



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

Subject: Decision of the Pakistan Telecommunication Authority on Mobile Financial Services (MFS) and Mobile Number Portability (MNP) “Inter-Operator”

No: PTA/Finance/Finance/Mobilink 2/2006/56.

Venue of Hearing: PTA HQs, Islamabad
Date of Hearing: 4th January, 2021

Panel of Hearing:

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

Issue:

“Charging of Annual Regulatory Dues on Revenue from Mobile Financial Services (MFS), Mobile Number Portability (MNP) and non-deduction of International Roaming (IR) & SMS Charges as inter-operator payments while calculating ARDs”

1. Facts of the case:

1.1 Precisely stated facts of the case are that Pakistan Telecommunication Authority (the “**Authority**”) in exercise of its powers conferred under section 5 read with section 20 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the “**Act**”) granted license No. MCT-05/WLL&M/PTA/2007 dated 06th July, 2007, No. NGMS-04/WLL&M/PTA/2014 dated 21st May, 2014 and NGMS-06/WLL&M/PTA/2017 dated 29th June, 2017 (the “**license**”), to Pakistan Mobile Communication Limited (the “**licensee**”). By virtue of NGMS license, the licensee is authorized to provide license services in Pakistan to establish, maintain and operate telecommunication system subject to the terms and condition of license.

1.2 As per license condition 3.1.3 of the license, the licensee is under obligation to comply with the all orders, determination, direction and decision of the Authority. Apart from obligation for provision of licensed service, the license further obliges the licensee to pay Annual Regulatory Dues (ARDs) as provided in Article 4 of the license. The license condition No. 4.1.2 of the license expressly provide the parameters for calculation of ARDs. For ready reference the said license condition is reproduced below:

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

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

4.1.2.2

4.1.2.3”

1.3 In accordance with the terms and conditions of the license and regulation 23 of the Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2006, all fees, contributions & charges are required to be paid by the licensee. For the purpose of determination and authenticity of the dues, licensee is also required to submit annual audited account in accordance with license condition No. 4.3.1 of the license which provides as under:

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

1.4 Based upon the aforementioned, the licensee paid dues to the Authority. However, while examining the financial statements, for the year 2019, submitted by the licensee, it has been found that the licensee has deducted amounts received on account of Mobile Financial Services and Mobile Number Portability and paid on account of International Roaming while calculating ARDs (ALF, USF & R&D) claiming therein or considering amounts paid on account of International Roaming as “**inter-operator**” payment as provided in license condition 4.1.2. The Authority is of the view the payment made to foreign carriers does not fall with the ambit of the term “**inter-operator**” on the premise foreign carriers are not licensee of the Authority, therefore the allowable deduction as calculated by the licensee while submitting financial statement is not in consonance with the license terms and condition and directions of the Authority. With regard to Mobile Number Portability (MNP), the Authority has already decided that MNP is ‘Revenue from Licensed Services’ As a result thereof, the Authority issued provisional demand note dated 22nd April, 2020 and 6th May, 2020 requiring therein to pay annual regulatory dues for the year ended 31st

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December, 2019 and LPAF @ 2% calculated till 15th May, 2020. Detail of outstanding dues with breakup is give as under:

Sr. #	Description of amount	Amount in Rupees	ARDs Applicable including LPAF Calculated till 15 th May, 2020
1	Mobile Financial Services	1,829,508,000	46,195,077
2	Payment made to foreign carries (Roaming Charges)	502,879,009	12,697,695
3	Payment made to foreign carries (SMS Charges)	34,201,392	863,585
	Grand Total	2,366,588,401	59,756,357

Note: PMCL made payment of ARDs calculated on account of MNP Revenue, therefore, no dues outstanding on account of MNP Revenue.

1.5 Being aggrieved by the provisional demand notes issued by the Authority, the licensee under section 7 (1) of the Act filed F.A.O No. 66 of 2020, impugned the same before the Honorable Islamabad High Court. The Honorable Islamabad High Court vide order dated 8th October, 2020 subsequently corrected vide CM-1004 of 2020 dated 22nd December, 2020 disposed of the matter in following terms:

“7. After considering the contentions of the learned counsel for the parties this appeal is disposed of with direction to respondent PTA to adjudicate upon the matter on the primary question as to “whether Mobile Financial Services and Mobile Number Portability fall within the purview of licensed services and whether payments made to foreign carriers in respect of International Roaming provided in the license and any cost sustained by the appellant has to be considered as an allowable deduction” till then respondent PTA shall not take any coercive measures against the appellant for the payment referred in the provisional demand notes dated 22.04.2020 and 06.05.2020

