



**PAKISTAN TELECOMMUNICATION AUTHORITY**  
**HEADQUARTERS, F-5/1 ISLAMABAD**  
**Ph: 051-9225328 Fax: 051-9225338**

**Enforcement order under sub-section 3 of section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 against Redtone Telecommunication Pakistan (Pvt)Ltd**

**File No. PTA/Commercial Affairs/Access promotion Contribution/202/2009**

Date of Issuance of Show Cause Notice: 19<sup>th</sup> March, 2010  
Venue of Hearing: PTA HQs, Islamabad  
Date of Hearing: 21<sup>st</sup> April, 2010

**The Authority Present:**

Dr. Mohammed Yaseen:	Chairman.
S. Nasrul Karim Ghaznavi:	Member (Finance)
Dr. Khawar Siddique Khokhar	Member (Technical)

**The Issue: "Non-payment**

of APC for USF charges"

**DECISION OF THE AUTHORITY**

**I. BRIEF FACTS:**

1. Redtone Telecommunication Pakistan (Pvt.) Limited (the "licensee") is a private limited company incorporated under the Companies Ordinance, 1984 and was awarded a Long Distance International license on 16<sup>th</sup> August, 2004 bearing No. LDI-06 (02)-2004 (the "license") issued by the Pakistan Telecommunication Authority (the "Authority") to establish, maintain and operate Telecommunication System in licensed region on the terms & conditions contained in the license.

2. Powers of the Authority to issue Show Cause Notice: Under section 23 of the Act, whenever provisions of the Act, the rules framed thereunder or the terms and conditions of licence are contravened by a licensee, the Authority may proceed against it with the issuance of a show cause notice. For ready reference, the said section is reproduce as under;

**Section 23 of the Act:**

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 about the alleged contravention; or*

*(a) 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—*

*ft) levy fine which may extend to three hundred and fifty million rupees; or*

*(ii) suspend or terminate the licence, 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 licence 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.*

3. Briefly stated that the licensee has failed to make the payments for the months licensee has failed to make the payments for the months of July, August, September, and October, 2009 amounting to Rs. 199,419,0747- (Rs.46,317,850/-+ Rs.50,871,281/-+ Rs.42,786,210/-+Rs.59,443,7337-. on account of APC for USF Contribution (calculated on the basis of traffic-data submitted by the licensee for the aforesaid months only), despite repeated demands of the Authority, in contravention of the AP Rules, the AP Regulations, condition of the license arid directives of the Authority, therefore, the licensee was issued show cause notice vide\_ No.PTA/Commercial Affairs/Access promotion Contribution/202/2009/951 dated 19<sup>th</sup> march, 2010 under section 23 of the Act whereby required the licensee to remedy the aforementioned contravention by making the payments of Rs.199,419,074/- immediately of receiving the aforesaid notice and also submit written reply to the Notice within thirty (30) days of the issuance of the Notice and explain as to why the license should not be suspended, terminated or any other enforcement order should not be passed under section 23 of the Act against the

licensee. The licensee replied the notice vide its letter No.A&R/RTP/PTA/1 0/9280-2 dated 14<sup>th</sup> April, 2010 through its counsel Azam & Rai in the following terms:

**SUBJECT: REPLY TO SHOW CAUSE NOTICE DATED 19.03.2010 UNDER SECTION 23 OF THE PAKISTAN TELECOMMUNICATION (RE-ORGANIZATION) ACT, 1996 ON BEHALF OF REDTONE TELECOMMUNICATIONS PAKISTAN (PVT.) LTD**

1. We are writing on behalf of Redtone Telecommunications Pakistan (Pvt.) Ltd. (hereinafter referred to as "our Client") who have placed in our hands your Show Cause Notice No., PT A/Commercial Affairs/APC/202/2009/951 dated 19.03.2010 (the "Impugned Show Cause Notice") wherein you have threatened action against our Client under Section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996 (the "1996 Act"), if our Client does not deposit Access Promotion Contribution for Universal Service Fund ("APC for USF") dues for the period July-October 2009 amounting to Rs. 199,419,074/- and have asked our Client to make the payment of Rs. 199,419,074/- and also to show cause in writing within 30 days of the said Show Cause Notice as to why the our Client's Long Distance International License No. LDI-06(02)-2004 dated 16.08.2004 (the "License") should not be suspended or any other enforcement order-should not be passed against our Client under Section 23 of the 1996 Act.

2. Vide our earlier Notice dated 03.02.2010 and our Reply dated 05.03.2010 to your Notice dated 04.03.2010, which were served on the Pakistan Telecommunication Authority ("PTA") via fax and courier, we had informed you that our Client had filed Writ Petition No. 399 of 2010 titled Redtone Telecommunications Pakistan (Pvt.) Ltd. v. Pakistan Telecommunication Authority & Another in the Rawalpindi Bench of the Hon'ble Lahore High Court (the "Petition") against the PTA.

3. Vide his Order dated 02.02.2010, the Hon'ble Mr. Justice Asad Munir of the Lahore High Court, Rawalpindi Bench was pleased to restrain the PTA from suspending the international incoming traffic of our Client. A copy of the Hon 'ble High Court's Order dated 02.02.2010 was enclosed with our aforesaid Notice dated 03.02.2010, for the PTA's information and due compliance. It may be pertinent to mention that the aforesaid restraining order is all-encompassing and generic in nature.

4. Notwithstanding the above and without prejudice to our Client's stance that the PTA is not competent to issue it with a show cause notice under Section 23 of the 1996 Act nor take any action against our Client thereunder, our Client hereby makes the following representations as to why the License should not be suspended or terminated or any other enforcement order should not be passed against our Client under Section 23 of the 1996 Act:

(i) That the Impugned Show Cause Notice is in blatant violation of the Order dated 02.02.2010 of the Rawalpindi Bench of the Hon'ble Lahore High Court and tantamount to contempt of court.

