



PAKISTAN TELECOMMUNICATION AUTHORITY
HEADQUARTERS, F-5/1 ISLAMABAD
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**Enforcement Order under sub-section 3 of Section 23 of the Pakistan
Telecommunication (Re-organization) Act, 1996 in the matter of
M/s PAKCOM LIMITED (INSTAPHONE)**

File No. PTA/Finance/Mobile/Instaphone/288/2006
14-108/L&A/PTA/06

Date of Issuance of Show Cause Notice: 1st December, 2006
Date of re-hearing (under court order): 21st February, 2008
Venue of Hearing: PTA H/Qs, Islamabad

The Authority:

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

The Issue:

“Fresh decision after re-hearing the licensee pursuant to Lahore High Court, Rawalpindi, ’s order dated 15th January, 2008 on the issue of contravention of the terms and conditions of the licence regarding financial obligations”

Decision afresh by the Authority

Brief Facts:

1. Reasons for deciding the issue afresh:
 - i. Prior to embark on deciding the issue before us, we deem it appropriate to briefly narrate the facts leading to re-hearing the matter by us and deciding it afresh, for record and ready reference.
 - ii. M/s Pakcom/Instaphone (the “licensee”) was issued a show-cause notice under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the “Act”) on 1st December, 2006 for contravening terms and conditions of the licence regarding financial obligations. To decide on the aforementioned show-cause notice, the licensee was finally heard on 29th November, 2007 and since the licensee failed to satisfy us regarding the contraventions, pursuant to the show-cause notice and the

hearing, we proceeded with termination of the licensee's telecom licence vide our determination/enforcement order dated 3rd January, 2008.

iii. The licensee, being aggrieved of our aforementioned determination, approached the hon'ble Lahore High Court at Rawalpindi by invoking its appellate jurisdiction under sub-section (1) of section 7 of the Act through FAO No.03/2008.

iv. The aforementioned FAO came up for hearing before the high court on 15th January, 2008 and on the undertaking given by the learned counsel representing the licensee (appellant therein) regarding making payment to the Authority under our fresh decision, our earlier determination of 3rd January, 2008 was set-aside and the case was remanded back to us for our decision afresh and the licensee was directed to appear before us on 28th January, 2008. The licensee later on requested for re-scheduling of the hearing/date fixed which was entertained and allowed by us by re-fixing the matter for hearing today i.e. 21st February, 2008. Hence, the instant decision of the issue afresh by us vide this determination of ours.

2. Brief background of the issue:

Though complete background and facts of the issue was given in our earlier determination of 3rd January, 2008, however, since the said determination has been set aside by the hon'ble Court, the same facts are reproduced herein below for reference:

i. Award of licence and the licensee's obligations thereunder: The licensee was awarded license No.7(30)/89-P&T dated 19th April, 1990 (the 'licence') by the Ministry of Communications, Government of Pakistan, for establishment, maintenance and operation of Cellular Mobile Telephone system and services, in Pakistan, for a period of fifteen years (i.e. till 18th April 2005) which was re-validated after establishment of the Pakistan Telecommunication Authority (the "Authority") vide No.PTA/M(T)-002 dated 12th August, 1997. The licence was further renewed by the Authority for a further period of fifteen years vide No. CMT-04/LL&M/PTA/2005 dated 19th April 2005 subject to the terms and conditions contained therein.

ii. Under the terms and conditions of its licence, the licensee was required to comply with the provisions of the prevailing regulatory laws comprising the Act, the Pakistan Telecommunication Rules, 2000 (the "Rules"), PTA (Functions & Powers) Regulations, 2006 (the "Regulations"), terms and conditions of the licence and other related rules, regulations and policies of the Federal Government.

iii. Upon renewal of license, the licensee under clause 4.1 (*apart from other kinds of fees mentioned in the license*) was required to pay to the Authority Initial License Fee (ILF) of the Auction Winning Price in installments of two portions. First 50% of ILF was to be paid in installments by 18th April 2008 in the following manner:

- | | | |
|----|-----------------------------------|----------------------|
| a. | 10% at the time of renewal | (US\$ 14.55 Million) |
| b. | 10% 18 th October 2005 | (US\$ 14.55 Million) |
| c. | 10% 18 th April 2006 | (US\$ 14.55 Million) |

- | | | |
|----|-----------------------------------|----------------------|
| d. | 10% 18 th October 2006 | (US\$ 14.55 Million) |
| e. | 20% 18 th April 2007 | (US\$ 29.10 Million) |
| f. | 20% 18 th October 2007 | (US\$ 29.10 Million) |
| g. | 20% 18 th April 2008 | (US\$ 29.10 Million) |

iv. The remaining 50% is payable in ten (10) equal annual installments starting from 18th December 2008. Apart from ILF, the licensee, under clause 4.1, 4.2, 4.3 and 4.4 of the licence was also obliged to deposit (i) annual license fee (ALF), (ii) Spectrum Administrative Fee (SAF), (iii) Numbering Charges, (iv) USF Charges and (v) R&D Charges.

v. Beginning of the licensee's default and 1st Show Cause Notice: The licensee failed to follow the payment schedule given in its licence, reproduced above, and thus contravened the aforementioned provisions of the licence by making default in payment of ILF and SAF in accordance with the requirements of the licence and exposed itself to the proceedings under section 23 of the Act. The licensee was, therefore, issued a Show Cause Notice (the "1st notice") by the Authority on 6th February, 2006 which was followed by a hearing and finally by the determination/decision of the Authority dated 15th June, 2006 (the "1st determination") vide which the licensee's request to sell and transfer its majority shares i.e. 61.25%, alongwith management control of the company to M/s Total Telecom in consideration of the part-payment of US\$ 05 Million towards its outstanding financial obligations was allowed and was also directed to discharge the rest of its financial obligations under the licence including 2nd & 3rd installments of ILF and Spectrum Charges alongwith late payment surcharge within 120 days of the issuance of the 1st determination.

vi. Despite the aforementioned directions given vide the 1st determination, the licensee's default continued even after expiry of 120 days of the issuance of the said determination. The licensee thus not only contravened the provisions of the licence but also flouted our directions contained in the 1st determination of ours. A number of reminders were issued to it which all fell on a deaf ear. Finally, a warning letter dated 16th October, 2006 was issued requiring it to make payment of the outstanding dues, immediately and without further delay.

vii. Issuance of 2nd Show-cause Notice: When neither we/the Authority nor any of our officers could make the licensee to discharge its financial obligations under the licence, we, having been left with no other option, had to invoke the provisions of section 23 of the Act. Thus on 1st December, 2006 another show-cause notice was issued under section 23 of the Act, requiring the licensee to remedy the contravention by paying the amount of 2nd, 3rd and 4th installments of ILF, SAF charges of Pak Rs.65,647,614/-, USF charges of Rs.26,428,934/-, R&D and ALF charges of Rs.8,809,645/- each and Numbering charges of Rs.9,366,750/- (all with late payment charges in accordance with clause 4.2.2 of the licence) within fifteen (15) days of the notice and also to explain in writing in thirty (30) days as to why an enforcement order under section 23 of the Act may not be issued against it.

viii. The licensee replied to the notice on 27th December, 2006 and attempted to justify its default and its contravention of the terms and condition of the licence by submitting that there is no violation of any terms of the license as there is no 'negligence' or 'indifference' on its part towards its obligations under the license and that even if the 'delay' is considered and taken as 'default' or 'violation', (without conceding) the same is not persistent. The licensee, based on the foregoing grounds, termed the 2nd notice as uncalled for and unwarranted u/s 23 of the Act and requested for recalling and withdrawing of the same forthwith. Vide its reply the licensee also requested for providing it an opportunity of personal hearing. Brief of the licensee's reply on each account is reproduced as under:

Annual License Fee, USF and R&D Charges:

At the very outset, attention of the Authority is invited to clauses 4.1.2.1, 4.1.2.2 and 4.1.2.3 of the license wherein it is categorically stated and provided that payments to be made to the Authority on account of ALF, USF and R&D charges should be on the basis of gross revenue FROM LICENSED SERVICES minus inter-operator payments and related PTA/FAB mandated payments.

