



PAKISTAN TELECOMMUNICATION AUTHORITY
Headquarters, F-5/1, Islamabad
Website: www.pta.gov.pk

Decision of the Authority pursuant to order dated 21st June, 2019 passed by the Hon'ble Islamabad High Court, Islamabad in Writ Petition No.1750 of 2019 titled as "Pakistan Mobile Communication Limited Vs Federation of Pakistan & another"

No. PTA/Licensing/CMO-Renewal/30/2018(Jazz)

Venue of Hearing: PTA HQs, Islamabad
Date of Hearing: 25th June, 2019

Authority present in hearing

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

Issue

"Renewal of Mobile Cellular License No. MCT-02/RBS/PTA/2004 dated 26-05-2004 issued to Warid Telecom (Pvt.) Ltd (and now Jazz)"

DECISION OF THE AUTHORITY

1. This order is being passed in compliance with Court order dated 21-06-2019 passed by the Hon'ble Islamabad High Court, Islamabad in Writ Petition No. 1750 of 2019 titled as "Pakistan Mobile Communication Limited Vs Federation of Pakistan & another" whereby Pakistan Telecommunication Authority (hereinafter referred to as the "Authority") has been required to decide the issue through a speaking order. Operative part of the Hon'ble Court Order is reproduced herein below for ready reference:

"5. In view of the above consenting statements made by the learned Attorney General for Pakistan and the learned counsel for the petitioner Companies, these petitions are disposed of in the following terms:

- a) *The Authority will afford opportunity of hearing to the authorized representatives of the petitioner Companies on 25-06-2019. The latter will*

ensure that their respective representatives appear before the Authority on the said date at 9:00 a.m.

- b) The Authority shall consider the grounds raised before it by the petitioner Companies and decide the grievances through a speaking order.*
- c) The proceedings shall be completed at the earliest but not later than 15-07-2019.*
- d) The petitioner Companies shall not seek adjournment so that adjudication is not delayed.*
- e) The Authority would be at liberty to further extend the time for renewal of the licenses till a speaking order has been passed in compliance with this consent order.”*

2. Brief facts of the case:

2.1 Precisely stated facts relevant for passing of this order are that Warid Telecom (Pvt.) Ltd. (hereinafter referred to as the “**Warid**”) was granted a Mobile Cellular License bearing No.MCT-02/RBS/PTA/2004 on 26-05-2004 (hereinafter referred to as the “**License**”) by the Authority under section 21 of the Pakistan Telecommunication (Re-Organization) Act, 1996 (hereinafter referred to as the “**Act**”) to provide licensed services in Pakistan for a period of fifteen (15) years. The said License was issued after an auction process held pursuant to the Mobile Cellular Policy, 2004 (hereinafter referred to as the “**2004 Policy**”) of the Federal Government, as a result of which Warid paid a license fee of US \$291 million and was assigned the following radio frequencies:

- a. 2 x 4.8 MHz in 900 MHz
- b. 2 x 8.8 MHz in 1800 MHz

2.2 The said License was subsequently modified with mutual consent of Warid and the Authority pursuant to section 22 of the Act vide License No. PTA/Licensing/47/2014 dated 05-12-2014 for provision of licensed services based on LTE technology standards. Thereafter, Warid showed its intent to merge into Pakistan Mobile Communication Limited (hereinafter referred to as the “**PMCL**”). In this respect, the Authority vide order No. PTA/Licensing/Warid -Mobilink-Merger/69/2015 dated 19-05-2016 allowed the request of acquisition of shares of Warid by PMCL. Subsequently, this arrangement in

form of merger was formalized by way of order dated 15-12-2016 passed by the Hon'ble Islamabad High Court, Islamabad in C.O. No. 10 of 2016, pursuant to which all rights, liabilities and assets of Warid, including the License, stood transferred to PMCL. Accordingly, PMCL being the successor-in-interest of Warid is being treated as holder of the said License and shall hereinafter be referred to as the "**Licensee**" for the purposes of the instant order.

2.3 The said License is renewable and in case the Licensee wishes to renew the same, it was required to submit to the Authority a written request for renewal thereof at least thirty (30) months prior to the expiry of the current term of the License under clause 1.2.2 of the said License. The Licensee submitted its request vide letter dated 07-11-2016 to the Authority for renewal of its License. Upon the receipt of such request, the Authority was required under clause 1.2.3 of the License either to "*renew the License on such terms and conditions as are consistent with the policy of the Federal Government at that time ...*" within a period of three (3) months after the receipt of the Licensee's request or to give a written notice to the Licensee stating that the Authority may not renew the License.

