



Decision of the Authority in Appeal No. 7/2023 filed by CMPak Limited

No. PTA/Law and Regulation/Law/2202/2023/833

Appeal No. 7/2023:	26 th June, 2023
Venue of Hearing:	PTA HQs, Islamabad
Date of Hearing:	10 th October, 2023

Authority present in hearing:

Maj. Gen. Hafeez Ur Rehman (R):	Chairman
Dr. Khawar Siddique Khokhar:	Member (Compliance & Enforcement)
Muhammad Naveed:	Member (Finance)

The Issue:

“Appeal against order dated 17th May, 2023 regarding grant of LDI license to Transworld Associate”

1. This order will dispose of Appeal No. 7/2023 dated 26th June, 2023 filed by China Mobile Pak Limited (CMPak Limited) (the “Appellant”). The Appellant being aggrieved from the order dated 17th May, 2023 (the “Impugned Order”) issued by Director General (Licensing) against Appellant’s application dated 30th September, 2022 relating to grant of LDI license to Transworld Associate (TWA) filed the instant appeal under section 7(2) of the Pakistan Telecommunication (Re-organization) Act, 1996 (the “Act”) before Pakistan Telecommunication Authority (the “Authority”).
2. Relevant facts of the case are that the Appellant filed an application dated 30th September, 2022 against the grant of Long Distance and International (LDI) license to TWA. The said application was disposed of through letter dated 17th January, 2023 intimating the Appellant that all applications were evaluated, processed and entertained as per applicable framework. However, the Appellant, being aggrieved from the disposal of the said application, filed a Writ Petition No.8115 of 2023 before the Honorable Lahore High Court, Lahore. The Honorable Lahore High Court vide order dated 16th March, 2023 disposed of the said petition with the direction to decide the matter afresh of the complaint dated 30th Sep., 2022.
3. In respectful compliance of the court order, the matter was heard and decided by the Officer of the Authority, Director General (Licensing) vide order dated 17th May, 2023 (the “Impugned Oдер”) For ready reference, the relevant para of the impugned order is reproduced below:

“4. Order:

4.1 Foregoing in view, Application filed by CMPak to stop processing of TWA application for grant of LDI license on the grounds mentioned above, is not pertinent and TWA was granted a LDI license after fulfillment of all codal formalities. Accordingly, Application dated 30th September, 2022 is hereby disposed of.”

4. The main contentions of the Appellant are given below:
- a. The Impugned Order and the grant of license in favor of Trans World Associates is in violation of section 8 of the Act. The license has evidently been granted in absence of a policy directive by the Federal Government. Section 8 of the Act empowers the Federal Government to issue policy directives to the Authority on matters relating to telecommunication policy referred to in section 8(2) of the Act and the Authority is bound to comply with such directives.
 - b. Telecom Policy 2015, the Government of Pakistan created a framework under which PTA was tasked with conducting a biannual impact analysis before granting any licenses, especially LL, LDI and WLL licenses. The relevant excerpts from the 2015 Policy are reproduced hereunder:

"5.2.1 The current licensing regime will continue to apply. Separate category in class licenses regime associated with satellite services will be introduced. However, PTA will conduct bi-annual assessment of market absorption capacity and any new licensing in LL, LDI and WLL sectors will be subject to such assessment"

5.2.3 Federal Government (MoIT), in consultation with PTA, will therefore review the licensing policy framework, keeping in view the market state at that time, the move to regulation through Competition Rules, changes in the technology used to provide services and consequential changes in the types of organizations that are telecommunications service providers. It is expected that this review will take place by 31st December 2016. Any proposed changes to the licensing regime will be made in consultation with the sector stakeholders and will be subject to approval by Federal Government (MoIT).

5.9.1.3 The cable landing stations established by eligible licensees will provide access to any LDI licensee on fair and non-discriminatory terms at its cable landing stations for accessing the bandwidth on submarine cables. Such arrangements will be made on commercial terms.

