



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

Subject: Decision of the Pakistan Telecommunication Authority on “Inter-operator”

No: PTA/Finance/LDI/Link Direct International/159/2006/57

Venue of Hearing: PTA HQs, Islamabad
Date of Hearing: 5th 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:

“Non-deduction of amount paid to foreign operators”

Decision of the Authority

1. Brief 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**”) renewed a non-exclusive license of Pakistan Telecommunication Company Limited on 13th January , 2021 (the “**licensee**”). By virtue of its license, the licensee is authorized to provide licensed services in Pakistan to establish, maintain and operate telecommunication system subject to the terms and conditions of license.

1.2 As per license condition 23.1 of the license, the licensee is under obligation to comply with all orders, determination, direction and decision of the Authority. Apart from obligation for provision of licensed services, the license further obliges the licensee to pay Annual Regulatory Dues (ARDs) as provided in paragraph 6, 7 & 13 of the license. The license condition 6.2(a) of the license expressly provides parameters for calculation of annual license fee. For ready reference the said license condition is reproduced below:

“6.2. The licensee shall pay the following annual regulatory fees to the Authority:

- a. Calculated on the basis of 0.5% (or as the Authority may, by regulations, determine) of the licensee’s annual gross revenue from Licensed Services*

Dated: 8th April 2022

for the most recently completed financial year of the Licensee minus inter-operator costs and related PTA/FAB mandated payments. However, license renewal fee, spectrum renewal/initial fee, late payment additional fee, penalties/fines and other charges imposed by the Authority, if any, shall not be deducted from the gross revenue. 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.

1.3 In accordance with the terms and condition 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 (AAA) in accordance with license condition 6.7 of the license which provides as under:

“The licensee shall annually submit to the Authority audited financial statements within 120 days of close of its financial year in support of its calculations of annual fees, charges and contributions payable pursuant to Paragraphs 6, 12 and 13. The Authority shall have the right to audit such statements at any time.”

1.4 While examining the financial statements (*for the year 2019*) submitted by the licensee, it has been found that the licensee has deducted amounts paid to the foreign carriers considering it as “**inter-operator**” payment as provided in license conditions 6.2(a), 7.1 and 13.1. The Authority is of the view that the payments, if any, made to foreign carriers does not fall within the ambit of the term “**inter-operator**” on the premise that 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. As a result thereof, the Authority issued Provisional Demand Notes (PDN) dated 29rd April, 2019, 28th April, 2020 and 7th May, 2020 requiring therein to pay Annual Regulatory Dues for the year ended 31st December, 2018 and 31st December, 2019 respectively. Detail of outstanding dues for financial year ended 31st December, 2018 and 2019 (including LPAF calculated till 31st July, 2021) is give as below:

Description	2018		2019		Grand Total
	Principal	LPAF	Principal	LPAF	
Annual License Fee	38,756,548	21,264,426	33,332,246	10,155,224	103,508,444
Research & Development Fund Cont.	38,756,548	21,264,426	33,331,051	10,154,860	103,506,885
Universal Service Fund	116,269,644	63,793,278	99,997,937	30,466,038	310,526,897
Grand Total	193,782,740	106,322,130	166,661,234	50,776,123	517,542,227

1.5 Being aggrieved from the demand notes issued by the Authority, the licensee under section 22 (2) of the Act filed Writ Petition No. 1474 of 2020 before the Honorable Islamabad High Court. The Honorable Islamabad High Court, Islamabad vide order dated

Dated: 8th April 2022

4th November, 2020 disposed of the matter in the light of decision in F.A.O No. 67 of 2020 passed by Honorable Islamabad High Court, Islamabad. The relevant is reproduced below:

“12. In light of above, instant petitions are also disposed of by refereeing the matter of the petitioners to Pakistan Telecommunication Authority to adjudicate upon the matter, as to whether the foreign carriers fall within the term ‘inter-operator’ as provided in the license.

13. Needless to observe that till such time that the matter is adjudicated and decided by PTA, no coercive measures shall be adopted against the petitioners and no demand qua Late Payment Additional Fee, shall be made, which in any case, becomes applicable from the due date, which would be if and when matter is decided against the petitioners and the demand is made to make the payment.”

2. Hearing before the Authority:

2.1 In respectful compliance of directions of the court, the matter was fixed for hearing on 5th January, 2021. Mr. Amer Shafique, EVP Regulatory Affairs, Mr. Naveed K. Butt, GCRO, Mr. Ali Raza, Advocate Supreme Court of Pakistan, Ms. Habiba Alvi, Advocate and Mr. Ghulam Mustafa, EVP attended the hearing on the said date fixed before the Authority.

