



Telecommunications Newsletter Switzerland

Swiss Federal Supreme Court Rejects Appeal by Swisscom against Interim Order of ComCom in Mobile Termination Case

Facts

By its decision rendered on July 12, 2006, the Swiss Federal Supreme Court rejected the appeal filed by Swisscom Mobile AG ("Swisscom") against the interim order of the Federal Communication Commission ("ComCom").

On January 23, 2006, TDC Switzerland AG ("TDC") filed a request for interconnection against Swisscom. In essence, TDC requested to verify the costs for mobile termination services and to retroactively determine the costs as of January 1, 2006, on a cost oriented basis.

In its response, Swisscom requested the ComCom not to hear the case and alternatively, to determine the termination costs at CHF 0.20. In addition, Swisscom filed several procedural requests. In particular, Swisscom requested the ComCom to issue an appealable interim order in case the ComCom should decide to hear the case. In which case, the proceeding should be stayed until the question of market dominance - which is the subject of a proceeding pending with the Swiss Competition Commission - has been finally determined and again, if the proceeding is not stayed, Swisscom requested the ComCom to issue an appealable interim order.

By interim order dated May 4, 2006, the ComCom ruled to be competent to hear the case and rejected Swisscom's motion to stay the proceeding.

With appeal dated May 15, 2006, Swisscom requested the Swiss Federal Supreme Court to quash the order of the ComCom and not to hear the case. Should the case be heard, Swisscom requested again that the proceeding be stayed, pending the final decision of market dominance. Moreover, Swisscom

requested that the appeal be given suspensive effect. In particular, Swisscom argued that the mobile termination fees never were the subject of negotiations and that TDC failed to challenge the termination prices within the contractually stipulated period.

By decision of July 12, 2006, the Swiss Federal Supreme Court rejected Swisscom's motions and arguments. The Swiss Federal Supreme Court reasoned that in the case at hand interconnection has a reciprocal element such that both parties terminate calls on the other party's network. It was undisputed that Swisscom had requested TDC to lower their termination rates to the same level as Swisscom's and had notified the commencement of the negotiations to the ComCom. Given the reciprocity of the termination of the calls, the Swiss Federal Supreme Court argued that Swisscom's request to adjust TDC's termination fees to the Swisscom level also implied a negotiation of the termination fees charged by Swisscom. The Swiss Federal Supreme Court continued that a contractual price adjustment proceeding that only provides for price changes at the end of each year by observing a three months notice period does not change the competence of the ComCom to hear the case. The Swiss Federal Supreme Court further reasoned that it was questionable whether the parties can deviate from article 11 paragraph 3 of the Swiss Telecommunication Act and concluded that the ComCom did not violate Federal Law by accepting to hear the case.

The Swiss Federal Supreme Court also rejected Swisscom's motion to stay the interconnection proceeding, pending the outcome of the proceeding regarding market dominance. The Swiss Federal Supreme Court argued that neither of the two



proceedings had priority. It will be upon the commissions involved to coordinate amongst each other on the question of market dominance, whereby the lower instance will be guided by the decision of the higher instance. The Swiss Federal Supreme Court continued that it was not clear if and when a decision by the Swiss Competition Commission can be expected. Moreover, the decision of the Swiss Competition Commission can first be appealed to the Appellate Commission in Competition Law Matters and then to the Swiss Federal Supreme Court, whereas the decision by the ComCom in interconnection matters can be appealed only to the Swiss Federal Supreme Court. The fact that customers may only be able to benefit from lower termination fees if and when finally decided, which is in the public interest, speaks in favour of an acceleration of the interconnection proceeding. Hence, the Swiss Federal Supreme Court concluded that the ComCom's decision not to stay the proceeding was based upon reasonable grounds and was not in violation of Federal Law.

Comment

This proceeding shows once again the path embarked on by Swisscom since the first interconnection proceedings have been initiated. Swisscom leaves no opportunity open to drag on the proceedings and to use every chance to further delay proceedings by challenging every step of the interconnection proceedings. This behaviour is, however, neither in the public interest nor, obviously, in the interest of the new market entrants.

It is to be hoped that the proceedings will be accelerated further in the future and that the parties are given less opportunities to challenge interim orders. Only if and when interconnection proceedings can be resolved within a reasonable period of time, can the goals set by the Swiss Telecommunication Act, namely creating a level playing field for new market entrants and establishing competition for the benefit of the consumer, be achieved.

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