(ii) That our Client was originally the subsidiary of Redtone International Berhad, a limited liability company incorporated in Malaysia. On 24.12.2008, our Client was acquired by Quantum Global Networks, Inc. a limited liability company incorporated in the U.S.A. (hereinafter referred to as "QGN") upon issuance of a No Objection Certificate ("NOC") dated 24.12.2008 by the PTA. It

*may be pertinent to mention that, under Rule 11 of the Pakistan Telecommunication Rules, 2000 ("2000 Rules"), a telecom company requires PTA's NOCs for changes in both its (i) ownership (shareholding) and (ii) control (which, inter alia, includes management e.g. board of directors, chief executive, etc.). Whereas PTA approved the change of our Client's ownership vide the aforementioned NOC dated 24.12.2008, it severely delayed the approval of the change of our Client's management in blatant violation of Section 6(c) of the 1996 Act (which states that the PTA "shall ensure that all applications made to it are disposed of expeditiously") with adverse consequences for our Client (as explained in the succeeding paragraphs). Pursuant to Section 205 of the Companies Ordinance, 1984, our Client duly filed a Form 29 dated 14.03.2009 with the Securities & Exchange Commission of Pakistan (hereinafter referred to as the "SECP") to notify the SECP of the change in its management. For the reasons already explained hereinbefore, the SECP cannot approve a change in the management of a telecommunications company 'without the PTA's approval. The SECP, therefore, applied to the PTA for approval of the change in our Client's management vide its Letter No. ADR-I/R/156/14174 dated 29.05.2009, i.e. after an unexplained delay of approximately 2.5 months from the date of filing of the Form 29 by our Client. At its end, the PTA kept the matter pending and did not issue its approval/NOC to the SECP until 15.01.2010 vide its letter of the same date, i.e. after an unreasonable delay of approximately 7.5 months of receiving SECP's intimation and approximately 10 months since our Client filed the Form 29 with the SECP.*

*> Copies of (i) PTA's NOC for acquisition of our Client by QGN dated 24.12.2008; (ii) Press Releases on the acquisition of our Client by QGN dated 06.03.2009; (iii) PTA's NOC/approval of change of our Client's management dated 15.01.2010 and (iv) Form 29 dated 14.03.2009 are already on record with the PTA through our Client's Petition.*

*(Hi) That it may be pertinent to mention that our Client's customers/carriers make their payments to its holding company, namely Quantum Global Networks, Inc. (QGN) in the U.S.A., which, inter alia, is tasked by our Client with overseas customer dealings and collection of revenues, which are then remitted by QGN to our Client in Pakistan. Our Client was due to receive funds from QGN on account of revenues generated from incoming international traffic terminating in Pakistan, which formed the substantial, indeed bulk, part of our Client's revenues and were to be used by it for the payment of APC for USF. Due to the security checks by the U.S. authorities on all large fund transfers to Pakistan, the U.S. authorities enquired from QGN as to the nature of the proposed transfer of funds to Pakistan, especially considering the Lebanese origin of QGN's CEO. When the U.S. authorities were informed by QGN that these funds were to be transferred to our Client, which was its newly-acquired subsidiary in Pakistan, the U.S. authorities decided to independently verify the same. When, upon such verification, it transpired that the management control of our Client was in the hands of a Malaysian company (due to non-approval of the Form 29 dated 14.03.2010 by PTA), the U.S. authorities blocked the transfer of funds from QGN to our Client as a result of which our Client was deprived of the primary source of its revenue, which, inter alia, resulted in its defaulting on the APC for USF from July 2009 onwards.*

- (iv) *That, as can be seen from the above, our Client's default inpayment of APC for USF for February 2009 (which were, subsequently, cleared through other sources) and for July 2009 onwards, arises directly as a result of the unreasonable delay on part of PTA in approving the change of management and intimating the same to the SECP in contravention of Section 6 of the 1996 Act. Our Client has been forced into defaulting on the APC for USF payments as a result of the PTA's own omission/commission in delaying the approval of our Client's change of management pursuant to Rule 11 of the 2000 Rules and keeping the same pending for approximately 7.5 months in blatant violation of Section 6(c) of the 1996 Act, which resulted in the U.S. authorities blocking the transfer of funds from our Client's holding company in the U.S.A. that were to be used by our Client for fulfilling its APC for USF obligations. Therefore, our Client is being punished for the commissions/omissions of PTA in contravention of the legal maxim nemo punitur pro alieno delicto ("no person shall be punished for the wrongful act of another").*
- (v) *That our Client has otherwise been diligent in the payment of its APC for USF. Prior to its change of ownership and management, our Client made a total of Rs. 95,632,234/- in APC for USF payments for the period of January 2005 to December 2008. When QGN acquired our Client in December 2008, it inherited a liability of unpaid APC for USF amounting to Rs. 24,013,173 in arrears, which it duly paid in six (6) installments. Subsequently, our Client has been paying its APC for USF within time (with the exception of APC for USF for February 2009, which was briefly delayed for the reasons aforesaid but, subsequently, paid and the APC for USF for the period July 2009 onwards, which are the subject-matter of the Impugned Show Cause Notice). The following table shows the APC for USF payments made by our Client till date:*

S. No.	PERIOD FOR WHICH APC FOR USF DUE	APC OR USF PAYMENT (Rs.)	DATE OF PAYMENT	CHEQUE No.
1	January 2005 to December 2008	95,632,234	2005-2008	-
2	1 <sup>st</sup> Installment in arrears for outstanding APC for USF from October 2008 to January 2009	5,375,690	26.06.2009	1736002
3	2 <sup>nd</sup> Installment in arrears for outstanding APC for USF from October 2008 to January 2009	5,375,690	16.07.2009	1736049
4	3 <sup>rd</sup> Installment in arrears for outstanding APC for USF from October 2008 to January 2009	5,375,690	03.08.2009	4626124
5	4 <sup>th</sup> Installment in arrears for outstanding APC for USF from October 2008 to January 2009	5,375,690	21.08.2009	4626010
6	5 <sup>th</sup> Installment in arrears for outstanding APC for USF from October 2008 to January 2009	3,384,620	02.10.2009	8632839
7	6 <sup>th</sup> Installment in arrears for outstanding APC for USF from October 2008 to January 2009	3,384,620	30.10.2009	8632797
8	Payment of adjustment	640,065	02.10.2009	8632840
9	February 2009	22,729,486	02.07.2009	4626047

10	March 2009	38,460,422	02.07.2009	4626048
11	May 2009	60,939,462	24.08.2009	4626018
12	April 2009	39,539,136	27.07.2009	4626086
13	June 2009	60,199,169	15.10.2009	8632874
14	July 2009	9,263,570	15.11.2009	8632828
	<i>Total ARC for USF paid:</i>	<i>355,675,544</i>		

> Copies of the above APC for USF Payment Cheques & Receipts (along with covering letters) are already on record with the PTA.

