

IN THE MATTER HEARD BEFORE THE INDEPENDENT COMMUNICATIONS AUTHORITY OF
SOUTH AFRICA (ICASA) IN THE TERMS OF SECTIONS 100 AND 53 OF THE
TELECOMMUNICATIONS ACT NO. 103 OF 1996, ON 23, 24 AND 25 JANUARY 2002,
4 FEBRUARY 2002, 1 MARCH 2002 AND 13 MARCH 2002.

TELKOM SA LIMITED COMPLAINANT

AT&T GLOBAL NETWORK SERVICES

RULING

SOUTH AFRICA (PTY LIMITED) RESPONDENT

1 INTRODUCTION

1.1 The complainant, Telkom SA Limited ('Telkom' filed a complaint with ICASA ('the Authority') on 20 November 2000, in terms of section 100 (1)(a) of the Telecommunications Act 103 of 1996 ('the Act').

1.2 The Respondent is AT&T Global Network Services South Africa (Pty) Limited ('AT&T'), a value-added network service (VANS) licensee. AT&T filed a counter complaint against Telkom on 22 March 2001 in terms of section 53 of the Act.

1.3 In terms of section 17 of the ICASA Act, the Council of the Authority established a Special Committee to consider and analyse submissions made with regard to the complaint lodged by Telkom against AT&T as well as the counter complaint lodged by AT&T against Telkom. The Council also delegated the power to make the final decision on the complaints to the Special Committee and that such decisions shall be the final decisions on behalf of the Authority.

1.4 Telkom's principal complaint is that the service provided by AT&T to IBM is not authorized by its licence in terms of section 40 of the Telecommunications Act 103 of 1996 ("the Act") to provide a VANS. Telkom makes a range of allegations related to this principal complaint. Thus it contends that the service provided by AT&T:

1.4.1 encroaches on Telkom's monopoly over public switched telecommunications services ("PSTS"), in contravention of

- section 32(1) of the Act and condition 3 of Telkom's PSTS licence;
 - 1.4.2 contravenes section 40(4) of the Act in that AT&T is ceding or assigning their rights to use or subletting or parting with control of telecommunications facilities obtained from Telkom;
 - 1.4.3 constitutes the provision of a private telecommunication network (PTN) to IBM, without a licence in terms of section 41 of the Act; and
 - 1.4.4 is in breach of the contractual agreement between Telkom and AT&T.
- 1.5 Telkom also alleges that AT&T is aiding and abetting IBM to violate section 40 of the Act by providing VANS without a licence and by means of telecommunications facilities other than those provided by Telkom.
- 1.6 In its heads of argument, but not in its complaint, Telkom alleges also that the cable on the IBM and AT&T premises linking the AT&T front end processor and the IBM computer is a telecommunications facility which, in breach of the Act, has not been obtained from Telkom.
- 1.7 AT&T has filed a counter complaint alleging that Telkom's failure or refusal to provide AT&T with telecommunications facilities violates sections 43(1) and 44 read with section 100 of the Act and is inconsistent with section 53 of the Act because it is likely to have the effect of giving undue preference to Telkom's own VANS operations. In respect of the section 53 counter complaint, ICASA invited the Competition Commission to assist the Authority in a consultative capacity.
- 1.8 Telkom seeks to resist the counter complaint on two grounds:
- 1.8.1 First, it alleges that it was entitled to withhold facilities from AT&T because AT&T was planning to use these facilities in breach of the Act as set out in paragraph 1.3 above.
 - 1.8.2 Second, it contends that AT&T has contractually waived its rights to file this complaint.
- 1.9 The hearing took place on 23, 24 and 25 January 2002, 4 February 2002, 1 March 2002 and 13 March 2002.

This analysis deals with the statutory violation issue.

2.1 Section 33(1) of the Telecommunications Act 103 of 1996 (“the Act”), lists the categories of telecommunication service licences which the Authority may grant. Reading section 33(1) (a) with section 40 of the Act, it is clear that one such category is a value-added network service licence. Nowhere in the Act is “value-added network service” defined. The closest the Act comes to a definition of “value-added network service” is in section 40(2) which states the following:

“A licence to provide any value-added network service, including, but not limited to, electronic data interchange, E-mail, protocol conversion, access to a database or a managed data network service, shall contain a condition that the service in question shall be provided by means of telecommunication facilities provided by Telkom or made available to Telkom as contemplated in section 44 until a date to be fixed by the Minister by notice in the Gazette, and a different date may be so fixed in respect of national long-distance facilities.”

2.2 The VANS licence issued to Telkom in terms of the Act contains its own definition of “value-added network service”. It states the following:

“Value-Added Network Services” means all those value added services provided by the Licensee immediately before the commencement of the Act, including, without limitation –

- (a) Electronic data interchange;
- (b) Electronic mail;
- (c) Protocol conversion;
- (d) Access to a data base or a managed data network service;
- (e) Voice mail;
- (f) Store-and-forward fax;
- (g) Videoconferencing;
- (h) Telecommunication related publishing and advertising services, whether electronic or print;
- (i) Electronic information services, including Internet services provision;

And any other telecommunications service (including Mobile Telecommunication Services and Public Switched Telecommunication

Services) and in respect of which conveyance of signals is no more than is incidental to, and necessary for, the provision of that service.’