Our revenue from the LICENSED SERVICES began with the grant of the new license dated April 18, 2005, thus no charges on the aforesaid accounts are payable by us prior to that date. In fact, your calculations are based on 12 calendar months revenue generated by Pakcom which in reality and in the light of the aforesaid provisions of the license be based on 8 months, from May, 2005 till December, 2005.

The Authority through its letter No.PTA/Finance/Mobile/Instaphone/288/2006 dated November, 20, 2006 calculated the final figures as follows:

1.	Annual License Fee	Rs.8,759,645
2.	USF Charges:	Rs.26,428,934
3.	R&D Charges:	Rs.8,809,645

In fact, even the figures give in this letter for Annual License Fee and figures given in the Notice are inconsistent. It is therefore, based on 8 months revenues for resolution and settlement of fees in accordance with the aforesaid clauses of the license.

Numbering Charges

First of all, it should be noted that according to 'proviso' to Rule 18 of the Numbering Allocation Rules 2005, no fees/charges should be charged for the numbers allocated for less than six (6) months. Since the new license was granted in April, 2005, thus there should be no charges on account of numbers allocated prior to June, 2005 as it falls within the 'proviso' of Rule 18 of the aforesaid Rules, For convenience, this is referred to as '3rd year charges'.

Our abovementioned contention had been conveyed to the Authority vide our letter dated November 21, 2006 which is still pending before some department (wing) of the Authority as per your intimation expressed in your letter dated November 24, 2006. It was however expressed that a payment of Rs.6,124,500/- be paid while the issue of 3rd year numbering charges is pending. Now, in the Notice the amount of Rs.9,366,750/- has been demanded as payable by us without letting us know as to the status of pending dispute about 3rd year numbering charges. This needs to be resolved in the light of our aforesaid submissions, and adjusted towards final liability regarding numbering charges.

In any event under a separate cover we are submitting a cheque No.0161236 dated 29-Dec-2006, to pay off the sum of Rs.6,124,500/- with hope that the issue is resolved and we are informed accordingly.

Annual Spectrum Charges

This has been even a matter of concern for the entire telecom sector and a representation about this had been made to the Ministry of IT & Telecommunications with a request that "Annual Spectrum Charges needs to be worked out in transparent manner. The same may then be recovered from each of the users in the proportion of its use by them".

It may also be noticed that the new regime of Annual Spectrum Charges came in with the passage of "Mobile Cellular Policy" which was promulgated in January, 2004. We were not under its purview until April 2005 when new license was granted. The amount so claimed is with effect from January, 2004 while in our case it should be worked out and charged from April, 2005.

Furthermore, we have been allocated 7.38 MHz + 7.38 MHz frequency and it is clear from the policy as well as terms of our license that Annual Spectrum Charges are payable on the basis of per MHz per annum use of that frequency. We believe that we have been charged on the basis of 10 MHz + 10MHz, which is against the very terms of the license. We therefore submit that our submission be accepted and amount revised so that it may be settled.

Initial License Fee:

Pakcom reiterates its intentions to honour the obligations under the license keeping in view the agreements put in place for the planned rollout of CDMA 2000 EVDO REV A technology based service. In this regard you are well aware that to meet the license obligations and to support the new rollout Deutsche Bank has been mandated to raise the required additional funding in the international market.

We are pleased to inform you that the necessary agreements for the financing of 5 million lines network have already been signed. However, the fund raising process for the balance is still not complete although as per earlier expectation it was to be completed in 120 days from the date of your determination. The causes of delay are

attributable to the recent developments in the CMT sector in Pakistan namely the announcement made by Millicom to abandon even their EGSM license.