2.4 Upon receipt of the request for renewal vide letter dated 07-11-2016 by the Licensee, the Authority, considering the requirements of prevailing policy of the Federal Government, i.e. Telecom Policy, 2015 (hereinafter referred to as the "**2015 Policy**"), made its recommendations to the Federal Government in term of condition No. 1.2.3 (a) of the License read with clause 8.11.2 of the Telecom Policy, 2015. The said license condition and clause of 2015 Policy provides as under:

License Condition:

"1.2.3 (a)renew the License on such terms and conditions as are consistent with the policy of the Federal Government at that time to come into effect at the conclusion of the Initial terms, or"

Clause 8.11.2 of the 2015 Policy:

"In case of renewal of licenses, PTA will make recommendations to Federal Government (MoIT) within the timelines stipulated in the respective licenses."

2.5 However, the Licensee, despite being well aware and part of renewal process, filed a Writ Petition No. 1750 of 2019 titled as “Pakistan Mobile Communication Limited Vs. FoP & another” before the Hon’ble Islamabad High Court, Islamabad with prayer seeking directions for the Authority and the Federal Government, *inter alia*, to renew its License for another term of fifteen (15) years. Since the matter of renewal of license was already under discussion with all stakeholders including the Licensee, thus after due consideration of all relevant aspects and in consultation with Authority, the Federal Government issued a Policy Directive dated 09-05-2019 (hereinafter referred to as the “**Policy Directive**”) under section 8 (2) read with section 22(3) of the Act, for renewal of Cellular Mobile Licenses. Section 8 (2) and section 22(3) of the Act are reproduced below for ready reference:

Section 8(2). *“The matters on which the Federal Government may issue policy directives shall be__*

a. the numbers and term of the licenses to be granted in respect of telecommunication systems which are public switched networks, telecommunication services over public switched networks and international telecommunication services and the conditions on which those Licenses should be granted;

aa. framework for telecommunication sector development and scarce resources; and

b. the nationality, residence and qualifications of persons to whom licenses for public switched networks may be issued or transferred or the persons by whom licensees may be controlled; and

c. requirements of national security and of relationships between Pakistan and the Government of any other country or territory outside Pakistan and other States or territories outside Pakistan.

2A. Notwithstanding anything contained in sub-section (2), the Cabinet, or any committee authorized by the Cabinet, may issue any policy directive on any matter related to telecommunication sector, not inconsistent with the provisions of this Act, and such directives shall be binding on the Authority.

Section 22 (3). *“After the expiry of the initial or renewed term, the license may be renewed on terms and conditions consistent with the policy directive, if any, of the Federal Government at the relevant time.”*

2.6 Upon the issuance of the Policy Directive, the Licensee filed a Civil Misc. No. 2321 of 2019 in W.P No. 1750 of 2019 for setting aside/suspension of the said Policy Directive and subsequently filed another application bearing Civil Misc. No. 2559 of 2019 in W.P No. 1750 of 2019 for amendment of pleadings seeking permission, *inter alia*, to include the relevant contents and prayer for setting aside of the said Policy Directive. On 20-06-2019, after hearing the learned counsel for the Licensee at length, the Hon’ble Islamabad High Court, Islamabad suggested to the learned counsel for the Licensee and the learned Attorney General for Pakistan to refer the matter to the Authority for deciding the grievances independently and without being influenced by the directives issued by the Federal Government. The operative part of Court order dated 20-06-2019 was passed in the following manner:

“The learned counsel for the petitioner Company has been heard at length. It was suggested to the learned counsel for the petitioner Company and the learned Attorney General to refer the matter to Pakistan Telecommunication Authority for deciding the grievances independently and without being influenced by the directives issued by the Federal Government. The learned Attorney General has stated that to this extent he does not oppose if the petitions are disposed of in such terms. The learned counsel for the petitioner Company has, however, sought a short adjournment in order to seek instructions.

2. *Re-list for tomorrow i.e. 21.06.2019. The petitions will be taken up at 11:00.a.m.”*

The matter was adjourned for the next day, i.e. 21-06-2019 as the counsel for the Licensee requested for time to seek instructions from the Licensee in this respect. In this backdrop, order dated 21-06-2019 was passed whereby W.P No. 1750 of 2019 was disposed of in terms of directions as mentioned in para 1 above of this order.

