



Telecommunication Newsletter Switzerland

Federal Supreme Court not Competent to Hear Appeal by Sunrise Communications AG on Determination of GSM Spectrum License Fees

Facts

By decision of August 20, 2007, the Federal Communication Office ("OFCOM") determined the GSM mobile license fees against Sunrise Communications AG ("Sunrise"). The license fees for the period for January 1 to March 31, 2007 were set at CHF 459'000 and for the period from April 1 to December 31, 2007 at CHF 2'864'160, taking into consideration a change in the law which permitted to consider the "value of the license" as additional criteria in determining the license fee.

Sunrise challenged OFCOM's decision by filing an appeal with the Federal Administrative Court, demanding a reduction of the license fee to CHF 1'008'000, arguing that the increase in the license fee was illegal. The Federal Administrative Court rejected Sunrise's appeal by decision of August 4, 2008.

Sunrise filed an appeal against the decision of the Federal Administrative Court with the Federal Supreme Court, requesting that the license fees should be determined in accordance with the fee schedule applicable at the time the license was granted.

Decision

The question first to be decided by the Federal Supreme Court was whether Art. 83 lit. p section 1 Federal Court Act, as in effect of March 24, 2006 and April 1, 2007, which excludes the appeal against decisions of the Federal Administrative Court in respect of telecommunication and radio and television broadcasting licenses awarded by way of public tender, also encompasses the determination of license fees.

Sunrise did not contest that Art. 83 lit. p section 1 Federal Court Act excluded an appeal by its very own

wording, but argued that the exclusion did only apply to the award of the license and not the rights and obligations under the license, once awarded.

The Federal Supreme Court proceeded to analyse the "long and intricate" genesis of Art. 83 lit. p section 1 Federal Court Act and the statements made in the parliamentary commissions. It concluded that when enacting Art. 83 lit. p section 1 Federal Court Act, the parliament was fully aware that there could be different views as to the benefits of the exclusion of an appeal as contemplated by Art. 83 lit. p Federal Court Act.

However, the Federal Supreme Court held that the parliament found the exclusion of the appeal to be an acceptable compromise. This conscious exclusion of the appeal in such matters was intended to lessen the case load of the Federal Supreme Court.

In the decision rendered May 27, 2009¹, the Federal Supreme Court, therefore, held the Federal Administrative Court to be competent to finally determine these matters and that there was no room for an appeal against its decision.

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¹ http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=27.05.2009_2C_679/2008