

DECISION

DATE

14 May 2003

OUR REFERENCE

03-5701/23

CONTACT, DEPARTMENT/SECTION, TELEPHONE, E-MAIL

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Applicant

Svenska UMTS-licens AB
c/o Svenska UMTS-nät AB
Årstaängsvägen 1A
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The matter

Application for amendment of licence conditions in accordance with Section 16 of the Telecommunications Act (1993:597).

Background

On 12 May 2000, the National Post and Telecom Agency (PTS) published, in accordance with Section 14 of the Telecommunications Act, an invitation for applications for licences to provide network capacity for mobile telecommunications services in accordance with the UMTS/IMT 2000 Standard and the GSM Standard in Sweden (UMTS licence). In conjunction with this, PTS also published a guidance for the applicants (Guidance), which explained how the applications should be formulated and how the assessment of the applications would be conducted. Before this PTS had decided to adopt regulations concerning the said licences (National Post and Telecom Agency Regulations on licences to provide network capacity for mobile telecommunications services in accordance with the UMTS/IMT 2000 Standard and the GSM Standard respectively – PTS Code of Statutes PTSFS 2000:5). These indicated how the licence consideration by PTS would be conducted and what basis of selection would be applied in connection with the consideration.

On 16 December 2000, PTS decided, in matters with file references 00-13055, 00-12986, 00-13042 – 00-13046, 00-13048, 00-13051 and 00-13053 to issue UMTS licences to Tele2 AB (Tele2), Orange Sverige AB (Orange), Europolitan AB (Europolitan) and Hi3G Access AB (Hi3G) subject to the conditions on coverage requirements, among other things, which would be issued by PTS according to a special procedure. Telia AB (Telia), Telenordia Mobil AB and Reach Out Mobile AB appealed against the decision to the County Administrative Court, which confirmed PTS's decision by a judgment of 27 June 2001 (case no. 499-01). The

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judgment of the County Administrative Court was thereafter not appealed against to the Administrative Court of Appeal, for which reason it has entered into final legal force. The licences apply as of and including 16 December 2000 until the end of 2015.

PTS has, by a decision of 22 March 2001, in the matter with file reference HK 01-7950 issued licence conditions to Tele2 for the UMTS licence, to apply as of 1 April 2001 up to and including 31 March 2006. It is stated in the licence conditions, as far as regards the requirements for coverage, that the network capacity shall have a coverage of at least 8,860,000 people in Sweden (Section 1.1.2. of the licence conditions) and that Tele2, no later than 1 March 2004, should verify that the coverage requirements are satisfied as of 31 December 2003 (Section 1.3.1. of the licence conditions). The licence conditions have not been appealed against by any of the licence holders.

By a decision of 9 July 2001 in the matter with file reference 01-10013, PTS granted Tele2 Sverige AB's application to be allowed to transfer the UMTS licence to Svenska UMTS-licens AB. Svenska UMTS-licens AB has through the decision taken over the obligations that follow from the licence conditions for Tele2's UMTS licence.

PTS has, by a decision of 30 September 2002 (file reference 02-10223), adopted a position on an application by Orange for an amendment of licence conditions relating to the UMTS licence. By the decision, PTS rejected the application.

PTS has also, by a decision of 25 November 2002 (file reference 02-12280), adopted a position on an application by Vodafone for an amendment of licence conditions relating to the UMTS licence. PTS has also by this decision rejected the application.

Hi3G has, by a written communication received by PTS on 11 November 2002 (file reference 02-14635), applied for an amendment of the licence conditions for the UMTS licence.

Applications

Svenska UMTS-licens AB (SULAB) applies, by a written communication received by PTS on 31 March 2003, for the grant by PTS of an amendment of the company's licence conditions relating to the UMTS licence in such a way that the time for the coverage requirements to be satisfied is postponed until 31 December 2005.

Grounds, etc.

Svenska UMTS-licens AB states as grounds for its application that, after Tele2 submitted its application for the UMTS licence, several circumstances have occurred that have affected the possible rate of development. The preconditions have, in the opinion of SULAB, changed in such a way that could not be anticipated. In the view of the company, it will not be possible to implement the

commitments that were made in the application for a UMTS licence by 31 December 2003.

In support of its application, SULAB has basically stated the following.