8. It is expected that the respondent PTA will adjudicate upon the matter expeditiously in accordance with law by providing opportunity of hearing to the appellant”

2. Hearing before the Authority:

2.1 In respectful compliance of the court, the matter was fixed for hearing on 4th January, 2021. Mr. Asif Raza, Manager Financial Reporting, Mr. Zulfiqar Ali, Manager Regulatory Affairs, Ms. Fariha Khan, Manager Litigation, Mr. Afnan Karim Kundi Advocate Supreme Court of Pakistan, Barrister Adeel Aftab, Advocate High Court and Mr. Mudassar Husain VC Jazz attended hearing on the said date before the Authority.

2.2 On behalf of the licensee, legal counsel submitted that unless the **Mobile Financial Services** (MFS) clearly fall within the purview of the licensed services under its license, the revenue therefrom cannot be considered part of the gross revenue from the licensed services. In addition, with regard to **International Roaming**, the licensee submitted that it merely recovers the corresponding amounts from its subscribers and pay them onward to foreign operators on behalf of its subscribers, therefore, these amounts are liable to be netted off from the Annual Gross Revenue (AGR) before calculating ARDs.

Furthermore, in respect of **Mobile Number Portability** (MNP), the licensee stated that it has challenged the Authority's decision dated 03.07.2017. wherein it was decided that MNP revenue shall be counted for the calculation of ARDs before the Islamabad High Court in F.A.O No. 116/2017 and the same is pending adjudication.

In order to substantiate the above submission legal counsel referred and relied upon the following grounds:

A. Mobile Financial Services:

i. Under clause 4.1.2 of Next Generation Services License, the licensee is obligated to pay ARDs under the head of ALF, R&D and USF at certain fixed percentage of the licensee's annual gross revenue from Licensed Services minus inter-operator payments and related PTA/FAB mandated payments. Annual gross revenue (AGR) is therefore the basis for determining ARDs after adjusting allowable deduction and adjustments therefrom/therein

ii. Regulation 23 of the Pakistan Telecommunication Authority (Function & Powers) Regulations, 2006 (F&P Regulations) provides definition of Gross Revenue as under:

“Gross Revenue means the turnover or gross income exclusive of sale tax or any other tax levied by the Govt. from time to time which is charged and collected by licensee at the time of sale and deposited with the tax authorities and trade discount shown on invoices or bills, derived from sale of goods or from rendering or supplying of services of benefits or from execution of contracts from the licensed and business”

iii. Going by the above explanation provided in regulation 23 of the F&P Regulations, only that revenue shall constitute Gross Revenue which the appellant earns from its services and business that is licensed by the Authority under its license.

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iv. The scope of the license granted by the Authority clearly stated in clause 1.1.1 i.e. that this license authorizes the licensee to establish, maintain and operate the licensed services and to provide the Next Generation Mobile Services in Pakistan.

v. The licensed services are defined in clause 13.2 of the license and means "the telecommunication systems.... Provided, maintained and/or operated by the licensee for the purpose of providing licensed services by whatever means allowed under the license.

vi. Licensed Services are defined by clause 13.2 of the license to mean both the telecommunication Services and Optional Services

vii. Mandatory Services are in turn defined by clause 13.2 of the license as the telecommunication services that the licensee must provide under the license, as described in clause 1.1.2. Clause 1.1.2 of the license provides that:

1.1.2.1 emergency service

1.1.2.2 operator assistance services

1.1.2.3 national and international long-distance services through LDI operator

1.1.2.4 such other telecommunication services as the PTA may, by regulation requires

viii. The Mobile Financial Services clearly do not fall within the purview of Mandatory services.

ix. Optional services have not been specifically defined in the license. However, clause 1.1.3 of the license provides that the "licensee may provide optional services incidental to Next Generation Mobile Services."

x. Next Generation Mobile Services (NGMS) is defined in clause 13.2 of the license as "the mobile communication services offered through technologies standardized for 3G/4G/LTE and advanced generations".

xi. Mobile communication services is simply defined in clause 13.2 of the license as a wireless-based telecommunication services where terminal equipment may be connected to the telecommunication system by wireless means and used while in motion.

xii. A combine reading of the above definitions clearly tells that the licensed services are essentially telecommunication services. In this regard, clause 13.2 of the license also carries definition of the term "Telecommunication Services" contained in clause (v) of section 2 of PTRS 1996. No deviation from the definition in parent statute i.e. PTRS 1996 was in any case possible in the terms and

