



**PAKISTAN TELECOMMUNICATION
AUTHORITY**
HEADQUARTERS, F-S/1 ISLAMABAD
<http://www.pta.zov.pk>

Enforcement Order under Section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 read with sub-rule (4) of Rule 9 of the Telecom Rules, 2000 in the matter of CM Pak Limited (Zong) on OoS

File NO.14-587/L&A/PTA/09

Date of Issuance of Show-cause Notice:	17 th December, 2009
Date of Hearing:	6 th April, 2010
Venue of Hearing:	PTA HQs, Islamabad

The Authority Present

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

The Issue

"Failure to meet or exceed QoS standards as laid down in the license and KPIs"

Decision of the Authority

1. Brief Facts

1.1. M/s CM Pak Limited (Zong) (the "licensee") which is maintaining telecommunication systems and providing telecommunication services in the country under license No.CMT-03/LL&M/2004 dated 23rd October, 2004 (the "license") issued to it by Pakistan Telecommunication Authority (the "Authority") was, on 25th November, 2008 issued a show cause notice (the "notice") under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the "Act") for contravening the terms and conditions of the license regarding the required quality of service (QoS) to be provided and maintained by the licensee.

1.2. **Powers of the Authority under Section 23 of the Act** whenever provisions of the Act, the rules framed there under or the terms and conditions of license are contravened by a licensee, the Authority may proceed against it with the issuance of a show cause notice. For ready reference, the said section is reproduce as under;

- 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.*

Explanation—For the purpose of this section, the Administrator shall be appointed from amongst the persons having professional knowledge and experience of telecommunication.

2. **Relevant Provisions of the Act, the Telecom Rules 2000 (the "Rules"), the Pakistan Telecommunication Authority (Functions & Powers) Regulations.**

2006 fthe "Regulations") and the terms and conditions of the license Contravened by the Licensee regarding QoS:

- 2.1. Under clause (d) of section 4 of the Act, the Authority is under obligation to promote the availability of a wide range of high quality, efficient, cost effective and competitive telecommunication services throughout Pakistan.
- 2.2. Clause (g) of sub-section (4) of section 21 of the Act, contain the licensee's obligations to provide telecommunication service to particular persons or areas to meet minimum standards for quality and grade of services requirements.
- 2.3. Under regulation 9 of the Regulations the licensee is obliged to provide good quality of services to its customers.
- 2.4. clause 6.5.1 of the license oblige the licensee at all times to meet or exceed the quality of service standards described in Appendix-3 and such other quality of service standards as the Authority may, by regulation, require.
- 2.5. Appendix 3 of the license prescribes the quality of service standards in detail manner and requires the licensee to take all reasonable and prudent measure to ensure that its Telecommunication System and Licensed Services are available and operate properly at all times and during each calendar month it shall meet or exceed the quality of services standards mentioned in clause 1.3 of Appendix-3 of the license.

3. Issue within Show Cause Notice

- 3.1. The Authority, through its Zonal offices at Rawalpindi, Peshawar, Lahore, Karachi and Quetta conducted surveys during the year 2009 [i.e., at: (i) Rawalpindi Zone from 21st March, 2009 to 10th April, 2009, (ii) Peshawar Zone from 15th June, 2009 to 18th June, 2009, (iii) Lahore Zone from 22nd October, 2009 to 31st October, 2009, (iv) Karachi Zone from 3rd November, 2009 to 10th November, 2009 and (iv) Quetta from 15th November, 2009 to 17th November, 2009].
- 3.2. Results of the survey showed that the QoS being provided by the licensee was far below than the required standard. The detail of the average results of surveys is as under:

Voice;

Network Down Time < 1%	Grade of Service < 2%	Call Completion Ratio > 98%	Call Connection Time < 5 Sec	Call Quality (MOS) >3
0	2.08	97.35	7.89	2.14

SMS:

Service Accessibility \geq 99%	Access Delay \leq 2 Sec	End to End Delivery Time < 5 Sec
93.41	4.78	11.58

- 3.3 The aforesaid survey results established that the licensee has contravened Clause (d) of section 4 of the Act, clause (g) of sub-section (4) of section 21 of the Act, Regulation 9 of the Regulations and Clause 6.5.1 read with Appendix 3 of the license by failing to provide the required grade of telecommunications services to its customers, hence, the notice under section 23 of the Act.

4. Licensee's Response to the Notice

- 4.1. The licensee's response to the notice vide letter dated 19th December, 2008 is reproduced in *verbatim* as under:

Reply to the Show Cause Notice dated 17 December 2009 on Quality of Service (Ref: No.14-587/L&A/PTA/09/J46) issued by Pakistan Telecommunication Authority to CMPak Limited.

