

Request for intervention presented by Nortenet to rectify the improper billing of requests for the migration of loops pursuant to the "Rede ADSL.PT" Offer.

(Decision)

A. Request for intervention presented by Nortenet

1. NORTENET- Sistemas de Comunicação, SA (Nortenet) is a provider of electronic communications services which, in the exercise of its business, makes use of the "Rede ADSL PT" wholesale offer of PT Comunicações, S.A. (PTC) for the provision of ADSL Internet connection services.

Under article 10 of Law no. 5/2004 of 10 February (LCE), Nortenet has requested administrative resolution of a dispute between the company and PTC, seeking the adoption of measures to ensure compliance with the determinations ICP-ANACOM (ANACOM) made on 21 April 2006, 3 October 2007 and 26 June 2008 on the "Rede ADSL PT" wholesale offer.

2. In brief, Nortenet maintains that the determinations referred to above determine that whenever PTC presents new conditions of the "Rede ADSL PT" offer to the market, all requests for migration and bandwidth alterations should be provided free of charge for a period of 6 months following the entry into force of these offer conditions, regardless of the aggregation mode or whether a change in service provider occurs.

Nortenet considers that, by charging for migration which occurred between 31 December 2007 and 30 June 2008 and between 25 November 2008 and 24 May 2009, PTC has not observed the obligations to which it is subject under the determinations of ANACOM of 21 April 2006, 3 October 2007 and 26 June 2008 on the "Rede ADSL.PT" wholesale offer.

On such grounds it requests the intervention of this Authority to order PTC to issue credit notes in respect of the improperly charged amounts.

The arguments set forth by this company are described and analyzed in further detail in the draft decision which, as annex 1 hereto, is a part of and gives basis to the present decision.

B. First position presented by PTC

3. Giving its position on the presented request, PTC argued that the reasoning put forward by Nortenet reflects an understanding which has no basis in the determinations issued by ANACOM.

PTC argues that the determinations cited by Nortenet should be considered in light of preceding determinations which make it clear that ANACOM never intended to impose the *"obligation that, whenever PTC presents new conditions of the "Rede ADSL PT" offer to the market, all requests for migration and bandwidth alterations should be provided free of charge for a period of 6 months"*.

As such, it concluded that it is a legitimate creditor of the values for which payment from Nortenet is claimed in respect of provider alteration requests submitted in the context of the "Rede ADSL PT" offer, and that Nortenet's claim is accordingly without basis, whereby Nortenet's request should be denied.

The argument used by this company is fully described and analysed in the draft decision which, as Annex 1, constitutes basis to and an integral part of the present determination.

C. Draft decision - hearing of interested parties

4. Considering the request submitted by Nortenet, the elements and arguments presented by both the applicant and by the plaintiff and the determinations issued by ANACOM which have bearing on the "Rede ADSL.PT" offer, on 13.01.2011, ANACOM's Management Board approved, as draft decision (DE0082011CA):

«1. In compliance with the provisions of paragraph 5 of ICP-ANACOM determination of 03.10.2007 on the methodology for assessing margin squeeze in the broadband offers of Grupo PT, PTC is bound to ensure that all requests made by Nortenet in respect of the "Rede ADSL PT" offer between 31 December 2007 and 30 June 2008 and between 25 November 2008 and 24 May 2009 for migration and bandwidth alterations are provided free of charge.

2. PTC shall, within a period of not more than 10 calendar days, undertake rectification of the bills issued in respect of requests for migration and bandwidth alterations occurring during the periods referred to in the paragraph above.

3. Pursuant to and for the purposes of Articles 100 and 101 of Código do Procedimento Administrativo (Administrative Proceeding Code), Nortenet and PTC are to be notified that, where they see fit, they may state their positions on the decision set out in the preceding paragraphs.»

5. The draft decision was notified to the applicant and to the plaintiff on 17.01.2011, by circular ANACOM-S004822/2011.

This letter was received by PTC on 18.01.2011 and by Nortenet on 20.01.2011.

By application presented on 27.01.2011, PTC requested that the period allowed for the presentation of positions on the notified draft decision be extended until 04.02.2011. Considering the arguments put forward, the requested extension was granted and the applicant company was informed by fax ANACOM-S013606/2011 of 28/01/2011.