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conditions of the license. Needless to state that under PTR 1996, the Authority can only license and regulate a service if it constitutes a "telecommunication services".

xiii. A telecommunication service is simply defined in both the License and PTR 1996 as a service consisting in the emission, conveyance, switching or reception of any intelligence.

xiv. In light of the above, any "service incidental to NGMS" as envisaged regarding Optional Services by clause 1.1.3 of the license would strictly mean a telecommunication service that naturally appertains to NGMS as a minor accompaniment thereto.

xv. As such, unless the Mobile Financial Services clearly fall within the purview of the licensed services under the licensee's license, the revenue therefrom cannot be considered part of Gross Revenue from the "licensed services" as envisaged by the explanation provided in regulation 23 of the F&P Regulations and clause 4.1.2 of the license reproduced above.

xvi. Since, 2012 Waseela/ Mobile Microfinance Bank Limited, a licensee of the State Bank of Pakistan, has been providing branchless banking services through a commercial agreement with the licensee to its customer by utilizing the facilities and portfolio of the licensee.

xvii. MFS is part of an arrangement of branchless banking services regulated by the SBP as a regulator under the branchless banking regulations, 2008, which were upheld in 2016 (BBR) and Regulation for Mobile Banking Interoperability, 2016(RMBI) issued and updated by the SBP from time to time. While PTA has also come up with its own set of regulations under section 5(2)(o) of PTR 1996, namely, Regulations for technical implementation of Mobile Banking, 2016 (RTIMB), the same are redundant being merely a reproduction of SBP's RMBI with a few cosmetic changes. In fact, the PTA has recently advertised and sought consultancy services to carry out study of MFS model in Pakistan covering technical, legal, financial and other aspects viz a viz international best practices in implementation of MFS models, and applicability of regulatory dues on mobile financial services. The Authority has yet to ascertain and finalize if it has a regulatory role to perform the same regarding MFS. As such, there is no legal sanction behind the impugned PDNs for charging ARD on the revenue from MFS in the absence of a clear, reasoned and valid regulatory framework for MFS enabling the Authority to discharge its mandatory statutory responsibility under section 6 of PTR 1996.

xviii. MFS is offered/provided as a branchless banking service by the licensee in collaboration with and as an agent of an SBP-authorized financial institution (AFI)

using the licensee's vast physical network/ footprint of facilities/ out lets and man powered employed therein together with the mobile banking platform solution to electronically facilitate branchless banking transaction, either directly by the customer or through the licensee's outlets. The mobile banking platform is duly licensed to the AFI which has control and administrative rights over the same at all times.

xix. The branchless banking transactions carried out over the mobile banking platform inter alia include money transfer, utility bill payments, inter-bank transfers etc. these services can also be provided by any entity like Post Offices, Petrol Pumps etc. having a vast channel footprint in the country by entering into a similar commercial arrangement with AFIs and no PTA license is required for provision of these services. In essence, the licensee's arrangements for the provision of MFS with the AFI is an agreement in the nature of outlet sharing.

xx. By its very nature, services comprised in MFS are neither directly a part of NGMS and the mandatory services forming part of the licensed services under clause 1.1.2 of the license. Nor could MFS be termed as service "incidental to NGMS" to be treated as an optional service forming part of the licensed services under clause 1.1.3 read with clause 13.2 of the license.

xxi. Moreover, MFS cannot be and, in fact, has not been treated as a category of licensed services envisaged under clause 1.1.8 of the license. Nor any on the provisions of clause 6.2.1 of the license relating to discontinuation of any category of the licensed services are applicable to MFS. Cognizant of this fact and in acknowledgment thereof, the Authority itself decided to treat MFS as an altogether different service outside the domain of the licensed services by formulating a distinct set of regulations, though howsoever, redundant as submitted above, namely the RTIBM (Regulation for technical implementation of Mobile banking, 2016). While acknowledging the need for a separate license, regulation 3(1) of RTIMB specifically exempts all telecom operators from obtaining a separate license for providing MFS.

xxii. The license granted to the licensee itself clearly admits of the possibility of the licensee's revenue being generated from source other than the licensed services as in the case of revenue from MFS. Clause 4.3.1 of the license makes provision for excluding such other revenue from Annual Gross Revenue (AGR). It clearly distinguishes between licensed services and non-licensed services and provides that notes to the financial statements of the licensee should be drawn up in sufficient detail so as to disclose separately the Annual Gross Revenue between the licensed and non-licensed services. The licensee has been regularly showing the MFS revenue separately from the revenue of licensed services.