On instructions of our Client, CMPak Limited (hereinafter, "CMPak"), we submit below the reply to the show cause notice dated 17 December 2009 (hereinafter, the "SCN"), issued by Pakistan Telecommunication Authority (hereinafter, the "Authority") to CMPak.

A. Introduction

Since Paragraphs 1 to 8 of the SCN only mention different provisions of the Pakistan Telecommunication (Re-organization) Act 1996 (hereinafter, the "Act"), Pakistan Telecommunication Rules 2000 (hereinafter, the "Rules"), the Pakistan Telecommunication Authority (Functions & Powers) Regulations 2006 (hereinafter, the "Regulations"), and terms and conditions of the license issued by the Authority to CMPak on 23 October 2004 (hereinafter, the "License"), they do not beg any response. Reply to Paragraphs 9 to 13 on factual as well as legal plane is as follows.

B. Legal Objections

The SCN has not been issued in accordance with the Act and the Regulations.

- 1. While issuing the SCN, the prescribed procedure of pointing out contraventions, suggesting remedial steps, and giving opportunity to take the said remedial steps has not been followed. Under Regulation 10(3) of the Regulations, the Inspecting Officer of the Authority is obligated to prepare a quality of service inspection report and provide it to the licensee by clearly*

enumerating where the licensee has failed to adhere to the provisions of the Act or the Rules. If the licensee fails to remedy the same in the allotted time and does not submit a compliance report accordingly, the Authority or any of its Directors may penalize the licensee under Section 23(1) of the Act, as provided under Regulation 10(5) of the Regulations. Likewise, Section 23(1) & (2) of the Act provides that a show cause notice should not only specify the nature of the alleged contraventions, but should also suggest remedial steps to be taken by the licensee.

The SCN has been issued without sharing the inspection report with the licensee prior to the issuance of the SCN. Even, the SCN does not mention details of the said report and no remedial steps to be taken to circumvent the shortfalls have been suggested.

- 2. Except results of the surveys conducted unilaterally by the Authority between March and April 2009 at Rawalpindi/Islamabad and in June 2009 at Peshawar, no other survey results, incomplete or otherwise, conducted at Lahore, Karachi and Quetta, were shared with CMPak prior to SCN. Even the survey results mentioned in the SCN are incomplete and vague. Average of results of the aforesaid five different zones, as given in the SCN, does not identify the exact zone-wise shortfalls.*
- 3. To attract and impose penal provisions of Section 23(3)(C)(i) & (ii) of the Act, it is mandatory to give an opportunity to rectify the alleged contraventions. In case of the SCN, the said mandatory provisions of iawr have not been complied with.*

C. On Merits

- 1. The SCN states that the Rawalpindi zone was surveyed between 21 March 2009 to 10 April 2009 and Peshawar zone between 15 June 2009 and 18 June 2009. It implies that no recent surveys have been conducted in the areas and the allegations in the SCN are based on the aforesaid old surveys. The SCN is therefore not tenable.*
- 2. The quality of service standards per clause 1.3 of Appendix 3 of the License have not been applied accurately. According to the said clause, the minimum targets to be achieved for the long term are measured over a one month period. The period of each survey given in the SCN ranges between three days to fifteen days, which does not adequately fulfill the requirements of measuring the quality of service on a monthly average basis. Moreover, the SCN provides an average of all the zones combined for periods that do not relate to one another.*
- 3. We bring to the Authority's attention the letter dated 8 July 2009, collectively drafted and submitted by representatives of all cellular operators to the*

honourable Chairman of the Authority. Through the said letter, the persisting problems of acute power outages, prevailing security issues in Pakistan, and external interferences in the allocated spectrum were elaborated, and it was requested that

- i) a revision of quality of service parameters and the methodology of related surveys be conducted in view of the adverse impact of the above-mentioned issues;*
- ii) joint surveys be conducted.*
- iii) The formula under which 50-50 weight age is given to on-net and off-net calls be revised; and*
- iv) TEMS equipment be used by the Authority when conducting surveys to achieve accurate results.*

However, while issuing the SCN and conducting the surveys the above joint requests have been ignored altogether without any justification.