3. Proceedings before the Authority:

3.1 In order to proceed further and in respectful compliance with the Court order dated 21-06-2019, the matter was fixed for hearing on 25-06-2019 before the Authority at PTA HQs, Islamabad. On behalf of the Licensee, Mr. Aamir Ibrahim, CEO (Jazz), Ms. Saima Kamila Khan, CLO (Jazz), Mr. Salman Malik, VP (Public Policy & Reg. Affairs), Mr. Gabor Kocsis, CFO (Jazz), Mr. Zulquarnain Bhatti, Head of Litigation, Mr. Farhan Ul Hassan, Director Dig. Policy & Reg., Mr. Usman Ali Virk, Advocate and Mr. Shehzad A. Elahi, Advocate Supreme Court, learned counsel for the Licensee, attended the hearing on the said date.

3.2 Mr. Shahzad A Elahi, Advocate Supreme Court of Pakistan, (hereinafter referred to as the “**Legal Counsel**”) for the Licensee, apart from making verbal submissions also filed written submissions on behalf of the Licensee. Moreover, the Licensee also provided documents in two volumes containing the following:

- i. Copy of Writ Petition No. 1750 of 2019;
- ii. Copy of rejoinder on behalf of the Petitioner/Licensee to the Interim Report and Parawise Comments filed on behalf of the Authority, C.M No. 2321 of 2019 and C.M No.2559 of 2019 in W.P No. 1750/2019; and
- iii. Report/Comments on behalf of Respondent No.1, Interim Report and Parawise Comments filed on behalf of the Authority and reply by the Authority to CM No. 2321/2019.

3.3 The Legal Counsel submitted that request for renewal of its License vide its letter dated 07-11-2016 was made within the timelines stipulated in the condition No. 1.2.3 of the License. However, the Authority did not take any step to renew its License within three (3) months time as stated in License’s condition No. 1.2.3, i.e. by February 7, 2017. Instead of complying with the said License condition, the Authority vide letter dated 24-04-2017 addressed to the Ministry of Information Technology (“**MoIT**”), suggested hiring of an independent consultant for finalization of the Cellular Mobile License Renewal Framework. Even hiring of consultant took more than year as hiring of the consultant concluded on 14-05-2018 when contract with WRAP International was signed.

The consultant was supposed to complete the consultancy by September 18, 2018. However, due to various reasons best known to the Authority, none of which was attributable to PMCL, the process of consultancy was further inordinately delayed and was never completed. He submitted that it appears that among other reasons, one of the same was an apparent disagreement/issue between the Authority and Frequency Allocation Board ("**FAB**"). The Licensee even continued to follow-up with the Authority for the renewal of the License. Despite all, the Authority has failed to renew the License and has, therefore, not fulfilled its obligations under, *inter alia*, condition No. 1.2.3 of the License.

3.4 Due to inaction on the part of the Authority, the renewal of License was delayed. Eventually, the Prime Minister constituted an Inter- Ministerial Committee (the "**IMC**") vide notification dated 15-10-2018 to resolve the issue of renewal of cellular licenses. Upon the constitution of IMC, the consultancy was terminated and a "Technical Committee for Cellular License Renewal Oversight" (the "**TC**") was constituted vide notification dated 11-01-2019. He further submitted that despite objections by FAB, TC continued its working and after numerous meetings finalized its recommendations for renewal while relying on the report/working papers of the Authority.

3.5 The Legal Counsel asserted that the Licensee (a) has a vested right for renewal of the License on the same terms and conditions, including license fee of US \$ 291 million; and (b) the Authority cannot modify the terms of the License on renewal by imposing more onerous conditions on coverage, quality of service etc. or imposing a much higher license fee. He further submitted that in terms of condition No. 1.2.3 of the License, the renewal of the License is to take place on such terms and conditions as are consistent with the policy of the Federal Government at that time, i.e. between November 7, 2016 and February 7, 2017 (the "**Relevant Period**"). In this respect, the applicable policy of the Federal Government was 2015 Policy, as well as 2004 Policy, i.e. the policy under which the License was issued. Thereafter, he went through the clause 8.11 of the 2015 Policy, and clause 5.4 of the 2004 Policy, according to him both deal with renewal of License. He submitted that other than the above-mentioned policies, there was no other policy of the Federal Government dealing with the renewal of licenses during the Relevant Period. He stated that the request of the Licensee for renewal of its License on

same terms and conditions including license fee of US \$ 291 million was fully consistent with the afore-mentioned policies applicable in the Relevant Period and there was nothing in the afore-mentioned policies which was inconsistent with this request. In fact, the previous renewals of CM Pak (Zong), Mobilink and Ufone licenses in 2004, 2007 and 2014 respectively was also in accordance with the same principles and also served as a suitable and binding precedent for the Authority.

