



Enforcement order under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 against Telecard Limited

Date of Issuance of Show Cause Notice: 14th January 2011, 14th April 2011, 12th May 2011, 24th May 2011, 15th July 2011, 16th August 2011, 6th October 2011, 18th November 2011, 23rd November 2011, 26th January 2012, 28th February 2012, 15th March 2012 and 13th April 2012

Venue of Hearing: PTA HQs, Islamabad
Date of Hearing: 20th May 2011, 1st December 2011 and 29th May 2012

The Authority present:

Dr. Mohammad Yaseen: Chairman
Dr. Khawar Siddique Khokhar: Member (Technical)

The Issue:

“Non-payment of APC for USF Contribution”

DECISION OF THE AUTHORITY

BRIEF FACTS:

1.1 Telecard Limited (the “licensee”) was awarded a non-exclusive license No.LDI-05(10)-2004 dated 3rd August, 2004 by the Pakistan Telecommunication Authority to establish, maintain and operate telecommunication system and provides telecommunication services in Pakistan subject to the terms and conditions contained in the license and required to comply with the prevailing regulatory laws time being in force.

1.2 Under section 4(1)(k) of the Pakistan Telecommunication (Re-organization) Act, 1996 (the “Act”), the Pakistan Telecommunication Authority (PTA) is mandated to regulate the Access Promotion Contribution. In accordance sub-rule 2 of rule 5 of Access Promotion Rules, 2004 (AP Rules) and sub-regulations (3) and (4) of regulation 6 and sub-regulation (2) of regulation 10 of Access Promotion Regulations, 2005 read with license condition No.4.1.3 and 9.1.3 of the license, the licensee is obliged to deposit APC for USF contribution (the “Contribution”) within ninety (90) days after the end of the calendar month for which the payment obligation arises.

1.3 In performance of statutory functions, PTA demanded and required APC for USF contribution for the months July to September 2010 (Rs.300,233,446/-), October & November 2010 (Rs.264,207,443/-), December 2010 (Rs.98,538,995/-), January 2011

(Rs.94,262,914/-), February 2011 (Rs112, 442,915/-), March 2011 (Rs.120,957,958/-), April 2011 (44,748,618/-), May 2011 (Rs.47,908,225/-), June 2011 (Rs.60,168,965), July 2011 (Rs.81,027,460), August 2011 (Rs.71,462,762), September 2011 (Rs.58,539,825), October 2011 (Rs. 7,341,978) and November 2011 (Rs. 8,250,052) from the licensee. Despite various demand, the licensee did not pay the said contribution within due dates. Subsequently due to aforesaid contravention thirteen (13) Show Cause Notices vide dated 14th January 2011, 14th April 2011, 12th May 2011, 24th May 2011, 15th July 2011, 16th August 2011, 6th October 2011, 18th November 2011, 23rd November 2011, 26th January 2012, 28th February 2012, 15th March 2012 and 13th April 2012 were issued under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the "Act").

1.4 As per SCNs, the licensee was required to pay outstanding Contribution along with late payment charges with seven days and explain in writing within thirty days of the issuance of the SCN as why the license should not be suspended, terminated or any other enforcement order should not be passed against the license under section 23 of the Act. The licensee replied the SCNs and denied allegation on the common grounds i.e., AP Rules, 2004 and AP Regulations, 2005 have been challenged in C.P.L.A No.459 of 2009 in Supreme Court of Pakistan and a C.P No.3223 of 2010 is also pending adjudication in Sindh High Court at Karachi wherein the court has restrained the Authority from suspending/cancelling or disturbing the licensee's traffic in any way. The licensee also replied that APC for USF charges are not payable by the licensee as the same have not been calculated in accordance with the AP Rules and AP Regulations.

1.5 In light of replies filed by the licensee, the matter was fixed for hearing on 20th May, 2011 and 1st December, 2011. Brig (R) Shahid Naeem Butt attended the hearings on the said dates. The licensee reiterated the same points as was submitted in written arguments. In nutshell, main grounds of the licensees are under:

- a) That PTA has failed to determine the APC for USF Contribution in accordance with Rule 8(4) of the 2004 and has only arbitrarily notified the APCL Contribution as a fixed rate of US\$ 0.055 vide its letter dated June 19, 2009 and is demanding APC for USF at the rate of US\$ 0.055 which is against the very spirit and intent of rule 8(4) of the AP Rules 2004, the Policy and the Information Memo which do not envision the APCL Contribution as a fixed amount. Hence PTA's letter dated June 19, 2009 and all previous letters notifying the APC or APCL Contribution as an arbitrary fixed amount contrary to the AP V 2004 are illegal, without lawful authority, void ab initio and of no legal effect.
- b) That the amounts being demanded by PTA on account of APC for USF Contribution are based on incorrect and illegal calculations that are contrary to the provisions of the AP Rules 2004 and the AP Regulation 2005 s and are illegal, without lawful authority, void ab initio and of no legal effect.
- c) That PTA has set the ASR for July to September, 2010 at the arbitrary rate of US\$ 0.105 which is much higher than the internationally prevalent settlement rates. Further PTA has only notified one ASR for all the countries in the world instead of a separate ASR for each country of the world as required to be notified under t Rules he AP 2004. The ASR as notified is US\$ 0.105 does not reflect the actual rates in practice in the world. The ASR is in any case required to be one half (50%) of the Approved Accounting Rate but PTA has failed to correctly notify the Approved Accounting Rate since the coming into force of the AP Rules 2004.
- d) That PTA did not correctly frame the Approved Accounting Rate and PTA did not correctly determine ASR which is required to be one half of the Approved

Accounting Rate. Further, PTA cannot fix ASR arbitrarily as the same needs to be derived from Approved Accounting Rate.

- e) That the settlement rate trend for Pakistan traffic is continuously downward since 2008 and despite being aware of such trend PTA has failed to revise the APC for USF Contribution under Rule 9 of the 2004 Rules which is causing loss of business to the licensee and hindering the progress of the licensee, hence, PTA is liable for not performing its statutory duty under Rule 9 of the 2004 Rules and is inhibiting the licensee ability to carry on its lawful business which act of PTA is violative of the licensee 's right under Article 18 of the Constitution.
- f) That PTA did not review/revise the APC for USF every 6 months despite the fact that it knew the actual settlement rate was declining rapidly and LDI share was declining. This is neglect of PTA's duties and has been done only to benefit Pakistan Telecommunication Company Limited (PTCL) which has been the only beneficiary of the high APC rate.
- g) That PTA has failed to prevent PTCL from cross subsidizing APC for USF payments from APCL received by it from LDI operators and other revenues, which is the real cause behind the rapid collapse of the ASR. PTCL is trying to kill competition from LDI operators like the Respondent by such illegal cross subsidization, and PTA is neglecting its obligation to protect operators like the licensee from this abuse of power by PTCL which is a significant market player (SMP).
- h) That PTA is demanding the APC for USF Contribution from the licensee based on its own calculation of APCL Contribution which is against the AP Rules 2004 and the AP Regulations 2005 and hence illegal and is tantamount to compelling the licensee to do which the law does not require it to do. Such act of PTA being in violation of Article 4 of the Constitution.
- i) The price of international calls coming into Pakistan have declined substantially and LDI operations have not yielded the 6 cent margin (or anywhere close to it) as promised by the Policy due to its incorrect application by PTA.

2. Findings of the Authority

2.1 The Authority has examined the arguments made and filed by legal counsel of the licensee during the hearing and reached to the conclusion that the aforesaid objection/ grounds mentioned in 1.5 above all are based on incorrect information of law and facts on the subject , hence, do not convince the Authority in the light of following reasoning:

- i. Since the licensee is under obligation to pay Access Promotion Contribution for USF (APC for USF Contribution), as defined under the Access Promotion Rules, 2004 (the "AP Rules"), the Access Promotion Regulations, 2005 (the "AP Regulations") and the terms and conditions of Long Distance & International (LDI) License issued to the licensee, hence, non-payment within the timeline of 90 days constitute contravention of the said provisions of Rule/ Regulation/ license condition.
- ii. The PTA had rightly determined the ASR as per Rule 8 of the AP Rules since 2005 and have been regularly reviewing the level of APCL and APC for USF under Rule 9 of the AP rules after consultation with all stakeholders and in case of revision, the same has been notified 30 days before its implementation. Some of the review of ASR notified by the Authority were challenged before Islamabad High Court in 2008, 2009 and 2011 and all the petitions were either dismissed or withdrawn, hence, the statement that ASR was not determined in accordance with rule 8 of AP Rule is based on incorrect information of law and fact on the subject, hence, is not accepted.