- 4. While formulating the allegations in the SCN, service quality indicators of voice have been applied to assess quality of SMS. This is without any justification,*
- 5. The survey published by the Authority in the newspapers provide Mean Opinion Score (hereinafter, "MOS") Value to be 1.99 for the Islamabad/Rawalpindi region, whereas the letter of the Authority issued on 6 May 2009 to CM Pak provides the MOS Value to be 2.41 for the same region. Such discrepancy in the survey results has not only caused confusion, but also invalidates the survey results.*
- 6. CM Pak continuously takes steps to improve the quality of service across Pakistan and regularly conducts surveys to evaluate the quality of service, which has always been found to be above the parameters provided under the License.*
- 7. Since the issuance of the License in 2004, CMPak finds itself in a disadvantageous position when compared to other operators as it has been facing inherent interference in its allocated frequency spectrum. Upon taking control of the company in 2007, the management of CMPak has repeatedly filed complaints and exchanged correspondence with the Frequency Allocation Board (hereinafter, "FAB") to resolve the issue and has also requested the Authority's intervention in this regard. We reiterate some of the major issues with regard to interference as follows:*
 - i) CMPak is facing cross-border interference from India, where not only areas adjacent to the border are affected by such interference, but also major cities and regions, such as the Lahore zone, have been deeply affected by such interference. It has been brought to the Authority's*

attention on numerous occasions that such interference has caused depreciation in quality of service in the affected areas, and such interference has been further affirmed by the Authority and FAB through joint surveys -with CMPak. However, no concrete action has been taken to resolve the issue and external interference remains a major concern of CMPak. The surveys on quality of service, when conducted by the Authority independently in various areas, have not taken such interference into account. The results of such surveys, therefore, are not conclusive and hence without any justification.

ii) *The Authority is further aware of the usage of the frequency assigned to CMPak to be used by Special Communications Organization (hereinafter, SCO") and other governmental/intelligence agencies of Pakistan. Since this factor has not been taken in consideration in the surveys conducted by the Authority, the results of the aforesaid surveys do not depict accurate quality of service of CMPak.*

Hi) *Usage of jammers in various cities, for either security purposes or otherwise, is an issue that cannot be ignored when conducting quality of service surveys. Further, the tools used for conducting surveys can only record the Downlink information, whereas CMPak usually observes external interference in its Uplink Band. The results of the surveys mentioned in the SCN cannot therefore be relied upon.*

Prayer

In view of above submission, it is respectfully prayed that the SCN may kindly be withdrawn.

5. The Hearing

5.1. The matter was fixed for hearing on 21st April, 2010 whereby licensee was represented by Mr. Ejaz khan (Counsel), Mr zafar Usmani, Mr Xurlairour (CTO Zong), Mr. Cyrus Sikander (Advisor to CTO), Mr Mohammed Ahmed Sheikh (counsel), Mr Ahmad Hassan, Aslam Minhas (Co sec) and Mr Naser Hamdani (Dir Regulatory).

5.2. **Written arguments submitted by the licensee:** The licensee, on the day of hearing, submitted the following arguments which are reproduced in verbatim;

Written Arguments supplementary to the Reply

These written arguments are supplementary to the Respondent's reply dated 14.1.2010 ("Reply") to the show cause notice dated 17.12.2009 ("SCN") and are to be read in conjunction therewith.

The items of correspondence and other relevant material referred to herein have not been described in detail, nor copies appended herewith, for the reason that such items are well within the knowledge of the PTA. Should any item referred herein not be within the knowledge of the PTA, the Respondent will provide copies of the same on being so required by PTA.

Capitalised expressions used but not defined herein have the same meaning given in the SCN and the Reply.

Submissions on Without Prejudice basis

As described in more detail in the ensuing paras, the Respondent is unable to put up a meaningful defence without having reviewed the Inspection Report forming the basis of the SCN.

The Respondent makes these submissions only in order to avoid an ex parte decision and vehemently asserts that the procedure adopted renders it incapable of putting forth its defence to the allegations in the SCN. The submissions made herein are therefore made "in the dark" and the Respondent reserves all legal and equitable rights to revisit these submissions if and when the Inspection Report is made available.

In any event, the Respondent rejects these proceedings as being in flagrant disregard of time-honoured statutory and judicial principles applicable to like proceedings.

Role of Authority as an Impartial Tribunal

It is fundamental that the Authority (3 members, and not the body corporate) act as a tribunal, independent of the prosecuting case officers and impartial as between them and the Respondent, and above all, free of any pre-conceived conclusions or inclinations based on internal discussions between the Authority and its relevant officers.

This principle is implicitly recognised in Regulation 23 of the Regulations which postulates presentation of the case first by the case officer of the PTA, who shall produce all relevant oral and/or documentary evidence, followed by presentation of its case by the respondent.

If the Authority (3 members, and not the body corporate) does not so act. Authority becomes both the prosecutor and the judge, which is anathema to all norms of a fair hearing.