(vi) That from the above, the folio-wing balance of payments situation can be deduced:

<i>Balance of Payments for APC for USF (January 2005 to December 2009)</i>	
<i>APC for USF Payable:</i>	<i>Rs. 650,166,960</i>
<i>APC for USF Paid:</i>	<i>Rs. 355,675,544</i>
<i>APC for USF Outstanding:</i>	<i>Rs. 294,491,416</i>

(vii) That in accordance -with Reg. 10(6) of the Access Promotion Regulations, 2005 (the "2005 Regulations"), our Client is paying, and the Ministry of Information Technology, Government of Pakistan is accepting, payment of a late payment surcharge @ 1.5% on the outstanding amount per month on the delayed APC for USF for the months of July 2009 onwards and has, to date, paid a total of Rs. 3,554,328/- as late payment surcharges for these months (for which the Impugned Show Cause Notice has been issued), the breakdown of which is given in the table below:

<i>&amp; No.</i>	<i>Late Payment Surcharge Period @ 7.5% of Outstanding ARC for USF per Month</i>	<i>Amount Paid by our Client</i>	<i>Date of Payment</i>
<i>1</i>	<i>July 2009 and August 2009 (2 months)</i>	<i>Rs. 1,457,836</i>	<i>15.12.2009</i>
<i>2</i>	<i>July 2009 to September 2009 (3 months)</i>	<i>Rs. 2,096,492</i>	<i>15.01.2010</i>
<i>3 J</i>	<i>July 2009 to October 2009 (4 months)</i>	<i>Rs. 2,847,037</i>	<i>17.02.2010</i>
<i>4</i>	<i>July 2009 to November 2009 (5 months)</i>	<i>Rs. 3,850,936</i>	<i>17.03.2010</i>
<i>5</i>	<i>July 2009 to December 2009 (6 months)</i>	<i>Rs.4,417,371</i>	<i>Will be paid on 15.04.2010</i>
	<i>Total:</i>	<i>Rs. 14,669,672</i>	

*> Copies of our Client's Payment Receipts (along with covering letters) for Late Payment Surcharge on APC for USF for the period July to December 2009 are already on record with the PTA.*

*(viii) That the Impugned Show Cause Notice is in blatant violation of, and does not take into consideration, Clause 12.2 (Force Majeure) of the License clearly states that: "Notwithstanding anything contrary... contained in this License, if the Licensee shall be rendered unable to carry out the whole or any parts of its obligations under this License for any reason beyond the control of the Licensee... then the performance of obligations of the licensee as it is affected by such cause shall be excused during the continuance of any inability so caused, provided that the Licensee has taken all appropriate precautions and reasonable measures to fulfil its obligation and that it shall within 14 days of its first occurrence notify to the Authority the same and cause of such inability and its effects to remove such cause and remedy its consequences." Pursuant to Clause 12.2 of the License, our Client had immediately informed the PTA of the situation arising out of the non-approval of its change of management by the PTA and the resulting blockage of the transfer of funds from QGN by the U.S. authorities and had requested a respite of the same in its various meetings and correspondences with the PTA, which are listed as follows:*

- (i) Our Client's Letter to PTA dated 18.05.2009*
- (ii) Our Client's Letter to PTA dated 22.06.2009*
- (Hi) Our Client's Letter to PTA dated 05.11.2009*
- (iv) Our Client's Letter to PTA dated 15.12.2009*

*-Copies of our Client's aforesaid letters are already on record with the PTA.*

*(ix) That the Impugned Show Cause Notice is in blatant violation of, and does not take into consideration, Clause 8.2(c) of the General License Conditions, applicable to the License, which are contained in Appendix 'B' pursuant to Rule 7(4) of the 2000 Rules and which provide that: "The Licensee shall have no liability for any failure or delay in complying with any provision of this License if, and to the extent and for so long as, that compliance is prevented or substantially hindered by... any other act of governmental or municipal authorities, or other national authorities, or international organisations, or any other cause whatsoever which is substantially beyond the control of the Licensee."*

- (x) *Section 23 of the 1996 Act would not be the penalty that would be attracted or applicable in the present case. The penalty prescribed by law for non-payment or late-payment of APC for USF is Regulation 10(6) of the 2005 Regulations, which prescribes a fine for the same.*
- (xi) *The Impugned Show Cause Notice is unlawful, ultra vires, mala fide, arbitrary, discriminatory, unreasonable and contrary to the principles of natural justice.*
- (xii) *The Impugned Show Cause Notice is contrary to the law and the facts and the same suffers from inherent defects in light of the same.*
- (xiii) *The Impugned Show Cause Notice has been issued in complete contravention of Section 23 of the 1996 Act and Rule 9 of the 2000 Rules.*
- (xiv) *The Impugned Show Cause Notice is in contravention of Section 10(6) of the 2005 Regulations. The only specific penalty provided under Reg. 10(6) of the 2005 Regulations for failure to make payment is a fine as stipulated thereunder. In accordance with the rules of statutory interpretation, the express mention of a fine as penalty under Reg. 10(6) for failure to make payments excludes all other general penalties under law and our Client's Licence. The applicable rule of statutory interpretation is *expressio unius est exclusio alterius* (the express/special mention of one thing operates as the exclusion of things differing from it).*
- (xv) *The Impugned Show Cause Notice is ultra vires of the 2005 Regulations and the 1996 Act and is liable to be set aside on this ground alone.*
- (xvi) *The Impugned Show Cause Notice is violative of Section 6 of the 1996 Act, inasmuch as the PTA has, in breach of their statutory obligations thereunder, already exercised and are threatening further exercise of power:-*
- (a) *in violation of the rights of our Client, in contravention of Section 6(a) of the 1996 Act;*
  - (b) *that would result in unfair benefits being accrued to the our Client's competitors to the detriment and at the cost of our Client thereby negating fair competition in the telecommunication sector, in contravention of Section 6(e) of the 1996 Act;*
  - (c) *that will cause irreparable harm and injury to our Client's interests, in contravention of Section 6(f) of the 1996 Act.*
- (xvii) *If the PTA is ignorant and unappreciative of the provisions of the 2000 Rules, the 2005 Regulations and the 1996 Act, then our Client should not be threatened or penalized for the PTA' lack of understanding of the same. It is trite law that no person should suffer as a result of any act of the State.*



