



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

Enforcement order of the Pakistan Telecommunication Authority on Show Cause notice issued to DV Com Data (Pvt.) Limited regarding non-payment of remaining 50% Initial Spectrum Fee of Rs. 1,664,860,796 inclusive of Late Payment Additional Fee calculated @ 2% per month or part thereof

File No. PTA/Finance/Finance/WLL/ISF66/2006/1

Date of issuance of Show Cause Notices: 2nd June, 2010

Venue of Hearing: PTA HQs, Islamabad
Dates of hearings: 12th January, 2011
8th April, 2011
2nd June, 2011

The Hearing Panel:

Dr. Mohammed Yaseen: Chairman
Dr. Khawar Siddique Khokhar: Member (Technical)

The Issue:

Non payment of remaining Initial Spectrum Fee amounting to Rs. 1,664,860,796 inclusive of Late Payment Additional Fee calculated @ 2% per month or part thereof

“Decision of the Authority”

1. Brief Facts:

1.1 The enforcement order will dispose of Show Cause Notice (SCN) issued to M/s DV Com Data (Pvt.) Ltd. for non-payment of remaining 50% Initial License Fee amounting to Rs. 1,314,000,000 due on 17th March, 2010. Precisely stated facts of the case are that the Pakistan Telecommunication Authority (the “Authority”) issued various Wireless Local Loop (WLL) licenses in the year 2004 by implementing De-regulation Policy on Telecommunication, 2003 issued by the Federal Government of Pakistan and also auctioned frequency spectrum *inter alia* in the bands of 1900 MHz and 1900 MHz through open auction and in accordance with the procedure provided in the Information Memorandum duly approved by the Authority.

1.2 For the purpose of this particular case M/s DV Com Data (Pvt.) Ltd. (the “Company”) also participated in the bidding and emerged out as successful bidders in the band of 1900 MHz against consideration which was determined through open auction as Initial Spectrum Fee. Accordingly, Company was issued license with respective slot of frequency spectrum after

receiving payment of 50% of auction winning price/Initial Spectrum Fee as upfront payment. According to clause 4.1.1 (b) read with clause 1.3.1 of Appendix of the license, the remaining 50% of the Initial Spectrum Fee was to be paid.

1.3 However, instead of making the payment of remaining part of the Initial Spectrum Fee, the WLL industry representatives made a presentation to the Prime Minister of Pakistan for staggering of some specific WLL frequency spectrum payments. Simultaneously, PTCL had also made presentation before PTA and Ministry of Information Technology and Telecommunication requesting for equitable treatment and refund of their paid amounts in the case of other operators (mobile) in which the staggering of payment was allowed. In view of the above, Ministry of IT & Telcom Division formulated a revised summary, after taking input/views of the Authority, for the consideration of the Economic Coordination Committee (ECC) of the Cabinet Division. Previously, the Ministry of IT & Telecom Division moved a summary regarding "Grace Period in Wireless Local Loop (WLL) Spectrum Fee Payment Determined through Open Auction" which was not approved by the ECC vide decision dated 28-11-2005. However, on the revised summary dated 02-03-2006 submitted by Ministry of IT & Telecom Division on the subject the ECC approved para 8 (given below) which is reproduced *in verbatim* and conveyed to the Authority for implementation vide letter dated 17th March, 2006:

"In view of the foregoing and in the interest of speedy rural telecom growth i.e. to enhance rural tele-density, Ministry of IT, in principle, supports deferring of payment. It is therefore proposed that:

- i. Concession of 4-years moratorium to WLL operators be allowed on the balance payment, only for commercially important 1900 and 1900 MHz frequencies, similar to that approved for mobile operators, without altering other IM conditions of LL operators;
- ii. All others operators should pay balance amount for frequencies (other than 1900 MHz and 1.9 GHz) used for non-core business; and
- iii. A Committee comparing nominees from MoIT, MoF and PTA will be constituted to consider optimal options to adjust the amount of Spectrum Fee paid in full by PTCL and others against annual fees (or any other dues) payable to PTA and FAB. The committee will also recommend sustainability of these options.