Accordingly, the Respondent requires the assurance stated in para 1.3.1. If the Respondent receives the above assurance, then:

The case officer/prosecuting department is required to meet all requirements of the law of evidence (as further described in para 1.5 below); and

the Authority is to rule on the admissibility of the oral and documentary evidence sought to be relied on by the case officer, before asking the Respondent to

respond to such evidence - no item of evidence which is not formally "admitted in evidence" (and in respect of which the Respondent is not given the opportunity to cross-examine the relevant witnesses) can be used by the Authority in its final determination; and

Any evidence sought to be relied upon by the case officer but which is not admissible under law shall not be presented during the hearing.

Failure to provide Inspection Report

Despite requests to this effect in the Reply, and subsequently through letter dated 22.3.2010, the Inspection Report has not been provided to the Respondent in disregard of Regulation 10(3) of the Pakistan Telecommunications (Functions and Powers) Regulations 2006 (the "Regulations").

It is inconceivable in any procedural framework striving to provide a "fair opportunity of hearing" to withhold the underlying incriminating document, and that too when the legal framework governing such proceedings itself requires such document to be shared with the respondent.

The SCN merely sets forth the 'results' of the survey, which are not a substitute for the detailed narrative of the survey itself; the results of an inquiry are not the same as the inquiry report itself. The 'charge' cannot be equated with the "evidence" substantiating such charge. By way of illustration:

An accused has to be provided the FIR and the witness statements to prepare its defence. It is never the case that the Court merely notifies the allegation of the offence asking him to defend himself on that basis alone.

An employee facing disciplinary proceedings has to be provided the copies of any underlying inquiry report. It is never the case that an employee is merely informed of the alleged instances of indiscipline without the report substantiating such instances.

Application of Qanun-e-Shahadat Order, 1984

The Qanun-e-Shahadat Order, 1984 ("QSO") is applicable to the instant SCN proceedings (see preamble to the QSO).

the instant proceedings are judicial proceedings for the purpose of QSO, on the basis of the litmus test laid down in the judgment reported at PLD 1980 Lahore 15, wherein the Court held that:

"The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a judge in Court, or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind - that is, a mind to determine what is fair and just in respect of the matters under consideration."

Even assuming, but not conceding, that the QSO is not applicable in the strict sense, the underlying principles are applicable (see 2005 PLD (C.S.) 1015, 1993 PTD 206(DB)). Even in cases where the QSO was held not applicable in the strict sense, the Courts examined whether the procedure adopted (including consideration of underlying evidence) resulted in any miscarriage of justice. The cardinal principles of the law of evidence enshrined in the QSO, in so far as relevant to the context are that:

A tribunal can only act on the basis of evidence which is properly "admitted as evidence". Put differently, not every item of information is 'evidence' but only that information which is 'relevant' and 'properly admitted' by the tribunal trying the matter is evidence;

The tribunal can only act on the basis of evidence;

No evidence used against a respondent can be relied upon without sharing that evidence with the respondent, and giving him a reasonable opportunity to review and analyse the same and then present 'evidence in rebuttal'. It goes without saying that no evidence in rebuttal can be filed without first seeing the evidence against the respondent;

In cases where the veracity and accuracy of evidence is in question (after having seen it in the first place), the respondent has a right to cross-examine or question the witness presenting that evidence;

In order to rely on evidence 'generated by electronic means' - which is the case when QoS monitoring logs are relied upon, it is incumbent to show before the tribunal - transparently to the respondent - that the equipment was in "working order" (Section 46-A, Explanations 3 and 4 to Article 73, and Article 78-A, added vide Electronic Transactions Ordinance 2002 ("ETO"). These requirements were introduced by the ETO, and have found judicial recognition in the case reported at PLD 2009 Lahore 254. The equipment being in 'working order' means not just that it operates, but that it operates consistently with its specifications, is properly calibrated, was properly operated and the outputs thereof were properly correlated to the parameters it was intended to measure. Further, the Respondent denies the allegations contained in the QoS logs forming the basis of the survey results, and therefore the burden lies on the case officer to demonstrate the application of the "security procedure.

No reliance on any document can be placed unless that document is produced by a witness before the tribunal. Especially, when a 'notice to produce' has been given, the document cannot be relied upon in proceedings unless it is produced before the tribunal and shared with the respondent (Article 160 of the QSO). As

noted above, the Respondent has already given this notice to produce vide its Reply and its letter dated 22.3.2010.

As noted further in paras 1.5.4.2, 1.7.2, 2.7, 2.9 and 2.11 hereof, the Respondent requires compliance with the above-stated principles of the law of evidence for the following reasons:

Respondent's mobile cellular licence dated 23.10.2004 ("License") provides as an exception to the QoS obligations the "causes attributable to another Operator". Further, Article 12.4 provides for the defence of Force Majeure. It is critical for the Respondent to have a copy of the Inspection Report (and to cross-examine the surveying officer if required) to determine whether such defences are available on a factual plane.