2.3 The Telecommunications Amendment Act, Act No. 64, 2001 contains a definition of VANS as follows:

“**value-added network service**” means a telecommunication service provided by a person over a telecommunication facility, which facility has been obtained by that person in accordance with the provisions of section 40(2) of the Act, to one or more customers of that person concurrently, during which value is added for the benefit of the customers, which may consist of-

- (a) any kind of technological intervention that would act on the content, format or protocol or similar aspects of the signals transmitted or received by the customer in order to provide those customers with additional, different or restructured information;
- (b) the provision of authorised access to, and interaction with, process for storing and retrieval of text and data;
- (c) managed data network services.’

2.4 For the purposes of this ruling, neither the VANS definition in Telkom’s VANS licence nor the VANS definition in the Telecommunications Amendment Act are relevant. The VANS definition in Telkom’s licence is only of relevance to Telkom and cannot override section 40 of the Act. The VANS definition in the Telecommunications Amendment Act was passed after the complaint in this matter was filed and cannot have retrospective application. In this ruling, the Authority is guided by the provisions of the Act with respect to the issue of statutory definition and violation.

2.5 Since the enactment of the Act, developments in telecommunication technology have facilitated the creation of “virtual private networks” (VPNs). VPNs use technologies like tunneling, encryption and redundant switching and transmission capacity to provide a range of different clients with a service which simulates a private telecommunication network but which has additional levels of reliability and security and which does not depend on its own independent telecommunication facilities.

2.6 The location of VPNs within the scheme of the Act has presented the Authority with some problems. Several licensed VANS providers offered VPNs to their clients, taking the view that the provision of a

VPN fell within the terms of their VANS licences. Telkom, however, does not accept that VANS providers are authorized to provide VPNs. Telkom has raised several different objections to the actions of the VANS providers in this regard:

2.6.1 Telkom has complained that a VPN is a private telecommunication network within the contemplation of section 41 of the Act and that by providing VPNs to their clients through their own facilities and VPN technology, the VANS providers are violating section 41(2)(a) of the Act which requires a PTN to be provided only by means of telecommunications facilities made available by Telkom.

2.6.2 Telkom has also complained that by providing VPNs to their clients, the VANS providers are violating section 40(4)(a) of the Act which prohibits a VANS licensee from ceding or assigning its rights to use the telecommunications facilities provided to it by Telkom or from otherwise disposing of the facilities in question.

2.6.3 An alternative complaint of Telkom is the following:

2.6.3.1 Because of the commonly shared infrastructure on which VANS operators provide VPNs to their clients, notwithstanding the logical partitioning between clients, it is possible for clients to communicate with each other over the VANS operator's network;

2.6.3.2 By making such communication possible, the VANS operators are providing public switched telecommunications services without a licence to do so;

2.6.3.3 They are therefore in contravention of section 32(1) of the Act and in breach of Telkom's licensed monopoly over such services conferred in accordance with section 36(3)(a) of the Act.

2.7 Telkom's primary complaint therefore raises issues of the boundary between PSTS and VANS. It is necessary to review some of the general features of this boundary issue and then to examine the specifics of the complaint.

2.8 Unlike VANS, private telecommunication networks are defined in the Act. Section 41(1)(a) of the Act states the following:

“A person providing a telecommunication network for purposes principally or integrally related to the operations **of such person** (hereinafter referred to as a private telecommunication network)..”

2.9 The hallmark of a private telecommunication network is therefore that it is a network provided “in house” (and licensed to the in house provider) for the purpose of enhancing the operations of the business.

2.10 It is clear that a VPN is not such a network. The VPN is not provided “in house”. It is provided by the external licensed VANS provider who provides VPNs not for the purposes of enhancing its own operations, but rather for the purposes of generating income from clients who want their operations enhanced by a VPN.

2.11 Section 40(4) of the Act states the following:

“A person who provides a value-added network service –

(a) (i) shall, until a date to be fixed by the Minister by notice in the Gazette, not be entitled to cede or assign his or her rights to use such facilities or to sub-let or part with control or otherwise dispose of the telecommunication facilities in question; and

(ii)

(b) The provisions of paragraph (a)(i) shall not prevent the due and proper use of such facilities by their customers of such person, in the cause of utilizing the service in question.

2.12 A VANS provider who offers VPNs to its clients does not contravene the provisions of section 40(4)(a)(i) of the Act by so doing. The VANS provider does not simply cede or assign to its clients its rights to use the facilities it receives from Telkom, nor sublet or otherwise part with control or dispose of these facilities to its clients. At all times, the VANS provider remains in control of the telecommunications facilities it receives from Telkom. What it provides its clients is a service to use certain bandwidth along with guaranteed levels of service, security, reliability and availability. Any use of Telkom facilities by the clients of a VPN provider is therefore clearly authorized by section 40(4)(b).

2.13 The argument that VPNs are public switched telecommunication services is not altogether clear and would appear to conflict with the argument that VPNs are private telecommunications networks. It is necessary to point out that the value added elements inherent in VPNs and their non-public nature distinguish them from the basic and public telecommunication services which would fall within the category of public switched telecommunication services in the Act.