5.9.1.4 PTA will carry a study and formulate recommendations for the Federal Government (MoIT) to facilitate establishment of cable landing stations, under appropriate licenses, to increase diversity and promoting competition in this segment. The study will investigate international best practices especially effects of the practice of capacity swaps in respective countries between licensed operators of a country having capacity on a submarine cable with non-licensed party on the submarine consortium or a party of some other submarine cable system of another country."

- c. It is a matter of record that neither any bi-annual market assessment was conducted nor any industry wide consultation undertaken prior to the grant of new LDI license. It is also evident from the record that no recommendations

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- were forwarded to or approved by the Federal Government in the entire process.
- d. It has been a consistent position of the Authority that it is bound by the provisions of the Telecom Policy 2015. Reference is made to the Report and Parawise comments filed by the Authority in Writ Petition No. 3626/2019 filed by the Appellant Company before the Islamabad High Court.
 - e. The sheer opacity of the process surrounding the grant of LDI license to TWA further exacerbates the plight of the Appellant and it is evident that the process was completed without even providing basic information to critical stakeholders like the Appellant company and CMPak LDI. The Appellant had sought details regarding the entire process through its letter dated 21-03-2023; however, no response was received from PTA. Furthermore, a request for information was also made on 24-03-2023 under the Right of Access to Information Act, 2017 ("RTI Act") regarding details pertaining to any policy directive of the Federal Government, to details regarding the studies, biannual market absorption and industrywide consultation initiated by the PTA. The said request was rejected on hyper technical grounds through PTA's response dated 08-06-2023, after a lapse of several weeks beyond the stipulated period for provision of information under the RTI Act.
 - f. The process adopted in adjudicating the Complaints, pursuant to the order of the Honorable Lahore High Court, was contrary to the principles of natural justice and the right to fair trial. The Respondent was directed by the LHC to provide the Appellant with an opportunity of hearing in the matter, before deciding the same. However, the hearing was called through a notice from PTA which was received by the Appellant through fax on 17-04-2023 at 2:29 p.m., and the hearing itself was scheduled on 18-04-2023. It is submitted that less than 24 hours' notice was provided for hearing which is contrary to the principles of natural justice. It is pertinent to mention that, in compliance of the order of the LHC dated 16-03-2023, CMPak entered appearance on 21-03-2023 at the PTA office and made a request for fixing an early date of hearing. However, after lapse of more than 25 days, hearing date was intimated with a notice of less than 24 hours, while the LHC expressly directed the Respondent to dispose of the matter within 30 days of the said date.
 - g. As per the express directives of the LHC, the matter of the Complaint was to be heard by the Authority, however, upon attending the hearing scheduled by PTA, it was discovered that the power had been delegated and was to be heard by the DG (Licensing). At this time, the Appellant requested that PTA provide a copy of the official delegation by the Authority, however, the same was never shared with the Appellant. Moreover, when section 9 and section 5(2)(a) of the Act, are read together, it is clear that the Authority may not delegate the power to grant and renew licenses for any telecommunication system/service. It is submitted that CMPak's complaint dated 30-09-2022 and complaints submitted thereafter, as well as Writ Petition No. 8115/2023, primarily pertain to TWA's application and grant of LDI license. Therefore, the power to adjudicate over the matter cannot be delegated to an officer. The matter should be heard by the Authority itself, having the exclusive power/authority to grant or deny licenses to applicants.