Given that a minor fraction of the calls performing inadequately can swing the QoS average results against the Respondent, it is critical that the times, the places and any interconnecting networks should be reviewed by the Respondent. The PTA is well aware of the issues relating to frequency interference, the use of jammers, the prevalent load-shedding and other like issues which are set out either in the Reply or are well within the knowledge of the PTA. Assuming a sample size of 500 calls, even 10 calls made in areas with frequency interference (or if VIP movement was taking place in the vicinity, for instance) can swing the average results against the Respondent. As Respondent is aware of its network statistics, it would be able to identify if the cause of the "poor calls" was attributable to "circumstances beyond its control" (Force Majeure) or the performance of third party networks (Clause 1.3 exception). However, the Respondent is crippled in its defence because the Inspection Report is not available.

Principles of Natural Justice

Section 6(d) of the Pakistan Telecommunication (Re-organisation) Act, 1996 ("Act") provides for an "opportunity of being heard" to the Respondent. Judicial precepts abound to the effect that such opportunity should be fair, meaningful and adequate.

The test of what constitutes a fair opportunity of hearing varies with the circumstances. However, it is established law that proceedings entailing penal consequences require a higher threshold of access to incriminating evidence, and an adequate opportunity to review and rebut such evidence.

The best expression of the principle that natural justice requirements vary according to the exigencies of the matter at hand is found in the judgment of a full bench of the Hon 'ble Supreme Court reported at PLD 1965 SC 90, the relevant part of which reads as follows:

"What these principles of natural justice are it is not possible to lay down with any exactness, for, they have been variously defined in various cases. The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the

subject-matter that is being dealt with, and so forth. Nevertheless, the general consensus of judicial opinion seems to be that, in order to ensure the "elementary and essential principles of fairness" as a matter of necessary implication, the person sought to be affected must at least be made aware of the nature of allegation against him, he should be given a fair opportunity to make any relevant statement putting forward his own case and "to correct or controvert any relevant statement brought forward to his prejudice".

Regulation 29 (1) of the Regulations itself acknowledges that the hearing procedure will be "...subject to the nature of the show cause...", i.e. the procedure has to be modified to ensure that the opportunity of hearing is meaningful and not merely a matter of going through the motions.

In view of the submissions made in paras 1.4 and 1.5 above, it is submitted that the procedure laid down in Regulation 29 of the Regulations is grossly inadequate to satisfy the principles of natural justice in the instant case. The mere presentation of the results of the survey during the hearing does not give any fair opportunity to the Respondent to review and analyse the incriminating items of evidence as the Respondent cannot be expected to jump to provide its defence to a survey which presumably consists of hundreds of calls made all across Pakistan at different times and months over a span of several days.

Accordingly, it is submitted that compliance with the hearing procedure laid down in Regulation 29 does not meet the spirit of the statutory requirement under Section 6(d) of the Act, read with the Supreme Court's decision referred in para 1.6.3 above, when viewed in the context of the submissions made in paras 1.4 and 1.5 whereby the Respondent is deprived of ex ante preparation of a defence to the SCN proceedings.

Purpose of QoS obligations

It is internationally recognised that the objective of QoS obligations is to improve customer services and to benchmark the state of competition in the sector and thereby for the regulator to explore avenues for improvements. The Respondent refers in this context to the report titled "Background Paper, ICT Quality of Service Regulation, Practice and Proposals", published under the aegis of the ITU, September 2006, attached herewith as the Annex.

The objective of QoS obligations is not to go about penalising operators for minor shortfalls in services, especially where such shortfalls are attributable to causes beyond the control of the operator. In the instant case, the PTA is well aware of the following issues faced by the industry:

Severe interference which is coming most of the time from India is in the frequency band allocated to the Respondent. The EGSM-900 band is wrongly allocated to respondent because the allocation of uplink and downlink frequencies should have been in the same band keeping in view the geographical boundaries of two territories, rather than reciprocal. (Refer to letters dated 8.11.2007,

12.12.2007, 7.3.2008, 28.3.2008, 18.4.2008, 6.8.2008, 14.10.2008, 15.12.2008, 10.7.2009). In fact, the Respondent has several causes of action for compensation and damages accrued to it for having received "unclean "frequency band despite payment of the frequency fee under the License (Para C-7 of the Reply is reiterated). Such interference continues to date, as recently notified to the PTA vide letter dated 25. 3,2010; and

Frequent use of jammers, and the PTA's actions to prevent the consequent offence under Section 31(1)(F) of the Act remaining largely unsuccessful to date (refer to letters dated 16.7.2008, 15.12.2008 and 16.4.2009);

Severe load-shedding in the country which necessitates use of gensets, which too can only be operated for a limited number of hours. The business case prevailing when the Licensed QoS were established clearly did not take into account such heavy operation of the standby power sources, or else a discount on the auction price would have been factored in (use of gensets over thousands of BTS Sites accrues to very high Opex).