Tele2 and TeliaSonera considered the preconditions to build and develop a new network based on UMTS on the basis of their experience from the development of the GSM networks. As the 3G networks require a considerably enhanced number of base stations, it was natural to estimate a longer decision procedure under the Planning and Building Act and also more appeals. However, it can be concluded that the processing of the building permit matters has taken significantly longer time than the parties could anticipate and had cause to assume. It has also transpired that the building permit applications, when they have actually been dealt with, have been rejected to a significantly greater extent than could be expected. The rate of decisions in matters is now so slow that, even if there had been unlimited financial resources, the planned rate of development cannot be pursued to completion.

There are still certain technical basic foundations lacking in the market, for which reason it will not be possible to establish usability, functionality and technical system coordination before the end of the year. Moreover, the terminal suppliers have not been able to supply terminals in the volumes that are required for a commercial launch. Furthermore, the few terminals that have been supplied to date often only function in relation to the kind of system that the supplier itself provides. Nor has it to date been possible to ensure functionality between terminals and 2G and 3G systems (so-called "hand-over"). At the time of the application for the UMTS licence, there was nothing that suggested that the technical problems would be of such scope, even if it was well known that technology is often accompanied by inadequacies that can result in delays. On the contrary, the major suppliers assured that access to commercially feasible terminals in sufficient volumes would be made available in the market in good time in order to satisfy the commitments that were made in the application. There was therefore no possibility to anticipate that the technical preconditions would be changed so that implementation of the commitments made would in practice be rendered impossible.

The financing of the UMTS developments in accordance with the licence conditions is secured via a loan facility of SEK 11 billion. The interest alone under the facility amounts to several hundred million kronor annually. To utilise the facility without a practical possibility for revenues via the UMTS network would, from the corporate financial perspective, be bad. Furthermore, these additional costs must be borne by someone, which will probably be the end-users. From a purely socio-economic and customer perspective, a retention of the rate of development would be disadvantageous because, when terminals actually exist so that the services can be provided in volumes, the prices will as a consequence of the earlier utilisation of the credit facility probably involve significantly greater prices than what would otherwise have been the case.

In summary, the company currently makes the assessment that it would be primarily practically/technically possible, but also commercially feasible to satisfy the required coverage requirements no later than 31 December 2005. However, this presupposes that the actual technical and market developments do not radically deviate from what can now be assumed.

Reasons

Section 2 of the Telecommunications Act prescribes that the provisions of the Act aim at ensuring that private individuals, legal entities and public authorities shall have access to efficient telecommunications at the lowest possible cost to the national economy. This implies, among other things

1. that anyone shall be able to use, at his/her permanent place of residence or regular business location and at an affordable price, telephony services within a public telecommunications network ,
2. that everybody shall have access to telecommunications services on equivalent terms, and
3. that telecommunications shall be sustainable and accessible during crisis and wartime.

It is stated in Section 3 of the Telecommunications Act that when implementing the Act it will be endeavoured to create scope for and maintain efficient competition within all parts of the telecommunications sector as a means of achieving the objectives specified in Section 2.

It is stated in Section 14 of the Telecommunications Act that, when issues arise concerning the issue of licences to provide within a public telecommunications network new or substantially revised mobile telecommunications services or network capacity in connection with such services and when in such a case it may be assumed that the frequency spectrum which can be allotted to the activity concerned is not sufficient for granting licences to all who wish to pursue such an activity, applications are to be dealt with through an open invitation to apply procedure.

According to Section 16 of the Telecommunications Act (1993:597), licence conditions shall apply for a specific period of time. Amendments of licence conditions under a current conditional period may be effected only subject to reservations in conditions issued or with the consent of the licence holder and upon consultation with other licence holder(s) whose activities are directly affected by the amendment.

In Section 9 of the Terms of Reference of the National Post and Telecom Agency Ordinance (1997:401), it is stated that PTS shall, in accordance with its sector responsibility, promote the efficient functioning of the telecommunications market from both a consumer and regional policy perspective and also the

functioning of an efficient telecommunications market from the competition perspective.

In the National Post and Telecom Agency's Regulations on licences to provide network capacity for mobile telecommunications services in accordance with the UMTS/IMT 2000 Standard and the GSM Standard respectively (PTSFS 2000:5), it is stated in Section 9 that the initial consideration will be based on the applicant's capacity to provide network capacity with respect to

1. financial capacity: The applicant should be able to demonstrate that it, or its owner, is willing to make sufficient capital available in order to provide network capacity for mobile telecommunications services.
2. technical feasibility: The applicant's technical plans shall demonstrate reliability, access, speech quality or other quality parameters as may be used in the design of the proposed system.
3. commercial feasibility: The commercial feasibility of the application shall be documented in a business and market plan with investment plans and financial prognoses.
4. suitable expertise and experience: The applicant should demonstrate that it has access within its organisation to staff with suitable expertise and experience of mobile communications or other equivalent experience.

