



PAKISTAN TELECOMMUNICATION AUTHORITY
HEADQUARTERS, F-5/1 ISLAMABAD

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Decision of the Authority Pursuant to Court Order 13th April, 2021 Passed in W. P No. 38464/2020 along with W.Ps No. 38464/2020, 69038/2020, 18884/2021 and 20099/2021 titled Pakistan Mobile Communication Ltd. Vs FoP & Others

File No: PTA/Enforcement Wireless/Complaints/60/2021/529

Venue of Hearing:	PTA HQs, Islamabad
Date of Hearings:	26 th April, 2021
	10 th June, 2021

Panel of Hearing:

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

Issue:

"Unauthorized Sale of Sims/ Door to Door/ Kiosk Activities"

DECISION OF THE AUTHORITY

1. FACTS OF THE CASE:

1.1 Brief facts of the case are that Pakistan Mobile Communication Limited (hereinafter referred to as "licensee") filed Writ Petitions No.38464 of 2020, 69038 of 2020, 18884 of 2021 & 20099 of 2021 before the Lahore High Court, Lahore, impugning therein: i) **letter dated 25th June, 2020**; ii) **clause 5(q) of the Standard Operating Procedure on SIM Sale and Activation through Biometric Verification dated 2nd April, 2019** (hereinafter referred as "SOP"); and iii) Show Cause Notices (SCN's) dated **9th October, 2020** (including hearing notice dated 18th December, 2020) **30th September, 2020** with regard to non-provision of data in respect of sale of SIMs and **10th February, 2021** pertaining to non-provision of sale transaction data including MSISDN etc.

1.2 The Honorable Lahore High Court vide its consolidated order dated 13th April, 2021 disposed of the above writ petitions in the following manner:

"Para 3..... these petitions stand disposed of in the terms that actions / order impugned therein are quashed and the matter will deem to be pending before respondent No.2, who after consultation of record as well as providing right of audience to all the concerned will resolve the ongoing issue at his end in either way through well-reasoned speaking order under the mandate of relevant law within the sixty days positively. Till then no adverse action will be initiated against the petitioner. However, any of the party aggrieved thereby will definitely have each & every independent right to assail the same as well as to reiterate the prayers extended herein before the appropriate forum. The parties will appear before respondent No. 2 on 26.04.2021"

1.3 In respectful compliance of the Court Order dated 13th April, 2021, the matter was fixed for hearing before the Authority on 26th April, 2021. On behalf of the licensee, Mr. Zulqurnain Bhatti, Head of Litigation, Mr. Shehzad Elahi, Advocate Supreme Court (Counsel), Mr. Shahmeer Arshad, Advocate High Court and Mr. Mudassar Hussain, VP attended the hearing. However, counsel requested for another opportunity of hearing to provide further submissions. Accordingly, another opportunity of hearing was provided and matter was fixed on 10th June, 2021. On the said date of hearing, *in addition to legal counsel*, Mr. Usman Ali Virk, Advocate High Court, Ms. Fariha Khan, Manager Legal (*online*), Mr. Nowsherwan Haq, Legal (*online*), Mr. Umar Afzal, COM (*online*) and Syed Nasir Ali Hamdani, CRD (*online*) on the behalf of licensee attended the hearing.

1.4 The counsel of the licensee reiterated the same as contended in the writ petitions. The legal counsel was also of the view that in light of court order all actions/orders as impugned in writ petition have been quashed therefore, SCNs issued by the Authority have also been quashed. Now the matter has to be decided by the Authority in totality as the matter has been referred by the Honorable Court to the Authority.

1.5 Crux of the submissions made by counsel of the licensee are as under:

a. With regard to clause 5(q) of the SOP, the licensee is of the view that the Authority established under the Pakistan Telecommunication (Re-Organization) Act, 1996 (the "Act") has all powers, functions and administrative actions. Any regulations or SOPs issued by the Authority that go beyond the mandate of the Act would be a manifest illegality, necessarily rendering any action taken under the garb of such illegal regulation/SOPs *non-est*. Accordingly, clause 5(q) of the SOP is alien to the scheme of the Act, thus liable to be declared *void ab initio*, unconstitutional and against the spirit of Article 18 of the Constitution and the clause 5(q) of the SOP is accordingly liable to be set aside as such.