1.4 The aforesaid decision of the ECC of the Cabinet Division was implemented by the Authority including (i) and (ii) above, vide its letters, hence, extended the timeline for payment of remaining 50% amount of Initial Spectrum Fee by four years which expired on 16th March, 2010. As per the aforesaid decision of the ECC the Company were required to make the remaining payments by 17th March, 2010. Since, the Company failed to make the payment by the deadline, hence, specific demand notes were issued and required the Company to make the outstanding dues, but in vain. Since, the Company failed to pay the balance amount of initial spectrum fee of Rs.1,308,167,205/- for the frequency spectrum, i.e., 1900 & 1900 MHz, till date, in contravention of the license conditions, hence, SCN was issued on 2nd June, 2010. They responded to the show cause notice and the same is reproduced below:

Subject: - Reply to the Show Cause Notice Dated June 02, 2010

Dear Sir,

It is with reference to the Show Cause Notice (No. PTA/Finance/WLL/ISF66/ 2006/1/396) dated June 02, 2010 served on my client namely DV Com Data (Pvt.) Ltd. ("Company") and in accordance with its instructions, I state as follows:

1. Initially a non-exclusive Wireless Local Loop License (No. WLL-18-2004) dated November 04, 2004 ('License') was awarded by the Pakistan Telecommunication Authority ('PTA') to DV Com Ltd. Suffice to say for the purposes of this Reply to the Show Cause Notice that after incorporation of the Company in March 2007, the aforesaid License was transferred to the Company by DV Com Ltd and approval was accorded by PTA on September 28, 2007. The Company thus stepped in the shoes of former Licensee with effect from September 28, 2007 and assumed all responsibilities towards PTA.
2. Upon transfer of the license to the Company, the previous Licensee had not completed its Roll Out obligation and there was no business of licensed services as such. The Company was not in a position to accomplish its Roll Out obligation for reasons beyond its control and admitted by the PTA as such. Therefore, period for Roll Out obligation was extended from time to time; the matter was finally resolved in a Writ Petition No. 633/2009 by the then Islamabad High Court and a Review Petition No. 12/2009 is still pending (now) before Lahore High Court, Rawalpindi Bench. The Company is yet to accomplish its Roll Out and commence commercial operation and generate some revenue.
3. In view of the foregoing, the case of answering Company is quite separate and different from the rest of the companies, licensees or operators and the demand notes or the Show Cause Notice sent to the Company are all uncalled for and may kindly be withdrawn as such. It may be averred that any adverse order by the PTA and or determination on the aforesaid Show Cause Notice would derail the entire set up of the Company that has been initiated after the Order passed by the then Islamabad High Court. Hence, once again, the Show Cause Notice is unwarranted and uncalled for and obviously contrary to the well settled principle of regard for judicial forums.
4. With respect to the 50% balance of initial spectrum fee, it is added that the predecessor of the Licensee along with other WLL operators made a formal request to the Ministry of IT, Government of Pakistan that all WLL Operators be afforded a moratorium of four years and after that the aforesaid 50% balance of initial spectrum fee be staggered over the remaining period of license. The matter was taken up by the ECC and vide its decision dated March 17, 2006 granted a four year moratorium.
5. As far as the second request of staggering the balance spectrum fee over the period of the license was concerned; initially the Authority informed us that

the first installment of the balance spectrum fee be paid but this was later on recalled. This also gives support to the point that ECC did not refuse that option in its aforesaid decision. It was, however, decided that a Committee, comprising nominees from the Ministry of IT, Ministry of Finance and PTA be constituted to recommend the sustainability of the options considered by the ECC. But till date even after the expiry of the moratorium, no such Committee has been constituted and this aspect of the request still awaits recommendation by the Committee and reconsideration by the ECC especially in the light of the financial crisis of the Telecom Industry. Since this exercise is yet to take place in light of the aforesaid decision of the ECC, therefore the matter is sub judice and there is no 'right' having accrued to PTA to call for payment, let alone the 'liability' of the Company to pay it as a condition of its License.

