



**PAKISTAN TELECOMMUNICATION AUTHORITY**  
**HEADQUARTERS, F-5/1 ISLAMABAD**

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**Decision/Determination of the Authority in the matter of**  
**LDIs APC for USF**

Date of Hearing: 29<sup>th</sup> February, 2008  
Date of receiving additional arguments: 7<sup>th</sup> March, 2008  
Venue of Hearing: PTA HQs, Islamabad

**The Authority Present:**

Maj Gen. (R) Shahzada Alam Malik:	Chairman
S. Nasrul Karim Ghaznavi:	Member (Finance)
Dr. Muhammad Yaseen:	Member (Technical)

**The Issue:**

“LDI’s liability to make Access Promotion Contribution to the Universal Service Fund under the Access promotion Rules, 2004”

**Decision/determination of the Authority**

Through this common decision/determination of ours we propose to dispose of eight show cause notices issued under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the “Act”) involving identical questions of law and fact. Brief description of the said show-cause notices is as under:

- i. No.02-06/2005(AP)/PTA-658 dated 4<sup>th</sup> December, 2006 (M/s WorldCall)
- ii. No.06-01/0(Interco)/PTA/1460 dated 18<sup>th</sup> July, 2007 (M/s Callmate)
- iii. No.06-01/0(Interco)/PTA/1458 dated 18<sup>th</sup> July, 2007 (Wisecom)
- iv. No.06-01/0(Interco)/PTA/1459 dated 18<sup>th</sup> July, 2007 (DV Com)
- v. No.06-01/5(Interco)/PTA/1619 dated 29<sup>th</sup> August, 2007 (Dancom)
- vi. No.06-01/0(Interco)/PTA/1464 dated 20<sup>th</sup> July, 2007 (Circle Net)
- vii. No.06-01/0(Interco)/PTA/1243 dated 7<sup>th</sup> June, 2007 (Telecard)
- viii. No.06-01/04(AP)/PTA/965 dated 28<sup>th</sup> February, 2007 (Burraq Telecom)

2. The relevant facts in small compass are that eight Long Distance & International (“LDI”) licensees of the Pakistan Telecommunication Authority (the “Authority”), namely, M/s WorldCall, M/s Callmate Telips, M/s Wisecom, M/s DV Com, M/s Dancom, M/s Circle Net, M/s Telecard and M/s Burraq (*hereinafter referred to collectively as the “licensees” and individually with the name of each company*) were required by the Authority to pay Access Promotion Contribution (“APC”) for Universal Service Fund (“USF”) (“APC for USF”) under the Access Promotion Rules, 2004 (the “Rules”) read with the terms and conditions of their respective LDI licenses and provisions of the Access Promotion Regulations, 2005 (the “Regulations”).

3. The licensees have been paying APC for USF from 1<sup>st</sup> January, 2005 i.e. from the day next to the date of promulgation of the Rules towards the end of 2005 when they stopped paying it despite our repeated demands made through our finance division. The licensees were time and again reminded of their obligations to pay APC for USF under the Rules, Regulations and under the terms and conditions of their respective LDI licenses but to no avail. Considering this act of the licensees as contravention of the Rules and terms and conditions of the licenses, we, by invoking the provisions of section 23 of the Act, served the subject show cause notices on the licensees and required them to explain their position and show cause as to why any enforcement order may not be passed against them for contravening the provisions of the Rules and terms and conditions of their licenses.

4. Except for M/s Circle Net, all the licensees replied to the show-cause notices wherein the Rules being allegedly *ultra vires* and thus illegal was the main cause/justification shown for withholding APC for USF. M/s Dancom, on the other hand, in its reply relied on SRO No.846-(I)/2007 dated 20<sup>th</sup> August, 2007 read with the Federal Government’s letter dated 21<sup>st</sup> September, 2007 and maintained that it is liable to deposit APC for USF in the Federal Government’s account directly and not to the Authority. In its reply M/s Dancom also asked for clarification from the Authority if the position taken by it was not correct.

5. All the replies received were carefully perused by us and after being found not-satisfactory, we required the licensees to appear before us so that they could be heard on the points/grounds raised by them in their replies to our show cause notices and the points so raised could be evaluated and considered with their assistance.