As far as the 4th installment is concerned, our submission is that as per clause 4.1.1, the trigger date is October 18, 2006. The licensee has 180 days from the trigger date as per clause 4.4.4 of the license, to make the payment. All efforts are being made to ensure there is no delay or default on this count.

Hearings given to the licensee:

Hearing on 16th March, 2007:

- i. Pursuant to the show cause notice of 1st December, 2006, the licensee was required to appear and heard on 16th March, 2007 Mr. Jawaid Feroz, CEO of the licensee, appeared before us for and on behalf of the licensee and requested for adjournment of the hearing on the ground of his legal counsel's engagement before the Supreme Court of Pakistan.
- ii. Since as per our view there was no issue involved requiring legal interpretations on which we could be assisted by a professional legal expert and the entire issue was the licensee's failure to discharge its financial obligations under the licence and purpose of the hearing was to know about the licensee's commitment or otherwise to discharge it, on our request Mr. Feroz/the licensee showed his willingness to explain the licensee's position and reiterated the facts and points reproduced in para 1.8, above.
- iii. Nutshell of the licensee's submissions was to seek PTA's support with time to complete the fund raising.
- iv. The points raised by the licensee were anxiously considered and its objection regarding levying of numbering charges fee before promulgation of the Number Allocation and Administration Regulations, 2005 was accepted and the amount of Rs.9,366,750/- i.e. the outstanding fee under the numbering charges was accordingly reduced to Rs.6,244,500/- out of which the licensee has made payment of Rs.6,124,500/- on 29th December, 2006. The outstanding amount under this heading thus came to Rs.120,000/-.
- v. The licensee's request for giving it time to complete its proposed transaction and paying the dues was also allowed in light of its commitment to submit detailed business plan within two weeks and making payment of all its financial obligations under the license and the hearing was adjourned accordingly.
- vi. The licensee's failure to honour its commitment: The licensee failed to honour the commitment it had made before us on 16th March, 2007 and again our office vide letter No.PTA/Finance/Mobile/Instaphone/288/2006 dated 3rd October, 2007 had to remind the licensee of its commitment regarding discharging of its financial obligations and submission of detailed business plan and was informed that such inordinate delay in fulfilling its licence obligations may lead to serious repercussions

if the matter is not resolved immediately. Vide the said letter the licensee was finally directed to fulfill its commitment mentioned above failing which the Authority shall initiate appropriate legal action against it.

vii. The licensee vide its reply of 29th November, 2007, to the letter mentioned above, submitted that its transaction with very important international group (SK Telecom) was expected to be completed within November, 2007 but the same could not be completed due to the political and related situation which has resulted in emergency in the country. The licensee further stated that the proposed visit of SK Telecom senior management to meet the leadership of Pakistan has also been delayed. For the foregoing reasons, vide the letter aforementioned, the licensee again requested for allowing it some time to complete the transaction.

Hearing on 29th November, 2007:

i. On 29th November, 2007 the licensee, on our directions, again appeared before us through its CEO Mr. Javed Feroz who, when confronted with our concern regarding the licensee's continuous default on its financial obligations under the licence, repeated his earlier request of seeking some time for completion of some transaction which, as per Mr. Feroz's contention, was under consideration/in process. However, neither any cogent evidence was produced before us, in this regard, nor any specific date was given for completion of the same.

ii. The licensee's failure in satisfying us and changing our opinion regarding the contravention being grave and persistent in nature made us pass our earlier determination of 3rd January, 2008 vide which the licence was terminated. However, as mentioned above, the aforementioned determination with set-aside by the High Court with our consent and on the assurance of the licensee to pay all outstanding dues in light of the fresh order to be passed by us.