2.2 On behalf of the licensee, legal counsel submitted that the Authority’s calculation for not allowing deduction of amount paid to foreign carries is not in line the applicable regulatory regime. In addition, the term “**inter-operator**” as provided in the license conditions does not postulate to restrict its scope only to the extent of licensee of Pakistan. Since the said term has not been defined neither in the license nor in any other regulatory instrument thus it is construed that the term “**inter-operator**” include “**foreign carriers**”. Legal counsel also argued that PTCL’s license enables provision of National and International Long-Distance Service and by any means whatsoever the licensee has to make arrangement with the “**foreign carriers**” for termination of international minutes. Therefore, application of the term “**inter-operator**” excluding therefrom “**foreign carries**” is neither the intent nor the scope the said term. It is very much clear that the payment made to “**foreign carriers**” pursuant to LDI’s operations / services is allowable deduction. In order to substantiate the above submission legal counsel referred and relied upon the following grounds:

- A) That the Authority has no authority to interpret, alter or amend the terms of the licensee’s license unilaterally in the absence of express consent by the Petitioner pursuant to Section 21(1) of the PTR 1996. The Petitioner has at no time consented to the amendment or modification of its license terms.
- B) That the Authority is estopped by its conduct having accepted and acknowledged foreign operator payments as deductibles under the head of “inter-operator” payments’ since the inception of the licensee’s license and

Dated: 8th April 2022

furthermore, having raised the issue in 2007 and accepted the resolution to the same thereafter by including such foreign operator payments under the head of 'inter-operator payments' subsequently.

- C) That the Authority has wrongly sought to interpret the term 'inter-operator' used in License Clause 6.2(a), clause 7.1 and clause 13 which is otherwise not a defined term under the licensee's License, the PTR 1996 or the Regulations issued by the Authority. The word used in Clauses 6.2(a), 7.1 and 13 is "inter-operator" and not "Operator". The word "Operator" is separately defined under Clause 27.2 of Schedule 1 of the License as those operators based in Pakistan who are licensed by the Authority and does not carry same meaning as the non-capitalized term 'inter-operator'. Furthermore, a defined term -wherever used is in the capitalized form. When not it is a different term altogether carrying a general or dictionary meaning or defined by the conduct of the parties concerned where the same pertains to a license or contract. Therefore, the definition of the term 'Operator' cannot be merely read into the wholly different and unique term 'inter-operator' as the same amounts to an amendment or the term itself and in doing so limiting the scope of the term 'inter-operator' to the direct detriment of the licensee.
- D) That even otherwise seeking to interpret the word 'operator' in the term 'inter-operator' to be restricted to the defined term 'Operator' would result in an absurdity as by virtue of the very nature of the LDI business the licensee has to interconnect with foreign operators who cannot be licensed by the Authority as they don't exist or operate within the jurisdiction of the Pakistan and nor are they required to be licensed by the Authority. Whereas by the very structure of the license the Annual Regulatory Dues are calculated on gross revenues of the Petitioner after deducting fixed fee and exactions paid to the Authority and the Government of Pakistan and charged paid out of commercial fee received by the licensee in effect on trust for other operators with whom it inter connects its network and thereafter pays such amounts to such third party operators; foreign and Pakistani.
- E) That inter operator costs paid by the licensee are in the nature of trust payments received by the licensee on behalf of and for the benefit of third party operator and is paid to the said operator. Trust payments are not deemed direct revenue as received and held for a third party's exclusive benefit, the licensed clauses 6.2(a), 7.1 and 13 of the licensee, License excludes such inter-operator payments from the gross revenue for purposes of calculating the Annual License Fee and other Annual Regulatory Dues.
- F) That the Authority has always in the past allowed these deductions of foreign operators under the term 'inter-operator', until the demand notices were

Dated: 8th April, 2022

issued in 2019 and 2020. The Authority by its past and consistent conduct has in fact defined the term 'inter-operator' as being a reference to all operators domestic and foreign and whether licensed by the Authority or not and has further created a vested right in the licensee to proceed on such basis and receive the benefit of such interpretation and application of Clause 6.2(a), 7.1 and Clause 13. The consistent conduct of the Authority being a statutory regulator has been acted upon by the licensee and hence creates a legal right in favour of the beneficiary of the action and therefore, such action cannot be altered by the Authority so as to deprive the licensee of the said right to its disadvantage.