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xxiii. Without prejudice to the foregoing, fundamentally speaking, the totality of deliverables comprised in the provision of MFS by the licensee as an agent for an AFI offering branchless banking cannot simply be termed or treated as an emission, conveyance, switching or reception of any intelligence” and as such MFS cannot be equated with “telecommunication services” as defined in section 2(v) of PTR 1996 and adopted in clause 13.2 of the license.

xxiv. It is therefore clear that MFS does not fall within the purview of licensed services under the license granted to the licensee and the licensee’s revenue from MFS cannot be legitimately included in AGR for calculating the ARDs.

B. International Roaming (IR):

i. International Roaming is a facility provided to the subscribers who are visiting abroad so that they remain connected and may utilize services of foreign operators so long as they remain in the respective country with the convenience of paying the said charges to the operators of its origin i.e. the licensee in the instant case, which accordingly pays back to the concerned foreign operator(s), being the cost of such services availed by the customers.

ii. It is, therefore, clear that this is only a payment facility being provided by the appellant to its subscribers which they owe to a foreign operator if they had opted to avail the latter’s services abroad. The corresponding amounts mainly represent a liability owed to the foreign operator and do not constitute the licensee’s revenue.

iii. Since the licensee merely recovers the corresponding amounts from the subscribers and pays them onward to foreign operators on behalf of its subscriber, therefore, these amounts are liable to be netted off from Annual Gross Revenue (AGR) before calculating ARD.

iv. It may be noted that the above practice of netting off is actually in vogue ever since the grant of license to the licensee and the impugned PDNs are the first ever departure from this long-held consistent established practice of the Authority.

v. IR services are provided by the licensee as a license obligation under clause 2.9 of its license that the “*licensee shall use its best efforts to enter into necessary agreements with foreign operators in order to enable and provide international roaming to its subscribers*”. The licensee must follow PTA guidelines on international roaming which may be issued from time to time.

vi. Pursuant to the abovementioned license condition, the licensee has entered into commercial viable agreements with corresponding foreign operators to provide IR services to its subscribers and, as such, payments to such foreign operators

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would be duly covered by “inter-operator payments” liable to be subtracted from the AGR as specified in clause 4.1.2 of the license as likewise interpreted and implemented by the Authority itself since inception and without exception, hence, having become a long-held consistent established departmental/institutional practice of the Authority, from which deviation would not be now permissible under the law as held in various pronouncements of the superior courts.

C. Mobile Network Portability (“MNP”)

i. The Authority had earlier decided vide decision dated 03.07.2017 as under;

“ The Authority is of the view that revenue generated from Mobile Number Portability (MNP) is “revenue from licensed services”. The Authority has, therefore, decided that MNP revenue shall be counted for calculation of Annual Regulatory Dues (ARDs)”.

ii. The aforesaid Authority’s decision stands challenged by the licensee in an appeal (F.A.O No. 116/2017) before the Hon’ble Islamabad High Court under section 7(1) of PTMA 1996 which is currently pending adjudication and the Authority has already joined proceeding therein.

iii. While the matter is *sub judice* before the Hon’ble High Court as aforesaid, it may be stated that the main grounds agitated before the Hon’ble is the lack of any reasoning whatsoever provided by the Authority in its impugned decision dated 03.07.2017 as to legally how MNP revenue could legitimately be considered as part of revenue from licensed services under the licensee’s license. None of the grounds agitated before the Authority were ever dealt with, discussed or disposed of on merits.

iv. As such, it will be in the fitness of things that the Authority may take this opportunity to consider the matter afresh and give a detailed, reasoned and speaking decision in the matter. This is legally permissible since instant appeal relates to the fresh demands of ARD from the licensee after filing the instant appeal before the Hon’ble High Court and do not relate to the demands forming subject matter of the said appeal which pertain to an earlier time period. For this purpose, the ground taken earlier before the Authority as well as before the Hon’ble High Court in appeal may kindly be read as an integral part hereof.