It causes grave sense of injustice and inequity when the Respondent is accused of failing to meet its licensed obligations despite the afore-said hardships and severe limitations.

It cannot be lost on the PTA that the aforesaid constraints are a direct cause of revenue loss to the Respondent. The Respondent cannot be expected to act imprudently and let its revenues suffer (with the indirect consequence of shortcomings in the QoS) if it had any control over the said factors.

Methodology for the Survey

The Respondent is not aware of the methodology applied by the PTA for the survey. It is submitted that the purported reliance on the sweeping powers of the PTA under Regulation 10 "to conduct inspections and surveys" does not lead to a fair and equitable result unless the methodology is transparent and consisted with best global practices (in the latter cases as required by Regulation 9(2)). Issues related to sample sizes, on-net and off-net calls, the QoS 'targets' and the equipment to be used are so crucial in the ultimate result that small variations can lead to the licensee being "in contravention of its license obligations". To illustrate, 10 "poor" calls in a sample size of 490 means a breach of 98% GoS, when 500 calls will mean that it is in full compliance (only 10 more calls). To penalise the Respondent for outcomes which may be purely a matter of caprice or choice of a surveying officer is most unjust, unfair and contrary to international best practices.

For the foregoing reasons, it has been thought fit by international bodies such as ITU and ETSI to develop detailed recommendations on how the QoS target setting, survey methodology and analysis of the results should be carried out. However, PTA's own consultation process initiated vide its letter dated 22.6.2009 ("QoS Consultation Process ") was deficient in that:

It did not specify which 'best global practices' it would follow, though this was required under Regulation 9(2);

It did not specify that, out of a multitude of 'recommendations' and practices, how will it go about selecting the preferred methodology from amongst several alternatives.

By way of illustration, it is still not determined if the MoS will be calculated using the "objective" or the "subjective" method under ITU-T recommendation P.800, or whether the Call Connection Time sampling will exclude entirely the off-net calls as required under ITU-T recommendation E.800.

The need for a transparent methodology was acknowledged (at least implicitly) when the PTA initiated the QoS Consultation Process. The Respondent, jointly with the industry, raised pertinent concerns vide its letter date 8.7.2009. However, PTA never concluded the said QoS Consultation Process and any methodology discussed in its presentation remains unsettled to date. The PTA has not issued any order or decision stating that a given methodology is settled for surveys. In fact some of the surveys forming the subject of the instant SCN preceded the said presentation by the PTA.

Any decision by PTA to follow the methodology presented in its meeting with the industry will be a "decision or determination " of the PTA. Under Section 6(b) of the Act, such decision or determination is required to be made in a transparent manner with participation of the industry, to be followed by a formal decision or determination, in order for the Respondent to know for sure what methodology will be followed.

If PTA decided not to follow the methodology referred above, then the Respondent is completely in the dark as to what methodology was followed, what were the ratios of on-net versus off-net calls, whether the Respondent is being penalised for shortcomings in interconnected operators' networks, and like matters. In that case it becomes a fluctuating discretionary decision of PTA's surveying officers to determine all these parameters on a survey-to-survey basis, and they may decide tomorrow to apply different criteria and methods to arrive at more detrimental results to the Respondent.

TEMS versus NEMO Equipment

The choice of equipment is another relevant concern. PTA uses NEMO equipment which is not industry standard in Pakistan. All other operators use TEMS equipment (which is the most widely used equipment internationally as well) and have also requested PTA to use the same in order to enable an "apples to apples" comparison. As the Respondent uses TEMS equipment for its network optimisation and QoS parameters setting, use of different equipment is bound to produce results that may differ in minor but important details. As noted above in para 1.8.1, since minor differences can lead to the average results swinging against the Respondent, the Respondent is prejudiced by use of a different equipment by PTA.

All the above concerns have been highlighted to PTA at different occasions and also in the Reply, and all such items of correspondence and materials are reiterated here.

It is not clear why PTA wishes to use equipment different from that in use by the industry, and wishes to base penal action on such divergence.

In seriatim Submissions

Para 1

No comment is called for.

Para 2

No comment is called for.