6. *The Company assures the Authority that subject to whatever has been stated aforesaid, every financial or other obligation under the term of the License or any provisions of law, Rules or Regulations would be discharged by the Company to the very satisfaction of the Authority.*

It is therefore most respectfully requested that the Show Cause Notice dated June 02, 2010 be recalled and no further adverse order or determination be passed, announced or implemented against the Company, especially in view of the matter that is already pending before the Lahore High Court.

1.5 However, without hearing any response from the Authority and without letting the Authority to adjudicate the matter by convening a formal hearing to lead the matter to a logical conclusion, the Company filed a Writ Petition No.4429/2010 titled: DV Com Data (Pvt.) Limited & others vs. Federation of Pakistan, etc before Lahore High Court at Rawalpindi Bench against the aforesaid SCN. The Honorable High Court vide its order dated 7th December, 2010 disposed of the aforesaid writ petition in the following terms. The certified copy of the order was received in PTA on 28th January, 2011.

“At the outset the Deputy Director (Litigation) PTA (respondent No .2) has raised objections regarding the maintainability of the petition by, inter alia, submitting that proceedings are pending before respondent No.2 as a consequence of the impugned show cause notices having been issued to the petitioners by respondent No. 2. The Petitioners without waiting for the decision thereof have filed this petition which is premature. Further submits that the petitioners may raise objections, which are available to them under the law, during the course of the hearing of the show cause notices. Undertakes that during the pendency of the show cause notices no coercive measures shall be adopted against the petitioner.

2. *The learned counsel for the petitioners in view of the above statement does not press the petition with the permission, however, to raise all or any objections available to the petitioners under the law, including but not limited to, the questions of maintainability of the show cause notices and the power to grant*

moratorium, which issues may be directed to be treated and decided as preliminary issues. Further prays that the show cause notices may be ordered to be heard and decided expeditiously, preferably within a period of three weeks, after providing an opportunity of fair hearing to the petitioners. Also prays that during the said hearing the respondents may be directed not to take any coercive measures against the petitioners for recovery of the impugned amounts”.

1.6 Pursuant to the aforesaid orders of the High court the Company were required vide letter dated 3rd January, 2011 to appear before the Authority on 12th January, 2011 for hearing. In response the counsel of the Company made request for short adjournment which was refused. However, the Company appeared before the Authority on the said date through its counsel namely Mr. Ali Raza, Advocate, Mr. Aimal Khattak, Advocate, Miss Mehreen Haider, Advocate and Mr. Muhammad Kamil Khan and submitted joint application for production of evidence and regulation of hearing and joint written submissions and requested to decide first the joint application and also requested to provide the summary of the Ministry of IT& Telecom Division submitted before the ECC in 2006 on the basis of which moratorium was approved. Written submission of SCN filed by the Company on 12th January, 2011 are reproduced below:

BEFORE THE PAKISTAN TELECOMMUNICATION AUTHORITY

In the Matter of:

Show Cause Notice No. PTA/Finance/Finance/WLL/ISF66/2006/I/396 issued to DVCom Data (Pvt.) Limited dated 2nd June 2010;

Show Cause Notice No. PTA/Finance/Finance/WLL/ISF66/2006/I/396 issued to Great Bear International Services (Pvt.) Limited dated 2nd June 2010;

Show Cause Notice No. PTA/Finance/Finance/WLL/isf66/2006/I/397 issued to Telecard Limited dated 2nd June 2010

JOINT WRITTEN SUBMISSIONS on behalf of DVCom Data (Pvt.) Limited, Great Bear International Services (Pvt.) Limited & Telecard Limited

We act for, and address you for/on behalf of our Clients, DVCom Data (Pvt.) Limited {"DVCom Data"}, Great Bear International Services {Pvt.} Limited {"GBIS"} & Telecard Limited {"Telecard"} in the matter of the captioned Show Cause Notices dated 2nd June 2010 issued to our Clients.