b. PTA's letter dated 25th June, 2020 with regard to carry out stall activities with prior PTA's permission was without providing an opportunity of hearing. As a result

Dated: 31st August, 2021

of undue reliance on SOP by the Authority blanket ban has been imposed on the licensee which is contrary to applicable law.

d. Legal counsel further asserted that clause 16 (c) of the SOPs provides that in case of any violations by sales outlets, the mobile companies will take appropriate and immediate action against the sales outlets. The Authority shall forward complaints to FIA for taking action in accordance with relevant provisions of the Act and PECA 2016.

e. The licensee further submitted that it would be appropriate if a consultation process may be initiated to address all the concerns of the licensees.

f. Legal counsel further asserted that by virtue of court order all SCNs issued by the Authority have been quashed therefore, only issue with regard to PTA's letter dated 25th June, 2020 will be decided.

1.5.1 Since, the Honorable Court has referred the matter to the Authority therefore, for ready reference the relevant points with regard to SCNs and hearing notices raised by the licensee in writ petitions are given below:

1.5.1. 1 W.P No. 69038/2020 titled "PMCL vs FOP & Others" – SCN dated 9th October, 2020

a. In this petition the licensee contended that show cause notice was to ascertain the importance of kiosk as well as moving sale Door to Door activities to the business of the company, so as to ascertain whether the ban so imposed should be lifted. The said ban is illegal and without jurisdiction. Thus, asserted that the Show Cause Notice dated 9th October, 2020 and hearing Notice dated 18th December, 2020 is illegal, patently contemptuous, beyond the scope of the Act and the same is liable to be set aside.

b. Since, the operation of the letter dated 25th June, 2020 was suspended therefore, blanket ban that was imposed cannot continue to base its action upon the matter, cognizance of which has been taken by the Hon'ble High Court, therefore, the Hearing Notice dated 18th December, 2020 is liable to be set aside.

c. The counsel on the behalf of licensee stated that the Authority has the right to require information from the CMOs. However, this right is not unfettered especially where a log of such information is not required to be kept under any law/rules/regulations. The action of the Authority in insisting upon provision of the requisite information where no such information exists speaks volumes of illogical approach being adopted by the Authority, which cannot sustain in law.

1.5.1.2 W.P No. 18884/2021 titled “PMCL vs FOP & Others” SCN dated 10th February, 2021

a. In this petition the licensee contended that Show Cause Notice dated 10th February, 2021 and hearing notice dated 1st December, 2020 are capricious and arbitrary and they have been issued to the licensee as a counter-blast measure with the sole objective of harassing the licensee in view of the injunctive orders obtained by the licensee against the Authority, in Writ Petition No. 38464/2020 and Writ Petition No. 69038/2020.

b. The counsel averted that the information/data sought vide letter dated 1st December, 2020 under the garb of the SOPs of 2019, its clauses 5(m), 5(n) & 5(o) in specific, is commercially sensitive and confidential information/data belonging to the licensee and, such data, if surfaced or made public under any circumstances, would cause substantial and irreparable damage to the licensee. Thus, such actions are oppressive and restrictive to trade are unreasonable and in view of SCNs and letters are liable to be set aside.

c. As per section 4(d) of the Act, one of functions of the Authority is to promote competitive telecommunication services throughout the Country and, as such, clause 5(m), 5(n) & 5(o) of the SOPs in substance are inconsistent with the Scheme of the Act as it substantially harms and causes a serious impediment to the competitive atmosphere in the industry in addition to being restrictive to trade. Thus, the SOP, to the extent of its clause 5(m), 5(n) & 5(o) are liable to be struck down as the same travels beyond the scope of the enabling statute and is unfair, unreasonable and is against the very spirit of principles enshrined in the Constitution.

d. The SCN has been issued contrary to the scheme of law. The Pakistan Telecommunication Authority (Function and Powers) Regulations, 2006 regulates the procedure relating to the issuance of and adjudication upon SCN's, and as per Regulation 27 of the same, a SCN and all ancillary proceedings shall be conducted by the Authority or an officer not below the rank of the Director from Law Division, however, the SCN has been issued by Mr. Farhan Habib Ahmed, Director (Enforcement Wireless-1), thus, the said officer had no jurisdiction to issue the SCN. It is trite law that when a law requires something to be done in certain manner, it is to be done in that manner and anything to the contrary would be a nullity in the eyes of the law.