Para 3

The statutory obligations of PTA also include the following:

Rights of licensees to be duly protected (Section 6(a) of the Act);

The rights of the Respondent not being protected in the instant SCN proceedings are, inter alia:

Frequency interference due to use of jammers and use of the allocated frequencies by third parties which the PTA and FAB have so far been unable to eliminate;

The Respondent being held to QoS standards relating to SMS which is not one of its licensed obligations (as further described in para 2.9.2.3);

Respondent being deprived of its right under Regulation 10(3) to be provided with a copy of the Inspection Report (as described in detail in para 1.4);

Decisions and determinations of PTA to be "...made promptly, in an open, equitable, non-discriminatory, consistent and transparent manner..." (Section 6 (b) of the Act);

This statutory obligation of PTA is not met, inter alia, because the QoS Consultation Process on the methodology for the QoS surveys was initiated, but never concluded. Further, the PTA's decision on the comments of the industry conveyed vide letter dated 8.7.2009 was never announced, nor the details of the methodology ever finalised in an open or transparent manner (as further elaborated in para 1.8).

The persons affected by its decisions and determinations to be provided with an opportunity of being heard (Section 6(d) of the Act).

This statutory obligation is not fulfilled due to reasons set forth in para 1.6.

Para 4

The license obligation referred to in this para of the SCN is to be read subject to Article 12.4 (Force Majeure) and Clause 1.3 of Appendix 3.

Para 5

It is submitted that reliance on the said provisions is misplaced when viewed within the context of the SCN and the submissions made herein.

Para 23.7 of Part 6 of the Rules does not exist. If the reference is to para 23.7 of Part 6 of Schedule 2 to the Rules, then these are merely general conditions of the license prescribed by the Rules, but which the Authority had decided not to incorporate in the License. Accordingly, the said provision does not apply.

The PTA cannot place reliance on Regulation 10 when it itself decides to ignore its provisions which are favourable to the Respondent. The law does not permit PTA to pick and choose as to which part of a Regulation it will apply or not. The PTA has itself not complied with Regulation 10 by failing to provide a copy of the Inspection Report.

Any reference to KPIs is completely misplaced, and contradicts the letter and spirit of Section 22 of the Act, No regulations have been made prescribing any KPIs. The PTA does not have carte blanche in prescribing any KPIs at any time. If the KPIs enlarge the scope of the obligations of a licensee (such as adding new QoS parameters or modifying the targets), these cannot be introduced without the consent of the licensee, as to do so will amount to modification of Appendix 3 of the License which cannot be done without the consent of the Respondent. (Section 22 of the Act). It is an established principle of law that what cannot be done directly can also not be done indirectly.

The Respondent's obligation in the License to comply with the regulations (or with KPIs pursuant to the Regulations) made by PTA made from time to time cannot be read so as to make Section 22 of the Act infructuous - neither the License nor any regulations can be read inconsistent with the Act. It was for this reason that the PTA started the QoS Consultation Process referred in para 1.8, and that ought to have led to a consensus based on consultation, followed by regulations specifically dealing with KPIs, that the PTA could rely on clause 3.1.1 of the License relating to the Respondent's obligation to follow the regulations made by PTA from time to time.

Para 6

This obligation is subject to defences of Force Majeure and Clause 1.3 of Appendix 3 of the Licence,

Para 7

The said obligation of the Licensee is to be read not as an absolute obligation, but together with the terms and conditions of the License, including Force Majeure and Clause 1.3 of Appendix 3 of the Licence.

For any additional QoS conditions, regulations are required to be made. In this context, the submissions made in para 2.5.4 are reiterated.

Para 8

The obligations expressed here are a matter of record. However, as noted in this para of SCN itself, the compliance is to be calculated on a monthly average basis. This objection to the SCN on this score has already been taken in para C-2 of the Reply.

Para 9

The objections to the SCN for being based on survey periods of less than 1 month are already raised in para C-2 of the Reply and are hereby reiterated.

Further, it is noted with emphasis that there is still no consensus between PTA and the industry as to what precisely is meant by these QoS parameters or as to how these are to be measured. The QoS Consultation Process was never concluded by the PTA. For instance:

In case of Call Connection Time, ITU Recommendation ITU-T E. 800 defines this as follows:

"The period starting when the address information required for setting up a call is received by the network (recognized on the calling user's access line) and finishing when the called party busy tone, or ringing tone or answer signal is received by the calling party (i.e., recognized on the calling user's access line). Local, national and service calls should be included, but calls to Other Licensed Operators should not, as a given operator cannot control the QoS delivered by another network."