The joint submissions herein below are in furtherance to the Reply to the Show Cause Notices earlier submitted by our Clients and the submissions made before

the High Court Rawalpindi Bench in the Writ No. 4429 of 2010 filed before the High Court Rawalpindi Bench may be read as an integral part thereof.

Furthermore, the joint submissions are subject to the application presented by our Clients for production of relevant documents which are essential to a hearing before this forum.

In addition the Authority is requested to first take up and decide the two preliminary issues as directed by the Honorable Lahore High Court, Rawalpindi Bench, vide its Order dated 7.12.2010 in Writ Petition No.4429 of 2010, whereafter, a final determination can be forthcoming after hearing the parties on the remaining issues raised in the Show Cause Notices..

The Joint Submissions are as follows;

- 1. That our Clients {"Licensees"} were issued licenses for providing LL services in 2004 for a duration of 20 years following which they acquired frequency spectrum through an auction in 2004 which was in turn assigned to their LL Licenses to providing WLL services. Our Clients continue to take all possible measures to ensure full compliance to their license obligations as well as the Act, Rules and Regulations made there under.*
- 2. That the Show Cause Notices issued to our Clients provide that the Licensees contravened provisions of the Act and rules made thereunder by not making payments on account of "Initial Spectrum Fee". Furthermore, the Authority alleges, vide the said Show Cause Notices, that our Clients failed to comply with Clause 4.1.1(b) read with Clause 1,3.1 of Appendix 2 of their License as well as Regulation 23(6) and Regulation 23(7) of the Regulations.*
- 3. That due to the issues and limitations faced by our Clients in terms of low demand and lack of economies of scale, a moratorium was granted on 17th March 2006 by the Economic Coordination Committee (ECC) of the Cabinet on the basis of a summary submitted by the IT & Telecom Division and as also confirmed by the Authority vide its letter dated 10th April, 2006 whereby the following was decided:
"It was decided that to grant a moratorium of 4-year to the WLL operators, which had acquired the 450MHz and 1900MHz frequencies spectrums, on the payment of the balance spectrum, similar to that approved for mobile operators, without altering other IM conditions of LL Operators. A committee has been constituted by the Ministry of Information Technology which includes representation of the Ministry of Finance, Ministry of Information Technology and PTA and will give deliberations on the modalities of the payment after which the complete scheme would be commanded to all the concerned parties."*
- 4. That a summary of the background to the grant of the moratorium by the Government of Pakistan is as follows;*
 - a) That the Licensees were offered their WLL licenses with options to purchase through an open auction frequency spectrum in the 450 MHz and 1900 MHz range and hence would be using primarily CDMA technology as against the*

GSM and AMPS technology which was being used by the then existing cellular mobile operators. The principle purpose behind the Government of Pakistan and the Authority's introduction of WLL operators was to provide further competition in the market through an alternative communication technology and a resultant increase in the teledensity as previously the then existing mobile cellular operators as well as the principal SMP PTCL were depending on more or less the same customer base located in the large metropolitan cities and were not marketing beyond to a large potential customer base located in other regions resulting in the teledensity not increasing substantially after the early surge. Enhancing teledensity and providing greater communication options were and remain the principal mandates of the Authority.