1.5.1.3 W.P No. 20099/2021 titled “PMCL vs FOP & Others” SCN dated 30th September, 2020

a. In this petition the licensee contended that the SCN dated 30th September, 2020 and the hearing Notices dated 9th March, 2021 and 10th March, 2021 have been issued

without affording an opportunity of being heard to the licensee which is otherwise a fundamental right as enshrined under Article 4 and 10-A of the Constitution.

b. The licensee further contended that it is a fundamental principle of law that an authority enjoying discretion powers, exercises the same without any guidelines but at the same time such authority must not exercise the discretion arbitrarily and capriciously. It may not be obligatory for the concerned authority to exercise the discretion in a particular manner but the exercise of such power in an unreasonable manner is not proper, however, PTA seems to be lacking in fulfilling the aforesaid standards as it is exercising its discretionary powers arbitrarily and capriciously and keeping in view such conduct, the SCN and hearing Notices are liable to be set-aside.

c. The licensee submitted that it had been complying with the instructions of the Authority in the past, however, it is a canon of law that there is no estoppel against law, therefore, such conduct of the licensee would not be held against it.

2. FINDINGS OF THE AUTHORITY:

Standard Operating Procedure Issued by Authority (*for sale of SIM*)

2.1 Pakistan Telecommunication Authority (PTA) issued SOP dated 2nd April, 2019 for sale of SIM and activation through Biometric Verification. As per clause 5(q) of the SOP, concession was granted to CMOs to carry out door to door/ kiosk activities only after approval of PTA. However, it has been observed that the CMOs started blatantly misusing the permission for the purposes of conducting Kiosk/door to door sale activities. On account of persistent violation of the clause 5(q) of the SOP, a letter dated 25th June, 2020 was issued wherein it was stated that **“all non-compliant operators are, therefore, directed to stop stall activities with immediate effect”**.

2.2 Clause 5(q) of the SOP provides that door to door/kiosk activity shall be carried out only after approval from PTA on case to case basis. The permission may be obtained wherever there is need for Kiosk/door to door sale/ activities. The CMOs on the other hand have been attempting to claim and assert an unfettered right of selling of SIMs without fulfilling the procedures (*without permission*) as laid down under the applicable regulations and SOPs which has serious national security and law & order related implications.

PTA directions with regard to unabated stall activities by CMOs

2.3 The licensee's submission that the letter dated 25th June, 2020 issued by PTA was without affording an opportunity of hearing thus unjustified. The Authority is of the view that there is no question of being condemned unheard. In the said letter, all non-compliant operators were directed to stop stall activities with immediate effect. In this regard it is

clarified that in the impugned letter only legal position was intimated and conveyed to all CMOs.

2.4 The licensee's articulation that a blanket ban vide letter dated 25th June, 2020 is lacking just and legal reasoning or interpretation is misconceived. The fundamental reason behind the stopping of Kiosk/stall/ door to door sale/activities was that the CMOs indulged in misusing/abusing the said concession and continued to conduct Kiosk/ Door to Door activities and as a result the number of grey SIMs in the market arose to an alarmingly high level. It is pertinent to mention here that the instructions vide letter dated 25th June, 2020 were issued and applicable to those licensees who are non-compliant and not for those licensees who were carrying out Kiosk/Door to Door sale activities as per applicable regulatory laws.

2.5 The contention of the licensee that restrictions imposed by Authority on a lawful trade are to be adjudged on the touchstone of the doctrine of proportionality, and the letter dated 25th June, 2020 being capricious and arbitrary and substance fails the test of proportionality is based on misperception. In this regard, it is stated that concerns of national security and law & order situation is more than sufficient to satisfy any threshold of proportionality. Regulation of any activity necessarily entails the aspect of restriction if the same is required. If the Authority does not impose these restrictions, the very purpose of having a regulatory framework would become redundant.

2.6 The licensee's contention that insertion of clause 5(q) of the SOP has curtailed the right of free lawful trade and the same is in violation of Article 18 of the Constitution which provides equal rights of free lawful trade is based on misconception. It is clarified that the regulatory framework in place sufficiently empowers the Authority to impose requirement of prior approval for carrying out such activities. In addition, there is nothing in the law that allows the licensee to conduct or carry out the same in an unfettered way. It is completely unnecessary to have sale of SIMs carried out at every road and corner since that leads to serious issues of non-compliance and has grave repercussions for national security and law & order. It is pertinent to mention here that the Authority has not completely banned the Kiosk activities, permission has been granted for the same even after issuance of the letter dated 25th June, 2020.