Applications that do not satisfy the above-mentioned criteria will be rejected following the initial consideration.

If the number of applicants who satisfy the above-mentioned criteria exceeds the number of available licences, a detailed consideration will take place in accordance with Section 10.

It is also stated in PTSFS 2000:5, Section 10, that a detailed consideration shall be based on the applicant's

1. commitments concerning geographical coverage with own access network in accordance with the UMTS/IMT 2000 Standard. The consideration shall take into account the extent of the coverage in relation to the surface area and population of Sweden together with the distribution throughout Sweden, and
2. commitments concerning the development rate for networks in accordance with item 1, and also the dates from which UMTS/IMT 2000 services and GSM services will be made available within a public telecommunications network.

The assessment of PTS

SULAB's application for an amendment of conditions

In this matter, PTS has to adopt a position on whether SULAB's application for an amendment of the licence conditions for the UMTS licence shall be granted. In the decisions regarding Orange's and Vodafone's corresponding applications (file references 02-10223 and 02-12280), PTS has concluded that the authority has statutory powers to amend the licence conditions issued and that in that case there should be circumstances whereby a need for amendment is manifest.

Amendment of licence conditions for licence issued after an open invitation to apply
 The issue is then whether there are “circumstances whereby such a need becomes manifest” or whether the starting point – that the licence conditions should apply during the term as decided – shall apply.

The Commission has, in a Communication of 11 June 2002 to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Towards the Full Roll-Out of Third Generation Mobile Communications (COM (2002) 0301) (Section 3.1)), stated among other things the following.

“...When balancing the benefits and drawbacks of a rigid application of the conditions determined by the issued 3G licences, the Commission is of the opinion that in principle the licensing conditions should not be changed because the sector is best served by a predictable environment. Predictability allows business cases to be established in a reliable manner and to be credibly defended when accessing investment funds. Changes to licence conditions should be envisaged only when circumstances have changed unpredictably and in these cases any modification should be proportional, transparent and non-discriminatory...”

When assessing whether there are reasons for an amendment, the following must also be taken into account. Tele2 received its UMTS licence following a “beauty contest”, i.e. an open invitation to apply in accordance with Section 14 of the Telecommunications Act. In preparation for the application procedure, the authority has, by Regulations on licences to provide network capacity for mobile telecommunications services in accordance with the UMTS/IMT 2000 Standard and the GSM Standard respectively (PTSFS 2000:5) and in conjunction with the Guidance issued in conjunction with the regulations, stated the basis on which the evaluation and selection process by PTS would be conducted. In accordance with Section 9 of the said Regulations, PTS had to consider the various commitments by the applicants as regards feasibility in technical and commercial respects and also whether the applicants had the expertise, experience and financial capacity to implement their commitments. In the event that the number of applicants who satisfied the above-mentioned criteria exceeded the number of available licences, a detailed consideration would take place. The detailed consideration was to be based on the respective applicant’s commitments concerning geographical coverage in relation to the surface area and population of Sweden and also distribution throughout Sweden together with commitments regarding the development rate for the promised coverage. (Section 10).

As the number of applicants who satisfied the above-mentioned criteria exceeded the number of licences, there was a detailed consideration in accordance with that stipulated above.

The operators who submitted applications for UMTS licences have thus, in their respective applications, had to proceed on the basis of the preconditions

prescribed in the Regulations. PTS has based its decision on the applicants' own commitments. Tele2, like the other licence holders, has subsequently had conditions issued regarding the level of coverage and development rate as regards coverage levels in accordance with the commitments that Tele2 made in its application for a UMTS licence.

