



Government of Pakistan
PAKISTAN TELECOMMUNICATION AUTHORITY
HEADQUARTERS, F-5/1, ISLAMABAD

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

No: PTA/Finance/Mobile/Mobilink/2006/27

Show Cause Notice: 11th March 2020
Venue of Hearing: PTA HQs, Islamabad
Date of Hearings: 1st June, 2021
12th October 2021

Panel of Hearing:

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

The Issue:

“Late Payment Additional Fee USD 30,545,600 on account of delay in making payment of License Renewal Fee”

Decision of the Authority

1. Brief facts of the case:

1.1 This order shall dispose of Show Cause Notice (“SCN”) No. PTA/Finance/Mobilink/Mobilink/2006/45 dated 11th March, 2020 issued to Pakistan Mobile Communication Limited (“licensee”) requiring therein to pay Late Payment Additional Fee (“LPAF”) USD 30,545,600 (*US Dollar thirty million five hundred forty five thousand and six hundred only*) on account of delay in making payment of license renewal fee that was due for payment on 26th May, 2019.

1.2 Relevant factual background of the case is that Warid Telecom (Pvt.) Ltd (“Warid”) was granted a Cellular Mobile License No. MCT-02/RBS/PTA/2004 on 26th May, 2004 by the Pakistan Telecommunication Authority (“Authority”) under section 21 of the Pakistan Telecommunication (Re-organization) Act, 1996 (“Act”) to provide the licensed services in Pakistan for a period of fifteen (15) years which expired on 25th May, 2019.

1.3 For the purpose of record it is also relevant to point out that by virtue of Authority’s order dated 19th May, 2016, a No Objection Certificate for the acquisition/ proposed merger/ change in substantial ownership of shareholding of Warid and PMCL was issued to the licensee. As a result of the Authority’s order dated 19th May, 2016, the licensee (i.e. PMCL the merged entity) was under obligation to abide by all requirements as provided therein. Relevant paras with regard to transfer of license and obligation in case of renewal are given below:

“Para 7.1.2 Merger between the Parties (step 2)

As a result of proposed merger, once finalized, under the applicable law, Warid Telecom (Pvt.) Ltd. shall cease to exist as a separate legal entity, thus matters pertaining to its consumer, licenses terms and conditions in license

No.MCT-02/RBS/PTA/2004 dated 26th May, 2004 shall be complied with by the Merged Entity..."

"Para 7.1.2.7 National Destination Codes and Numbering Series

If upon expiry of existing cellular mobile license No.MCT-02/RBS/PTA/2004 dated 26th May, 2004, the Merged Entity does not get the existing license renewed, the Merged Entity shall make the following payment:

i. Allocation Fees of NDC (032) =US\$5 million (or equivalent Pak Rupees). This will be upfront payment and will be charged once.

ii. Annual Number Fees per MSISDN as per the provision of Numbering Allocation & Administration Regulations, 2011 or its amended version which PTA may issue from time to time.

"Para 7.1.2.10 Renewal of license:

The renewal process under clause 1.2 of the cellular mobile license shall be handled by the Merged Entity/Parties on time as per the terms and condition of the license, the Rules, the Regulations, the Act, policy directives of the Federal Government at the relevant time."

1.4 Having aforementioned factual position, the licensee is under an obligation to renew the license and make payments on account of renewal of license fee upon expiry of the license. However, upon expiry of license, the licensee instead of renewing its license and making payment with effect from 26th May, 2019 preferred to file a Writ Petition No. 1750 of 2019 before the Honorable Islamabad High Court. The honorable court remanded the case back to the Authority for passing a speaking order. Accordingly, the Authority after providing a fair opportunity of hearing decided the matter of renewal on 22nd July, 2019 and the licensee was directed to pay renewal fee with effect from 26th May, 2019. For reference operative part of the Authority's order is reproduced below:

"6.1 In view of the foregoing discussion, the Authority passes the following order:

- a. Fee for renewal of license shall be US \$ 39.5 million per MHz for frequency spectrum of 900 MHz and US\$ 29.5 million per MHz for frequency spectrum of 1800 MHz;*
- b. License No. MCT-01/RBS/PTA/2004 dated 26th May 2004 will be renewed with effect from 26th May 2019 for a period of further fifteen (15) years, on technology neutral basis, subject to payment of renewal fee to be calculated in accordance with per MHz price as provided at para 6.1(a) above;*
- c. The payment terms for the renewal fee shall be 100% upfront or 50% upfront with remaining 50% in five (5) equal annual installments on LIBOR plus 3%. The payment shall be made in USD or with the option to pay in equivalent Pak Rupees calculated at the market exchange rate at the time of payment;*
- d. The upfront payment as given in para 6.1 (c) above shall be paid on or before 21-08-2019. In case of non-payment of upfront fee as required, the licensee shall stand expired;*