(xviii) *The Impugned Show Cause Notice threatens to impinge on our Client's Fundamental Right of trade, business and profession as enshrined in Article 18 of the Constitution. The threatened actions of the PTA, communicated through the Impugned Show Cause Notice, would result in the violation of the inalienable rights of our Client to enjoy the freedom of profession and the protection of law and to be treated in accordance with law as guaranteed by Article 4 of the Constitution.*

(xix) *The Impugned Show Cause Notice is contrary to the scheme of the 1996 Act inasmuch as the 1996 Act envisages the promotion and encouragement of telecommunication services in Pakistan, whereas the effect of the Impugned Show Cause Notice is to discourage the creation and continuation of telecommunication services.*

(xx) *The Impugned Show Cause Notice is also a negation of the letter and spirit of the Foreign Private Investment (Promotion & Protection) Act, 1976 and the Protection of Economic Reforms Act, 1992 as our Client is a foreign investor and the Impugned Show Cause Notice discourages foreign investment in Pakistan.*

(xxi) *The Impugned Show Cause Notice is against all cannons of justice, equity and fair play and contrary to the principles of natural justice.*

5. *For the aforesaid facts, circumstances and reasons, the License should not be suspended, terminated and nor any other enforcement order should be passed against our Client under Section 23 of the 1996 Act by the PTA.*

6. *Furthermore, since the Hon'ble High Court, vide its Order dated 02.02.2010, has restrained the PTA from suspending our Client's international incoming traffic generally, the Impugned Show Cause Notice amounts to contempt of court and you are hereby warned that any action by you against our Client shall amount to further contempt of court and our Client reserves the right to petition the Hon'ble High Court to initiate contempt proceedings against you under the law.*

7. *A copy of the Petition, which may also be read as an integral part of this Reply, and the Hon'ble Court's Order dated 02.02.2010 is, once again, enclosed/attached herewith for your information and due compliance.*

*This Reply is without prejudice to any of the rights or remedies available to our Client under the law.*

*Please take this Reply accordingly.*

4. However, prior to disposing of the aforesaid show cause notice, the licensee was given opportunity of personal hearing vide PTA letter No.2-9 (Vigilance) PTA/10/211 dated 13<sup>th</sup> April, 2010 requiring it to appear before the Authority on 21<sup>st</sup> April, 2010. Mr. Tariq Javed Qureshi, GM Regulatory Affairs, Mr. R.M.S. Azam Legal Consultant and Ms. Ruqia Ismail, Assistant to Legal Consultant attended the hearing before the Authority on behalf of the licensee on the said date. The representatives of the licensee reiterated the same facts as mentioned in its reply to the

show cause notice and written arguments. The licensee has also advanced its written arguments on 20<sup>th</sup> April, 2010 and requested to withdraw the aforesaid notice.

5. The written arguments are reproduced as under:

*SUBJECT: PTA HEARING DATED 21.04.2010 & SHOW CAUSE NOTICE  
DATED 19.03.2010 ISSUED TO REDTONE  
TELECOMMUNICATIONS PAKISTAN (PVT.) LTD. UNDER SECTION 23 OF THE  
PAKISTAN TELECOMMUNICATION (REORGANIZATION) ACT, 1996*

*Without Prejudice Notice:*

*Redtone Telecommunications Pakistan (Pvt.) Ltd. ("Redtone") is participating in this hearing and submitting these Arguments as gesture of bonafide good will and courtesy without prejudice to the Writ Petition No. 399/2010 titled "Redtone Telecommunications Pakistan (Pvt.) Ltd. v. Pakistan Telecommunication Authority & Another" pending adjudication in the Court of Mr. Justice Asad Munir, Hon'ble Judge, Lahore High Court, Rawalpindi Bench, Rawalpindi and without admitting the allegations, stances or insinuations, if any, alleged by the PTA in the Show Cause Notice dated 19.03.2010 or in any other letter or notice issued by the PTA to Redtone. Redtone's participation in this hearing and its submission of these arguments shall not constitute or be construed to constitute any admission, waiver or estoppel on part of the Redtone.*

*RESPECTFULLY SUBMIT:*

*Redtone Telecommunications Pakistan (Pvt.) Ltd. (hereinafter referred to as "Redtone") has been issued with a Show Cause Notice No. PTA/Commercial Affairs/APC/202/2009/951 dated 19.03.2010 (the "Impugned Show Cause Notice") wherein the PTA has threatened action against Redtone under Section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996 (the "1996 Act"), if Redtone does not deposit Access Promotion Contribution ("APC") for the Universal Service Fund ("USF") dues for the period July-October 2009 amounting to Rs. 199,419,0141- and also to show cause in writing within 30 days of the said Show Cause Notice as to why the Redtone's Long Distance International License No. LDI-06(02)-2004 dated 16.08.2004 (the "License") should not be suspended or any other enforcement order should not be passed against Redtone under Section 23 of the 1996 Act.*