6. The matter was thus fixed for hearing on 18<sup>th</sup> July, 2007 which was later adjourned on M/s WorldCall’s request and was rescheduled for 29<sup>th</sup> February, 2008.

7. M/s Dancom and DV Com did not turn up while rest of the licensees appeared through the following:

- i. M/s WorldCall: Kh. Tariq Rahim and Kh. Ahmed Hosain, legal counsels alongwith Sohail Qadir, Adeel Khan
- ii. M/s TeleCard: Afnan Karim Kundi and Barrister Ahmed Ch. Advocates alongwith Shahid Naeem Butt

- iii. M/s Callmate: Shujaat Ali Qarni, CEO
- iv. M/s Burraq: Ali Raza, Advocate alongwith Mohsin Qazi, CFO
- v. Circle Net: M. Zafar Ch.
- vi. Wisecom: Khurram Shahzad, legal counsel alongwith M Shamsul Haq

8. Mr. Kh Ahmed Tariq Rahim and Mr. Khuwaja Ahmed Hosain, learned counsel for M/s WorldCall started presenting their case and invited our attention through oral as well as written arguments, to the following points:

**M/s Worldcall argues:**

- i. That the amount shown and demanded through the show cause notice is not the amount payable under the license of Worldcall Telecom Limited but is the amount being claimed under the Rules;
- ii. That the Rules are dated 31<sup>st</sup> December, 2004 promulgated in exercise of the powers conferred by Section 57 of the Act while at the material time the Federal Government was not competent to issue the Rules under section 57 of the Act as the section then was.
- iii. That the Act, before the amendments introduced in it in the year 1996 contained no mention of a Universal Service Fund nor did it envisage that any Rules may be promulgated regarding contributions to a Universal Service Fund. The learned counsel further argued that it is therefore clear that the Rules are *ultra vires* and illegal as the Federal Government had no power on 31<sup>st</sup> December 2004 to promulgate any Rules which would pertain to a Universal Service Fund or the making of a contribution to a Universal Service Fund.
- iv. The learned counsel further maintained that section 57(1) only allows Rules to be promulgated where they are specifically contemplated by the Act as it was before the amendments and this is what the term "and where provided for hereinbefore" means.
- v. That the above lacuna was subsequently addressed by virtue of the Pakistan Telecommunication (Re-organization) (Amendment) Act, 2006 (the "2006 Amending Act") which was passed on 22<sup>nd</sup> February 2006 vide which a new Section 33A was introduced into the Act which is reproduced as under:  
  
*"As soon as may be, after the commencement of the Pakistan Telecommunication (Amendment) Act, 2006, the Federal Government shall by notification in the Official Gazette, establish a Fund to be called the Universal Service Fund hereinafter referred to as USF."*
- vi. That the 2006 Amending Act made two material amendments in Section 57. First, the term "*and where provided for hereinbefore*" was removed. Second, a specific

new Rule making power was inserted in Section 57(2)(af) under which the Federal Government can make rules by providing in the following words:

*"...requiring licensees that handle international telephony services to make payments... (ii) to the USF in respect of international telephony service calls that prescribed categories of licensees terminate in Pakistan;"*

- vii. That the above two amendments quite clearly establish that as at the date of promulgation of the Rules, the Federal Government had no power to make it. If it did, there was no need for inclusion of the amendments that the legislature made through the 2006 Amending Act in the Rule making power of the Federal Government. Following the insertion of this rule making power on 22<sup>nd</sup> February 2006, the proper legal course was for the Federal Government to promulgate rules in respect of APC under the new rule making powers. This has not been done. Hence, the Rules being *ultra vires* and illegal, no amount can be demanded under the terms thereof.
- viii. M/s Worldcall's learned counsel next argued that as at 30<sup>th</sup> April 2006 (the date up to which the demand in the show cause notice relates), the USF did not exist. The 2006 Amending Act contemplates issuance of a notification after its promulgation constituting a Fund to be known as the Universal Service Fund and that no such notification has been issued. There is a notification dated 7<sup>th</sup> October 2005 which by its terms purports to create a Universal Service Fund under the Pakistan Telecommunication (Re-organization) (Amendment) Ordinance, 2005. However this notification has been superseded by the clear terms of the subsequent statute which contemplates a creation of a USF after the commencement of the 2006 Amending Act.
- ix. That it is only with promulgation of the USF Rules that it has been established that the Fund is a bank account of the Federal Government and until the relevant account has been designated by the Federal Government the Fund does not exist since the Fund is essentially the distinct account created for USF purposes by the Federal Government. Until this account is designated, the Fund does not exist as it is not possible to make or remit payments to a non-existing account.
- x. That the relevant account was designated by virtue of SRO 846(1)72007 which was promulgated on 20<sup>th</sup> August, 2007 (the "2007 SRO"). The 2007 SRO has been made under Rule 5 of the USF Rules and specifically directs that APC for USF is to be paid into a specified account. The 2007 SRO contains directions for all licensees and also for the PTA.
- xi. Based on the foregoing, the licensee further submitted that until the 2007 SRO there was no Fund into which payments of USF could be made and therefore no amounts can be claimed in respect of USF contributions and payments prior to this date. In