3.6 While further arguing, the Legal Counsel put an emphasis upon the powers of the Authority under section 5 (2)(a) and section 6 of the Act and stated that on the one hand it is the exclusive power of the Authority to grant and renew licenses for any telecommunication system and any telecommunication service on payment of fee as it may specify from time to time but at the same time certain obligations have been imposed upon the Authority including the duty to ensure that the rights of the Licensee are duly protected. Thus, renewal of the License on the same terms and conditions including license fee of US \$ 291 million is obligatory on the Authority and any deviation from earlier license terms and conditions would be a discriminatory treatment with the Licensee.

3.7 In order to substantiate the contention of not increasing renewal fee over and above US \$ 291 million, it was highlighted that there is difference between renewal fee and fee for fresh grant/assignment of license/spectrum. The renewal fee is not the same as determination of fee to be paid on fresh allocation of license or spectrum. Renewal and allocation of spectrum/license are different and must be dealt with differently to the advantage and not to the detriment of the incumbent Licensee. In the instant matter, the position of the incumbent Licensee is not the same as a person bidding for a fresh license or require additional spectrum. The latter has a choice as to whether or not to enter the business or expand the business whereas the incumbent Licensee would be seeking renewal just to maintain or preserve his existing business/consumers. The incumbent Licensee has a vested right in the License, spectrum and business which needs to be protected by the Authority.

3.8 With regard to determination of renewal fee, the Legal Counsel is of the view that there should be a rational and reasonable basis for fixing the renewal fee; fixing the

renewal fee by reference to the auction prices for 2016 auction (850 MHz) and 2017 auction (1800 MHz) is neither rational nor reasonable. He further contended that the Licensee has a vested right for renewal of the License on the facts and circumstances applicable during the Relevant Period, i.e. between November 7, 2016 and February 7, 2017, if any renewal fee is to be determined afresh, it has to be on basis of benchmarks already available in the Relevant Period.

3.9 Fixing of price of 850 MHz determined as a result of auction with the 900MHz band is also not correct on the ground that it is well-recognized that 850 MHz and 900 MHz are different and independent spectrums. It is also recognized by FAB as well as International Telecommunication Union that 850 MHz and 900 MHz are different and independent spectrums. Thus, the Legal Counsel concluded that any reliance on the 2016 auction price of 850 MHz for fixing of renewal price of 900 MHz is incorrect and misconceived.

3.10 The Legal Counsel further contended that the practice of fixing license fee in US \$ was adopted firstly under the 2004 Policy, when the context and requirement was very different inasmuch as that direct foreign investment was being attracted from new entrants. By contrast, in 2019 the Licensee will primarily be relying on Pak Rupee income and local borrowing to pay this license fee. Moreover, he pointed out that the fiscal impact of PKR devaluation is also not being considered by the Authority. He submitted that due to these reasons, the Licensee has consistently been of the view that the License and spectrum fees should be delinked from US\$ and be fixed in Pak Rupees.

3.11 On the issue of additional coverage and quality of service obligations, the Legal Counsel argued that such requirements are far beyond the 2004 license or even the 2014, 2016 and 2017 licenses and will be difficult and costly to achieve. He pointed out that the Licensee has already raised serious concerns on these proposed changes in its earlier letters dated 19-03-2019 and 27-05-2019. On the issues of Additional Monitoring and Cyber Security Obligations as well as the Mandatory National Roaming for SMP(s), the Legal Counsel has submitted that a lot of open-ended and vague requirements regarding monitoring, reporting and cyber security compliance requirements would result in increased cost for the CMOs. Instead of passing on the burden to CMOs, such

requirements should be addressed from the ALF/R&D contributions. He further submitted that the Authority did not address the Licensee's concerns regarding mandating national roaming for SMP(s) as the cellular mobile market is fully competitive. The Licensee has explained that CMOs should be free to negotiate commercial arrangements with each other for national roaming without the Authority's intervention.