2.7 The licensee's submission that sale of SIM cards includes certain pre-conditions such as the submission of CNIC, verification process etc. are sufficient thus restrictions imposed vide clause 5(q) of the SOP are unwarranted and tantamount to violation of Article 4, 18 of the Constitution is incorrect and not in line with the prevailing laws. The licensees have repeatedly pointed out that they are not in a position to control their existing sale channels, whereas at the same time they wish to obtain an unfettered right to sell SIMs through Kiosk/ Stall/ door to door sale/ activity, which cannot be allowed/permitted since lapses and non-compliance in this context has grave repercussions for national security and law & order

situation. The licensee's only concern over here appears to be maximizing its commercial profits, even if it is done at the cost of national security and law & order concerns for the public at large.

Show Cause Notices under section 23 of the Act

2.8 With regard to issuance of SCNs, it is clarified that the under section 23 of the Act the Authority is empowered to issue SCN on the contravention of license conditions and provision of the Act. For ready reference section 23 of the Act is reproduced below:

"23(1). Where a licensee contravenes any provision of this Act or the rules made thereunder or any term or condition of the licence, the Authority [or any of its officers not below the rank of Director] may by a written notice require the licensee to show cause within thirty days as to why an enforcement order may not be issued.

(2) The notice referred to in sub-section (1) shall specify the nature of the contravention and the steps to be taken by the licensee to remedy the contravention.

(3) Where a licensee fails to—

- (a) respond to the notice referred to in sub-section (1); or*
- (b) satisfy the Authority [or any of its officers not below the rank of Director] about the alleged contravention; or*
- (c) remedy the contravention within the time allowed by the Authority, [or any of its officers not below the rank of Director], the Authority [or any of its officers not below the rank of director], may, by an order in writing and giving reasons—*
 - (i) levy fine which may extend to three hundred and fifty million rupees;*
or
 - (ii) suspend or terminate the license, impose additional conditions or appoint an Administrator to manage the affairs of the licensee, but only if the contravention is grave or persistent.*

(4) Without prejudice to the provisions of sub-section (1) and sub-section (3), the Authority [or any of its officers not below the rank of Director] may, by an order in writing, suspend or terminate a license or appoint an Administrator, if the licensee—

- (a) becomes insolvent or a receiver is appointed in respect of a substantial part of the assets;*
- (b) being an individual, become insane or dies.*

Explanation—*For the purpose of this section, the Administrator shall be appointed from amongst the persons having professional knowledge and experience of telecommunication."*

Dated: 31st August, 2021

2.9 In light of said section, the Authority after receipt of reply to the SCN and providing an opportunity of hearing to the licensee passes enforcement orders. Therefore, issuance of SCNs do not require any prior opportunity of hearing. The licensee in reply to the SCN is required to provide reasons and justification against contravention alleged in the SCNs.

2.10 All SCNs issued to the licensee were in accordance with the provisions of the Act and required the license to remedy the contravention as mentioned in the SCNs. The reasons for issuance of SCN have explicitly been provided which show persistent default on the part of the licensee with regard to non-adhering legal regulatory requirements. Thus, all SCNs issued by the Authority are within the provisions of the Act. These SCNs will be disposed of after providing an opportunity of hearing to the licensee.

3. ORDER:

3.1 What has been discussed above, it is concluded that the licensee has failed to place on record any cogent, satisfactory and plausible reasons in support of its assertions made with regard to setting-aside letter dated 25th June, 2020, clause 5(q) of the SOP dated 2nd April 2019, and Show Cause Notices dated 30th September, 2020, 9th October, 2020 and 10th February, 2021, therefore, all actions and proceedings initiated as per applicable regulatory regime are within the four corners of law.

Maj. Gén. Amir Azeem Bajwa (R)
Chairman

Muhammad Naveed
Member (Finance)

Dr. Khawar Siddique Khokhar
Member (Compliance & Enforcement)

Signed on 31st day of August, 2021 and comprises of (0) pages only.