the alternative, even if it is held that the USF was created by virtue of the USF Rules or by virtue of the notification dated 7<sup>th</sup> October 2005, no amount can be claimed as a contribution towards USF for that time period prior to the lawful constitution of the USF. If there is no Fund, there can be no legal obligation to contribute to the Fund.

- xii. That PTA does not have the power to collect APC for USF contributions which are to be made under the Rules. Under Rule 5 of the Rules, the Federal Government can direct PTA to collect and remit this amount to the Fund's designated account. No such direction has been given. PTA is therefore not empowered to collect this amount. In addition, and without prejudice to the foregoing, the PTA does not have the statutory power under the Act (as amended by the 2006 Amending Act) to act as a collection agent for the Federal Government. PTA is a distinct legal entity set up to regulate the telecommunication sector. It is meant to be independent of the Federal Government and not a part of the Federal Government and that is the whole basis of independent regulation. The Federal Government cannot assign tasks to PTA which are not contemplated by the statute which created it.
- xiii. The licensee further submitted that without prejudice to all the above legal submissions, as at the date hereof, it has made payments totaling Rs.223,018,227 to PTA for the period up to October 2005 as APC for USF. These payments were made under a mistake of law as they were made during a period when no Universal Service Fund existed and therefore where no liability existed for contribution to the USF, hence, these payments must be adjusted against any dues of USF that may be lawfully claimed prior to any recovery of USF contributions from it.
- xiv. Before summing up, the learned counsel summarized his arguments mainly in three points i.e.
  - a. the APC Rules are *ultra vires* and illegal and therefore no amounts can be recovered or held to be payable under the APC Rules;
  - b. the USF was not in existence at the material time and since the obligation is a very specific obligation to make a payment to the USF, such obligation cannot exist until the USF is created and, without prejudice, the USF is simply a bank account of the Federal Government which was only established in the USF Rules and therefore there can be no obligation prior to the date of these USF Rules since there was no way that payment could be made when it was not clear what exactly the "Fund" was; and
  - c. PTA has no power under law to act as a collection agent for the Federal Government. PTA is an independent regulator set up to perform certain specific functions stipulated in the statute under which it has been created. The Federal Government cannot through Rules assign the job of collection of a Federal Government Fund to PTA.

### M/s TeleCard's Submissions:

M/s TeleCard mainly assailed issuance of the show cause on the ground of it being contrary to the terms and conditions of its LDI licence and maintained that imposition of obligation to pay APC for USF is in fact modification of the terms and conditions of the licence unilaterally. The points raised in by the learned counsel in his written arguments and the submissions made before us orally can be summarized as under:

#### No Condition in the license for payment of APC for USF

- i. That under the licence issued to M/s TeleCard, it was expressly obligated to make only the following contributions:
  - a. Access Promotion Contribution ("APC") under section 3.5; and
  - b. Universal Service Fund Contribution (the "USFC") under section 3.6.
- ii. That the license did nowhere expressly require TeleCard to make APC for USF. The only provision which may be construed to have imposed the payment of APC for USF is section 4.1.3 of the License.
- iii. That the Rules do impose APC for USF on the LDI licensees, it is not in the nature of a "fee" but more akin to a "tax". By its essential nature, APC for USF is a "tax" as it is being levied as part of a common burden upon all LDI licensees in the form of a compulsory exaction of money by the Federal Government for a public purpose i.e. "Access Promotion". There is no corresponding special benefit or privilege afforded to the LDI licensees by virtue of their payment of APC for USF, which may have opened room for interpreting it as a "fee" instead of "tax".
- iv. In support of his foregoing submission, the learned counsel cited before us the case decided by the august Supreme Court of Pakistan titled ***Collector of Customs and others versus Sheikh Spinning Mills*** reported in **1999 SCMR 1402** and reiterated that the above-mentioned section 4.1.3 of the License only obliging TeleCard to pay "fees" under the Rules, would not cover APC for USF even if imposed under the Rules.

#### Modification of License required for APC for USF

- v. That in the absence of a condition in the License, it would have required a modification to the License to impose the levy of APC for USF on TeleCard. Modification of the License, as per section 22 of the Act, can only be done in a specified manner also involving TeleCard's consent.
- vi. On the Federal Government's Deregulation Policy for the Telecom Sector ("Deregulation Policy"), the learned counsel argued that the same was issued prior to the grant of License in July 2003 and it did mention the imposition of APC for USF, however, the Deregulation Policy could at best be termed a policy directive of the Federal Government issued under section 8 of the Act and

that sheer mention of the APC for USF in the Deregulation Policy could not be legally made the basis for its levy for two reasons:

- a. The Deregulation Policy itself stated that necessary legal support for levying APC for USF shall be provided by amending the Act and the rules made thereunder (clauses/sections 5.2 and 11.1) and the date for its levy was to be notified later (clause/section 4.3.4).
  - b. Modification of any license through a policy directive like the Deregulation Policy issued under section 8 of the Act, is not permissible.
- vii. The learned counsel submitted that the legal position stated in (b) above was endorsed and reinforced by the legislature while amending the Act through the 2006 amending Act which clearly envisaged modification of the terms and conditions of any existing license in terms of a policy directive of the Federal Government only after the expiry of the license term.
- viii. The 2006 Amending Act added a new sub-section (3) to the very section 22 of the Act pertaining to modification of licenses, stating therein as under:
- "After the expiry of the initial or renewed term, the licence may be renewed on terms and conditions consistent with the policy directive, if any, of the Federal Government."
- ix. M/s Telecard further submitted that having been enacted pursuant to the Deregulation Policy, the 2006 Amending Act would be deemed to take the effect of the Deregulation Policy fully into account and the very placement of sub-section (3) in section 22 of the Act pertaining to modification of licenses clearly implies that the Deregulation Policy shall not have any effect on the terms and conditions of License on its own till the expiry of its current term or till the Act itself provided for the levy of APC for USF, whichever is earlier.

#### *Non-Existence of Universal Service Fund*

- x. Arguing on the point of non-existence of the Universal Service Fund, the learned counsel submitted that without conceding that APC for USF could be validly imposed under the Rules without amending the parent legislation i.e. the Act and regardless of the nature of APC for USF as a "tax" and not a "fee", the same could still not be charged from or imposed on LDI licensees till the time the Universal Service Fund ("USF") was duly established by the Federal Government.
- xi. On this point, the learned counsel for M/s Worldcall has already made detailed submissions. Discussing the points raised by M/s Telecard, on the subject, would be simply repetition of the arguments already addressed, we, therefore, for conciseness, deem it appropriate not to reproduce Telecard's arguments here.

*Absence of Legal Sanction for Levy/Collection of APC for USF*

- xii. The learned counsel next draw our attention to the proposition that regardless of when USF was established and came into existence, it still needs to be examined whether the collection/levy of APC for USF could be lawfully made under the AP Rules?
- xiii. Elaborating his submissions on the proposition above, the learned counsel formulated the following two main points:
  - a. Having been made' prior to the Amending Act, whether AP Rules were framed competently?
  - b. If not, whether AP Rules are validated by the Amending Act?