3.12 Lastly, the Legal Counsel prayed that the matter may be decided in favour of the Licensee and the License in question may be renewed for another term of fifteen (15) years on same terms and conditions including renewal license fee of US \$291 million.

4. Findings of the Authority:

Matter heard and record perused. After careful examination of record and hearing contentions / submissions of the Licensee at length in the light of order dated 21-06-2019 passed by the Hon'ble Islamabad High Court, Islamabad and the relevant provisions of law, findings of the Authority are as under:

4.1 At the very outset, the Licensee's assertion with regard to delay in processing the matter as well as non-renewal in accordance with timeline needs to be addressed in detail. It is imperative to point out that in addition to statutory provision under the Act, renewal process has also been provided in condition No. 1.2.3 of the License which states that within three (3) months after the receipt of the Licensee's request pursuant to condition No.1.2.2 of the License, the Authority shall either renew the License on such terms and conditions as are consistent with the policy of the Federal Government at that time to come into effect at the conclusion of the initial term or take action as provided in condition No. 1.2.3 (b) of the License. The said license condition obligates the Authority that in case of renewal it has to be initiated "on such terms and conditions as are consistent with the policy of the Federal Government at that time". Meaning thereby that Authority was under an obligation according to the terms of the License read with section 22(3) of the Act to comply with the prevailing policy directive which provides the procedure for the renewal of the License. For the purpose of clarity, section 22 (3) of the Act provides that:

Section 22 (3) – “After expiry of the initial or renewed term, the license may be renewed on terms and conditions consistent with the policy directive, if any, of the Federal Government at the relevant time.”

Since at the relevant time, 2015 Policy was in place and clause 8.11.2 of the said policy specifically requires the Authority to make recommendations to the Federal Government in case of renewal of License associated with spectrum. Thus, on receipt of request for renewal, the obligation of the Authority flow from two sources, (i) terms of the License, (ii) from 2015 Policy and relevant provisions of the Act. Accordingly, in compliance with the applicable regulatory regime at that time and in accordance with terms of the License, recommendations were made to the Federal Government.

4.2 The use of the word “policy” in condition No.1.2.3 (a) of the License referred to a policy specifically dealing with the renewal process. The submission of Legal Counsel that for purposes of renewal 2004 Policy was also applicable is without substance inasmuch as that in year 2015, the Federal Government reviewed its previous policies including 2004 Policy and integrated them into a one coherent document in the form of 2015 Policy. The previous policies which have been protected by enlisting them under clause 9.11 of 2015 Policy which will continue to apply. It is worthy to point out here that 2004 Policy has not been enlisted under clause 9.11 of 2015 Policy. The clause of 2004 Policy mentioned by the Legal Counsel that *“fees for renewed licenses will also be paid using the same payment profile and be based upon the same per MHz per annum price as determined in the auction”* was actually meant for existing operators at that time. For further clarity the clause 5.4 of the 2004 Policy is as under:

“The Mobile Cellular License under this policy will replace all existing licenses as soon as possible or at least upon expiry of the current licenses.”

The said clause further provides that:

“The fees for the renewed licenses will also be paid using the same payment profile and be based upon the same per MHz per annum price as determined in the auction.”

At the advent of the said 2004 Policy i.e. CM Pak Limited, Pakistan Mobile Communication Limited (Mobilink) and Pakistan Telecommunication Mobile Limited (Ufone) were the three existing operators. Accordingly, their licenses were renewed in 2004, 2007 and 2014 respectively against a renewal fee of US \$ 291 million during the substance of 2004 Policy and before the issuance of 2015 Policy.