3 STATUTORY DEFINITION / VIOLATION ISSUE: SUMMARY OF EVIDENCE AND ARGUMENTS

3.1 Telkom's principal complaint is that AT&T is in statutory violation of the Act in a number of aspects.

3.1.1 Telkom alleges in paragraph 7 of its Statement of Complaint that "AT&T operates a private telecommunication network on facilities obtained from Telkom which is interconnected to the telecommunication system of Telkom, but does not hold a licence as referred to in section 41(1)(b) of the Act." ¹

3.1.2 In paragraph 2 of Telkom's Heads of Argument, Telkom's counsel asserts that "Telkom submits that whatever services AT&T may be providing and which may constitute legitimate VANS, it is not entitled to make its network available to a customer for the conveyance of data from one premises of that customer to other premises of the same customer or to third persons (e.g. customers of the customer of AT&T). Telkom submits that if AT&T makes its network (consisting of telecommunication facilities) available for this purpose, it is providing a telecommunication service without a licence and performing a function which only Telkom may legitimately perform"².

3.2 In his evidence on behalf of Telkom, Dr Celli contends that:

- corporations, like IBM, used to establish PTNs for their data communication purposes;

¹ Telkom Statement of Complaint, paragraph 7, p7

² Telkom Heads of Argument paragraph 2, p5

- such corporations obtained their telecommunication facilities from Telkom to construct their PTNs;
- as the PTNs became more complex, some corporations such as IBM outsourced the responsibility for managing their PTNs to specialized companies;
- such outsourcing was often to VANS providers;
- a form of VANS is the MDNS, which consists in the managing of the PTN which a customer uses for data communication;
- such MDNS became included in the services provided by VANS providers;
- more recently, VANS providers under the guise of providing MDNS, have been providing switched data telecommunication services or virtual private network (VPN) services;
- recent technological developments have made it possible to create out of underlying telecommunication infrastructure a new way of making telecommunication facilities available to users;
- a VANS provider sets up a large network with facilities leased from Telkom which forms the backbone from which the VPN is created;
- the backbone network is partitioned into logically independent subsets, each of which can be made available for the exclusive use of a customer;
- the backbone network is shared by all the users of the VPNs thus provided;
- each partition provides to its user the same functionality that would be provided by a PTN made up of fully dedicated telecommunication facilities;
- there, therefore, is no basic difference between a PTN and a VPN;
- although it would be permissible for a VANS provider to use VPN technology to provide VANS to a customer, if a VANS provider provides a VPN service, involving the carriage of data from the premises of one customer to different premises of that same

customer or any other customer, this would constitute to the provision of a PSTS and would be illegal;

- it is precisely this type of VPN service which AT&T is providing to IBM;
- as a consequence, Telkom suffers a reduction of income from the provision of its PSTS;
- in the process of providing VPN services, the VANS provider is no longer only providing the value-added functionality that it provided to the PTN of its customers in the traditional MDNS but is operating and managing its own network and providing conveyance of signals for which the customer would otherwise have required a PTN or Telkom's PSTS;
- these VANS providers construct, maintain and use a network with telecommunication facilities obtained from Telkom and use it to provide a PSTS (in the form of telecommunication facilities in a VPN configuration) to their customers;
- this is precisely what AT&T does in regard to the services it provides to IBM;
- the primary purpose of the VANS operator which provides a VPN service to its customers is to convey the data communication signals of the customers through and by means of the telecommunications facilities which the VANS provider (not Telkom) makes available for the purpose, something which only Telkom is licensed to do³.

3.3 In his evidence on behalf of AT&T, Mr Silman contends that:

- Global companies require a consistent data communications network interface for operational purposes. Many global companies' entire business controls depend on a globally managed data communications network service and could not otherwise operate in South Africa. Managed Data Network Services (MDNS) offered by AT&T in South Africa were developed in response to these business customer needs for secure and highly reliable

³ Celli's Statement of evidence p3-14

enterprise – wide computer networks allowing the sharing of data resources on a national and global basis;

- MDNS services are customized value-added data network services allowing businesses to communicate data internally and with their customers and suppliers through the use of different data communications protocols over a highly secure and reliable national and global network. MDNS do not involve merely the provision of consulting services – human activity such as involved in designing a network or acting as a point of contact with the basic services provider;
- AT&T provides MDNS in South Africa over a frame relay backbone network and customer access lines, using circuits leased from Telkom. International circuits also leased from Telkom connect AT&T's international nodes in Johannesburg to AT&T's European data centres in the UK and Germany providing messaging, security and Internet services to customers in South Africa. AT&T also uses dial-up access hardware and software to allow remote access to its backbone network over Telkom's PSTS;
- pro-active management is an essential feature of MDNS. AT&T provides the continuous 24/7 monitoring of its international backbone network, its backbone networks within individual countries, all network connections and equipment, including the interface into the customer LAN and sometimes onto the LAN itself;
- provision of pro-active management and service on an end-to-end basis is also critical to the enhanced functionality provided by MDNS. To ensure end to end functionality, performance and reliability, AT&T's MDNS is offered only on a fully bundled basis, with AT&T always providing the customer premise router and associated management equipment, which remains under AT&T's full and exclusive control. Both AT&T's global backbone network, and its local backbone network in South Africa, which uses circuits leased from Telkom, are designed with built in redundancy to bypass circuit failures and ensure reliability;
- end-to-end customized design is also critical to the enhanced functionality provided by MDNS. AT&T designs each MDNS customer's network at the global and individual site level to provide the required availability, reliability and response times. AT&T provides and installs all required equipment, arranges the

necessary telecommunication facilities, ensures interoperability for other value-added services, such as global messaging and business Internet services, and ensure the availability of any necessary back-up facilities to ensure reliability. These activities are managed pursuant to a plan agreed in advance with the customer to ensure the minimal disruption as services are implemented globally;