*The Rules not competently framed*

- xiv. The learned counsel argued that the Rules are essentially a piece of subordinate or delegated legislation. As such, they could only have been validly made by the Federal Government if such rules lay within the scope of the authority for subordinate legislation delegated by the Parliament to the Federal Government under the Act (as it existed on 31.12.2004 when the Rules were made).
- xv. Emphasis was made on the point that any rules outside the scope of the authority delegated by the Parliament in the Act would of course be *ultra vires* and, therefore, ineffective against the rights and obligations of TeleCard.
- xvi. M/s TeleCard assailed the Rules almost on the same grounds already argued by M/s Worldcall and maintained that APC for USF is indeed in the nature a "tax" levy as opposed to being a "fee" for services rendered, Article 77 of the Constitution of the Islamic Republic of Pakistan, 1973 lays down that a tax cannot be levied for the purposes of the Federation except by or under the authority of an Act of the Parliament
- xvii. Elaborating the point further, the learned counsel submitted that the Federal Government may, therefore, have imposed APC for USF only after necessary authority had expressly been granted to it by the Parliament through an enabling provision in an Act of Parliament (like the 2006 Amending Act). The licensee relied on the dictum laid down in the case of **Crescent Re Rolling Mills, Lahore versus Assistant Collector of Sales Tax, Lahore (2005 PTD 2436)**.

*AP Rules not Validated by the Amending Act*

- xviii. To the points raised by M/s WorldCall regarding the validity or otherwise of the Rules, M/s TeleCard added that upon the enactment of the 2006 Amending Act, the Federal Government became competent to impose and exact APC for USF from LDI licensees in light of the enabling amendments to the Act.

However, these amendments by the 2006 Amending Act on their own do not render valid, either retrospectively or even prospectively, the provisions of Rules imposing APC for USF on LDI licensees, which were originally *ultra vires* of the Federal Government's delegated authority of rule-making under the Act as it stood un-amended at the time of making the Rules on 31.12.2004.

- xix. The learned counsel further added that inherent lack of delegated authority in the making of the Rules does not stand cured by the mere introduction of enabling provisions in the 2006 Amending Act unless the Rules are made afresh by the Federal Government under its newly inserted rule-making powers in section 57 of the Act and the fresh empowering amendments to the Act introduced by the Amending Act will, therefore, not automatically validate, either retrospectively or prospectively, the *ultra vires* provisions of the AP Rules regarding levy of APC for USF, unless these fresh powers are exercised by the Federal Government to make rules for the imposition, collection and administration of the APC for USF.
- xx. Based on the foregoing, the learned counsel concluded his arguments on the point under discussion that unless the new rule-making powers under the amended section 57 of the Act are now exercised by the Federal Government to frame rules for the exaction of APC for USF, the same cannot be demanded by the Federal Government or PTA merely under the authority of the Rules, since the relevant provisions of the said subordinate legislation continue to remain *ultra vires* as they exist illegalities from which not only the AP Rules but the entire legal and regulatory framework is presently suffering and which remain uncured to date, and for which APC for USF cannot be levied or collected from TeleCard or any other LDI licensee for that matter.
- xxi. The learned counsel representing Telecard prayed that in the best interest of justice and keeping in view the dictates of section 24A of the General Clauses Act, 1897 the following may be done:
  - a. The Show Cause Notice may kindly be withdrawn in *toto* without any adverse action against TeleCard pursuant or consequent thereto since the same relates to the period before 01.11.2006 when the USF was admittedly not in existence; and
  - b. The rest of the entire matter of levy and collection of APC for USF may kindly be referred to the Federal Government alongwith the instant submissions for consideration and appropriate action/rectification including necessary instructions, if any, to PTA in accordance with law.

**M/s Burraq Telecom:**

M/s Burraq Telecom also argued on the same lines and after referring to the relevant provisions of the Act, the 2006 Amending Act and the Rules, summarized its points as under:

- a) Prior to 22<sup>nd</sup> February, 2006 there was no USF Fund and could not even be notified retrospectively;
- b) The Federal Government had to notify the USF Fund specifically through a notification, in the absence of which there would be no USF Fund; and
- c) The payments to be made by the license holders would be made pursuant to the Rules made under the Act.
  - i. Relying on its points mentioned above, M/s Burraq Telecom submitted that the question of any APC for USF payments being demanded from or made by LDI license holders prior to 22<sup>nd</sup> February, 2006 simply does not arise.
  - ii. The learned counsel representing M/s Burraq further argued that under Rule 8 of the Rules the Authority was required to determine APC for USF country by country, such determination in itself could not create an obligation on the LDI License holder to pay such contribution in the absence of the USF Fund being established and furthermore, the amendments of 2006 clearly show that the APC Rules, 2004 themselves, were not legally valid until the provision to make such rules was provided for under the Pakistan Telecommunication (Re-organization) Act of 1996 vide the Pakistan Telecommunication (Re-organization) (Amendment) Act of 2006 dated 22<sup>nd</sup> February, 2006.
  - iii. The learned counsel further submitted that in addition to the provisions of the Act and the Rules, the License issued to the holder in Clause 3.4.1 states that USF contribution will be made to the Universal Service Fund, not to the Authority as the licence does not state which date this is applicable from. Under Clause 4.2.2 of the License this fact is further confirmed as it is stated that the 'contributions' under Clause 3.4.1 will be made within 120 days of end of the financial year to which such contributions relate. The learned counsel reiterated that the USF contributions are to be made to the USF Fund and not the Authority.
  - iv. Elaborating the aforementioned point further, the learned counsel argued that since under Rule 5 of the Rules and Section 2(a) of the Act any payment on account of USF Contribution had to be made to the USF Fund which is administered and managed by the Federal Government, the Authority in issuing the Demand for such APC for USF Contributions was simply acting as an agent of the USF Fund and in the absence of the very existence of the USF Fund, the Authority could not have acted as an agent and issued such Demands which are therefore, invalid.
  - v. The learned counsel next argued that the provision requiring the LDI Licenses to make contribution payments to the USF Fund, in addition to being a subordinated legislation, it is a fiscal provision which cannot be applied retrospectively. Therefore, it cannot be even implied that the amendments incorporated vide the 2006 Amending Act could be considered with

retrospective effect in the absence of a specific provision in the law for retrospective effect.

- vi. It was contended that the Authority primarily acting as an Agent of the USF Fund in respect of issuing Demands of the USF Contribution and collecting such payments on behalf of the USF Fund, cannot decide whether these Demands are infact legal and valid. The Authority is acting under its jurisdiction of an agent and therefore, its only option is to revert the matter to the USF Fund and the Federal Government for a review of this legal and statutory lacuna in the Demands issued uptil now and seek a clarification and require the Federal Government and the USF Fund to;
  - a) Issue new Demands based on calculations made from the date that the USF Fund was incorporated;
  - b) Issue a valid authorization to the Authority to issue such Demands on behalf of the USF Fund; and
  - c) Issue a valid authorization to the Authority to collect proceeds against such Demands.

**The Authority's competency to declare the Rules *ultra vires*:**

9. After when the learned counsel representing the licensees fully exhausted their arguments, *inter alia*, on the point that the Rules are *ultra vires* and illegal, and any demand under these Rules is as such illegal and its contravention can not be termed as contravention of the Rules for invoking provisions of section 23 of the Act, they were asked to assist us that if it is presumed/admitted, without conceding, that the Rules are *ultra vires* and illegal, who's domain it is to declare it as such i.e. whether we have/the Authority has the jurisdiction to declare the Rules *ultra vires* and against the law?

10. The foregoing query of ours was without prejudice to the legal status of the Rules as before sitting and deciding on the legality or otherwise of the Rules, we deemed it appropriate to first know our jurisdiction and competency to declare the Rules *ultra vires*, if any such conclusion could be arrived at.

11. M/s Kh. Ahmed Tariq Rahim and Kh Ahmad Hosain, learned counsel for M/s WorldCall requested for three to four days time to respond to our aforementioned query.

12. It was not earlier than 7<sup>th</sup> March, 2008 that we received M/s WorldCall's arguments/response to our query mentioned above, through fax and also through courier on the next day. M/s WorldCall's arguments on our competency to declare the Rules *ultra vires*, can be summarized as under:

- The procedure to be followed by the Authority while hearing matters is prescribed in terms of SRO 315(1) 2007 and specifically Chapter 3 of the said Regulation deals with adjudication, regulation 27, 28, 29. Elaborately prescribed the procedure to be followed by the Authority which leaves no room for doubt that the Authority is performing quasi-judicial functions

while sitting in adjudication over show cause notice issued by the Authority.

