



Government of Pakistan
PAKISTAN TELECOMMUNICATION AUTHORITY
Headquarters, F-5/1, Islamabad

Subject: Decision of the Pakistan Telecommunication Authority on “inter-operator”

No: PTA/Finance/LDI/Link Direct International/159/2006/55

Venue of Hearing: PTA HQs, Islamabad
Date of Hearing: 5th January, 2021

Panel of Hearing

Maj. Gen. Amir Azeem Bajwa (R):	Chairman
Dr. Khawar Siddique Khokhar :	Member (Compliance and Enforcement)
Muhammad Naveed :	Member (Finance)

Decision of the Authority

Issue:

“Non-deduction of International Roaming (IR) as inter-operator payments while calculating Annual Regulatory Dues (ARDs)”

1. Brief facts of the case:

1.1 Precisely stated facts of the case are that Pakistan Telecommunication Authority (the “**Authority**”) in exercise of its powers conferred under section 5 read with section 20 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the “**Act**”) granted License No. MCT-06/WLL&M/PTA/2014 dated 08th April, 2014, No. NGMS-03/WLL&M/PTA/2014 dated 21st May, 2014 and No. MCT-02/WLL&M/PTA/2006 dated 26th June, 2006. By virtue of licenses, the licensee is authorized to provide Licensed Services in Pakistan and AJK & GB and to establish, maintain and operate telecommunication system subject to the terms and conditions of license.

1.2 As per license condition 3.1.3 of the license, the licensee is under obligation to comply with all orders, determination, direction and decision of the Authority. In accordance with terms and conditions of license and other enabling regulatory provision, the licensee is required to pay Annual Regulatory Dues (ARDs) as provided in paragraph 4 of the license. The license condition 4.1.2 of the license expressly provides parameters for calculation of ARDs. For ready reference, the said license condition is reproduced below:

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“4.1.2 The licensee shall pay the following annual regulatory fees, contribution and charges to the Authority within 120 days of the close of the financial year of the licensee:

4.1.2.1 The license shall pay Annual License Fee (ALF) to the Authority, an amount equivalent to 0.5% of the Licensee's annual gross revenue from Licensed Services minus inter operator payments and related PTA/FAB mandated payments. In the case of PTA/FAB mandated payments, this deduction will be allowed if these amounts have actually been paid and not on accrual basis. However, Initial Spectrum Fee, Initial License Fee, lease line charges, late Payment Additional Fee, penalties, collection charges, and other expenses imposed by PTA, if any, shall not be deducted from the gross revenue.

4.1.2.2.....

4.1.2.3.....”

1.3 In accordance with the terms and condition of the license and regulation 23 of the Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2006 (the “Regulations”), all fees, contributions and charges are required to be paid by the licensee. For the purpose of determination and authenticity of the dues, licensee is also required to submit Annual Audited Account (AAA) in accordance with license condition 4.3.1 of the NGMS license which provides as under:

“The licensee shall annually submit to the Authority audited financial statement in support of its calculations and annual fees, charges and contributions. The notes to the financial statements of the licensee should be drawn up in sufficient detail so as to disclose separately the Annual Gross Revenue between Licensed and Non-Licensed Services, and inter-connection and inter-operator payments that are allowable to determine the Adjusted Gross Revenue of the licensee as per clause 4.1.2 above for the purpose of calculation of Annual Fees, charges and contributions.”