D. Other grounds:

i. The impugned PNDs part with the established norms and principles prevalent over the years and are also violative of the AGR adjustment formula as

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per provisions of the PTR 1996, the applicable GoP Policies and the terms and conditions of the license.

ii. That some of the CMOs had been contesting the calculations of ARDs based on previous years demand notes and in fact made payments by taking off the disputed amounts. The contentions of CMOs were deliberated by Authority's Finance Division and subsequently committee was formed to finalize the way forward in that regard.

iii. The impugned PDN dated 06.05.2020 is a nonspeaking, unreasoned order which fails to deal with or discussed the detailed grounds taken by the licensee before the Authority, hence, the impugned PDNs are liable to be set aside.

iv. The impugned PDNs have been issued in violation without affording a hearing to the licensee and have been issued as a matter of administrative routine by the Authority

v. The impugned PDNs have been issued in violation of section 6 of PTR 1996 as well as section 24A of the General Clauses Act, 1897 and hence liable to be set aside.

vi. The impugned PDNs are in clear violation of fundamental rights of fair trial and due process for determination of civil rights guaranteed under Article 10A read with Article 2A and 4 of the constitution.

vii. To the extend the impugned PDNs unlawfully deprives the licensee of its revenue also adversely affecting its finance, the same are in direct violation of Article 18, 23 and 24 of the constitution.

viii. That in case the impugned PDNs have been issued without the approval of the Authority and since no delegation of relevant powers in the favour of Director & Assistant Director (finance) could be made due to the bar on delegation of powers under section 5(2)(a) of PTR 1996 contained in the proviso to section 10 thereof, then of course the impugned PDNs are liable to be set aside on that ground alone.

2.3 Legal counsel further argued the term "Operator" has been defined in the license which means a license holder. The term "Operator" with capital "O" indicates the specific purpose of the term "Operator" used in the license will referred the licensee. Whereas the term "operator" used with word "inter" cannot be equated with the term "Operator" on the ground the word "operator" when is used or referred will be any operator either licensee or non-licensee. Preferable will be referred to any company dealing with the business of telecommunication services. Since the mandate of the licensee is to provide NGMS service which requires agreement with foreign carries therefore, the term inter-operator in general parlance has been

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used so as to include all kind of telecom operators either local or foreign in hominization of telecom regulatory regime.

3. Findings of the Authority:

3.1 Matter heard, after hearing arguments advanced by legal counsel and careful perusal of record, the moot point of discussion is to ascertain as whether Mobile Financial Services and Mobile Number Portability fall within the purview of licensed services and whether payments made to foreign carriers in respect of International Roaming provided in the license and any cost sustained by the appellant has to be considered as an allowable deduction.

3.2 At the very outset with regard to determination of issue MFS is concerned, it is clarified that PTA has initiated consultation process on the issue of MFS therefore, the same will be finalized subject to conclusion of the consultation process with all stakeholders including the licensee. On the other hand, the issue of MNP is already *sub-judice* therefore, upon final adjudication of the matter related to MNP the same will be proceeded further accordingly.

3.3 However, with regard to the applicability of the term "operator" as provided in the license. The matter examined and while perusing of the terms and condition of the licensee, it has been observed that license condition No. 13.2 of the license provides that the words and expression used herein but not defined shall have the same meaning as are respectively assigned to them in the Act, the Rules and Regulations and licenses issued thereunder unless the context otherwise requires, the terms used in the license shall have the meaning defined in the license.

3.4 The term Operator has been defined in the license which states that any person authorized by a license issued by the Authority to establish, maintain and operate a Telecommunication System or to provide Telecommunication Services. Meaning thereby the word "**operator**" wherever used in this license would intents and means a "**license holder**" with reference to the context and in the manner as it has been used.

3.5 Most importantly, it is also relevant to point out that the word "**operator**" with a small "o" has also been defined in the Pakistan Telecommunication Rules, 2000 which means any person authorized by a license to run a connectable system. The holistic overview of the term "operator" as provided in the license either with capital "O" or small "o" will be considered and treated as a licensee by all means. Thus careful reading of the term "**inter-operator**" as provided in the license condition No.4.1.2.1 of the license excludes foreign carrier or foreign operator. As a result thereof, any cost sustained by the licensee in this regard cannot be considered as an allowable deduction for the purpose of calculation of Annual Regulatory Dues as provided in the license terms and conditions.

4. Order:

4.1 What has been discussed above read with para 3.2 of the findings of the Authority, the matter is disposed by concluding that the term "operator" has been defined in the license which means any person authorized by a license issued by the Authority to provide

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telecommunication services to establish, maintain and operate a telecommunication system. Careful perusal of the definition of the term "inter-operator" postulates the arrangement among the operator(s) being a license holder(s) under the Act. Since, PTA has not issued license to foreign carriers therefore any payment made to foreign operators / carrier cannot be considered and treated as "inter-operator" payment.

Maj. Gen. Amir Azeem Bajwa (R)
Chairman

Muhammad Naveed
Member (Finance)

Dr. Khawar Siddique Khokhar
Member (Compliance & Enforcement)

Signed on 8th day of April, 2022 and comprised (12) pages only.