In other words, no off-net calls can be considered for measuring Call Connection Time. However, PTA's own consultation paper seems to give an equal weightage of 50-50 to off-net calls. This is not only contrary to the recommendation of the highest regulatory body in the world in this sector, but also disregards the pleas of the industry as well as Clause 1.3 of Appendix 3 of the Licence. As the Respondent has not had the benefit of the Inspection Report and the accompanying call logs, it is unable to determine whether the survey result is based on a call pool excluding off-net calls.

In case of MOS, the License refers to ITU-T P.800 being followed. However, PTA has not made any 'decision' or 'determination' if the "subjective" or "objective" method will be used. The only reference to the inclination of PTA to the Objective method is by referring to PESQ Algorithm in PTA's presentation given to the industry in connection with the QoS Consultation Process; however, as noted above, the said process has not been completed consistent with the provisions of the Act and any reliance on this method is therefore arbitrary and premature. Further still, as different softwares can yield different MOS. it needs to be settled by PTA consistent with Sections 6(a), 6(b) and 6(d) of the Act as to which software is to be used.

SMS QoS cannot be used by PTA to claim a contravention of the licence. Para C-4 of the Reply and para 2.5.4 hereof are reiterated.

Para 10

The Respondent contests and denies the 'revelation' referred to in this para. It is submitted that the Respondent is simply unable for the reasons set forth hereinabove to determine whether such 'revelation' was accurate or was the result of fanciful and self-serving conclusions drawn from a defective survey which never culminated in an Inspection Report of adequate quality that could stand the test of regulatory and legal scrutiny and was therefore never provided to the Respondent in disregard of the Regulations.

Para 11

It is denied vehemently that there has been any violation of any nature as alleged in this para or at all. The contents forming the basis of this denial as set forth hereinabove and in the Reply are reiterated.

Para 12

It is submitted that the SCN is bad in law in so far as it purports to penalise the Respondent without first ensuring that the remedial steps specified by the PTA have not been adopted. In other words, the PTA cannot both specify the remedial steps and also penalise the licensee for such contravention. To interpret Section 23 in any other way would result in a conflict of Section 23(2) and Section 23(3)(c) and it is an established principle of statutory interpretation that provisions of a statute must be interpreted harmoniously.

The periods of survey referred in the SCN are the same in relation to which PTA issued notices to the Respondent on 6.5.2009 and 3.7.2009 requiring the Respondent to remedy the alleged shortfalls. It is submitted that the network and services of the Respondent have since been run compliant with the License obligations.

Accordingly, any alleged contravention of the QoS obligations of the Respondent, which in any event are not admitted, stand "remedied" and the requirements of Section 23 met.

It will be highly inequitable, unfair and prejudicial to the Respondent to base any penal action on surveys which occurred over 6 months ago.

Prayer

In view of the foregoing:

1. acting as an impartial tribunal independent of its prosecuting department, the PTA is requested to return a finding that the prosecuting department of the PTA has not discharged the burden of proof by failing to submit adequate and relevant evidence before the tribunal and, accordingly, to return the verdict that there is insufficient evidence on record to establish the violations alleged in the SCN against the Respondent; and/or

2. Withdraw the SCN.

6. Findings of the Authority

- 6.1 The survey was conducted in accordance with the standards set out in condition 1.3 of the Appendix 3 of the license, KPIs and the methodology of surveys already provided to the licensee. The license provides short term and long term targets. Under the license and the regulations, the licensee is obliged to meet or exceed the quality of service standards provided in the license and KPIs, which it failed to maintain, hence, show cause is not contrary to license conditions.
- 6.2 The matter is scrutinized in all aspects and reached the conclusion that the survey was conducted in accordance with the standards set in condition 1,3 of the Appendix 3 of the license, KPIs and the methodology of surveys already provided to the licensee and the results were subsequently shared as well. It is in light of these findings, that the Authority finds the licensee has failed to provide the required grade of telecommunications services to its customers which amounts to grave violation of the prevailing regulatory laws, directions of the Authority and the terms and conditions of the licence.

7. **Order of the Authority**

- 7.1 The licensee has failed to satisfy the Authority on the aforementioned contraventions made by it regarding the mandatory level and standard of Quality of Service, the licensee is, therefore, directed to remedy the aforementioned contravention by bringing and maintaining the required standards of quality of service within twenty nine (29) days of the issuance of this order.
- 7.2 Next survey shall be conducted by the Authority after the aforementioned period of twenty nine (29) days and if the licensee is found again in violation of para 7.1, above, final determination shall be issued under sub-rule (5) and (6) of rule 9 of the Regulations otherwise the notice shall be favourably disposed of.

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

(Dr. Khawar Siddiq\ie Khokar)
Member (Tech)

(Dr. Mohammed Yaseen)
Chairman

This determination is signed today at this 25day of May, 2010 and comprise 19 pages