1.4 Based upon the aforementioned, the licensee paid dues to the Authority, while examining the financial statements for the year 2019 as submitted by the licensee, it has been found that the licensee has deducted amounts paid on the account of International Roaming while calculating ARDs (ALF, USF & R&D) claiming therein or considering as “inter-operator” payment as provided in license condition 4.1.2. The Authority is of the view that the payment made to foreign carriers does not fall with the ambit of the term “inter-operator” on the premise foreign carriers are not licensee of the Authority, therefore the allowable deduction as calculated by the licensee while submitting financial statement is not in consonance with the license terms and conditions. As a result thereof, the Authority issued Provisional Demand Notes (PDN) dated 29th April, 2020, 22th April, 2020 and 6th May, 2020 requiring therein to pay annual regulatory dues for the year ended 31st December, 2019 respectively. Detail of outstanding dues with breakup is give as under:

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Description of amount	Amount in Rupees	ARDs Applicable including LPAF Calculated till 15 th May, 2020
Payment made to foreign carriers (Roaming Charges)	416,940,000	12,049,566

1.6 Being aggrieved by the demand notes issued by the Authority, the licensee under section 22 (2) of the Act filed Writ Petition No. 1494 of 2020 before the Honorable Islamabad High Court. The Honorable Islamabad High Court, Islamabad vide order dated 4th November, 2020 disposed of the matter in the light of decision in F.A.O No. 67 of 2020 passed by Honorable Islamabad High Court, Islamabad. The relevant portion is reproduced below:

“12. In light of above, instant petitions are also disposed of by refereeing the matter of the petitioners to Pakistan Telecommunication Authority to adjudicate upon the matter, as to whether the foreign carriers fall within the term ‘inter- operator ‘as provided in the license.

13. Needless to observe that till such time that the matter is adjudicated and decided by PTA, no coercive measures shall be adopted against the petitioners and no demand qua Late Payment Additional Fee, shall be made, which in. any case, becomes applicable from the due date, which would be if and when matter is decided against the petitioners and the demand is made to make the payment.”

2. Hearing before the Authority:

2.1 In respectful compliance of the court, the matter was fixed for hearing on 5th January, 2021. Muhammad Rizwan, Head of Legal, Mr. Hamid Bashir Alvi, Head Regulatory Affairs, Mr. Ali Raza, Advocate Supreme Court of Pakistan and Ms. Habiba Alvi, Advocate High Court attended the hearing on the said date fixed before the Authority.

2.2 On behalf of the licensee, legal counsel submitted that the Authority’s calculation for not allowing deduction of amount paid to foreign carriers is not in line the applicable regulatory regime. In addition, the term “inter-operator” as provided in the license conditions does not postulate to restrict its scope only to the extent the licensee of Pakistan. Since the said term has not been defined neither in the license nor in any other regulatory instrument thus it is construed that the term “inter-operator” include foreign carriers. Therefore, application of the term "inter-operator" excluding therefrom foreign carriers is neither the intent nor the scope the said term. It is very much clear that the payment made to foreign carriers pursuant to NGMS license is allowable deduction. In order to substantiate the above submissions of legal counsel referred and relied upon the following grounds:

