



Telecommunication Newsletter Switzerland

Federal Administrative Court Rejects Swisscom's Appeal Against ComCom Decision

Facts

On December 15, 2004 a request for determination of interconnection prices and certain contractual terms was filed against the incumbent operator. The Communication Commission ("ComCom") was petitioned to determine (amongst others) the interconnection charges effective January 1, 2000 up to the time of the ComCom rendering its decision.

Swisscom requested the ComCom to issue an appealable interim decision regarding ComCom's competence to determine the interconnection charges for the year 2007 arguing in substance that the prices for the year 2007 had not yet been determined by Swisscom and therefore could not yet be a matter of dispute. The ComCom was only competent to decide if and when the parties have unsuccessfully negotiated for a period of three months. This requirement, according to Swisscom, must be met for each and every single year for which a determination of the interconnection charges is requested.

On March 29, 2007 the ComCom issued an appealable order in which the ComCom confirmed to be competent for the determination of the interconnection charges also for the year 2007. This order was appealed by the incumbent operator. The ComCom and the party requesting the determination of the interconnection charges requested that the appeal be rejected in full.

Decision

Upon appeal, the Federal Administrative Court rejected the incumbent operator's arguments and fully upheld the ComCom decision. The Federal Administrative Court reasoned that there was no obligation to annually adjust the interconnection charges, that an interconnection agreement was one for the performance of mutually continuing and ongoing obligations and that the interconnection

charges are valid, for as long as the parties have not come to an other agreement or the charges have been determined by the competent authority.

The court found the ComCom competent to determine the interconnection charges also for the year 2007 in the pending proceeding, even though the parties may not have negotiated for three months for the prices applicable to the year 2007.

Comment

The decision of the Federal Administrative Court is to be welcomed and will hopefully lead to a further acceleration of interconnection proceedings in the future. In the past these proceedings have lasted for over half a decade during which many new market entrants have already disappeared. Although the revised Telecommunication Act now provides that the ComCom will have to decide within a period of seven months, given the fact that Swisscom has in the past used every available legal remedy to stall the interconnection proceedings, it is difficult to imagine that the seven month period is a realistic one.

The next test will be on the unbundling of the local loop, where several parties have already indicated that they will request the ComCom to determine the unbundling charges.

The past experience has also shown that where the parties are in a disagreement on the interconnection prices, negotiating for three months has seldom lead to an agreement. Moreover, if more than one proceeding is pending, Swisscom may not be able to compromise with one party without prejudice to the other pending proceedings.

It is no secret that the incumbent operator did and does everything, and in the past was quite successful in doing so, to deter new market entrants from engaging in interconnection proceedings who may



shy away from the long and costly proceedings. But the tide may be turning.

Thouvenin Rechtsanwälte regularly supports and advises providers of telecommunication services in negotiations with the incumbent operator and in interconnection proceedings and represented the incumbent operators counterparty in these proceedings.

November 9, 2007

David Känzig

For further information please contact:
David Känzig (d.kaenzig@thouvenin.com)