- h. That the Impugned Order fails to discuss let alone resolve any of the serious questions pertaining to competition repeatedly raised by the Appellant. The same are highlighted below for the indulgence of the Authority:
- i. The reliance of TWA on the one-stop shop or single bill approach will result in overall weakening of Pakistan's international communications infrastructure and also impact the domestic telecom sector. It will hurt and possibly shut down significant number of foreign and local technology products and service companies that service this sector as at the end Trans World will become the only international network operator with local connectivity with end-to end service provisioning.
 - ii. By claiming to have established one-stop shop and single point billing mechanism Trans World has established a clear monopoly, anticompetitive, behavior and backdoor entry into the domain of LDIs and other telecom service providers through its agreements with its own sister companies; Clause 3(23) of the Submarine Cable License provides that the "licensee shall not enter into any agreement or arrangements, which shall in any way prevent or restrict competition in relation to the operation of any telecommunication service licensed by the Authority". Such conduct ought to have a material consideration on part of the Authority while considering the LDI license application of TWA. However, the same has been ignored while rejecting the complaint of the Appellant's company through the impugned order.
 - iii. TWA currently already holds a Submarine Cable Landing Station license, granted by PTA in 2002. Effectively TWA has become the only international network operator with local connectivity with end-to-end service provisioning. With the grant of LDI license in favor of Trans World, there is no way of ensuring arms-length transactions. The effect of this is a monopolistic infrastructure which derogates against the very principles of the deregulation policy.
 - iv. That Clause 5.9.1.3 of the Telecom Policy, 2015 mandates that the cable landing stations established by eligible licensees shall provide access to any LDI licensee on fair and non-discriminatory terms at its cable landing stations for accessing the bandwidth on submarine cables. This particular stipulation itself restricts the grant of license to TWA which is already holding a powerful and favorable Submarine Cable License.
 - v. TWA has distorted fair competition by entering into an agreement with its associated or related party company like LDM and extending preferential rates to its wholly owned subsidiary at the retail level.
 - vi. LDI operators' will lose international incoming and outgoing voice and data business by purchasing expensive or less bandwidth from its competitor in the market. This may also cause elimination or reduction of international bandwidth and circuits as required or needed for LDI business.
 - vii. Rollback to a monopolistic infrastructure will result in loss of foreign investor confidence since it directly goes against written

and implied guarantees given by the government of Pakistan. It is effectively rolling back the clock on almost 2 decades of deregulation and is establishing TWA's infrastructure monopoly without appropriate licenses or tailor-made licenses like the present LDI license despite its monopolistic positioning.

- viii. The two incidents (Karachi - Singapore IPLC and Karachi - Fujairah IPLC) narrated by the Appellant regarding the tendency of TWA to initiate a predatory price ought to have served as a cautionary tale meriting the consideration by PTA as such in its evaluation of Trans World's application for LDI license. Trans World has been exploiting its unique position in the market by virtue of its Submarine Cable Landing Station license which was granted to it prior to the deregulation of the telecom sector and has further obtained the TIP and FLL licenses in the largest telecom regions in Pakistan.
- ix. The differential treatments offered as Trans World Enterprise Services Ltd, Trans World Associates Ltd, and Trans World Infrastructure Services Ltd; all are 100% owned ventures of Orascom and OMZEST groups. It may be noted that TWA had preferential interconnect and operations and maintenance agreements with Mobilink and its 100% owned subsidiary Link Direct International (LDI) when both the companies on both sides were jointly owned and managed by Orascom and M/s Saif groups.
- x. TWA can potentially and artificially control the prices in the market and escape notice as it is already declared as SMP. Trans World can potentially dictate the market; its actions are resulting in value chain distortion, reduction in value to customers and would send negative signal to international market in foreign direct investment in the LDI domain. Reduction in LDI operations, loss of infrastructure and loss of appetite for investments are the potential hazards which are against the settled principles of competition.

5. In order to proceed further in the instant matter, the appeal was fixed for hearing on 10th October, 2023. Mr. Shahryar Riaz (Legal Counsel), Mr. Faizan Razaq (SM Regulatory) and Mr. Mian Ahmed Ibrahim (Director Law) attended the hearing on the said date. Legal counsel appeared on behalf of the Appellant reiterated the same as contended in the Appeal.

6. Findings of the Authority:

6.1 Matter heard and record perused. After careful examination of record, followings are the findings of the Authority:

6.1.1 At the very outset it is clarified that by virtue of provision(s) of the Act, the Authority is mandated to regulate the establishment, maintenance and operation of telecommunication system and provision of telecommunication services in Pakistan. In accordance with section 5 read with sections 20 & 21 of the Act, the Authority is empowered to grant and renew licenses. In addition, under section 8 of the Act, Federal Government is empowered to issue policy directive. Accordingly, in light of policy directive issued by Federal Government by time to time Long Distance & International, Local Loop, Class Licensing, Infrastructure licenses and Cellular Mobile Licenses etc., are being granted and renewed in Pakistan.