- e. *All fees and other charges as provided on part 4 of the license shall apply in a similar manner to the renewed license from its effective date i.e. 26th May 2019;*
- f. *The terms and conditions relating to enhanced quality of service and coverage of network shall be finalized in line with applicable regulatory practice and 2015 Policy after consultation with the Licensee on or before 21-08-2019;*
- g. *In case, the Licensee opts for non-renewal of its License, it shall pay on pro rata basis of the renewal fee as mentioned in para 6.1 (a) along with all other applicable fee and other charges as provided in Part 4 of the license commencing from 26-05-2019 till the date of withdrawal/vacation of radio frequency spectrum.”*

1.5 However, the licensee being aggrieved from the decision of the Authority filed a F.A.O No. 163 of 2019 before the Honorable Islamabad High Court. The Honorable Court vide order dated 19th July, 2021 dismissed the appeal.

1.6 It is relevant to point out that in light of court order dated 21st August, 2019 passed in FAO No. 163 of 2019 the licensee deposited amount on 2nd September, 2019 and 4th September, 2019 on account of license renewal fee which was due and payable on 26th May, 2019. As a result of delay in making payment a demand note dated 30th September, 2019 followed by corrigendum dated 2nd October, 2019 for payment of USD 30,545,600 as LPAF was issued. However, the licensee did not pay the same. As a consequence, thereof, a SCN dated 11th March, 2020 was issued to the licensee requiring therein to remedy the contravention by making payment of USD 30,545,600 within fifteen days of the issuance of SCN and to explain in writing within thirty days of the notice as to why the license should not be suspended, terminated or any other enforcement order should not be passed against the licensee under section 23 of the Act.

2. Reply to the SCN:

2.1 The licensee vide letter dated 8th April, 2020 submitted reply to the SCN and denied allegations leveled in SCN. For ready reference, crux of the reply to SCN are given below:

- i. There is no delay in payment of license renewal fee, thus no question of any late payment additional fee which even is not relevant and applicable in facts and circumstances;
- ii. The licensee filed W.P No. 1750 of 2019 on 4th May, 2019 due to PTA's inaction in resolving the matter of Jazz license renewal in accordance with prevailing law and terms of the licenses. In addition, PMCL has also challenged policy directive dated 9th May, 2019 in W.P No. 240 of 2020. The said policy directive stated that payment of the license renewal fee shall be due on **25th June, 2019**. Therefore, requirement to make payment on **26th May, 2019** is factually incorrect and contrary to the policy directive.
- iii. The Honorable Court disposed of the petition and referred the matter vide consent order dated 21st June, 2019 by remanding the case back to the Authority.
- iv. The Authority through order dated 22nd July, 2019 clarified in terms of para 6.1(d) that the license Renewal fee was to be paid on or before **21st**

August, 2019. PMCL filed appeal (FAO 163 of 2019) against the order of PTA in IHC.

- v. The Honorable Court vide order dated 21st August, 2019 allowed two weeks' time to deposit payment and accordingly 50% of license fee was deposited.
- vi. Initially payment was to be made on 25th June, 2019. However, this was suspended by the consent court order dated 21st June, 2019. Between 21st June, 2019 till PTA order dated 22nd July, 2019 the amount of renewal of license was not known. Thereafter, PTA re-determined the amount and payment was to be made by 21st August, 2019.
- vii. The said time line was also superseded by the interim order of the Honorable Court vide order dated 21st August, 2019 to make payment.
- viii. In light of the above, there is no delay in making renewal fee and thus licensee is not liable to pay LPAF.

2.2 In order to proceed further, the matter was fixed for hearing on 1st June, 2020. Since the Honorable Islamabad Court vide order dated 21st August 2019 in F.A.O No. 163 of 2019 restrained the Authority for passing final order therefore, the matter was not decided. For ready reference relevant portion of the Honorable High Court order is reproduced below:

“The impugned orders are suspended subject to deposit of the amount in accordance with one of the options mentioned therein the Appellant company shall deposit the respective liabilities within two weeks to the satisfaction of the Pakistan Telecommunication Authority. The said deposit shall be subject to the final adjudication of these appeals. In case the Authority intends to proceed against the company for the recovery of charges on account of delay then it may issue Show Cause Notice but final order shall not be passed.”

2.3 Later on, after dismissal of the said appeal, the matter was again fixed for hearing on 12th October, 2021. Mr. Shahzad Elahi, Advocate Supreme Court of Pakistan along with Ms. Saima Kamila Khan (CLO), Mr. Fakhar Ahmed (CRA), Mr. Farhan-ul-Hassan, Head of Policy Regulatory and Mr. Zulqurnain Bhatti, Head of Litigation attended the hearing on the said date before the Authority. During hearing, the licensee reiterated the same as submitted vide its SCN reply dated 8th April 2020.