- pro-active performance measurement, also ensures delivery of the enhanced functionality provided by MDNS. AT&T provides service level agreements (SLAs) at the customer premise level required the regular measurement and reporting of performance data concerning required availability, reliability and response times;
- heightened security is provided by MDNS through AT&T's global service manager application governing authentication and authorization and providing the automatic denial of user access to unauthorized applications;
- AT&T's MDNS services in South Africa are value-added network services not only because they provide managed data network but also because they provide the following value-added network services: code and protocol conversion, providing connectivity between terminals and data processing equipment using different protocols; online data and information processing, providing interactive management of customer equipment, network environment and performance; and online information and data base retrieval. These value-added functions ensure the connectivity and allow the operation of the management functions that provide the high level of functionality, performance and reliability delivered by MDNS;
- because of this widespread use of different equipment and network, protocol conversion is an important function of MDNS ensuring communication between users with incompatible data communication equipment or networks;
- through protocol conversion, MDNS allows the appropriate configuration and successful transmission of local area network (LAN), wide area network (WAN) and mainframe computer (or "host") protocols (e.g., IBM system network architecture (SNA) mainframe equipment), thus allowing businesses to communicate

with their employees, customers and trading partners despite the use of different computer equipment;

- another core feature of MDNS is on-line, end-to-end management of customer specific equipment, network functionality and usage and network performance through online information and data processing. MDNS provides comprehensive management of all customer premise elements and all other equipment used in serving each other;
- MDNS also provides online information and data base retrieval services in South Africa. As described above, the core online management functions of MDNS require the collection and storage of data concerning customer network configuration, usage and performance, interaction between AT&T and the customer and by AT&T, on the customers behalf, with the stored data and the provision of customer reports using this data. AT&T also provides firewall services within the MDNS network allowing users to access databases and online information services generally available on the Internet while protecting against unwanted intrusion;
- AT&T's managed data network services are marketed both under the name "managed data network services" and as "Virtual Private Network Feature Services." VPN-based services provide VANS customers with additional security and reliability, and do not use private telecommunication network facilities, or otherwise allow exclusive usage of any telecommunication facility. Instead, VPN-based services simply allow more efficient and secure usage of the shared networks used to provide MDNS and other VANS services. They achieve this result by using software to establish logically defined connections for each customer allowing more exact monitoring and management of customer usage and preventing unauthorized communication. AT&T's managed data network services use two types of VPN: "network-based" VPNs for communications carried on the backbone network, and "edge-based" VPNs to create encrypted tunnels for traveling and telecommuting users using Internet access⁴.

3.4 In his evidence on behalf of AT&T, Mr Harvey contends that:

⁴ Silman's Statement of Evidence p77 - 89

- AT&T provides MDNS services to IBM by combining AT&T-owned hardware and software with a backbone network and customer access lines comprised of telecommunication facilities obtained from Telkom;
- AT&T-owned hardware used to provide these MDNS services includes routers, front end processors ('FEPS'), digital and channel service units ('DSU's' and 'CSU's') and frame relay access devices ('FRADs'), DSU and hub, hub routers and access switch ports, and modems;
- AT&T provide these MDNS services to IBM by linking AT&T-owned FEP equipment to an IBM mainframe computer;
- The FEP is managed by additional AT&T-owned systems software called 'virtual telecommunications access method ('VTAM') and runs systems software called 'network control programme' ('NCP');
- the mainframe computer protocol or other protocols used by IBM equipment accessing the network requires conversion to different protocols used by personal computers or workstations, and LAN protocols must be converted to WAN protocols for transportation across the network;
- AT&T also performs all the necessary conversion between asynchronous and synchronous protocols allowing remote access to the IBM mainframe, which protocol conversion is performed by AT&T-owned FEP, router and gateway equipment;
- AT&T also uses hardware and software to provide network design and on-line end-to-end comprehensive management of the usage, reliability and performance of the MDNS services provided to IBM. This requires the collection and storage of data concerning IBM's network configuration, usage and performance, interaction with IBM and by AT&T, on IBM's behalf, with the stored data, and the recommendation and implementation of improvements in IBM's network configuration, usage and equipment;
- a key component of MDNS and other VANS services provided by AT&T to IBM are security procedures protecting all data on the AT&T VANS network from unauthorized access or disclosure through use of access controls, dedicated firewalls for all transactions and other measures;

- AT&T provides MDNS services to IBM in South Africa by using VPN-based services to facilitate end-to-end management of IBM's network usage, reliability and performance by establishing and monitoring the amount of data transported for each IBM connection across the frame-relay backbone network;
- AT&T also provides the following VANS services to IBM: global messaging (e-mail) to the Internet and the IBM Intranet for all business transactions; and business Internet services;
- AT&T renders a charge to IBM for all value-added services, the precise components of that charge depending upon the services employed from time to time. The services so rendered are significantly more than would be the cost of dedicated lines leased from Telkom. Indeed, in a typical MDNS network such as that provided by AT&T to IBM, the bandwidth costs are less than 50% of the total cost of the service provided⁵.