4.3 Regarding the argument of the Legal Counsel that the Licensee has a vested right of renewal of its License, there is no cavil to the proposition that renewal of the License is undeniably a valuable right of the Licensee, however, such a right is not an absolute right rather the same is subject to a policy of the Federal Government at that time and it has to be renewed consistent with such policy as specifically set out in the License. As admitted by the Licensee that no renewal frame work or policy was in place in 2016 except the clause 8.11 of 2015 Policy requiring the Authority to make recommendations to the Federal Government for renewal of licenses associated with spectrum. It is pertinent to state here that apart from a fee for renewal, there are many other areas on which policy of Federal Government was essential, for instance, duration of renewal, terms of licenses and quality of service, etc. These are the areas where the Federal Government has the power to give a framework through a policy directive. Section 8 of the Act empowers Federal Government for issuance of policy directive on the matter related to telecommunication in the following manner:

Section 8 (1). *“The Federal Government may, as and when it considers necessary, issue policy directives to the Authority, not inconsistent with the provisions of the Act, on the matters relating to telecommunication policy referred to in sub-section (2), and the Authority shall comply with such directives.”*

Section 8(2). *“The matters on which the Federal Government may issue policy directives shall be __*

a. the number and term of the licenses to be granted in respect of telecommunication systems which are public switched networks, telecommunication services over public switched networks and international telecommunication services, and the conditions on which those Licenses should be granted;

aa. framework for telecommunication sector development and scarce resources; and

b. the nationality, residence and qualifications of persons to whom licenses for public switched networks may be issued or transferred or the persons by whom licensees may be controlled; and

c. requirements of national security and of relationships between Pakistan and the Government of any other country or territory outside Pakistan and other States or territories outside Pakistan.

2A. Notwithstanding anything contained in sub-section 2, the Cabinet, or any committee authorized by the Cabinet may issue any policy directive or any matter related to telecommunication sector, no inconsistent with the provisions of this Act, and such directives shall be binding on the Authority.”

4.4 Considering the afore-mentioned statutory provisions and license condition, the Authority processed the case in accordance within time. More importantly, the Licensee was not only kept abreast about all the proceedings or actions on the part of the Authority but also participated in several meetings at various higher forum including but not limited to PTA and MoIT. On the issue of meeting timeline for renewal i.e. within three (3) months of receipt of renewal request, record indicates that Authority had been continuously working on it and the Licensee remained associated with the entire renewal process. As a matter of fact, the Licensee attended various meetings with PTA, MoIT, Committee of Ministers and was involved in the consultation process on renewal on different occasions starting from 2017 onward till 03-05-2019. It may not be out of place to mention here that had the delay been so detrimental to the Licensee as portrayed, it could have approached Court of Law for redressal of its grievance after expiry of stipulated time as mentioned in condition No. 1.2.3 of the License. The record shows that the Licensee, despite being aware of every stage of renewal process, did not feel the need to seek remedy from any Court of Law rather remained associated with the process and the Licensee only choose to approach the Court just three days ahead of issuance of the said Policy Directive dated 09-05-2019.

4.5 On the issue of engagement and termination of consultant namely WRAP raised by the Legal Counsel, it is clarified that the consultant could not complete the required task due to certain reasons, which are neither relevant for deciding the instant matter nor the same has caused any prejudice to the Licensee.

4.6 The most important issue in whole exercise is to address the issue of renewal of license fee. Before addressing the issue of renewal of license fee in light of prevailing regulatory regime, the Authority feels it appropriate to analyze international practice(s) for determining renewal fee by various jurisdictions in telecom markets. The international best practices show that the renewal process should be fair, transparent and participatory to promote regulatory certainty.

Countries set license fee according to their own perspective / markets, for example, in India, Thailand and Singapore, the regulators determined the license renewal process by auction. Australia and New Zealand re-issued licenses to the same licensees on market-based spectrum price and if licensees fail to accept the renewal offer on market- based price expectations then the spectrum is auctioned.

However, it is increasingly recognized by policy makers and regulators that whatever method used, the upfront payment needs to reflect the economic value of the spectrum and to ensure its efficient use. Accordingly, in Pakistan the market determined price based on market forces has been suggested for the renewals of cellular mobile licenses i.e. recent auction prices of 850 MHz and 1800 MHz spectrum in years 2016 and 2017 respectively.

4.7 Now, after having gone through the international perspective, it would be appropriate to examine what strategy/course of action is to be adopted to determine the fee for renewal of mobile cellular license in the prevailing regulatory regime of Pakistan. It is to be understood that the License in question is not merely a simple license granting permission to provide cellular mobile services rather this License is associated with the right to use spectrum which is a "scarce resource" owned by the State as a trustee of people of Pakistan. Under section 8 (2) (aa) of the Act, the Federal Government is empowered to issue policy directive with regard to framework for telecommunication

sector development and scarce resources. The decision of the State to grant access to scarce resources, which belong to the people, must ensure that people are adequately compensated. The spectrum has a high economic value in the light of the demand for it on account of the rapid growth in the telecom sector. For purposes of renewal of License associated with spectrum, different model/methods are used internationally for renewal of such License, such as Auction, Administrative Re-assignment and Hybrid, etc. Considering the various factors in the telecom market in Pakistan, two rationale methods were available with the Authority for determining the fee for renewal of the License associated with spectrum; (i) by engaging a consultant to recommend a renewal framework and suggestive spectrum price (not a binding on the Authority) or (ii) to use the recently determined price through an auction for use of spectrum in the similar bands as a benchmark for renewal of License.