Nortenet did not submit a position on the notified draft decision.

PTC submitted its position on 04.02.2011.

D. Hearing of interested parties: Position of PTC

6. In its position PTC challenged the notified draft decision, firstly on the basis that the decision was not timely and also on the basis that Nortenet's claim and the draft decision lacked basis; as such PTC argued that: (i) in the context of the "Rede ADSL.PT" offer, it is technically unacceptable that the free-of-charge provision provided for with respect to bandwidth alterations should be extended to operator migrations; (ii) the precedents to this determination make it clear that only alterations of bandwidth classes will be free; (iii) throughout the continuance of the "Rede ADSL.PT" offer, PTC has always stated, without objection from the operators or from ANACOM, that only alterations of bandwidth classes will be free and (iv) that subsequent to 14.01.2009, when approval was given to the final determination on the markets of wholesale (physical) network infrastructure access at a fixed location (Market 4) and wholesale broadband access (Market 5), the obligations established under paragraph 5 of the determination of 03.10.2007, which give basis to the notified draft decision, cease to apply.

The arguments presented by PTC are fully described and analyzed in the Report on the Prior Hearing of Interested Parties which, as Annex 2, constitutes basis to and an integral part of the present determination.

7. With the reasoning set out in the Report on the Prior Hearing of Interested Parties, there are grounds for a partial reformulation of the contents of the notified draft decision and the decision that forms a part thereof, and it is concluded that:
 - PTC presented its position on the request for intervention submitted by Nortenet on 21.12.2009 within the deadline established for this purpose by notice ANACOM-S62715/2009 of 02.12.2009;

- Only Nortenet responded after the expiry of the deadline established in notice ANACOM-S62716/2009, attaching documents deemed necessary and appropriate to support its request;
- The reasoning which determined the acceptance of elements which were presented by the applicant company one day after the expiry of the established period remain valid now only for the applicant company.
- The arguments presented by PTC justify a revision of the deadline established for the rectification by PTC of billing, taking into account that the data to be corrected is over 2 years and 6 months old and involves extensive billing periods;

Therefore, considering the arguments put forward by PTC, the view is taken that there are grounds for amending the deadline for the rectification of billing, establishing it as 30 consecutive days instead of 10 days as set out in the draft decision.

As concluded in the Report on the Prior Hearing of Interested Parties in annex to the present determination, except as set out above, other facts and arguments presented by PTC do not warrant any amendment to the notified draft decision; as such, with the amendments identified above, the content of the determination of the Management Board of 13.01.2011 (DE00822011CA) is to be maintained.

E. DECISION

In light of the reasoning presented above, as well as the reasoning expressed in the Draft Decision approved on 13.01.2011 (DE00822011CA) and in the Report on the Prior Hearing of Interested Parties in annex to the present decision and considering the provisions of paragraph 5 of the determination of ANACOM of 03.10.2007 on the methodology for assessing margin squeeze in the broadband offers of Grupo PT, and pursuant to the powers set forth in point b) and q) of paragraph 1 of article 6 of its Statutes, in annex to Decree-Law no. 309/2001 of 7 December, and pursuant to the provisions of point l) of article 26 of the same Statutes, in exercise of the powers and responsibilities conferred upon it under paragraph 1 of article 10 of Law no. 5/2004 of 10 February and in pursuit of the objectives of regulation provided for in point a) of paragraph 2 of article 5 of the same law, the Management Board of ICP-ANACOM decides:

- I. In compliance with the provisions of paragraph 5 of ICP-ANACOM determination of 03.10.2007 on the methodology for assessing margin squeeze in the broadband offers of Grupo PT, PTC is bound to ensure that all requests made by Nortenet in respect of the "Rede ADSL PT" offer between 31 December 2007 and 30 June 2008 and between 25 November 2008 and 24 May 2009 for migration and bandwidth alterations are provided free of charge.
- II. PTC shall, within a period of not more than 30 consecutive days, undertake rectification of the bills issued in respect of requests for migration and bandwidth alterations occurring during the periods referred to in the paragraph above.

Lisbon, 28 July 2011.