The Authority's findings:

- 3.5 The Authority is satisfied that what AT&T has advanced in evidence to describe its VANS activities is factually correct.
- 3.6 The basic premise of Telkom's viewpoint is faulty, namely, that 'an MDNS consists of managing the PTN which a customer uses for data communication'⁶
- 3.7 Section 40(2) of the Act indicates that value-added network service licensees (which include managed data network services) shall contain a condition in their licences that the value-added network services shall be provided by means of telecommunication facilities provided by Telkom.
- 3.8 There is no suggestion here that a customer of a VANS provider is obliged to obtain the telecommunication facilities from Telkom.

⁵ Harvey's Statement of Evidence p90-105

⁶ Celli's Statement of Evidence paragraph 4.2, p9.

There is no suggestion that a managed data network service as a form of VANS has anything to do with managing the PTN of the VANS customer.

3.9 There is no suggestion that an MDNS may only be provided by managing of PTNs of VANS customers or that the facilities for the provision of which have to be obtained by the customer from Telkom.

3.10 There is no suggestion that an MDNS or a VANS has anything whatsoever to do with a PTN.

3.11 Telkom's reliance throughout its arguments in this complaint on the basic premise that the Act sanctions its view that 'an MDNS consists of managing the PTN which a customer uses for data communication' is misplaced and fundamentally vitiates its arguments. Whether it is technically feasible for a VANS to manage the PTN of a customer is irrelevant. Such a contractual relationship is a matter of commerce, not of law, and has nothing to do with section 40 of the Act.

3.12 In point of fact, VANS are governed under section 40 of the Act and PTNs under section 41 of the Act.

3.13 There is nothing in section 40 of the Act that prevents AT&T from leasing facilities from Telkom to conduct MDNS as a VANS service.

3.14 There is nothing in section 40 of the Act which says that AT&T may not construct a backbone network out of the facilities it leases from Telkom in order to offer VANS to its customers, including MDNS. The term 'value-added network services' explicitly includes the term 'network'. The term 'managed data network service' explicitly includes the term 'network'. What is to be offered by a VANS or MDNS is a 'network service'. The facilities leased from Telkom are to be used to provide the 'network service'. The responsibility for adding the value to the network is that of the VANS provider. The responsibility for managing the data network service is the MDNS provider. There is no question of a PTN here.

3.15 Telkom develops a second premise in which to hang its argument which is as faulty and erroneous as the first.

The argument is as follows:

- a VANS provider sets up a large network with facilities leased from Telkom which forms the backbone from which VPNs are created;
- the backbone network is portioned into logically independent subsets, each of which can be made available for the exclusive use of a customer;
- the backbone network is shared by all the users of the VPNs provider;
- each partition provides to its user the same functionality that would be provided by a PTN made up of fully dedicated telecommunication facilities;
- there, therefore, is no basic difference between a PTN and a VPN⁷.

There are two faults with this argument.

- First, VANS providers are prohibited from carrying voice while PTNs may carry voice. Therefore, Telkom's proposition that there is no basic difference between a PTN and a VPN is false.
- Second, the voice prohibition on VANS means that the statement that 'each partition provides to its user the same functionality that would be provided by a PTN made up of fully dedicated telecommunication facilities' is also false.

Telkom is comparing apples with pears.

3.16 There is nothing in section 40 of the Act that prevents a VANS from setting up a backbone network shared by its customers and to then partition the backbone network into logically independent subsets, each of which can be made available for the exclusive use of a customer. The only proviso is that value must be added in the process of doing this. The evidence of Harvey and Silman indicates a wide range of value add taking place in AT&T's services:

- MDNS;
- Protocol conversion;
- Online information and /or data processing;
- Data base retrieval;
- Enhanced security;
- High reliability.

All of the above are provided for in section 40(2) of the Act as VANS.

⁷

Whether the process of partitioning a network into logically independent subsets is called a VPN or not, is, from a regulatory point of view, irrelevant. The Act does not distinguish a VPN or a VPN service. As far as the Authority is concerned, the technology which enables the partitioning of the backbone network into logically independent subsets, each of which can be made available for the exclusive use of a customer may be called VPN technology. Such VPN technology may be used as one form of technology that may be used to construct an MDNS.

3.17 Telkom has not produced any convincing evidence to demonstrate its contention that AT&T is involved in the carriage of data from the premises of one customer to different premises of that same customer or any other customers without any value being added in the process. Nor was Telkom's counsel in his cross-examination of AT&T's witnesses able to demonstrate that there was no value add in AT&T's provision of MDNS services to IBM. In other words, Telkom has been unable to show that AT&T is providing a PSTS illegally.

3.18 If AT&T wishes to market its managed data network services as 'Virtual Private Network Feature Services', that is irrelevant from a regulatory point of view.