4.8 The Authority in consultation with the Federal Government decided to hire a consultant for the aforesaid purpose, however, the process could not be concluded in a timely manner. Therefore, to complete the renewal process in a timely manner, the Authority decided to opt for the second mechanism i.e. determination of spectrum price through an auction already conducted fairly and impartially close to the time of renewal of the License. It is very pertinent to mention here that in the auctions conducted in years 2016 and 2017 (close to the time of renewal of License), the existing telecom operators including the Licensee participated in the auction and the market price of the spectrum in the similar bands was set by the telecom operators including the Licensee themselves. It may not be out of place to mention here that auction based price for a license associated with spectrum is an established principle based on past practices as the Licensee was originally granted the License through an auction process and even all subsequent cellular mobile licenses associated with spectrum have been granted through process of auction and even renewal of cellular mobile licenses have been made from 2004 onward on the basis of price determined in the auction. Accordingly, the Authority, after thorough deliberations and analyzing number of various other factors i.e. increasing trends of cellular mobile subscribers, growth in mobile broadband, growth in 3G and 4G technologies enabled services, earlier trends and spectrum prices etc., recommended to the Federal Government that for the purpose of renewal of the License linked/associated

with the spectrum, benchmark recently determined through auctions in the respective band may be used. Given these circumstances as well as considering the dynamics and overall prospectus of the telecom market, the Authority is of the view that the benchmark for the spectrum fixed through the aforesaid auctions still fairly holds good for renewal of the License associated with the similar spectrum.

4.9 There is no cavil to the preposition that it is prerogative of the Authority under section 5(2)(a) of the Act to renew the license for any telecommunication system and any telecommunication service on payment of such fee as it may from time to time specify. The use of the phrase “from time to time specify” in section 5(2)(a) of the Act explicitly convey that it is the mandate and power of the Authority to determine and specify fee for grant and renewal of license. Accordingly, the Authority in exercise of such power is well within its mandate to specify the renewal fee of a license other than the fee fixed/determined at the time of grant of the said license. However, an upper limit for levying such fee and other charges has been envisaged under section 5(2)(p) of the Act inasmuch as that the Authority should not exceed the limit as specified by the Committee of the Cabinet, if any.

4.10 The contention of the Licensee with regard to payment of the renewal licensee fee in Pak Rupees instead of US \$ is without any substance. It is a matter of record that fees for all cellular mobile licenses, either granted or renewed, were based upon in US \$ since 2004. The Licensee has not only itself paid license fee in US \$ in 2004 but also paid for renewal of its another license in 2007 as well as for fresh NGMS license granted to it in years 2014 and 2017. Hence, the Licensee is estopped by its own conduct to raise this argument at this stage.

4.11 The arguments of the Legal Counsel for the Licensee that benchmark for 850MHz auction has erroneously been used for 900 MHz are completely misconceived. It is clarified that 850 MHz and 900 MHz band exhibit similar channels characteristics in the mobile propagation environment. Moreover, to clarify the importance of radio frequency spectrum there is a need to highlight technical issues involve therein as internationally various bands are allocated for cellular mobile communication. These bands may be divided into the following two groups:

i. Coverage Bands: These are sub-Giga (below 1000 MHz) frequency bands e.g. 700, 800, 850 and 900 MHz. Due to low frequency these electromagnetic waves can travel to a greater distance hence provide extended coverage. Often such bands are used to provide coverage in rural/far flung areas.

ii. Capacity Bands: These include 1800, 2100, 3500, etc. which do not cover a large area but can carry greater amount of data hence such bands are usually used where high data rates are required in a densely populated area.

As far as 850 MHz and 900 MHz bands are concerned, they have very similar characteristics such as coverage patterns, link budget, propagation loss and signal to noise ratio. Therefore, in most of the international technical reports there would not be any differentiation between these two bands at all. In addition, analysis of past four years type approval data shows that there is increased availability of terminal devices in 850 MHz band, however cell phones supporting 900 MHz band still have a definite higher number.

