



Telecommunication Newsletter Switzerland

ComCom Reduces the Access Price to the Last Mile as well as Interconnection Fees

Facts

In summer and fall 2007 COLT, Cablecom, Orange and Sunrise petitioned the Communication Commission ("ComCom") to determine the conditions for the full unbundling of the local loop as well as for the collocation services required for the unbundling.

On September 24, 2008, the ComCom announced to lower the fees for access to the last mile from CHF 23.50 to CHF 18.18 for the year 2008 (CHF 16.92 for the year 2007) and for collocation services. In particular, the ComCom lowered the prices for the feasibility study and implementation by 55 – 85%.

In separate decisions, the ComCom again lowered the interconnection prices for the years 2007 and 2008 by 25 – 30%.

The decisions of the ComCom can be appealed to the Federal Administrative Court.

Comment

The ComCom decisions to reduce the prices for the unbundling and interconnection are welcomed. It is impressive to see that the ComCom was able to render its decision on the unbundling almost within one year from the first filings made. This reflects a stark improvement over the past proceedings, where the ComCom took many years to come out with its first decision on interconnection charges.

It is furthermore interesting to note that the ComCom takes the position that based upon the non-discrimination obligation, the new prices will also apply to those who did not file a proceeding with the ComCom, irrespective of a contractual clause in their access agreements with Swisscom providing for the application of such lower prices.

The ComCom appears to take the position that the statutory non-discrimination obligation (see Art. 11

para. 1 Telecommunication Act ("TCA")) primes the contractual arrangement.

It is no surprise that Swisscom has always taken the position that under the principle of the supremacy of the freedom of contract, the parties to an interconnection agreement can deviate from the non-discrimination obligation and has refused to apply the new prices to competitors in the market who did not have such clause in their agreement with Swisscom.

In its press release, the ComCom touches furthermore on the delicate issue of the calculation of the relevant costs. The ComCom argues that the legal framework does not permit the use of historical costs. The TCA itself contains no such restrictions. Art. 11 para. 1 TCA merely states that access must be granted at cost oriented prices. Art. 54 para. 2 of Telecommunication Ordinance ("TCO") specifies further that the costs equal the costs of an efficient operator and that the costs of the network must be calculated at actual (i.e. modern equivalent and not historical) costs.

In our view, in particular in connection with the access to the local loop, the combination of efficient operator and modern equivalent assets poses an insurmountable conflict. While the costs are calculated on the basis of modern equivalents, the service received is antiquated.

The modern equivalent asset approach was, in our view, introduced primarily with a technological environment in mind, in which the costs for the replacement of electronic equipment decrease dramatically over time. Its purpose was aimed at reducing the cost basis, such as to prevent the incumbent operator to charge excessive costs for outdated equipment, of which the replacement value is today a fraction of the historical cost. The modern equivalent asset approach is, therefore, nothing more than the consequence of the efficient operator approach and has no independent meaning. It never



was, as far as we can see, intended to be applied to the costs of civil work, which has long been written off over time.

Another solution would be to apply the non-discrimination obligation set out in Art. 11 TCA in order to use historic costs. According to Art. 52 TCO, which further specifies the non-discrimination obligation, the incumbent operator must permit access for third parties on terms and conditions which are equal to the ones offered to the incumbent's own business sections.

From a financial perspective, however, the incumbent's own business sections enjoy the use at historical and not modern equivalent costs. If the third party seeking access must pay costs which are higher than the actual costs to the incumbent operator itself, this will lead to discrimination.

The modern equivalent asset method may work well in an environment where technology is the largest cost factor. In a situation where civil works form a large part of the costs, as it is the case with the local loop unbundling, this approach will not reap satisfactory results.

The debate, whether historical costs or modern equivalent costs should be used has just begun and this not only in the telecommunication sector. Similar issues are being discussed today in the electricity sector for the network costs.

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