

TIO Determination

Subject: variation of contract/disputed charges

Decision accepted by complainant

Summary of Complaint

The complainant is disputing \$1,190.00 in excess usage charges paid by him to the satellite internet service provider (the ISP). He is also disputing a further \$1,792.00 in excess usage charges that remain outstanding.

The Complainant's Position

The complainant claims that he had an internet connection with a previous provider for some years. He states that he paid \$29.95 per month for 500MB of data via direct debit. He states that his connection stopped or slowed once he reached 500MB. The complainant claims that he discovered some unusual direct debits on his account for March and April 2008 of \$546.00 and \$644.00 respectively. He claims he contacted his previous internet service provider, and was advised that his provider had changed to the ISP, that the plan he was on was no longer available and he was now being charged excess usage fees. He claims that he was advised that notice of this was sent to an email address listed on his account (the stated email address). The complainant states that this address has not been used for several years. He also states that contrary to the ISP's claims, excess usage emails could not have been sent to the stated email address as this address was only provided to the ISP when he upgraded to a "shaped" plan on 24 April 2008. The complainant claims he was not advised of the change of provider and received no notification of the excess usage on his account. He claims that whilst he has already paid \$1,190.00 in excess usage charges there is still \$1,792.10 in charges owing.

The complainant has suggested that a reasonable outcome to their complaint would be for the ISP to refund all excess usage charges and waive the current outstanding excess usage charges.

The ISP's position

The ISP has made the following claims in relation to the complainant's complaint. The complainant has been a customer of the ISP (billing for broadband services provided by the previous provider) since 15 February 2007. The complainant's original contract states clearly that the excess data over 500 mb is charged at .15 cents per megabyte. The data recording service was not set up until November 2007. Prior to this the complainant received free excess data. The complainant was notified two months in advance via email that data billing was to be activated and issued with examples of invoices. The complainant was out of contract and could have terminated his service at any time.

The complainant was sent excess usage emails to the stated email address as this was the email address supplied to the ISP as a billing email address. All the ISP's customers have access to the online portal to check usage graphs. All the ISP's customers have been offered shaped plans that cap the amount of their monthly invoice. This plan was and is on offer to the complainant. The complainant was called on 19 December 2007 to advise him of over usage and shaped plans, a voicemail was left but the complainant did not return the call. The ISP's records show the complainant has not called the ISP directly relating to this issue but has gone directly to the TIO. There is a physical limitation on how much data a customer can access through the satellite network and this prevents unlimited credit. The complainant was sent invoices and updates to the stated email address.

The ISP believes that the complainant received a large invoice and did not take any action with the ISP and then continued to use excessive amounts of data. In relation to the outstanding charges, the ISP proposes that the complainant pay the base plan amount and it will accept what the complainant thinks is fair for the excess usage component. The TIO notes that the ISP has not offered to refund the disputed charges already debited.

The TIO's consideration

The TIO has carefully considered the information provided by the ISP and the complainant in this matter and has formed the following view.

Contractual Issues

The complainant has advised that he had initially signed up for the service with the previous service provider several years ago. The complainant has advised that he was not made aware of the ISP taking over supply of the service. The TIO has asked the ISP to advise how it came to be supplying the service to the complainant, however the ISP has not responded to this query. The ISP has only advised that its records suggest that the complainant has been a customer of the ISP since 15 February 2007. The TIO has not been provided with any substantive evidence that the complainant was informed in any way that the ISP would be taking over his service previously supplied by the previous service provider or whether he was offered release from contract at the time.

The ISP has advised that the complainant's "original contract" clearly states that the customer would be charged .15 cents per megabyte for usage over 500 mb. Despite the TIO's request, the ISP has not provided a copy of the complainant's original contract substantiating this claim. The ISP has advised that this term of the contract was not enforced until November 2007 as prior to this the ISP was unable to monitor excess usage.

The ISP has claimed that it informed its customers of this term coming into force via email two months prior to November 2007. In the complainant's case the ISP has claimed that it notified him on the stated email address. The TIO notes that despite the TIO's request, the ISP has not provided a copy of the email it claims to have sent notifying the complainant that it would begin billing for excess usage. In addition to this, the complainant has claimed that this email address was only provided to the ISP when he upgraded his plan, well after he had incurred the excess usage charges. The complainant claims that he had contacted the ISP about the charges prior to contacting the TIO and he had upgraded his plan to avoid further excess charges as a result. He claims the ISP advised him that prior to this it would have sent emails to his original address with the previous service provider which he claims had not been in use for many years.