*2. Vide Redtone's earlier Notice dated 03.02.2010 and Reply dated 05.03.2010 to the Pakistan Telecommunication Authority ("PTA")'s Notice dated 04.03.2010, which were served on the PTA via fax and courier, Redtone had informed the PTA that it had filed Writ Petition No. 399 of 2010 titled Redtone Telecommunications Pakistan (Pvt.) Ltd. v. Pakistan Telecommunication Authority & Another in the Rawalpindi Bench of the Hon'ble Lahore High Court (the "Petition") against the PTA.*

3. *Vide his Order dated 02.02.2010, the Hon'ble Mr. Justice Asad Munir of the Lahore High Court, Rawalpindi Bench -was pleased to restrain the PTA from suspending the international incoming traffic of Redtone. A copy of the Hon'ble High Court's Order dated 02.02.2010 was enclosed with our aforesaid Notice dated 03.02.2010, for the PTA's information and due compliance. It may be pertinent to mention that the aforesaid restraining order is all-encompassing and generic in nature.*

4. *Notwithstanding the above and without prejudice to Redtone's stance that the PTA is not competent to issue it with a show cause notice under Section 23 of the 1996 Act nor take any action against Redtone thereunder, Redtone hereby makes the following representations as to why the License should not be suspended or terminated or why any other enforcement order should not be passed against Redtone under Section 23 of the 1996 Act:*

*(i) That the Impugned Show Cause Notice is in blatant violation of the Order dated 02.02.2010 of the Rawalpindi Bench of the Hon'ble Lahore High Court and tantamount to contempt of court.*

*(ii) That Redtone was, originally, the subsidiary of Redtone International Berhad, a limited liability company incorporated in Malaysia. On 24.12.2008, Redtone was acquired by Quantum Global Networks,. Inc. a limited liability company incorporated in the U.S.A. (hereinafter referred to as "QGN") upon issuance of a No Objection Certificate ("NOC") dated 24.12.2008 by the PTA. It may be pertinent to mention that, under Rule 11 of the Pakistan Telecommunication Rules, 2000 ("2000 Rules"), a telecom company requires PTA's NOCs for changes in both its (i) ownership (shareholding) and (ii) control (which, inter alia, includes management e.g. board of directors, chief executive, etc.). Whereas PTA approved the change of Redtone's ownership vide the aforementioned NOC dated 24.12.2008, but it severely delayed the approval of the change of Redtone's management in blatant violation of Section 6(c) of the 1996 Act (which states that the PTA "shall ensure that all applications made to it are disposed of expeditiously") with adverse consequences for Redtone (as explained in the succeeding paragraphs). Pursuant to Section 205 of the Companies Ordinance, 1984, Redtone duly filed a Form 29 dated 14.03.2009 with the Securities & Exchange Commission of Pakistan (hereinafter referred to as the "SECP") to notify the SECP of the change in its management. For the reasons already explained hereinbefore, the SECP cannot approve a change in the management of a telecommunications company without the PTA's approval. The SECP, therefore, applied to the PTA for approval of the change in Redtone's management vide its Letter No. ADR-I/R/156/14174 dated 29.05.2009, i.e. after an unexplained delay of approximately 2.5 months from the date of filing of the Form 29 by Redtone. At its end, the PTA kept the matter pending and did not issue its approval/NOC to the SECP until 15.01.2010 vide its letter of the same date, i.e. after an unreasonable delay of approximately 7.5 months of receiving SECP's intimation and approximately 10 months since Redtone filed the Form 29 with the SECP.*

- > *Copies of (i) PTA's NOC for acquisition of Redtone by QGN dated 24.12.2008; (ii) Press Releases on the acquisition of Redtone by QGN dated 06.03.2009; (in) PTA's NOC/approval of change of Redtone's*

*management dated 15.01.2010 and (iv) Form 29 dated 14.03.2009 are appended as Annexes 'A' to 'A/3' respectively.*

*(Hi) That it may be pertinent to mention that Redtone's customers/carriers make their payments to its holding company, namely QGN in the U.S.A., which, inter alia, is tasked by Redtone with overseas customer dealings and collection of revenues, which are then remitted by QGN to Redtone in Pakistan. Redtone was due to receive funds from QGN on account of revenues generated from incoming international traffic terminating in Pakistan, which formed the substantial, indeed bulk, part of Redtone's revenues and were to be used by it for the payment of APC for USF. Due to the security checks by the U.S. authorities on all large fund transfers to Pakistan, the U.S. authorities enquired from QGN as to the nature of the proposed transfer of funds to Pakistan, especially considering the Lebanese origin of QGN's CEO. When the U.S. authorities were informed by QGN that these funds were to be transferred to Redtone, which was its newly-acquired subsidiary in Pakistan, the U.S. authorities decided to independently verify the same. When, upon such verification, it transpired that the management control of Redtone was in the hands of a Malaysian company (due to non-approval of the Form 29 dated 14.03.2009 by PTA), the U.S. authorities blocked the transfer of funds from QGN to Redtone as a result of which Redtone was deprived of the primary source of its revenue, which, inter alia, resulted in its defaulting on the APC for USF from July 2009 onwards.*

*(iv) That, as can be seen from the above, Redtone's default in payment of APC for USF for February 2009 (which were, subsequently, cleared through other sources) and for July 2009 onwards, arises directly as a result of the unreasonable delay on part of PTA in approving the change of management and intimating the same to the SECP in contravention of Section 6 of the 1996 Act. Redtone has been forced into defaulting on the APC for USF payments as a result of the PTA's own omission/commission in delaying the approval of Redtone's change of management pursuant to Rule 11 of the 2000 Rules and keeping the same pending for approximately 7.5 months in blatant violation of Section 6(c) of the 1996 Act, which resulted in the U.S. authorities blocking the transfer of funds from Redtone's holding company in the U.S.A. that were to be used by Redtone for fulfilling its APC for USF obligations. Therefore, Redtone is being punished for the commissions/omissions of PTA in contravention of the legal maxim nemo punitur pro alieno delicto ("no person shall be punished for the wrongful act of another").*

