



Telecommunication Newsletter Switzerland

ComCom Rules that Non-Discrimination Obligation Supersedes the Supremacy of Contract Negotiations

Facts

On October 9, 2008, published on www.comcom.admin.ch/themen/00500/index.html?lang=en, the Swiss Communication Commission ("ComCom") has ruled again against Swisscom, the incumbent operator, in interconnection proceedings brought against Swisscom by Tele2 and others.

Not only did the ComCom reduce the interconnection prices for the periods 2007 – 2008, but the ComCom also held that, based upon the non-discrimination obligation, which is set out in Art. 11 of the Swiss Telecommunication Act ("TCA"), also a party who has not engaged in interconnection proceedings may benefit from lower prices ordered by the ComCom.

In its decision, the ComCom further held that the non-discrimination obligation protects all participants in the market and the effect of the non-discrimination obligation cannot be limited by contract. Therefore, even without a clause in the interconnection agreement providing for the retroactive application of interconnection fees or a clause attempting to limit the retroactive application of interconnection fees determined by the ComCom, each participant is entitled to request from Swisscom the application of the lower fees ordered by the ComCom and request reimbursement from Swisscom, including interest.

Furthermore, the ComCom has also held that Swisscom may not retroactively apply fees determined by the ComCom, if the fees determined by the ComCom are higher than the ones actually charged by Swisscom.

Comment

Although the ComCom is not competent to rule on a claim for reimbursement of such interconnection fees, such claim will have to be brought in the civil courts,

the ComCom's decision paves the way for all operators to claim back interconnection fees for the past.

It is not expected that the civil courts will deviate from the ComCom's opinion. Whether or not a participant may successfully reclaim the overpayment does, therefore, not depend upon a respective clause in the interconnection agreement. Participants are, however, advised to carefully verify that the statute of limitation has not expired or does not expire and to challenge the respective invoices from Swisscom within the timeframe set out in their agreements.

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