In relation to the above, the TIO is of the view that the ISP has provided no evidence supporting its claim that the complainant was contracted to pay excess usage charges, or that the complainant was advised that he would begin incurring excess usage charges as of November 2007. The TIO is also of the view that an email notification may be insufficient for the purposes of notifying customers of a change to billing which will likely have significant financial implications for them. The TIO notes that it does not appear that the ISP's customers received any other form of notification.

Credit Management

The TIO considers that service providers should have adequate systems in place to prevent consumer detriment caused by unexpectedly high bills. In this case it appears that the account

was left unmonitored by the ISP for an unreasonably long period which contributed to a large debt accruing without the knowledge of the complainant.

The ISP has advised that it sent warning emails to the complainant notifying him of excess usage on his account. The TIO has not been provided with any of these emails and can find no evidence of these emails being sent. Further to this the complainant claims that the ISP could not have sent warning emails to the stated email address as this address was not supplied to the ISP until 24 April 2008.

The only credit management step evident is a phone message left for the complainant on 19 December 2007. It appears that the complainant's invoice at this time would have been less than \$494.75, however it was sufficiently high to have alerted the ISP to the unusual increase in charges on the complainant's account. It appears that the ISP took no further action to contact the complainant and the credit management notes for 22 February 2008 which state "customer has not since called us, closing case due to inactivity" indicate that the ISP decided not to take any further action due to the complainant not having called back. The ISP's inaction appears to have resulted in almost \$3000.00 in excess usage charges being incurred by the complainant up until April 2008. Furthermore, the TIO does not accept the ISP's view that unlimited credit was prevented by the physical limitations as to how much data could be accessed through the complainant's satellite service given the complainant incurred almost \$3000.00 in charges without any impediment. The TIO is therefore of the view that the ISP did not take sufficient measures in this instance to prevent an unexpectedly high bill from accruing.

Additionally, the complainant has advised that he was not receiving invoices at the time (due to the ISP not having the correct email address) and he only noticed the high charges once they were direct debited from his bank account. The charges were debited on 4 March 2008 and 4 April 2008. It appears that once the charges were noticed by the complainant he contacted the ISP in April 2008 and upgraded his plan. The TIO considers that in this regard the complainant has taken all reasonable steps to avoid further charges for excess usage once the charges became known to him.

The complainant has been debited \$1,190.60 for excess usage charges and he has disputed a further \$1,792.10.

TIO's Preliminary View

In summary the TIO has formed its preliminary view based upon the following issues:

- the complainant's contract was varied without notice which resulted in the complainant being unaware of charges for excess usage
- the complainant was not notified in a timely fashion of the accrual of an unusually high debt.

Having considered all of the evidence provided to the TIO by both parties in relation to this complaint, and having had regard to the law, good industry practice and what is fair and reasonable in all the circumstances, the TIO has formed the preliminary view that a fair and reasonable outcome to this complaint would be for the ISP to refund \$1,190.60 in charges to the complainant and waive the outstanding \$1,792.10.

Responses to the Preliminary View

As is its usual practice, the TIO circulated the Preliminary View to the parties for their review and comment.

On 23 June 2009 the TIO sent the Preliminary View to the complainant. The TIO requested that the complainant respond to the TIO's Preliminary View within 14 days. The TIO has not received any comment from the complainant on the TIO's Preliminary View.

On 23 June 2009 the TIO sent the Preliminary View to the ISP at its address registered with ASIC as well as the postal address listed on its website. The TIO requested that the ISP respond to the TIO's preliminary view within 14 days. The TIO has not received any comment from the ISP on the TIO's Preliminary View.

As neither party has chosen to comment on the Preliminary View, the TIO has determined this matter in line with the Preliminary View.

Directions

For the reasons set out above, and having regard to the law, good industry practice, and what is fair and reasonable in all the circumstances, I am of the view that a fair and reasonable outcome to this complaint is for the ISP to refund \$1,190.60 in charges to the complainant and waive the outstanding \$1,792.10. Accordingly, I direct the ISP to pay \$1,190.60 to the complainant by cheque, and to waive the outstanding \$1,792.10.

This action should be carried out by the ISP within 14 days of the TIO providing it a completed TIO Release Form signed by the complainant.

**Simon Cleary
Deputy Ombudsman**

1 September 2009