*(v) That Redtone has otherwise been diligent in the payment of its APC for USF. Prior to its change of ownership and management, Redtone had made a total of Rs. 95,632,2347- in APC for USF payments for the period of January 2005 to December 2008. When QGN acquired Redtone in December 2008, it inherited a liability of unpaid APC for USF amounting to Rs. 24,013,173 in arrears, which it duly paid in six (6) installments. Subsequently, Redtone has been paying its APC for USF within time (with the exception of APC for USF for February 2009, which was briefly delayed for the reasons aforesaid but, subsequently, paid and the APC for USF for the period July*

2009 onwards, which are the subject-matter of the Impugned Show Cause Notice). The following table shows the APCfor USFpayments made by Redtone till date:

s.NO.	PERIOD FOR WHICH APCFOR USF DUE	APC OR USF PAYMENT	DATE OF PAYMENT	CHEQUE No.
1	January 2005 to	95,632,234	2005-2008	-
2	1 <sup>st</sup> Installment in arrears for outstanding APC for USF from October 2008	5,375,690	26.06.2009	1736002
3	2 <sup>nd</sup> Installment in arrears for outstanding APCfor USF from October 2008	5,375,690	16.07.2009	1736049
4	3 <sup>rd</sup> Installment in arrears for outstanding APCfor USF from October 2008	5,375,690	03.08.2009	4626124
5	4 <sup>th</sup> Installment in arrears for outstanding APCfor USF from October 2008	5,375,690	21.08.2009	4626010
6	5 <sup>th</sup> Installment in arrears for outstanding APCfor USF from October 2008	3,384,620	02.10.2009	8632839
7	6 <sup>th</sup> Installment in arrears for outstanding APC for USF from October 2008	3,384,620	30.10.2009	8632797
8	Payment of adjustment	640,065	02.10.2009	8632840
9	February 2009	22,729,486	02.07.2009	4626047
10	March 2009	38,460,422	02.07.2009	4626048
11	May 2009	60,939,462	24.08.2009	4626018
12	April 2009	39,539,136	27.07.2009	4626086
13	June 2009	60,199,169	15.10.2009	8632874
14	July 2009	9,263,570	15.11.2009	8632828
	Total ARC for USF	355,675,544		

> Copies of the above APCfor USF Payment Cheques & Receipts (along with covering letters) are appended as Annexes 'B' to 'BflQ' respectively.

(vi) That from the above, the following balance of payments situation can be deduced:

<i>Balance of Payments for APC for USLELLLUUUL&amp;I IHHS-ta T\afatnhat-</i>	
<i>APC for USF Payable:</i>	<i>Rs. 650,166,960</i>
<i>APC for USF Paid:</i>	<i>Rs. 355,675,544</i>
<i>APC for USF Outstanding:</i>	<i>Rs. 294,491,416</i>

(vii) That in accordance with Reg. 10(6) of the Access Promotion Regulations, 2005 (the "2005 Regulations"), Redtone is paying, and the Ministry of Information Technology, Government of Pakistan is accepting late payment surcharge @ 1.5% of the outstanding amount per month on the delayed APC for USF for the months of July 2009 onwards and has, to date, paid a total of Rs. 14,669,672/- as late payment surcharges for these months (for which the Impugned Show Cause Notice has been issued), the breakdown of which is given in the table below:

<i>s.No.</i>	<i>Late Payment Surcharge Period @ 1.5% of Outstanding APC for</i>	<i>Amount Paid by Redtone</i>	<i>Date of Payment</i>
<i>1</i>	<i>July 2009 and August 2009 (2)</i>	<i>Rs. 1,457,836</i>	<i>15.12.2009</i>
<i>2</i>	<i>July 2009 to September 2009</i>	<i>Rs. 2,096,492</i>	<i>15.01.2010</i>
<i>3</i>	<i>July 2009 to October 2009 (4)</i>	<i>Rs. 2,47,017</i>	<i>17.02.2010</i>
<i>4</i>	<i>July 2009 to November 2009</i>	<i>Rs. 3,850,936</i>	<i>17.03.2010</i>
<i>5</i>	<i>July 2009 to December 2009</i>	<i>Rs. 4,417,371</i>	<i>15.04.2010</i>
	<i>Total:</i>	<i>Rs. 14,669,672</i>	

> Copies of Redtone's Payment Receipts (along with covering letters) for Late Payment Surcharge on APC for USF for the period July to December 2009 are appended as Annexes 'C' to 'C/4' respectively, (viii) That the Impugned Show Cause Notice is in blatant violation of, and does not take into consideration, Clause 12.2 (Force Majeure) of the License, which clearly states that:

*"Notwithstanding anything contrary...contained in this License, if the Licensee shall be rendered unable to carry out the whole or any parts of its obligations under this License for any reason beyond the control of the Licensee...then the performance of obligations of the licensee as it is affected by such cause shall be excused during the continuance of any inability so caused, provided that the Licensee has taken all appropriate*

*precautions and reasonable measures to fulfil its obligation and that it shall within 14 days of its first occurrence notify to the Authority the same and cause of such inability and its effects to remove such cause and remedy its consequences."*

*Pursuant to Clause 12.2 of the License, Redtone had immediately informed the PTA of the situation arising out of the non-approval of its change of management by the PTA and the resulting blockage of the transfer of funds from QGN by the U.S. authorities and had requested a temporary respite from the same in its various meetings and correspondences with the PTA, which are listed as follows:*

- (i) Redtone's Letter to PTA dated 18.05.2009*
- (ii) Redtone's Letter to PTA dated 22.06.2009*
- (Hi) Redtone's Letter to PTA dated 05.11.2009*
- (iv) Redtone's Letter to PTA dated 15.12.2009*

*Copies of Redtone's aforesaid letters are appended as Annexes 'D' to 'D/3' respectively.*

*(ix) That the Impugned Show Cause Notice is in blatant violation of, and does not take into consideration, Clause 8.2(c) of the General License Conditions, applicable to the License, which are contained in Appendix 'B' pursuant to Rule 7(4) of the 2000 Rules and which provide that:*