3.19 ▲ Conclusions

The conclusions reached after an analysis of the provisions in the Act for a VANS telecommunications service and a study of the evidence and arguments by counsel for Telkom and AT&T, are as follows:

- MDNS do not consist of the managing of PTNs which customers use for data communications;
- MDNS is a form of VANS to be licensed and regulated under section 40 of the Act and not section 41 of the Act;
- AT&T is not operating PTNs;
- a PTN is not the same as a VPN;
- VPNs are a form of technology that may be used to construct MDNS;
- Whether MDNS are marketed as VPN Feature Services is irrelevant from a regulatory perspective;
- AT&T offers MDNS services to IBM and Telkom has not produced any convincing evidence to demonstrate that there is no value add or that the service provided by AT&T is a PSTS;

- AT&T's MDNS falls within the scope of a VANS in terms of section 40 of the Act.

4 STATUTORY DEFINITION / VIOLATION ISSUE: POSITION OF IBM

- 4.1 Telkom alleges that IBM has contravened section 40(2) of the Act and is providing telecommunications services without a licence⁸. IBM is not a party to this matter although it was proposed by AT&T during a meeting between the Authority, Telkom and AT&T before the hearing that they should be joined in the matter, which proposal was opposed by Telkom⁹. As IBM has not been heard in this matter, a judgment cannot be made on IBM's activities.
- 4.2 Statutory violation arguments involving IBM cannot be entertained as IBM is not part of this dispute process and have not been heard on the matter.

5 AIDING AND ABETTING / CEDING OF RIGHTS ISSUE

- 5.1 AT&T summarises the 'Aiding and Abetting argument' as follows:

"Telkom alleges that AT&T is contravening section 40(2) of the Act by 'aiding and abetting' IBM or acting as its accomplice in providing its (i.e. IBM's) VANS because AT&T, and not Telkom, provides IBM's telecommunications facilities¹⁰."

- 5.2 To find that AT&T has aided and abetted IBM in violating the Act, ICASA would first have to find that IBM has violated the Act. To do so in the absence of IBM is not fair as they have not had the opportunity to be heard in this matter. In addition, Telkom opposed AT&T's request to join IBM in the complaint¹¹.
- 5.3 There is, also, insufficient evidence before ICASA for any finding to be made against AT&T in this regard. The only witness with direct

⁸ Telkom Statement of Complaint 8.4, p8

⁹ Minutes of Special Complaints Committee Meeting with Telkom and AT&T dated 14 September 2001 in Index to Minutes and Correspondence, p3

¹⁰ AT&T's Heads of Argument, 77, p58

¹¹ Minute of Special Complaints Committee Meeting, p3

personal knowledge of what service IBM provides to its customers is Morris. His consistent evidence was that the service was confined to data processing and that IBM itself provided no network services but rather arranged with AT&T to convey raw and processed data between IBM and its clients over the AT&T managed data network, subject to certain security and performance guarantees which AT&T could offer in terms of its VANS.¹²

5.4 IBM has not been heard during the hearings and the Authority will not make any ruling on this issue.

5.5 Telkom has also alleged that AT&T is involved in ceding its rights over telecommunications facilities to IBM for the use of IBM's customers. As with the 'aiding and abetting' issue, in the absence of IBM being heard, the Authority is not able to make a finding on this issue.

6 THE CABLE ISSUE

6.1 The issue of whether the cable on the IBM and AT&T premises linking the AT&T front end processor and the IBM mainframe computer is a telecommunication facility which, in breach of section 40(2) of the Act, has not been obtained from Telkom, was never part of the complaint raised by Telkom.

6.2 To make a finding on the cable argument would violate AT&T's fundamental rights to a fair hearing because the cable complaint was not one that they were called upon to meet and was not one which they canvassed fully in the evidence.

6.3 The Authority is accordingly unable to address the cable issue.

7 AT&T'S COUNTER COMPLAINT

7.1 The issue is whether there is sufficient evidence to support the counter complaint that by withholding facilities from AT&T, Telkom has given undue preference to Equant, its own VANS supplier which competes

¹² Morris 24 January 2002, p187 lines 14-6, p191 lines 9-21, p192 lines 8-18, p193 line13, p194 line 2.

with AT&T. It is common cause that Telkom has withheld facilities from AT&T and by so doing has prevented AT&T from expanding its managed data network services of the sort which form the subject matter of the main complaint. If it can be shown that Telkom competes with AT&T in respect of these services, the effect of Telkom's withholding of facilities from AT&T will therefore be to give an undue preference to its own activities competing with AT&T.

7.2 The evidence establishes that Telkom does compete with AT&T in respect of the relevant managed data network services. The evidence in this regard can be divided into two broad categories:

7.2.1 First, there is the evidence of Telkom's marketing of its Equant managed data network services in terms which make clear that it is competing with AT&T in the field.¹³

7.2.2 Then, there is the specific evidence of the IBM witness, Morris,¹⁴ and Telkom's own witness, Labuschagne,¹⁵ which shows that Telkom was competing with AT&T in respect of managed data network services offered to IBM, which services form the very subject matter of Telkom's principal complaint against AT&T.

7.3 In addition the Competition Commission in a consultative capacity provided the Authority with an opinion regarding the counter complaint. The Competition Commission concluded that:

7.3.1 In terms of section 53(a), it would appear that Telkom is giving undue preference to its own VANS supplier Equant, by means of causing undue discrimination against AT&T (relative to the preferential treatment afforded to its own Equant). Therefore, the Authority should direct Telkom to cease taking such action (and resume the supply of telecommunication facilities to AT&T), but only after having given Telkom an opportunity to be heard.