- The said Regulation lays down the procedure regarding right of hearing, representation by legal counsel and filing of Power of Attorney. The fact that an appeal is provided to the High Court which is to be considered as first appeal in the said court fortifies the stand taken by the M/s. Worldcall Telecom Limited that the Authority while exercising its power is performing quasi-judicial functions.
- To fortify the above view reliance is placed on Administrative Law by Durga Das Basu page 213.

“Jurists were thus led to invent the word ‘quasi-judicial’, the word ‘quasi’ meaning literally, “not exactly”. It is commonplace to state that an authority is described as quasi-judicial because it has some of the attributes or trappings of a ‘Court’ but not all.”

- The word quasi-judicial was dealt with in the famous Donoughmore Committee on Minister Powers 1932 in England which stated that where a body/tribunal/authority was exercising nearly judicial functions though not tied to the ordinary judicial procedure then the said body/authority would be regarded as exercising quasi-judicial functions.
- One of the earliest decisions in England where the term quasi-judicial was used is Errington Vs Ministry of Health 1935 1 KB page 249. The underlying feature is that where an authority is determining the rights of persons which have a binding force that it is acting in a quasi-judicial manner.
- A corollary of the above is that while performing this function, the Authority is to act in accordance with law of the land and principle as enunciated and established by the Superior Courts is while determining whether an amount is payable or not the authority has to interpret the law and arguments can be addressed as to whether there is an obligation or liability which arises under the law. Reference is made to the number of decisions of the superior courts where the contention was raised that the recovery of dues as arrears of Land Revenue Act can be challenged before the Recovery Officer who was to determine whether the amount was legally due or not and whether the principle of natural justice had been followed. Reference is invited to PLD 1988 S.C. Page 67, PLD 1962 S.C. Page 384.
- In the present case, the Authority is exercising quasi-judicial functions and has to determine whether the Universal Service Fund established at the time or period for which the demand is being raised. If there was no

Universal Service Fund in existence then recovery or contribution in the absence of that Fund is not warranted under the law.

- It is also to be ascertained that the fund would only come into existence once it is duly notified by the Federal Government and rules are prescribed for regulating the said Fund.
- In any case prior to 7<sup>th</sup> October 2005 the USF was not existent and any demand would be illegal.
- Once it is established that the Authority is performing quasi-judicial functions then it cannot be denied that the Authority can examine the vires or otherwise of the rules.

### **Findings of the Authority:**

13. The query regarding our competency to decide on the legality or otherwise of the Rules was raised as the show-cause notices were mainly assailed on the ground of the Rules being allegedly *ultra vires* and illegal. Hence, deciding about our jurisdiction to call into question the *vires* of the Rules stood as a prerequisite for considering the arguments addressed on the point and dilating upon it.

14. We have examined the response to our aforementioned query, summarized in para 12 above, with care and caution and have found that emphasis is made mainly on the point if the Authority is a quasi judicial forum? Our query was very simple and specific. Irrespective of the fact of our status being quasi judicial or purely administrative body, we wanted to know our powers to declare a subordinate legislation done in the exercise of statutory powers as *ultra vires* the law.

15. Vide the response summarized in para 12, above, (the “response”), an effort is made to establish our status as a quasi judicial forum. However, even if agreed and the argument regarding our status as that of a quasi judicial forum is conceded, nothing has been shown to establish that a quasi judicial forum has the power and domain to call into question *vires* of a legislation i.e. the Rules in the instant case. The case law relied upon by the licensee is not relevant to the query raised by us.

16. As repeatedly mentioned above, vide the instant proceedings and the arguments addressed to us, we have been called upon to declare the Rules *ultra vires* and thus of no legal effect. Borrowing wisdom from the case of *Bahadur & others Vs. Umar Hayat & others* reported in **PLD 1993 Lahore 390** the power to declare an act of an authority or tribunal to be without jurisdiction and of no legal effect is the power of “judicial review” and we have not been shown that such power can be exercised by us or by some quasi judicial authority.

17. Our understanding, therefore, remained unchanged that such powers of judicial review are available only to our civil courts in exercise of their plenary jurisdiction and the High Courts and the Supreme Court in exercise of their constitutional jurisdiction.

The High Courts and the Supreme Court are creatures of the constitution which gives the judges of these courts the power of judicial review under which they may nullify unconstitutional act of the executive and of the elected representatives of the people assembled in the parliament and the state legislature.

