dial up as being provided under the VAS licence.

Provision of Internet access to end-users should be through an ISP, JTL is yet to comply with the provisions of the licence including the requirement to start operations in twelve (12) months from the effective date of the licence and hence the licence is due for termination unless the company pays its dues to the Commission and commences operations.

### **Ruling on ADSL and 944 national dialup**

The Commission views the provision of Internet services directly to end-users to be separately licensable and distinct from Value Added Services.

Subject to the foregoing analysis the Commission rules that:

1. Provision of Internet services to end-users shall be provided under an ISP licence, only.
2. Provision of Internet services does not constitute services under the VAS licence.
3. The pricing of all telecommunication services including dialup and ADSL services should be non-discriminatory and cost oriented.
4. TKL has contravened licences conditions in the International Internet Backbone services licence.
5. TKL, by providing Internet access direct to end-users bundled with infrastructure, has provided the services in an anticompetitive and unfair manner.
6. TKL from the date of this ruling, immediately cease the provision of ADSL and 944 national dialup services to new customers, in the current 'bundled' form until a negotiated agreement between TKL and ISPs is arrived at. That TKL inform existing customers of the discontinuation of the service, to facilitate migration to licensed ISPs within fourteen (14) days of this ruling.

It is the recommendation of the Commission that the agreement be of commercial nature and should include appropriate pricing and mechanisms to deliver affordable Internet access to end-users. Additionally, the said agreement, or any other agreement, must comply with relevant provisions under the regulations and the market structure.

### **Pricing of services**

#### **1. Pricing of Analogue Private Wire (APW) services**

The Commission noted that TKL has effected numerous price changes for APW from Kshs 3,000 per month for circuits provided pre-2001 and Kshs 7,250 for circuits provided after 2001 to Kshs 16,000 effective 1st July 2004. TKL has further reviewed and communicated a downward price change for APW to Kshs 10,000. The Commission encourages TKL and ISPs to enter into commercial negotiations to determine the appropriate pricing for the service taking into consideration end-user demand for affordable services.

The Commission rules that TKL establish a non-discriminatory, cost-based and firm pricing policy, sensitive to the needs and demands of consumers and give sufficient notice of the proposed price changes to the Commission and consumers as stipulated in the regulations.

### **Quality of service**

#### **1. QOS on Jambonet**

TKL is licensed to provide Internet backbone facilities and services offering both uplink and downlink international connectivity to Internet service providers

(ISPs) through a service brand named Jambonet. TKL is currently the sole provider of Internet backbone facilities and services, offering both uplink and downlink international connectivity to ISPs through a service brand named Jambonet.

TKL's license is for an initial period of five years ending 30th June 2004, but extended for a further three (3) months to allow for the renewal procedures, subject to performance and compliance with stipulated licensing conditions. The Commission has received complaints on the quality of service offered by Telkom Kenya on Jambonet. The Jambonet network has been reported to be prone to frequent downtimes and outages, oftentimes resulting in heavy losses for ISPs, corporate entities, individuals and the Government. In addition TKL has on several occasions been reported to block Internet ports causing the interruption of Virtual Private Network (VPN) Connections. Given that there are currently no alternatives in the provision of International access services and bearing in mind that TKL remains a dominant provider in this area it is imperative that these services be efficient and reliable. Guided by the Government policy for the sector it is the intention of the Commission to speedily introduce competition in this area.

The Commission rules as follows:

- That TKL provide the service on a non-discriminatory and cost oriented basis and provide a guarantee on the minimum quality of service levels including bandwidth, within thirty (30) days from the date this ruling.
- In addition sufficient notice, of not less than one (1) month, should be given for tariff changes both to the Commission and consumers guided by the provisions of the licence and regulations.