*"The Licensee shall have no liability for any failure or delay in complying with any provision of this License if, and to the extent and for so long as, that compliance is prevented or substantially hindered by...any other act of governmental or municipal authorities, or other national authorities, or international organisations, or any other cause whatsoever which is substantially beyond the control of the Licensee."*

- (x) Section 23 of the 1996 Act would not be the penalty that would be attracted or applicable in the present case. The penalty prescribed by law for non-payment or late-payment of APC for USF is Regulation 10(6) of the 2005 Regulations, which prescribes a fine for the same.*
- (xi) The Impugned Show Cause Notice is unlawful, ultra vires, mala fide, arbitrary, discriminatory, unreasonable and contrary to the principles of natural justice.*
- (xii) The Impugned Show Cause Notice is contrary to the law and the facts and the same suffers from inherent defects in light of the same.*
- (xiii) The Impugned Show Cause Notice has been issued in complete contravention of Section 23 of the 1996 Act and Rule 9 of the 2000 Rules.*
- (xiv) The Impugned Show Cause Notice is in contravention of Section 10(6) of the 2005 Regulations. The only specific penalty provided under Reg. 10(6) of the 2005 Regulations for failure to make payment is a fine as stipulated thereunder. In*

*accordance with the rules of statutory interpretation, the express mention of a fine as penalty under Reg. 10(6) for failure to make payments excludes all other general penalties under law and Redtone's Licence. The applicable rule of statutory interpretation is expressio unius est exclusio alterius (the express/special mention of one thing operates as the exclusion of things differing from it).*

*(xv) The Impugned Show Cause Notice is ultra vires of the 2005 Regulations and the 1996 Act and is liable to be set aside on this ground alone.*

*(xvi) The Impugned Show Cause Notice is violative of Section 6 of the 1996 Act, inasmuch as the PTA has, in breach of their statutory obligations thereunder, already exercised and are threatening further exercise of power:-*

- (a) in violation of the rights of Redtone, in contravention of Section 6(a) of the 1996 Act;*
- (b) that would result in unfair benefits being accrued to the Redtone's competitors to the detriment and at the cost of Redtone thereby negating fair competition in the telecommunication sector, in contravention of Section 6(e) of the 1996 Act;*
- (c) that will cause irreparable harm and injury to Redtone's interests, in contravention of Section 6(f) of the 1996 Act.*

*(xvii) If the PTA is ignorant and unappreciative of the provisions of the 2000 Rules, the 2005 Regulations and the 1996 Act, then Redtone should not be threatened or penalized for the PTA's lack of understanding of the same. It is trite law that no person should suffer as a result of any act of the State.*

*(xviii) The Impugned Show Cause Notice threatens to impinge on Redtone's Fundamental Right of trade, business and profession as enshrined in Article 18 of the Constitution. The threatened actions of the PTA, communicated through the Impugned Show Cause Notice, would result in the violation of the inalienable rights of Redtone to enjoy the freedom of profession and the protection of law and to be treated in accordance with law as guaranteed by Article 4 of the Constitution.*

*(xix) The Impugned Show Cause Notice is contrary to the scheme of the 1996 Act inasmuch as the 1996 Act envisages the promotion and encouragement of telecommunication services in Pakistan, whereas the effect of the Impugned Show Cause Notice is to discourage the creation and continuation of telecommunication services.*

*(xx) The Impugned Show Cause Notice is also a negation of the letter and spirit of the Foreign Private Investment (Promotion & Protection) Act, 1976 and the Protection of Economic Reforms Act, 1992 as Redtone is a foreign investor and the Impugned Show Cause Notice discourages foreign investment in Pakistan.*

*(xxi) The Impugned Show Cause Notice is against all canons of justice, equity and fair play and contrary to the principles of natural justice.*



5. *For the aforesaid facts, circumstances and reasons, the License should not be suspended, terminated and nor any other enforcement order should be passed against Redtone under Section 23 of the 1996 Act by the PTA.*

6. *Furthermore, since the Hon'ble High Court, vide its Order dated 02.02.2010, has restrained the PTA from suspending Redtone's international incoming traffic generally, the Impugned Show Cause Notice amounts to contempt of court and any act in furtherance of the Impugned Show Cause Notice, shall amount to further contempt of court and Redtone shall be constrained to initiate contempt proceedings against the PTA under the law.*

7. *A copy of the Petition, which may also be read as an integral part of these Arguments, and the Hon'ble Court's Order dated 02.02.2010 is, once again, enclosed/attached herewith for your information and due compliance.*

*> Copies of Redtone's Petition and the Hon'ble High Court's Order dated 02.02.2010 are appended as Annexes 'E' to 'E/I' respectively.*

8. *It may be pertinent to mention that in another Writ Petition titled Wateen Telecom Ltd. v. Pakistan Telecommunication Authority & Another over late payment of APC for USF and the threatened exercise of powers by the PTA, the Hon'ble Mr. Justice Asad Munir of the Lahore High Court, Rawalpindi Bench, Rawalpindi, vide his Order dated 24.12.2009, has ruled as follows:*

*(i) Late-payment of APC for USF is not a violation of the 1996 Act or the terms and conditions of the LDI License;*

*(ii) The only penalty for late payment of APC for USF by an LDI Licensee is Reg. 10(6) of the 2005 Regulations;*

*(Hi) Delay in the payment of APC for USF cannot be regarded as a breach of Rule 5(2) or Regulation 10(2) in respect of which any consequence other than that visualized by Reg. 10(6) would follow;*

*(iv) PTA cannot suspend the incoming traffic of an LDI Licensee for late payment of APC for USF.*

*(v) PTA cannot invoke the general powers under Section 23 in the presence of the specific penalty provided by Reg. 10(6) of the 2005 Regulations.*

*(vi) The 1996 Act, the 2004 Rules, the 2005 Regulations and the terms of the LDI License do not confer any power on the PTA to suspend the incoming international traffic of an LDI Licensee for late payment of APC for USF.*