18. The Authority is established under the Act and we derive our powers from the same Act. The instant proceedings are held pursuant to the show cause notices issued to the licensees under section 23 of the Act which is reproduced below for ready reference:

***Issue of enforcement orders and penalties.—(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—*

*(i) 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.*

19. Bare perusal of the provisions of section 23 of the Act nowhere suggests that while proceedings under it we could examine *vires* of a legislation or an act of some executive or legislative body.

20. The Rules are issued by the Federal Government in exercise of its powers under section 57 of the Act and, as mentioned above, we are not vested with any power to call into question the *vires* of these Rules and strike it down being *ultra vires*. Hence, we found ourselves unable to consider and ponder upon the licensees' submissions/arguments/reasons regarding legal status of the Rules and their request to declare it *ultra vires*. Any such attempt by us will be in excess of the jurisdiction vested in us under the Act.

21. Through the foregoing discussion it is settled that we have no domain to look into the *vires* of the Rules, hence, without prejudice to its legality or otherwise unless so declare by a competent court of law, the Rules are there issued by the Federal Government under section 57 of the Act and we, being the Authority, have to implement and follow the subordinate legislation done by the Federal Government under the Act and so are required the licensees.

22. The licensees' liability to pay APC for USF is given clearly and explicitly in rule 5 of the Rules. Thus their liability to pay the same is established from the Rules which they are obliged to follow and implement under the Act and the terms and conditions of the licence. Their failure or refusal to pay APC for USF is, therefore, a clear contravention of the Rules and consequently of the terms and conditions of their LDI licences in which situation we had no option but to invoke the provisions of section 23 of the Act.

The Authority as collecting agent:

23. The next important point argued before us was that if at all the licensees are liable to pay APC for USF, why to the Authority and not directly to USF.

24. Provisions of rule 5 of the Universal Service Fund Rules, 2006 are relevant here which is reproduced below for ready reference:

*“The Federal Government may require licensees directly to deposit USF contributions, within the period prescribed in their licences or may require them to deposit USF contribution on quarterly basis during the running financial year on estimated annual gross revenues subject to adjustment at the end of the financial year, and APC for USF in accordance with AP Rules or direct Authority to collect and remit USF contribution and APF for USF to the Fund’s designated account without any deduction within one month of receipt.” [Emphasis added]*

25. The foregoing rule explicitly provides that the Federal Government is empowered to direct us/the Authority to collect and remit USF contribution and APC for USF to the Fund's designated account and exercising the same powers, the Federal Government has directed us to collect and remit APC for USF to the designated account. Under no

authority can we refuse to implement the Federal Government's aforesaid directions given to us under the statutory authority vested in the Federal Government through the Universal Service Fund Rules, 2006. Hence, we are not persuaded by the arguments advanced by the licensees on this point.

26. The same is our view regarding raising demands for paying APC for USF vis-à-vis the date of establishment of the Fund. We are clear in our understanding, as discussed above, that we without going into the *vires* of the Rules and of the Federal Government's directives/instructions are obliged to implement it.

**Decision/Order of the Authority:**

27. For all these reasons and in light of the foregoing discussion, we are not inclined to accede to the licensees' arguments and their prayer for withdrawing the show cause notices and/or referring the matter to the Federal Government for consideration and appropriate action. We, therefore, hold that the show cause notices were rightly issued for contravention of the Rules and regulations and the terms and conditions of the licences, the licensees have failed to satisfy us in response to the show-cause notices.

28. To sum up our conclusion, we hold that the licensees are liable to pay APC for USF as earlier demanded by the Authority and we, therefore, direct the licensees to make payment of the entire APC for USF as mentioned in their respective show-cause notices and/or any other amount accrued against the licensees, in addition to the amount mentioned in the show-cause notices, under the heading of APC for USF within thirty days of the issuance of this determination of ours.

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Dr. Muhammad Yaseen  
Member (Technical)

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S. Nasrul Karim Ghaznavi  
Member (Finance)

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Maj Gen. (R) Shahzada Alam Malik  
Chairman  
Pakistan Telecommunication Authority

Signed on \_\_\_\_ April, 2008 and comprises 16 pages.