- b) That the Ministry of Information Technology and the Authority were fully aware at the time of offering the said licenses that the licensees would have to invest heavily in developing a market for the alternative technology and WLL services as an alternative to existing mobile cellular technology and for targeting a larger customer base in not only the large metropolitan cities but the far flung smaller urban and semi-rural regions. Furthermore, to the knowledge of the Ministry of Information Technology and the Authority's, the technologies available globally for WLL services based in the 450 MHz and 1900 MHz spectrum were still evolving rapidly and it would require some time for the technology to settle down and stabilize. Hence, this further translated into a longer period in terms of potential returns on investment for the Licensees.*
- c) That the single largest hurdle in the way of developing a profitable and viable WLL industry was the strict and focused regulation of the existing mobile cellular industry and more so PTCL being the SMP and the single largest LL operator upon whom the WLL operators would be to a great part dependent in terms of developing their network and specifically termination of telephone calls since PTCL at that time held by far the largest subscriber base.*
- d) That the Licensees based on these initial representations and assurances of the Ministry of Information Technology and the Authority applied for and obtained LL licenses and also participated in the auction for the spectrum in the 450 and 1900 MHz frequency bands. To the surprise of the Licensees firstly the Ministry of Information Technology and the Authority permitted PTCL to participate in the auction of the spectrum which effectively drove up the price of the spectrum and the fact that PTCL was allowed to participate, notwithstanding that it was an SMP and should not have been allowed to participate as that would only result in PTCL strengthening its dominant position in the industry, only to drive up the auction price became abundantly clear was granted a WLL license by the Authority on the instructions of the Government of Pakistan in 2005 rather than in 2004 along with all the other WLL Licensees. Already confronted with a situation where due to unforeseen bidding at the auction the price of the spectrums had reached a previously unthinkable level, the Licensees were now completely taken by surprise in having the telecom SMP becoming their direct competitor being granted a WLL license. To acquire the necessary spectrum in the 450 and 1900 MHz for all fourteen telecommunication regions of Pakistan, this translated to a value of upto Rs, 3.171 billion. This, it is submitted, was much higher than what had been anticipated by the Licensees*

pre-auction and even the Authority was aware that they had received a windfall in the form of the auction price of the said spectrum. However, upon the encouragement and continued assurances of the Ministry of Information Technology and the Authority that an even and fair playing field would be guaranteed, the Licensees proceeded to accept and acquire the said spectrums and licenses as the alternative would have been a complete failure on the part of the Ministry of Information Technology and the Authority's Ministry of Information Technology and the Authority in terms of developing and launching the WLL industry in Pakistan. It is further submitted that had the Ministry of Information Technology and the Authority acted in the best interests of developing the WLL industry, they would have ensured that the SMP PTCL was not granted a WLL license and who specifically at that time was a wholly owned company of the Government of Pakistan.

- e) That during 2004 and 2005 a total of five WLL licenses was issued in respect of 450 MHz and 1900 MHz of which our Client's are holders of three. The remaining licensees are PTCL and Worldcall Telecommunication Limited.*
 - f) That the Authority meanwhile just prior to the grant and auction of the WLL Licenses decided to grant two further mobile cellular licenses in 2004 bringing the total cellular operators to six and hence creating even further competition. The competition in the telecommunication market had been dramatically increased as a result with a total of six mobile cellular operators, 5 WLL operators and PTCL acting as the principle and largest LL operator hosting a copper and fiber based network across the country. It is pertinent to note that in all three categories of telecommunication voice services, PTCL was an operator in all three technologies. Hence, the competition for the WLL operators became greater than what was envisioned initially when planning to acquire the said licenses in early 2004.*
- 5. That the purpose of granting the moratorium was to give the Licensees a fair opportunity to break into the market against stiff competition from the mobile cellular industry and the Significant Market Player ("SMP") PTCL, as well as launch their WLL services which the Licensees continue to struggle with. During the period of the moratorium, the Licensees waited for the Committee which had been comprised to provide a report on optimal options for the Licensees to pay the remainder 50% Initial Spectrum Fee. It is pertinent to note that the said Committee has not provided any report, communication or recommendations to the Licensees' knowledge till date despite various letters sent to the Authority as well as to the Ministry of IT.*
 - 6. That based upon the said concession and assurances of the Government of Pakistan and the Authority that they would continue to support the development of the WLL industry the Licensees acting upon the grant of the Moratorium invested hundreds of millions of dollars into developing and installing their networks and marketing their businesses. However, as*

was feared, while the Licensees over the last five years have been the catalyst in developing the alternative CDMA based technologies and consequently a wireless communication consumer in not just the urban and semi rural but even the far flung rural areas of Pakistan, the benefactors of this development and increased customer base have primarily been the SMP PTCL and the mobile cellular operators who have due to the availability of the vast foreign investment funds proceeded to offer cheaper and attractive packages to consumers otherwise developed by the WLL Licensees resulting in fact a drastic shrinkage of the Licensees consumer base and which is in the knowledge of the Authority. This phenomena is directly a result of the Authority's failure to regulate the entire telecommunication industry in a manner to ensure that telecom licensees such as the WLL Licensees having invested hundreds of millions of dollars are not left at the mercy of the SMP and the limitless foreign investment funds available to the cellular mobile industry.