- > *Copy of Hon'ble High Court's Order dated 24.12.2009 is appended as Annex 'F'.*

PRAYER

*In view of the aforesaid facts, circumstances and reasons, it is most respectfully prayed that PTA kindly:-*

- (i) withdraw its Impugned Show Cause Notice dated 19.03.2010 sent to Redtone;*
- (ii) withdraw all notices/letters sent by it to Redtone in which the PTA has threatened against Redtone, including, without limitation, the following:*
  - a. PTA's letter dated 27.01.2010;*
  - b. PTA's letter 04.03.2010; and*
  - d. PTA's letter dated 12.04.2010.*
- (Hi) refrain from taking any action against Redtone under Section 23 of the Pakistan Telecommunication (Reorganization Act, 1996);*
- (iv) refrain from suspending the international incoming traffic of Redtone;*
- (v) comply with the letter and spirit of the Restraining Order dated 02.02.2010 issued by Mr. Justice Asad Munir of the Lahore High Court, Rawalpindi Bench, Rawalpindi, in Writ Petition No. 399/2010 titled Redtone Telecommunications (Pvt. Ltd. v. Pakistan Telecommunication Authority & Another;*
- (vi) permit Redtone to differ payment of all outstanding APC for USF until such time that Redtone can arrange such payment and, thereafter, allow Redtone to repay the same under an easy installment plan.*

**2. FINDINGS OF THE AUTHORITY:**

- i. Clause 8.1 of the Appendix B of the Rules and condition 3.1 of the license obliged the licensee to observe the provisions of the Act, the Rules and the Regulations.
- ii. Sub-rule 2 of rule 5 of AP Rules and sub-regulations (3) and (4) of regulation 6, and sub-regulation (2) of regulation 10 of the AP Regulations make it obligatory on the licensee to deposit APC for USF contribution within ninety (90) days after the end of calendar month for which the payment obligation arises.

iii. The licensee has failed to make the payment within the given time mentioned in the AP Rules and AP Regulations, hence, contravened the provisions, the AP Rules and AP Regulations.

iv. Section 23 (1) of the Act empower the Authority to issue show cause notice in case where a licensee contravenes any provision of the Act, the rules made there under or any term and condition of the license and in case it fails to satisfy the Authority or remedy the contravention, any of the punishments provided in sub-section (3) of section 23 of the Act may be imposed on it. In the instant case the licensee has contravened sub-rule (2) of rule 5 of AP Rules, sub-regulations (3) (4) of regulation 6 and sub-regulation (2) of regulation 10 of AP Regulations. Furthermore, it is required vide condition 9.3.1 of the license to comply with AP Rules and vide clause 3.1 of the license to observe the provisions of the Act, the Rules and the Regulations, which it contravened by not making the payments of APC for USF within ninety (90) days, hence, charge of contravention of the provision of the rules, regulations and license condition is established for which action under section 23 of the Act can be rightly initiated and any of the punishments mentioned in the aforesaid section can be imposed after recording reasons.

v. The argument of the licensee that it has filed writ petition No.399/2010 wherein it has challenged the letter of PTA dated 27-01-2010 and the court vide order dated 02-02-2010 has restrained PTA from suspending its incoming international traffic and that the Authority, therefore, is not competent to issue show cause notice or take action under section 23 of the Act is not convincing. Firstly, the court has not restrained PTA from exercising the powers given under section 23 of the Act. Secondly, the licensee itself admitted that it is not disputing the liability and stated that *"the approval of the change in Board of Directors by PTA has been received late on 15-01-2010 and as consequence the change of the management in compliance with the requirements of Company Ordinance, 1984, will be recorded by the SECP in due course whereafter the petitioner company will be able pay to PTA the sum of Rs.139, 766,126/- which is not disputed. "However, even after obtaining approval since 15-01-2010 it has not cleared its dues till date.*

vi. The arguments relating to delay in change in management, freezing of accounts of its US based company for which its funds were not transferred to it and *force majeure* is not accepted. Case of force majeure is not made out. Thirdly the licensee has continued its commercial operations for bringing international incoming telephony minutes and earning money during the period of pendency of its application for grant of NOC for change in management. As per rule 11(5) and regulation 21, the licensee has to notify the proposed change in shareholding and management, once the management is proposed, it is not affecting the business operations of the company and till the time NOC is granted its previous management is controlling the affairs and business of the company, hence, the licensee is liable to comply with the conditions of the license even if application for change in management is pending.

vii. As the court has not restrained the Authority for exercising its statutory powers under section 23 of the Act nor the licensee has disputed the financial liability, therefore, in case of non-compliance of rules/regulations and conditions of the license section 23 of the Act can be invoked.

viii. The merits of the case discussed in writ petitions No.2997, 3349, 3221, and 3211 of 2009 are entirely different as in those cases either the international incoming traffic of the licensees

were suspended without issuing show cause notices or threatened to suspend the said traffic on the issue of non-payment. Even in judgment announced on 05-03-2010 the powers given under section 23 of the Act were neither discussed nor restrained the Authority from exercising these powers in case of contravention of the provisions of the Act, the rules framed thereunder and the condition of the license, hence, the aforesaid judgement is not applicable in the instant case.

### **3. ORDER:**

3.1. Keeping in view the above mentioned facts coupled with the available record, the Authority hereby dispose of the aforesaid show cause notice in the following terms:

(a). Redtone Telecommunication Pakistan (Pvt) Limited is hereby directed to remedy the contravention by making the payment of APC for USF Contribution of Rs. 199,419,0747- for the months of July, August, September, and October, 2009 within a period of 30<sup>l</sup> days from the issuance of this order.

(b). In case of the licensee's failure to abide by this Order, the aforementioned amount shall be recovered under section 30 of the Act.

(S. Nasrul Karim A. Ghaznavi)  
Member (Finance)

(Dr. Khawar Siddique Khokhar)  
Member (Technical)

(Dr. Mohammed Yaseen)  
Chairman

4. This determination signed on 22/04/2010 and comprises 20 pages.