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- A) That the PTA has no authority to interpret, alter or amend the terms of the licensee's license unilaterally in the absence of express consent by the licensee pursuant to Section 21(1) of the PTCA 1996. The licensee has at no time consented to the amendment or modification of its license terms.
- B) PTA has wrongly sought to interpret the term 'inter-operator' used in License in Clauses 4.1.2.1, 4.1.2.2, 4.1.2.3 and 3.4.1 which is otherwise not a defined term under the licensee's License, the PTCA 1996 or the Regulations issued by the Authority. The word used in Clauses 4.1.2.1, 4.1.2.2, 4.1.2.3 and 3.4.1 is "inter-operator" and not "Operator" or "inter Operator" as wrongly alluded to by PTA in its Demand Note dated 06.05.2020. The word "Operator" is separately defined under Clause 13.2.1 of the License as those operators based in Pakistan who are licensed by the Authority and does not carry same meaning as the non-capitalized term 'inter-operator'. Furthermore, a defined term wherever used is in the capitalized form. When not it is a different term altogether carrying a general or dictionary meaning or defined by the conduct of the parties concerned where the same pertains to a license or contract. Therefore, the definition of the term 'Operator' cannot be merely read into the wholly different and unique term 'inter-operator' as the same amounts to an amendment of the term itself and in doing so limiting the scope of the term 'inter-operator' to the direct detriment of the Petitioner.
- C) PTA could not have sought to impose a new meaning and interpretation to the term 'inter-operator' without having first heard the licensee and hence, the impugned Demand Note is based on an act which is unilateral, without any basis and more so ex-parte without having afforded the licensee an opportunity of being heard.
- D) That even otherwise seeking to interpret the word 'operator' in the term 'inter-operator' to be restricted to the defined term 'Operator' would result in an absurdity as by virtue of the very nature of the international roaming, the licensee has to enter into international roaming agreements with foreign operators who cannot be licensed by the Authority as they don't exist or operate within the jurisdiction of the Pakistan and nor are they required to be licensed by the Authority. Whereas by the very structure of the license the Annual Regulatory Dues are calculated on gross revenues of the licensee after deducting fixed fee and exactions paid to the Authority and the Government of Pakistan and charged paid out of commercial fee received by the licensee in effect on trust for other operators with whom it connects its network and thereafter pays such amounts to such foreign third party operators.
- E) That International Roaming charges paid to the licensee are in the nature of trust payments received by the licensee on behalf of and for the benefit of third party foreign operator and is paid to the said foreign operator. Trust payments are not deemed direct revenue as received and held for a third party's exclusive benefit. Hence, the licensed clauses 4.1.2 and 3.4.1 of the

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licensee's License excludes such inter-operator payments from the gross revenue for purposes of calculating the Annual License Fee and other Annual Regulatory Dues.

- F) The licensee has in the case of other licensees permitted in the past similar deductions of foreign operator costs under the term 'inter-operator'. Therefore, the Authority by its past and consistent conduct in the case of other licensees has in fact defined the term 'inter-operator' as being a reference to generally all operators domestic and foreign and whether licensed by the Authority or not and has hence created a vested right in the licensee to be treated on the same basis as other licensees and consequently receive the benefit of such interpretation and application of Clause 4.1.2 and 3.4.1. The Impugned Demand Notice is therefore, discriminatory and without lawful basis.*
- G) That the interpretation sought to be placed by the Authority in excluding foreign operator costs from the "inter-operator payments" as set out in the license term amounts to a unilateral amendment or modification of the licensee's license terms, which pursuant to Section 22 of the PTSA 1996 can only take place with the express consent and agreement of the licensee. That the imposition of such a unilateral interpretation amounting to an amendment to the licensed terms and whereby additional fee is sought to be imposed upon the licensee cannot be sustained in law.*
- H) That there exists no basis in law or under the license terms for such an interpretation of allowable deductibles and specifically of the term 'inter-operator'. The same is hence without any lawful authority and therefore, the additional amount of Rs. 10,280,499 and Late Payment Fee imposed thereon as demanded by the Authority is without any lawful basis and illegal.*
- I) That the Authority in addition has sought to impose and claim Late Payment Fee at the rate of 2% per month on the additional amount claimed by it. The said additional amount based on the disputed modification of licensed terms has been contested by the licensee from the outset. Allowing the Authority to consider the period between a demand and prior to a conclusive determination during which the demand/imposition is contested on and for bona fide grounds and reasons represents a wholly unconscionable and unreasonable act. Furthermore, allowing the Authority to claim such late payment fee from the outset or for the period during which the matter remains in dispute and pending adjudication enables the Authority to substantially impair the licensee's ability to seek its vested legal remedies as the additional financial impact of a late payment fee threatened to be imposed on a period of adjudication which is beyond the control of the licensee represents an indirect coercion to accept the Authority unlawful and baseless demands.*

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J) That the Authority has failed to proceed as per regulatory mandate in the event of such a dispute where in the event of the Authority seeking to disagree with a licensee's representation pertaining to a licensed term which would amount to a modification of a license term the Authority is required to carry out proceedings pursuant to Rule 26 of the Pakistan Telecommunication Rules, 2000 culminating in disclosing of specific reasons by the Authority for its modification of a licensed term.