4.12 While renewing the License, the Authority in exercise of its vested right, telecom consumers' interest as envisaged under section 4(1) (m) of the Act and for the proper conduct of telecommunication services, has decided to enhance the quality of service and roll out targets in order to meet the parameters of quality of service so as to bring it in harmony with the international best practices. Further, the License is technology neutral, therefore, the Licensee is entitled to deploy any latest technology for provision of the Licensed services. Accordingly, the necessary changes in the terms of License has been incorporated as shared with the Licensee. Such changes in quality of service and roll out obligations shall certainly improve the key performance indicators (“KPI”) of the Licensee. However, the Licensee has raised various concerns on the terms and conditions dealing with enhanced quality of service and roll out obligations. In this respect, the Licensee's persistent stance, *inter alia*, has been that the issue of quality of service and roll out obligations is dependent on the quantum of renewal fee of the License. Even in the recent meeting held on 16-07-2019 on this issue, the Licensee reiterated its earlier stance that without first determination of the renewal fee, the terms and conditions pertaining to quality of service and roll out obligations cannot be finalized. The Authority

is of the view that though linking the issue of quality of service and roll out obligations with the renewal fee is not a rational approach, yet to avoid any deadlock and to give fair treatment on this issue, the Licensee's concerns on terms and conditions regarding enhanced quality of service and roll out obligations are still under consideration with the Authority and the same shall be finalized in consultation with the Licensee.

5. Conclusion:

5.1 On the basis of what has been discussed, it is concluded as under:

- i. There is no dispute on renewal of the License. Both the Authority and Licensee are agreed and intended to proceed for renewal of License;
- ii. The main issue in the instant matter relates to determination of the renewal price in the light of various factors and approaches/models;
- iii. Various jurisdictions have adopted different approaches, i.e. through auction or market-based price, for renewal of license associated with spectrum;
- iv. In Pakistan, spectrum price is being determined through auctions. The latest spectrum price in similar bands was determined through auctions held in years 2016 and 2017. The said spectrum price can fairly be considered as a benchmark for renewal of the License associated with similar spectrum as market-based price;
- v. Quality of Service and roll out obligations required to be enhanced in consonance with 2015 Policy and with the best regulatory practices. However, the Licensee's concerns on terms and conditions regarding enhanced quality of service and roll out obligations are being evaluated and require further consultation with Licensee. Thus, the same shall be finalized after consultation with the Licensee.

6. Decision:

6.1 In view of the foregoing discussions, the Authority passes the following order:

- a) Fee for renewal of License shall be US \$ 39.5 million per MHz for frequency spectrum of 900 MHz and US \$ 29.5 million per MHz for frequency spectrum of 1800 MHz;

- b) License No.MCT-01/RBS/PTA/2004 dated 26th May, 2004 will be renewed with effect from 26th May, 2019 for a period of further fifteen (15) years, on technology neutral basis, subject to payment of renewal fee to be calculated in accordance with per MHz price as provided at para 6.1 (a) above;
- c) The payment terms for the renewal fee shall be 100% upfront or 50% upfront with remaining 50% in five (5) equal annual installments on LIBOR plus 3%. The payment shall be made in US \$ or with the option to pay in equivalent Pak Rupees calculated at the market exchange rate at the time of payment;
- d) The upfront payment as given in para 6.1(c) above shall be paid on or before 21-08-2019; In case of non-payment of upfront fee as required, the License shall stand expired;
- e) All fees and other charges as provided in Part 4 of the License shall apply in similar manners to the renewed License from its effective date i.e. 26th May 2019;
- f) The terms and conditions relating to enhanced quality of service and coverage of network shall be finalized in line with applicable regulatory practice and 2015 Policy after consultation with the Licensee on or before 21-08-2019;
- g) In case the Licensee opts for non-renewal of its License, it shall pay fee on pro rata basis of the renewal fee as mentioned in para 6.1 (a) along with all other applicable fee and other charges as provided in Part 4 of the License commencing from 26-05-2019 till the date of withdrawal/vacation of radio frequency spectrum.

Chairman

Member (Finance)

Member (Compliance & Enforcement)

Signed on 22nd day of July, 2019 and comprises (19) pages only.