3. Findings of the Authority:

Matter heard and record perused. After careful examination of the record and hearing submissions of the licensee at length, findings of the Authority are as under:

3.1 Admittedly, there is no dispute with regard to effective date of renewal of license. As per decision of the Authority dated 22nd July, 2019, it has explicitly been provided that the effective date of renewal of license will be 26th May, 2019. However, the licensee has failed to make payment as per decision of the Authority.

3.2 The said order of the Authority clearly provides payment mechanism and due date of the renewal of license. Para 6.1 (c) of the said order provides that all fees and

other charges as provided in Part 4 of the license shall payable in a similar manner to the renewed license from its effective date i.e., 26th May, 2019.

3.3 The licensee's contention is that initially payment was to be made on 25th June, 2019. However, this was suspended by the consent order dated 21st June, 2019 passed in W.P No. 1750 of 2019. Thus, between 21st June, 2019 till PTA's order dated 22nd July, 2019 the amount of renewal of license was not known. Thereafter, PTA re-determined the amount and payment was to be made by 21st August, 2019. In this regard, it is clarified that the licensee was required to make the payment on certain date which was due and payable with effect from 26th May, 2019. Thus, without making renewal license fee, the licensee cannot be allowed to provide licensed services. Accordingly, while passing order dated 22nd July, 2019 effective date of renewal of license was mentioned.

3.4 It is also relevant to point out that the Honorable Islamabad High Court vide its order dated 21st August, 2020 in FAO No. 163 of 2019 also held that in case the Authority intends to proceed against the company for the recovery of charges on account of delay then it may issue Show Cause Notice but final order shall not be passed. Most importantly, the Honorable Islamabad High Court has upheld the Authority's order dated 22nd July, 2019 and dismissed appeal filed by the licensee. Thus, the licensee is under an obligation to make payment on account of LPAF.

3.5 With regard to renewal fee, the Honorable Islamabad High Court has discussed this issue in detail. For ready reference relevant paras of the order are reproduced below:

"9. It is noted that frequency spectrum is covered in the expression "scarce resource" and defined under section 2 (qc) of the Act of 1996. The scheme of the Act of 1996 clearly shows the allocation of scarce resource and determination of its price has to be made in a transparent manner. A licensee is therefore, under an obligation to pay the fee or price for the allocated frequency spectrum regardless of its actual use. The August Supreme Court in the case titled "Pakcom Limited and others Vs Federation of Pakistan other" [PLD 2011 SC 44] has elaborated the nature of frequency spectrum and the fee/ price for its use. It has been held that such fee is paid because frequency spectrum is owned by the state and is one of its precious scarce resources.

10. The dispute raised by the petitioners companies is regarding determination of the price for the use of frequency allocation for the purposes of renewal of the licenses. The Federal Government considered the proposal sent by the Authority and determined the price for the right to use the frequency spectrum vide policy directive, 09-05-2019. The determination was based on the bench mark of the bids received during the last held public auction. The determination of the price was obviously to be made on the basis of the market price of the right to use the scarce resource at the time of renewal of licenses. The most effective mode for determination would have been auctioned of the scarce resource through a transparent bidding process.

11. There is nothing on record to show that licenses could be renewed on the basis of a price less than the prevailing value of the right

to use the scarce resource. The mode of determination adopted by the Federal Government was reasonable, just and in public interest. There is no force in the argument advanced by the learned counsel for the petitioner companies that the delay in determination was in violation of policy and the terms of the licenses. The delay was also attributable to the petitioner companies. The policy directive of Federal Government, dated 09-05-2019, was reasonable and fair determination of the value of use of scarce resource for the purposes of renewal of license. The learned counsels were asked whether the petitioner companies were willing to participate in an international bidding process so as to determine the actual prevailing price for the right to use of the scarce resource? They prefer not to respond the question. The learned counsel despite their able assistance were not able to persuade this court that the licensees would be renewed on the terms and condition less favorable to the public interest or the exchequer. The impugned determination of the Authority is well reasoned and does not suffer any legal infirmity requiring interference.

12. *For the above reason, these appeals and constitutional are without merit and therefore accordingly dismissed.”*

4. Order

4.1 Keeping in view the above-mentioned facts coupled with the available record and court order, the Authority has reached to the conclusion that demand note dated 27th September 2019 and corrigendum dated 2nd October 2019 requiring the licensee to pay late payment additional fee amounting to USD 30,545,600 (US Dollar Thirty Million Five Hundred Forty-Five Thousand and Six Hundred only) has validly been issued. Therefore, the licensee is hereby directed to make payment of the said outstanding dues within seven (07) days from the date of receipt of this order.

4.2 In case of non-compliance of order at para 4.1 above, the matter will be processed further as per applicable law without any further notice.

Maj. Gen. Amir Azeem Bajwa (R)

Chairman

Muhammad Naveed
Member (Finance)

Dr. Khawar Siddique Khokhar
Member (Compliance & Enforcement)

Signed on 28th day of February, 2022 and comprises of (6) pages only.