7.3.2 Giving Telkom an opportunity to be heard is an extremely time-consuming process, to the obvious benefits to Telkom, and it is in Telkom's interests to prolong the legal processes as far as possible. For without a final determination having

¹³ Equant Web page Pleadings bundle pp147 and 306-308; Witness bundle pp74-85.

¹⁴ Morris 24 January 2002 pp 197-201.

¹⁵ Labuschagne 24 January 2002 pp93-135.

been reached by the Authority, Telkom is able to keep AT&T out of the market altogether by continuing to refuse to supply it with the necessary telecom facilities¹⁶.

7.4 Another issue is whether Telkom's withholding of facilities violated section 53.

7.5 Subsections (2) and (3) of section 44 of the Act provide that:

“(2) Telkom and any other provider of a public fixed telecommunication service shall, when requested by any other person providing a telecommunication service, including a private telecommunication network, lease or otherwise make available telecommunication facilities to such other person pursuant to an agreement to be entered into between the parties, unless such request is unreasonable.

(3) The provisions of section 43(1)(c), (d) and (e) shall apply, with the necessary changes, in relation to any request and agreement contemplated in subsections (1) and (2).”

7.6 Sub-section (3) of section 44 cross refers to section 43(1). The relevant paragraphs of the latter state the following:

(c) For the purposes of paragraphs (a) and (b), **a request contemplated in those paragraphs is not unreasonable where the Authority determines that the requested interconnection is technically feasible and will promote increased public use of telecommunication services or more efficient use of telecommunication services.**

(d) An agreement between the parties contemplated in paragraph (a) or (b) relating to interconnection shall be entered into within the prescribed period or such extended period as the Authority may allow in any particular case.

(e) The parties concerned shall, unless exempted by the regulations—

i. Notify the Authority if any request contemplated in paragraph (a) or (b), as the case may be, is made;

¹⁶ Submission by the Competition Commission to ICASA concerning the section 53 counter complaint of AT&T against Telkom, p6

- ii. **Where the reasonableness of any such request is disputed, refer the dispute to the Authority for its decision;**
- iii. Where the parties are unwilling or unable to negotiate or agree on any terms and conditions within the period or extended period contemplated in paragraph (d), submit the issue to the Authority” (emphasis added).

7.7 Section 100(12) states the following:

“100 Offences by licensees

(1) The Authority shall investigate and adjudicate-

(a) any alleged contravention of or failure by a licensee to comply with a provision of this Act, the relevant licence, any relevant agreement for the interconnection or provision of telecommunication facilities as contemplated in sections 43 and 44, respectively, or any direction in terms of section 36 (1)(d), 43 or 98”

7.8 The Act makes it clear that **unless** the Authority holds that a request for facilities in terms of section 43 or 44 is unreasonable, Telkom is obliged to make the facilities available. Sections 43(1) and 44(2) provide that Telkom **shall** provide facilities contemplated in the two Sections unless the request is unreasonable and section 43(1)(e)(ii) makes clear that disputes over unreasonableness are not resolved by the parties’ taking the law into their own hands but are to be referred to the Authority for its decisions.

7.9 It is significant too, that in terms of section 43(1)(c) of the Act, the Authority is obliged to hold that a particular request for facilities is reasonable if satisfaction of that request is “technically feasible and will promote increased public use of telecommunication services or more efficient use of telecommunication facilities” irrespective of the particular track record of the relevant VANS operator with respect to operating within the limits of the Act. The Act clearly contemplates that complaints about extra legal operations of licenced telecommunications service providers will be addressed directly in terms of the provisions of section 100 (which are designed specifically for this purpose) and not indirectly by cutting off their access to Telkom facilities in accordance with sections 44 and 43.

- 7.10 In conclusion, it has been shown that Telkom is competing with AT&T in the competitive VANS market. By withholding the provision of telecommunication facilities from AT&T which Telkom has a statutory obligation to provide in terms of section 44 of the Act, Telkom has taken an uncompetitive action in terms of section 53 of the Act, which is likely to have the effect of giving an undue preference in the VANS market to its own VANS supplier and has caused undue discrimination against AT&T by limiting its capacity to compete with Telkom in the VANS market.

8 THE CONTRACTUAL BREACH / WAIVER ISSUE

- 8.1 On 2 September 1999, Telkom wrote a letter to Trafex, a company which was formed by IBM (SA) in conjunction with AT&T and was later taken over by AT&T Global Network Services. Telkom requested confirmation of the uses to which Telkom-provided telecommunications facilities were put. Telkom went on to say that if the required confirmation was not forthcoming, they would cease the provisioning of any new services.
- 8.2 Trafex responded to the letter on 9 September 1999 by informing Telkom that there was a process pending before SATRA (ICASA's predecessor) and they were waiting for SATRA's decision. On 17 September 1999, Telkom wrote to Trafex and advised them that until they received the confirmation regarding the usage of facilities, they would not continue with the provisioning or transfer of any outstanding or new services and/or facilities.
- 8.3 AT&T then complained to the United States Trade Representatives' (USTR) office regarding this matter and meetings were held with the parties. Telkom in turn wrote to AT&T on 24 May 2000 undertaking not to treat AT&T differently to other VANS providers. Telkom undertook to accept orders for the installation of backbone capacity to AT&T's VANS backbone provided AT&T undertook only to provide the seven services listed as World Trade Organization (WTO) commitments in the General Agreement on Trade in Services (GATS) schedule.
- 8.4 On 5 June 2000, AT&T wrote to Telkom giving the undertaking to use facilities from Telkom to provide the Value Added Services listed in the GATS schedule of South Africa's WTO commitments and permitted under South African Law. In addition to the seven listed services,