K) That the impugned Demand Note represents a non-speaking order and an absence of application of mind and the relevant law since the Authority has not cited any reasons or basis for such an abrupt and unilateral determination of the formula for calculations of Annual Regulatory Dues and nor did the Authority seek to hear the licensee prior to the impugned act, hence merits to be set aside."

2.3 Legal counsel further argued the term "Operator" has been defined in the license which means a license holder. The term "Operator" with capital "O" indicates the specific purpose of the term "Operator" used in the license would refer the licensee. Whereas, the term "operator" used with word "inter" cannot be equated with the term "Operator" on the ground the word "operator" when used or referred would be for any operator either licensee or non-licensee under the Act. Preferably, the term inter-operator will be referred to any company dealing with the business of telecommunication services. Since the mandate of the licensee is to provide NGMS licensed service which requires agreement with foreign carries therefore, the term inter-operator in general parlance has been used so as to include all kind of telecom operators either local or foreign in hominization of telecom regulatory regime.

2.7 With the aforesaid arguments, legal counsel stated that demand raised by the Authority is neither within the legal regulatory regime nor it was the practice. Thus, interpretation of the Authority for excluding foreign carries from the term "inter-operator" is misconceived. Therefore, the licensee is not liable to make any dues as claimed by the Authority.

3. Findings of the Authority:

3.1 Matter heard. After hearing argument advanced by legal counsel and careful perusal of record, the moot point of discussion is to adjudicate as to whether the foreign carrier falls within the term "**inter-operators**" as provided in the license condition i.e. 4.1.2 and any cost sustained by the licensee in this regard has to be considered as an allowable deduction.

3.2 While examining the terms and conditions of the license, it has been observed that license condition No. 13.2.1 of the license provides that unless the context otherwise requires, capitalized words and expressions in this license that are not otherwise defined in this license shall be defined in the same manner as these words and expressions are defined in the Act and the Rules.

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3.3 In addition, clause 13.2.2 of the license further provides that unless the context otherwise requires, the following terms used in this license shall have the same meaning as mentioned in the license. Similarly, the term Operator has been defined in the license which states that any person authorized by a license issued by the Authority to provide telecommunication services of any kind or to establish, maintain and operate a telecommunication system. Meaning thereby the word operator wherever used in this license will mean and intend a license holder with reference to the context and in the manner, it has been used.

3.4 Most importantly, it is also relevant to point out that with the small "o" the term "operator" has also been defined in the Pakistan Telecommunication Rules, 2000 which means any person authorized by a license to run a connectable system. A holistic overview of the term "operator" as provided in the license either with capital "O" or small "o" will be treated and considered as a licensee by all means. Thus, careful reading of the term "inter-operator" as provided in the license condition No. 4.1.2 of the licensee exclude foreign carriers or foreign operators. As a result thereof, any cost sustained by the licensee in this regard cannot be considered as an allowable deduction for the purpose of calculation of Annual Regulatory Dues as provided in the license terms and conditions.

4. Order:

4.1 What has been discussed above, it is concluded that the term "operator" has been defined in the license which means any person authorized by a license issued by the Authority to provide telecommunication services to establish, maintain and operate a telecommunication system. Thus, careful perusal of the definition of the term "inter-operator" postulates that it only relates to the payment made to other licensees and not otherwise. Since, PTA has not issued license to foreign carriers therefore any payment made to foreign operators / carrier cannot be considered or treated as "inter-operator" payment.

Maj. Gen. Amir Azeem Bajwa (R)
Chairman

Muhammad Naveed
Member (Finance)

Dr. Khawar Siddique Khokhar
Member (Compliance & Enforcement)

Signed on 8th day of April, 2022 and comprised (14) pages only.