Hearing on 21st February, 2008:

i. As briefly narrated in the beginning of the instant determination, the licensee was directed by the high court vide its order of 15th January, 2008 to appear before us on 28th January, 2008, however, on the licensee's request the hearing was re-scheduled with a month's more time, for today i.e. 21st February, 2008.

ii. During today's hearing, the licensee was represented by its CEO Mr. Javaid Firoz alongwith his counsel Mr. Uzair Karamat Bhandari, Advocate. At the very outset, the court's order dated 15th January, 2008 was read out to determine scope of today's hearing. The learned counsel representing the licensee submitted his written submissions alongwith application for deferment in payment and grant of moratorium under Regulation 25 of the Regulations.

iii. The learned counsel argued that the show-cause notice issued is invalid, unlawful and void *ab initio* for want of meeting the requirements of law and being contrary to the provisions of section 23 of the Act. He further added that the show-cause notice

posses technical and procedural defects in it and where the initial notice is void, all proceedings subsequent thereto are also void.

iv. The learned counsel maintained that the only allegation leveled against the licensee in the show cause notice is non-payment of certain installments of the Initial Licence Fee and other dues allegedly payable under the License. No allegation whatsoever regarding violation of any other terms and conditions of the licence or any of the relevant laws have been leveled against Pakcom nor any complaint whatsoever is pending as no default can be attributed to it in this regard and that the alleged default on part of Pakcom in the payment of certain installments of the Initial Licence Fee, was on account of factors totally beyond the control of Pakcom.

v. It was further argued on behalf of the licensee that the licensee's inability to meet a portion of its obligation is a circumstance which cannot be viewed in isolation from the surrounding facts and circumstances, including but not limited to the incidents of Judiciary in March 2007, imposition of emergency in November 2007 and assassination of Ms. Benazir Bhutto on 27 December 2007 and its aftermath in the country tantamount to *force majeure* resulting in delay in the transaction with SK Telecom and in loosing the trust and interest of foreign investors to invest in Pakistan, hence, the licensee is entitled to an extension of time/ moratorium for payment of licence fee.

vi. The counsel claimed that requirements of exceptional circumstances under regulation 25 of the Regulations exist in favor of the licensee and the case for grant of moratorium is made out and prayed for allowing an initial moratorium of six months subject to further extension if so required.

Findings of the Authority:

i. Nevertheless the licensee's assurance/undertaking before the high court regarding making of payment under the fresh order relying on which assurance, our representative consented to the acceptance of FAO No.03/2008 and remanding of the case/matter back to the Authority for decision afresh, the licensee raised before us, today, the foregoing objections and instead of showing unconditional willingness to make the payment as undertook by it before the hon'ble Court and honour its commitment made before the court, it assailed and challenged the very basis on which it was required to pay the amount.

ii. If challenging/assailing our demand to make the payment and the process initiated for realizing the amount and taking action against the licensee under the law for contravening the provisions/terms and conditions of the licence was the licensee's intent, the licensee, instead of making undertaking to make the payment, should have raised all legal objections before the hon'ble court and should have got the case decided on its own merits. We, therefore, understand that the licensee's raising legal objections on action initiated by us and re-opening the case on its merits is in sheer disregard to the undertaking given by it before the court.

iii. Notwithstanding the foregoing observations of ours, we are taking the licensee's objection, first, regarding the legality or otherwise of the show-cause notice of December 1, 2006. In our view the same has been issued in accordance with law as section 23 of the Act clearly provides that in case a licensee contravenes the provisions of the Act, Rules or the terms and conditions of the licence, the licensee may be required to show-cause as to why any of the enforcement orders mentioned in the said section may not be issued against it. We, therefore, do not see any illegality or any irregularity in its issuance nor in its contents. Hence, this objection is overruled.

vii. Regarding the licensee's request/application under regulation 25 of the Regulations, as mentioned above, the license has been accommodated with time to the maximum. Every concession with time has been extended to the licensee but to no avail. The instant application is, as per our understanding, another attempt to gain more time and delay payment of the amount due since long. Besides the fact that this kind of application has never been made before nor such request was made before the hon'ble high court, the licensee has failed to establish its case of exceptional circumstances. The events referred to above are recent in time while the licensee's default has started much before it.