AT&T undertook to provide any other Value Added Service permitted under South African Law. On 8th June 2000 Telkom wrote to AT&T saying that their letter of 24 May 2000 was limited to the WTO commitments, and the addition of "any other Value Added Services permitted under South African Law" was not part of South Africa's commitments to the WTO.

- 8.5 Telkom then put AT&T on terms to either undertake to use facilities to provide only the seven services listed in the GATS schedule or wait for the outcome of a complaint which have been lodged with SATRA. On 12 June 2000 AT&T wrote to Telkom undertaking to provide the services listed in SA's April 1994 GATS Schedule and further informing Telkom that their concurrence to Telkom's letter of 24 May 2000 did not waive their rights to provide those services permitted then or in the future, under South African Law. On 23 June 2000 AT&T wrote to Telkom again attaching the signed undertaking and reiterating their stance of non-waiver of rights.
- 8.6 The main argument by Telkom in defence of AT&T's section 53 counter complaint is that, AT&T waived their rights to claim that Telkom provide them with facilities in terms of section 44 except in so far as those facilities would be used to provide only the seven services listed in the GATS schedule and that they would be used strictly within the confines of the agreement AT&T concluded with Telkom on the provisions of Telkom's letter dated 24 May 2000.
- 8.7 Telkom's argument breaks down for the following reasons:
- 8.7.1 As is clear from the summary of the evidence set out above, AT&T did not waive their rights to claim that Telkom provide them with facilities for purposes other than the seven services listed in the GATS schedule. On the contrary, AT&T repeatedly emphasized in the correspondence that they were not waiving their rights to provide any services they were allowed to provide in terms of South African law.
- 8.7.2 Even if a waiver agreement could be proven, the evidence relating to the "conclusion" of the agreement shows that Telkom brought AT&T to the bargaining table only by what amounted to an unlawful threat to terminate their access to telecommunication facilities. In the circumstances, Telkom can hardly rely on the "consent" of AT&T embodied in the "agreement" to set up a defence of waiver.

8.7.3 In any event, no agreement between Telkom and AT&T can override the provisions of the Telecommunications Act (in particular section 44 on facilities leasing and section 53 on uncompetitive actions). The provisions in question have been placed in the Act for the benefit of the public and the duties that these sections impose on Telkom are duties which are imposed in the public interest. It is not within the power of AT&T to release Telkom from its obligations in terms of these sections.

9 CONCLUSION OF RULING

9.1 With respect to Telkom's complaint that the service provided by AT&T to IBM is not authorized by its VANS licence in terms of section 40 of the Act the Authority finds that:

9.1.1 AT&T provides a managed data network service to IBM which is a legal VANS service in terms of section 40 of the Act;

9.1.2 AT&T is not providing a PTN to IBM;

9.1.3 AT&T is not in violation of s32 and s36 of the Act;

9.2 With respect to Telkom's complaint regarding whether AT&T is aiding and abetting IBM to violate section 40 of the Act by providing VANS without a licence and by means of telecommunication facilities other than those provided by Telkom or that AT&T is ceding its rights over its telecommunications facilities obtained from Telkom to IBM and its customers, the Authority makes no finding.

9.3 With respect to Telkom's complaint in its heads of argument that the cable on the IBM and AT&T premises linking the front end processor and the IBM mainframe computer is a telecommunication facility which, in breach of the Act, has not been obtained from Telkom, the Authority makes no finding.

9.4 With respect to AT&T's counter complaint that Telkom's failure or refusal to provide AT&T with telecommunication facilities violated sections 43(1) and 44 of the Act and constitutes an uncompetitive action likely to give undue preference to Telkom's own VANS in terms of section 53 of the Act, the Authority finds that:

- 9.4.1 Telkom violated section 43(1) and section 44 of the Act by withholding telecommunication services unlawfully from AT&T;
- 9.4.2 Telkom, by withholding telecommunication facilities unlawfully from AT&T, committed an uncompetitive action in terms of section 53 of the Act which was likely to give undue preference to its own VANS supplier, Equant, and cause undue discrimination against AT&T which competes with Telkom in the competitive VANS market.

9.5 The Authority therefore dismisses Telkom's complaint and upholds AT&T's counter complaint.

9.6 In accordance with the provisions of sections 43(1) and 44 of the Act, the Authority directs Telkom to provide AT&T with the telecommunication facilities it requires.

SIGNED BY THE CHAIRPERSON OF THE ICASA SPECIAL COMMITTEE DULY AUTHORISED

TO DISPOSE OF THE MATTER AT SANDTON ON 21 JUNE 2002

COUNCILLOR WILLIAM CURRIE