The commitments that Tele2 made, and which subsequently became licence conditions and for which SULAB now requests an amendment, were thus directly decisive for the decision of PTS to grant the licence for which Tele2 applied. Set against this background, in the opinion of PTS, particularly strong reasons to consent to an amendment are required. Section 16 of the Telecommunications Act, according to which statutory provision PTS is empowered to amend earlier licence conditions issued, does not actually contain any express requisite of the meaning that *particularly strong reasons* are required to allow an amendment of the licence conditions. The provision does not explicitly state any grounds that PTS must apply when assessing whether an amendment should be allowed or not. Nor do the *travaux préparatoires* to the provision provide comprehensive guidance on the matter of what assessment criteria PTS must apply when deciding whether an amendment of licence conditions should be allowed or not when the conditions have been issued following an open invitation to apply. However, PTS has, within the framework of its function of applying law, a responsibility as regards the interpretation of the purpose and aims of the Act and should apply the Act in accordance with what may be assumed to be the legislator's intention with a particular provision and what may be deemed to be reasonable in each individual case. Set against the background of that stated above regarding the formulation of the licence conditions in question in this matter – which are based completely on Tele2's own commitments – which were consequently directly decisive for the decision of PTS to issue the licence applied for to Tele2, particularly strong reasons should exist for an amendment to be allowed.

In such circumstances, the issue is thus what may constitute particularly strong reasons. In the view of PTS, such strong reasons may be that amended legislation makes it impossible to satisfy the licence conditions. The circumstance that a licence holder has been able to demonstrate that it is not capable of satisfying the licence conditions does not, however, necessarily constitute a reason for granting an amendment. The applicant can actually have put itself in such a situation through, for example, failing to apply for building permits, submitting incomplete applications for building permits or quite simply not making use of the building permits that were actually granted. However, if the situation arose although the licence holder had done what it was under a duty to do, the necessary reasons for granting an amendment may exist.

PTS should thus in this assessment take into consideration whether the circumstances referred to by SULAB mean that the preconditions have changed in such a way as could not have been anticipated at the time of application and, if that is the case, whether there are particularly strong reasons to amend the conditions prescribed. According to Section 16 of the Telecommunications Act, the starting point is that amendments of licence conditions under a current

conditional period should not be effected, and it is consequently SULAB – which now applies for an amendment of the licence conditions – that has the burden of proof for this.

SULAB's reasons for applying for amendment of the licence conditions

On the basis of that which PTS, in accordance with the above, must take into consideration when considering SULAB's application for amendment of the licence condition, PTS makes the following assessment.

SULAB basically gives three reasons for the company considering that it is prevented from completing the development of the UMTS network.

Processing of building permits

SULAB states that the processing of building permit matters by the municipalities has taken significantly longer time than could be anticipated and had cause to anticipate and that the building permit applications, when they were actually processed, were rejected to a significantly greater extent than could have been anticipated.

PTS confirms that the processing by certain municipalities of matters concerning building permits and decisions in these matters were, for various reasons, protracted. The changed preconditions can, in the opinion of PTS, have an effect on SULAB's possibility to fully satisfy the requirement for coverage by 31 December 2003. The question is thus whether these changed preconditions have an effect in such a way that particularly strong reasons for an amendment should now be deemed to exist.

As stated by PTS above, the circumstance that a licence holder has been able to demonstrate that it is not capable of satisfying the licence conditions does not constitute reasons to grant an amendment. The applicant can actually have put itself in such a situation. However, if the situation arose although the licence holder had done what it was under a duty to do, the necessary reasons for granting an amendment may exist.

When making such an assessment, the following should be taken into account.

SULAB shall, according to the licence conditions issued for the UMTS licence, provide network capacity for mobile telecommunications services in accordance with the UMTS/IMT 2000 Standard with certain coverage from a specified date. An absolute precondition for SULAB to be able to satisfy its licence conditions is that the company is granted a permit to use radio transmitters. Such permits are issued by PTS, currently under the Radio Communications Act (1993:599).

Applications for building permits are considered by the individual municipalities. If a radio transmitter is placed in an existing building, no building permit is

normally required. It should be taken into account in this context that SULAB is a company that is owned by Svenska UMTS-nät AB (SUNAB), which in its turn is indirectly owned by Tele2 and Telia. Both these owners have licences within a public telecommunications network to provide mobile telecommunications services regarding GSM. Furthermore, Telia has a licence to provide mobile telecommunications services regarding NMT-450 within a public telecommunications network. It is reasonable to assume that SULAB has access to this networking infrastructure, which would probably materially facilitate SULAB's development. Even in the event that a municipality rejects applications for building permits, there are thus opportunities for the licence holder to cover inhabitants, at least in parts of the municipality in question.