- G) *That on the application of the principle of locus potestate, once an order/action has taken effect and in pursuance thereof certain rights have been created in favour of a person then such an action cannot be withdrawn or rescinded to the detriment of rights created. Therefore, the Authority cannot retrace its steps at this belated stage and alter the meaning and interpretation of the said term 'inter-operator' in the license clause which has been consistently applied by the Authority to allow the foreign operator costs as deductibles thus creating legal and best rights in favour of the licensee.*
- H) *That the interpretation sought to be placed by the Authority in excluding foreign operator costs from the "inter-operator payments" as set out in the license term amounts to a unilateral amendment or modification of the licensee's license terms, which pursuant to Section 22 of the PTR 1996 can only take place with the express consent and agreement of the licensee. That the imposition of such a unilateral interpretation amounting to an amendment to the licensed terms and whereby additional fee is sought to be imposed upon the licensee cannot be sustained in law.*
- I) *That there exists no basis in law or under the license terms of the licensee's modified License for such an interpretation of allowable deductibles and specifically of the term 'inter-operator'. The same is hence without any lawful authority and therefore, the additional amount of Rs. 168,321,808 as demanded by the Respondent is without any lawful basis and illegal.*
- J) *That the Authority in addition has sought to impose and claim Late Payment Fee at the rate of 2% per month on the additional amount claimed by it. The said additional amount based on the disputed modification of licensed terms has been contested by the licensee from the outset. Allowing the Authority to consider the period between a demand and prior to a conclusive determination during which the demand/imposition is contested on and for bona fide grounds and reasons represents a wholly unconscionable and unreasonable act. Furthermore, allowing the Authority to claim such late*

Dated: 8th April, 2022

payment fee from the outset or for the period during which the matter remains in dispute and pending adjudication enables the Authority to substantially impair the licensee's ability to seek its vested legal remedies as the additional financial impact of a late payment fee threatened to be imposed on a period of adjudication which is beyond the control of the licensee represents an indirect coercion to accept the Authority unlawful and baseless demands."

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 that the word "**operator**" when used or referred would refer to any operator either licensee or non-licensee. Preferably, the operator would refer to any company dealing with the business of telecommunication services. Since, the mandate of the licensee is to provide LDI service which requires agreement with foreign carries therefore, the term "**inter-operator**" in general parlance has been used so as to include all kind of telecom operators either local or foreign in hominization of telecom regulatory regime.

2.5 In addition, Legal Counsel for the licensee also pointed out that the license was awarded in 1997 and modified in 2005 and since the date of issuance of license and payment made by the licensee on annual fees no such demand ever been made earlier and the licensee was given the benefit of payment made to foreign carriers under the existing prevailing regime. Persistent conduct of the licensee lead to establish that the licensee as per its legitimate understanding as well as legal regime rendered is financial obligation without any delay and does not require to pay amount / dues as claimed / demanded by the Authority.

2.6 With the aforesaid arguments, legal counsel stated that demand raised by the Authority is neither within the applicable legal regulatory regime nor it was in practice. Thus, interpretation of the Authority for excluding foreign carries from the term "**inter-operator**" is misconceived. Thus, the licensee is not liable to make any dues as claimed by the Authority.

3. Findings of the Authority:

3.1 Matter heard. After hearing argument advanced by Legal Counsel and careful perusal of record. The moot point of discussion is to ascertain as to whether the foreign carriers fall within the term 'inter- operator 'as provided in the license.

3.2 While examining the terms and conditions of the license, it has been observed that schedule 1 of the license clause 27.2 of license provides that unless the context otherwise requires, capitalized words and expressions in this license that are not otherwise defined in this license, shall be defined in the same manner as these words and expression are defined in the Act and the Rules.

3.3 In addition, it further provides that unless the context otherwise requires, the terms used in this license shall have the same meaning as mentioned in the license. Similarly, the

No: PTA/Finance/LDI/Link Direct International/159/2006/157

Dated: 8th April, 2022

term operator has been defined in the license which states that any person authorized by a license issued by the Authority to provide Telecommunication Services of any kind or to establish, maintain and operate a Telecommunication System. 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, it has been used.

3.4 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.6.2 (a) 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, it is concluded that the term “operator” has been defined in the license which means any person authorized by a license issued by the Authority to provide telecommunication services to establish, maintain and operate a telecommunication system. Thus, careful perusal of the definition of the term “inter-operator” postulates that it only relates to the payment made to other licensees and not otherwise. Since, PTA has not issued license to foreign carriers therefore any payment made to foreign operators / carrier cannot be considered or 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 (7) pages only.