



Telecommunication Newsletter Switzerland

Allocation of Fees Incurred by Regulator in Interconnection Proceedings: Alternative Providers Beware

Introduction

In the past access proceedings, the regulator has allocated the costs incurred by the regulator ("ComCom") in calculating the appropriate access charges which could amount to more than CHF 100'000 per proceeding almost entirely to the incumbent operator on the basis that the costs incurred by the regulator in access proceedings must be allocated to the party that is unsuccessful.

In a proceeding brought by Sunrise Communications AG ("Sunrise") against Swisscom (Schweiz) AG ("Swisscom") regarding interconnection and unbundled access, the ComCom allocated an amount of roughly CHF 140'000 cost for the proceeding to Swisscom. Swisscom appealed the decision and requested amongst others a different allocation of the costs.

Federal Administrative Court Decision

In the decision rendered on May 24, 2013,¹ the Federal Administrative Court reasoned that in application of general procedural rules, which also apply to the proceeding in front of the ComCom, the costs of a proceeding will be allocated in general to the unsuccessful party. According to the praxis of the Federal Administrative Court, the ComCom may deviate from this general rule in favour of the alternative provider for instance in case of insufficient transparency by the incumbent operator. In addition to the principle that losing party pays, the principle that a party causing costs must bear such costs applies as well.

In the present case, sunrise has requested that the prices offered by Swisscom be reduced to cost oriented levels. Sunrise was largely successful and the ComCom ruled lower prices than the ones offered by Swisscom with one exception. The Court reasoned that at first sight the allocation of the costs to Swisscom appears to be reasonable as Swisscom was the losing party on almost all accounts.

The Court continued that such a view, however, did not properly reflect the peculiarities of the ComCom proceeding. When verifying the prices offered for compliance with the law (cost orientation), the definition of the cost model of the incumbent operator is at the centre of the investigation. The verification of the cost model, its parameters and the input of the figures by the ComCom is a tedious, time consuming and thus costly process.

If in allocating the costs the court would only consider, whether the prices offered by Swisscom were too high, it would not take into account the burden of verifying the entire cost model. If, for instance only one of the parameters of the cost model applied by the incumbent operator was to be adjusted, the entire costs incurred by the regulator in verifying all other parameters cannot be allocated to the incumbent operator.

The Court held that the allocation of all costs to the incumbent operator did not comply with the purpose of the access proceedings. The Court reasoned that to the extent costs were incurred which did not result in lowering the prices offered, then these cost would need to be allocated to the alternative provider having requested such determination, in particular where the prayer for relief was not detailed and contained only a general determination of cost oriented prices. The costs incurred by the ComCom for verification must

¹ See also the similar decision of the Federal Administrative Court dated May 24, 2013 in the matter of Swisscom vs. TelcMmunications Services AG



therefore be allocated in principle to the alternative provider, where the ComCom has found no fault with the cost model applied by the incumbent operator. The court left the question open, whether the ComCom may -based upon equitable considerations - refrain from allocating these costs to the alternative provider.

Comment

It is no longer a given (as it was in the past) that the incumbent operator will have to bear all of the costs incurred by the ComCom, even though the ComCom may reduce the prices charged by the incumbent operator.

In the past Swisscom has continuously improved its transparency regarding the calculation of the costs with a view towards reducing its own cost exposure. Hence, in order to mitigate the risk that the costs of the ComCom are allocated to the alternative provider seeking determination of cost oriented access prices, one is well advised to carefully review the cost model presented by Swisscom to the extent available.

Based upon such review, it is recommended to make specific requests as to the adjustment of the cost model or the input parameters used by the incumbent operator, rather than just seeking a general way the determination of cost oriented prices.

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