The licence conditions do not state where the coverage shall be provided. As the population of Sweden has increased in recent years, PTS makes the assessment that the licence holders' opportunities to satisfy the licence conditions owing to this increase in population have probably increased. In the event that an operator cannot cover all inhabitants in a municipality, this can thus be compensated by coverage in other areas of Sweden.

There is a risk that SULAB will not fully be able to satisfy the specified requirements for coverage as of 31 December 2003. However, there is no reason to generally allow an extension of time for development. Such an amendment of the conditions would mean that it would not be possible to utilise building permits already granted and masts/antennae already erected and fitted before the later date allowed by the amended conditions. Nor is there reason to now grant an extended time for development in certain specified municipalities, set against the background of that stated above concerning the opportunities for coverage, although building permits have not been granted, and taking into account that the conditions do not impose requirements for coverage in particular geographically specified areas. The circumstance that the processing of applications for building permits by certain municipalities is protracted may instead be taken into account in the evaluation that PTS will initiate in 2004 in order to verify whether the development by SULAB and other licence holders corresponds to the requirements for coverage as prescribed by the licence conditions. If the coverage does not correspond to the conditions and this inadequacy is based on building permits not having been granted – although the licence holder may be deemed to have done what it was under a duty to do – the authority may not order the licence holder to satisfy the licence conditions subject to a default fine. The authority may not make an order subject to a default fine if it may be assumed that the licence holder lacks the actual and legal capacity to comply with the order.

Available technology

Already in conjunction with the application procedure, it must have been apparent for Tele2 that the necessary technology that was required to establish network infrastructure, etc. was at the developmental stage and that such technology is often accompanied by inadequacies that can result in delays. PTS does not question as such SULAB's claim that technical equipment has not been available at the time and of the quality and level of maturity that the suppliers claimed at

the time the applications were prepared. However, PTS considers that such equipment as is required to be able to fulfil the licence conditions regarding coverage requirements is available in the market. That stated by SULAB in this respect, in the opinion of PTS, does not mean that the preconditions have been changed in such a way that could not have been anticipated at the time of the application. There are, at this phase, no sufficient reasons to grant an amendment of the licence conditions.

Financing

SULAB states that, from a corporate financial perspective, it would be bad to early utilise the loan facility of SEK 11 billion, which has been granted, as there are currently no revenue possibilities and the interest alone would exceed several hundred million kronor annually. It can be concluded that the company has had access to the capital that was required for the development of the UMTS network in accordance with the licence conditions. The circumstance that it appears financially disadvantageous to invest in the network before there are possibilities for revenues via this network is not a reason to grant an amendment of the licence conditions.

Overall assessment by PTS

PTS considers that the circumstances referred to by SULAB in support of its application for an amendment of the licence conditions, neither individually nor together, are such that necessary reasons exist to grant SULAB's application at present. In such circumstances, PTS shall reject SULAB's application for an amendment of the licence conditions.

For purposes of information, it is noted that the decision by PTS on this date has dealt with Hi3G Access AB's application for amendment of licence conditions for the UMTS licence.

Determination by the National Post and Telecom Agency

The National Post and Telecom Agency rejects Svenska UMTS-licens AB's application for amendment of the licence conditions.

Notification concerning appeals

The decision can be appealed against to the County Administrative Court for the County of Stockholm, see Appendix 1.

Nils Gunnar Billinger
Director General

The Department Directors Ann-Marie Engvall and Katarina Kämpe, Deputy Director-General for Legal Affairs Charlotte Ingvar-Nilsson, Expert Advisor Britt-Marie Arne-Hellström, Divisional Manager Hans Brändström, Senior Legal

Officer Martina Irving Magnusson and Analyst Anders Björklund (the two latter presenting the matter) participated in this processing.

INFORMATION CONCERNING APPEALS

If you wish to appeal against this decision, you should write to the County Administrative Court for the County of Stockholm. However, the letter should be sent to the National Post and Telecom Agency, Box 5398, 102 49 Stockholm.

Explain in the letter which decision you appeal against by stating the number of the decision. Also explain the change that you wish to be made to the decision. The letter must be signed.

The National Post and Telecom Agency must have received your appeal within three weeks from the date when you received the decision. Otherwise, the appeal cannot be considered.

The National Post and Telecom Agency will forward the appeal to the County Administrative Court for consideration, unless the National Post and Telecom Agency itself alters the decision in the manner requested by you.

If something is unclear, you may refer to the National Post and Telecom Agency.