Licensee's outstanding liabilities:

Till this day, the licensee's outstanding financial obligations, under its licence, are as under:

Instaphone (Pak Com Limited)

Outstanding Dues with Late Payment Charges till 31st December, 2007

Sr. No.	Particular	Period	Amount	Late Payment Charges	Total Payable
1	Initial License Fee US \$	December, 2007	US\$ 94,850,000	US\$ 23,714,432	US\$ 118,564,432
			*	*	*
			Rs.5,838,017,500	Rs.1,459,623,290	Rs.7,297,640,790
2	Annual License Fee	December, 2005	9,048,045	4,396,874	13,444,919
3	R&D Charges	December, 2005	9,048,045	4,396,874	13,444,919
4	USF Charges	December, 2005	27,144,135	13,190,622	40,334,757
5	ASAF	December, 2006	89,827,614	43,651,495	133,479,109
6	Numbering Charges	December, 2006	120,000		120,000
Total			Rs.5,973,205,339	Rs. 1,525,259,155	Rs 7,498,464,494

All figures in the above table, except the first line (i.e. Initial License Fee), are in Pak Rupees.

[Company did not provide the annual audited accounts for the year ended December 31, 2006, due to which annual fees for that period which are in addition to the above amounts, could not be calculated.]

* Pak rupee equivalent amounts have been calculated by using NBP US\$ conversion rate as on December 31, 2007 i.e. Rs.61.55/US\$.

Licensee's financial viability to carry on with the licence:

i. Section 20 of the Act requires of us to see into and analyze, among other things, the technical and financial resources of the applicant applying for a licence to provide telecommunication services or establish telecommunication systems before granting such a licence. This statutory obligation of ours clearly shows that possessing the required technical and financial resources is one among the very pre-requisites for issuance of a licence. We understand that a factor(s) which is made essential by the statute for issuance of a licence must also be there for continuing with the possession of the licence i.e., *inter alia*, the required technical and financial resources of the person/company holding the licence.

ii. Apart from persistently contravening the terms and conditions of the licence by making continuous default as discussed above, regrettably, given the company/licensee profile and the outstanding liability, the company is not in a position to be viable any more. With the declining number of its customers, it is not possible for the company/licensee to discharge its mounting liabilities and, resultantly, continuing with the possession of the licence. Its continuous default on financial obligations further exposes its financial position. The licensee has also failed to submit its business and technical plan.

Order of the Authority:

i. The foregoing shows that the licensee has been extended every concession and has been fully accommodated in terms of time, which has been the licensee's main concern and request. However, it is observed that our concession, instead of being availed, has been abused every time and the licensee, despite the number of opportunities given to it, has failed persistently in showing a serious approach towards its obligations under the licence and our regulatory directives. We are of the considered opinion that the licensee's contravention of the terms and conditions of the licence regarding its financial obligations, incorporated in the licence on the strength of the provisions of the Act, is grave and persistent.

ii. Even this time when another opportunity was given to the licensee pursuant to the court's orders, no serious approach was shown by the licensee towards discharging its financial obligations.

iii. We, therefore, finally direct the licensee this time through this repeated decision of ours to make payment of all outstanding amounts as per the detail given above in accordance with the terms and conditions of the licence on or before 21st May, 2008.

iv. The licensee's failure to make payment on or before the aforementioned date shall not only be in violation of the undertaking given by it before the High Court dated 15th January, 2008 but shall also be in grave and persistent contravention of the terms and conditions of the licence.

v. In case of the licensee's failure to make payment on or before 21st May, 2008, its licence No.CMT-04/LL&M/PTA/2005 shall stand terminated under section 23 of the Act and all necessary measures, in this regard, shall be taken accordingly.

Dr. Muhammad Yaseen
Member (Technical)
Pakistan Telecommunication Authority

S. Nasrul Karim Ghaznavi
Member (Finance)
Pakistan Telecommunication Authority

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

This enforcement order of ours is signed on ____ March, 2008 and comprises 11 pages.