- iii. That the levels of ASR, APCL and APC for USF have been reviewed/ revised in accordance with rule 9 of AP Rules and after consultation with LDI operators including the licensee and method of calculation of APCL and APC for USF are provided in AP rules/ regulation, hence, this argument is also based on incorrect information of law and facts on the subject, hence, is not accepted.
- iv. Rest of the assertions of the licensee that rate US\$ 0.105 is higher than internationally prevalent rates, PTA failed to correctly frame approved accounting rates, the trend of settlement rate for Pakistan is downward since 2008, PTA failed to prevent PTCL from cross-subsidizing etc. are either based on incorrect information, or the licensee failed to establish the same through evidences, hence, such false, fabricated, wrong and misconceived assertions do not merit for stopping the legal demand of APC for USF from the licensee against the minutes terminated on mobile networks in Pakistan, hence, these assertions of the licensee are not established and are not accepted.
- v. Again the statement of the licensee that the price of incoming international calls for Pakistan have declined substantially, hence, not yielding US 6 cent margin to the operator, is not based on correct information. No doubt the price of incoming international calls has reduced significantly, however, there is handsome premium/ margin over and above the cost of termination (i.e. US 5 cents per minute), and hence, this statement is denied being factually incorrect.
- vi. In fact, the APC and USF regimes were introduced in furtherance of and within the dictates of De-regulation Policy of July 2003 (the "Policy") by the Federal Government for the telecom sector of Pakistan through which the licensee along with other operators, became eligible and got issued Long Distance & International (LDIs) *vis-à-vis* Local Loop (LLs) Licenses. The Policy under its clauses 4.3 and 5 introduced the regimes / obligations of APC and USF, respectively and both these regimes are covered under the terms and conditions of licenses, i.e. LDIs & LLs. The licensee along with other operators/licensees agreed to and accepted all the terms and conditions of licenses; including both the regimes/obligations of APC and USF, respectively by virtue and mandate of their licenses. In addition, the questions of law and facts concerning the *intra-vires* and/or *ultra-vires* of the AP Rules, AP Regulations and the regimes enumerated therein have been decided in favor of the Authority by the then Islamabad High Court in its judgment dated 21-01-2009 on the subject which is already *subjudice* and *pending adjudication* for final decision / judgment before the august Supreme Court of Pakistan in CPLA's 438,439,451,459/2009 against the orders of the Islamabad High Court. Since no restraining order has been passed by the Supreme Court of Pakistan, therefore, implementation of AP Rules cannot be stopped.
- vii. APCL is applicable for the international incoming traffic terminated on Local Loop network while APC for USF is applicable for the international incoming traffic terminated on cellular Mobile Operator Networks. It may kindly be noted that the share of international incoming traffic terminated on Local Loop network is 20% which goes to APCL and share of international incoming traffic terminated on CMO's is 80% which goes to APC for USF.
- viii. The Authority is of the considered view that the licensee is under an obligation to pay APC for USF as per the time line given in AP Rules/ Regulations. Non-payment of dues by the licensee is a contravention of license conditions and therefore, in such

circumstances, the Authority under section 23 of the Act is empowered to take action as per applicable special law on the subject.

- ix. It would not be out of context to mention here that the APC regime has been validly implemented and there is no discrimination or preferential treatment in respectful compliance of all the applicable provisions of law on the subject ranging from the Policy, the AP Rules, the AP Regulations, the USF Rules of 2006 (the “USF Rules”) and the license conditions as per the functions, powers and responsibilities given to the Authority under the Act. The Authority believes that the licensee itself misconceived and wrongly assumed that it is not in accordance with Access Promotion Rules 2004 and Access Promotion Regulations 2005 despite the fact that Islamabad High court in its judgment held that AP Rules are validly framed. APC is a value determined by the Authority and not a residue as perceived by the licensee.

3. ORDER

3.1 In view of the aforementioned, the Authority is of the view that the licensee is under an obligation to make payments of outstanding dues of Rs.1,370,091,556/- on account of APC for USF for the months of July, August, September, October, November, December 2010 and January, February, March, April, May, June, July, August, September, October and November and require the licensee to make the aforesaid payment IMMEDIATELY without any further delay.

3.2 However, the issue related to imposition of fine under regulation 10 (6) of the AP Regulations for the defaulted period shall be decided after recalling of restraining orders/disposal of the case, whichever is earlier.

3.3 In case of non-payment of the aforesaid dues as per Para 3.1 above, the matter shall be further processed as per applicable laws.

(Dr. Khawar Siddique Khokhar)
Member (Technical)

(Dr. Mohammad Yaseen)
Chairman

This enforcement order is signed on _____ and comprises 05 pages.