



Telecommunication Newsletter Switzerland

Federal Administrative Court Rules Upholds Decision by ComCom which Determined the Interest Rate on Repayments by Swisscom for Excessive Access Charges

Facts

In the decision rendered on February 16, 2011 [A-5982/2010], the Federal Administrative Court rejected the appeal filed by Swisscom against the decision of the ComCom ("Communication Commissions") pursuant to which the ComCom determined the interest rate payable by Swisscom on the repayment of excessive access charges.

In its decision of June 21st, 2010, the ComCom, in a proceeding brought by TelCommunication Services AG ("TelCommunication") against Swisscom, determined the interest rate applicable to repayments by Swisscom, ComCom set the interest rate at twelve months CHF-LIBOR plus 1.3%. As the date for the determination of the CHF-LIBOR rate, month's end in which the services were rendered is to be applied. After a twelve months period, the CHF-LIBOR rate will be determined anew and interest accrued will be added to the principal sum owed.

In the ComCom proceeding, Swisscom requested in its final submission the same interest rate, except that it did not specify that the interest was to be added to the principal amount due after 12 months.

Swisscom filed an appeal against the decision of the ComCom and ComCom rejected Swisscom's appeal and upheld the decision of the ComCom.

Decision

In its appeal, Swisscom primarily argued that the ComCom has awarded more to TelCommunication than it has requested and that the ComCom has violated Swisscom's right to be heard prior to the determination of the clause rate.

The ComCom requested that the appeal should be rejected. The clarification by ComCom as to the time

for the determination of the calculation of the interest rate and the capitalization of interest accrued was necessary, according to the ComCom, to clarify the clause.

The Federal Administrative Court reasoned that Swisscom had ample reason in the proceedings to address the question of the calculation of the interest rate and the question of adding the interest to the principal owed, particularly in light of the parallel access proceedings pending, but failed to do so in its final submission and therefore rejected Swisscom's argument that the ComCom has violated Swisscom's right to be heard.

The Federal Administrative Court also rejected Swisscom's argument that the ComCom had awarded more to TelCommunication than it had requested. According to the Federal Administrative Court, TelCommunication has made it clear in its submissions that it considered a fixed interest rate at 8% to be an adequate compensation. TelCommunication argued that by overcharging access fees, TelCommunication suffers a cash drain for which it has to be compensated. In order to adequately compensate for this cash drain, the interest rate must reflect the costs of capital. The Federal Administrative Court held that the determination by the ComCom takes these elements into consideration and consequently rejected Swisscom's argument that ComCom has awarded to TelCommunication more than it had requested.

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