6.1.2 In accordance with the applicable legal and regulatory framework, various licenses have also been granted / renewed to the Appellant. Currently, the Appellant holds LDI and LL licenses for establishment of telecommunication system and provision of telecommunication services in Pakistan. There is no restriction for any entity to hold fixed telephony license. In addition, the Appellant may also apply for infrastructure license if so required. Thus the Appellant's contention with regard to restriction to have more than one licenses by any entity in fixed telephony is not correct.

6.1.3 With regard to Appellant's contentions with regard to the requirement of policy for grant of license, it is clarified that all licenses are issued as per applicable regulatory regime. The licenses granted to TWA are also within the applicable regime and policy directive(s) issued by Federal Government. Regulatory framework is not imposing any restriction for granting LDI/ LL or TIP licenses and subject to fulfillment of all codal formalities; any entity may apply and obtain a license or licenses. For a matter of record, it is relevant to point out that on 2nd August 2017, a public consultation on LDI licensing was carried out wherein CMPak also participated and provided its comments. The Authority also carried out bi-annual market assessment of LDI and following recommendations were forwarded to MoIT:

a) *Option-I*

Since majority of existing LDI licenses are going to expire in July 2024, therefore, MoIT may issue a policy directive for an interim LDI license on existing terms and conditions for a period of four years. This would create harmony between the existing and new LDI licenses and all licenses would expire on the same date and time.

b) *Option-II*

In case of issuance of new LDI license for a period of 20 years then infrastructure related obligations may be considered for inclusion in the said policy directive.

In response, MoIT through Minutes of Meeting dated 11th January, 2021 intimated that "Provision of section 4(1)(d), 5(2), 5(2a), 5(2d), 21, 21(4)(g), 6(e), 6(f) of the Pakistan Telecommunication (Re-Organization) Act, 1996 empowers the Pakistan Telecommunication Authority to grant and issue new LDI Licenses under existing policies of the Federal Government".

6.1.4 On the issue of having multiple licenses by the Appellant, it is relevant to point out that in the **Impugned order** provides detail of licenses granted to the Appellant in the following manner:

"3.6 As far as the contention of the CMPak with regard to differential treatments offered as Trans World Enterprise Service (Pvt.) Ltd., Tran World Associates (Pvt.) Limited, and Trans World Infrastructure Services (Pvt.) Ltd; all are 100% owned ventures of Orascom and MZEST Group, is concerned it may be noted that all licenses are issued to companies duly incorporated in accordance with the company laws for the time being enforce in Pakistan. All companies holding licenses are under an obligation to comply with the terms and condition of licenses and enabling regulatory provisions. Similarly, CMPak holds Cellular Mobile licenses in Pakistan and AJK as well as LDI license in Pakistan as distinct company having same shareholding / ownership of the companies engaged in telecom business pursuant to respective licenses.

This grant of license to TWA having new company is permissible under the applicable regulatory laws."

6.1.5 The Appellant also raised observation with regard to Impugned order by contending that application dated 30th September, 2022 pertains to grant of LDI license, thus the same cannot be delegated to an officer. The matter should be heard by the Authority itself, having the exclusive powers / authority to grant or deny licenses to applicants. For the purpose of record and clarity it is clarified that the impugned order was passed by the officer under delegated powers of the Authority in accordance provision of the Act and as per court order passed by the Honorable Lahore High Court Lahore in Writ Petition No. 8115 of 2023. For ready reference court order is reproduced below:

"The grievance as expressed by learned counsel for the petitioner at the bar is that a complaint dated 30.9.2022 was filed with the respondent authority which has been disposed of without affording opportunity of hearing to the petitioner and that the "order" dated 17.1.2023 whereby stately the complaint has been disposed of is non-speaking in nature. Learned Law Officer when confronted with both these aspects was unable to give any satisfactory response in defence. In the circumstances it appears to be appropriate to remit the matter to the respondent No.2 for decision afresh of the complaint dated 30.9.2022 statedly filed by the petitioner, either himself or through an authorized delegate, after an opportunity of hearing to petitioner, it accordance with law and on its own merits by a well-reasoned and speaking order.

2. *Petitioner is directed to attend the office, of respondent No.2 on 21.3.2023 at 11:00 A.M through a duly authorized representative. It is expected that the pending matter will be disposed of within 30 days of the given date. **Disposed of** with these observations.*

In respectful compliance of the court order, the matter was processed and after providing hearing opportunity the application was decided. It would not be out context to refer here that the Appellant also filed a Crl. Original. No. 31571/2023 regarding non-compliance of the court order. The Honorable Lahore High Court, Lahore vide order dated 20th June, 2023 disposed of the said petition. For reference court order is reproduced below:

*"On behalf of respondents No.1 & 2, Barrister Ch. Muhammad Umer Advocate has entered appearance and has placed on record order dated 17.05.2023, a copy of whereof has been handed over to the learned counsel for the petitioner. Since the order of this Court has been complied with, no further proceeding are required by undertaken. **Disposed of.**"*

6.1.6 In the instant appeal, the Appellant has referred the issue of its application filed under the Right of Access to Information Act, 2017 (RTI) regarding provision of details pertaining to any policy directive of Federal Government, details regarding studies, biannual market absorption and industry consultation initiated by PTA. It is relevant to mention here that firstly, the Appellant through its Director Legal & Company Secretary has filed a request for seeking information under the RTI which was decided /responded by the Authority vide letter dated 8th June, 2023. Later on, the same person in individual capacity filed an application dated 24th July, 2023 before the Authority followed by Appeal No.3028-8/23 under section11 of RTI read with rule 8 of the Right of Access to Information Rules, 2017 before the Pakistan

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Information Commission which has been decided vide order dated 26th December, 2023 in the following manner:

"2. The representative of public body vide letter dated 26-12-23 has furnished all the required information along with relevant documents which has been shared with the learned counsel for the appellants. He is satisfied with the said information however, submits that if more information is needed he will file fresh appeal. In view of the above, no further proceedings are required, the appeal stands disposed of, anyhow if the appellant decides to get some more information except the information mentioned in the information request, he may file new appeal."

6.1.7 The contention of the appellant that neither any bi-annual market assessment was conducted nor any industry wide consultation was carried out prior to grant of new LDI licensee is not based on the fact. In this regard, it is relevant to mention here that in 2017, PTA has initiated public consultation on LDI licensing and operators including the appellant have submitted their comments against the consultation. The assertion of the licensee that no recommendations were forwarded to or approval of the federal Government is not correct insofar as the recommendations submitted by the stakeholder were forwarded to MoIT.

6.1.8 The Appellant has also pointed out that as result of grant of licenses, Trans World will become the only international network operator with local connectivity with end-to end service provisioning. With the grant of LDI license in favor of Trans World, there is no way of ensuring arms-length transactions. The contention of the Appellant with regard to grant of license to TWA and its apprehension or purported consequences in the manner as professed are based upon assumption on the ground that as per applicable legal and regulatory framework / regime any person aggrieved by any action by other licensee(s) may take remedies available under the law.

6.1.9 What has been discussed herein above, it is concluded that Impugned Order is within the applicable regulatory regime. The license granted to TWA is within the applicable regulatory framework. Thus the Authority could not find any cogent reason to interfere in the impugned order. Accordingly, instant appeal is hereby disposed of.

Maj. Gen. Hafeez Ur Rehman (R)
Chairman

Muhammad Naveed
Member (Finance)

Dr. Khawar Siddique Khokhar
Member (Compliance & Enforcement)

Signed on 14th day of March, 2024 and comprises of (08) pages only.