7. *That as a result of the representations by the industry, the Ministry of Information Technology vide its letter dated 24.2.2010 requested the Authority to provide its comments and recommendations on priority for a "judicious treatment of the issue". The Authority instead of providing such comments initially issued demand letters in March 2010 to the Licensees requiring immediate payment of the first of the, ten installments of the Initial Spectrum Fee based on its incorrect presumption that the moratorium as originally granted by the ECC had expired. However, what the Authority did admit through those initial notices was that the balance Initial Spectrum Fee was to be paid in 10 equal installments. Meanwhile, the Authority vide its letter dated 15.4.2010 submitted its recommendations and comments to the Ministry of Information Technology wherein it took the view that the moratorium having been granted by a decision of the ECC, the Authority was not competent to consider the same as extended or revised unless the same was approved by the ECC or the Cabinet of the Government of Pakistan. The matter is still pending before the Ministry of Information Technology and hence, the current Show Cause Notices are premature on that ground alone as the Authority is acting in haste instead of awaiting the decision of the Ministry of Information Technology on the issue and furthermore, in the absence of a decision by the Ministry of Technology the Licensees cannot even be presumed to have committed any default.*
8. *That upon the purported expiry of the moratorium period, the Authority's actions of issuing Show Cause Notices to our Clients demanding payment on account of the remainder Initial Spectrum Fee with no indication as to whether any options have been recommended by the Committee is without jurisdiction and premature and therefore should be withdrawn as per the submissions detailed herein below:*

The Authority has the power to grant a Moratorium:

9. *Notwithstanding the earlier submission that the moratorium as already granted is in effect continuing, it is contended that the Authority, as per its own Act, has an undeniable responsibility to ensure that the rights of its licensees are duly protected as per Section 6(a) of the Act. This responsibility infers a duty on the Authority to protect and promote the investments made by the Licensees which it has failed to protect by issuing the titled Show Cause Notices, Furthermore, the Authority, as per Section 6(b) is to ensure that all of its decisions and determinations are made in an open equitable, non-discriminatory, consistent and transparent manner.*
10. *Regulation 25 of the PTA (F&P) Regulations 2006 defines "Moratorium" in the following terms: "The Authority may in exceptional circumstances defer or allow payment in installments of fee or fees by way of moratorium if a case by a licensee is made out for it with reference to its resources and obligations and such licensee satisfies the Authority that it is in the interest of telecommunication industry as a whole and the public for such moratorium be granted. Every application for the grant of moratorium or payment in installments shall be evaluated and discussed by the Authority and the reasons for the grant or refusal of such moratorium shall be recorded and conveyed to the licensee."*
11. *For the purposes of explanation, the word "moratorium" has been defined in Corpus Juris Secundum Volume 58 pg 1208 as "a period of permissive or obligatory delay. In law, it is a period during which an obligator has a legal right to delay meeting an obligation."*
12. *It is clear from a plain reading of Regulation 25 that the Authority has the discretion to consider challenges being faced by its Licensees and in circumstances where the interests of the telecommunication industry as a whole may be affected, it can grant a moratorium. Furthermore, this Regulation also makes clear that if the Authority finds that a moratorium should not be granted, the reasons for refusal must be recorded and communicated to the Licensee.*
13. *It may be reasonable to consider that the reason the Authority decided that it does not have the discretion to grant a moratorium at the time the moratorium was originally granted vide the decision of the ECC on 17th March 2006 was due to the fact that the PTA (F&P) Regulations 2006 were not yet in force. However, the Regulations make it substantially clear that the Authority has been directly vested with the discretion to grant a moratorium. It is therefore humbly submitted that, contrary to its position on the said issue, the Authority does have the necessary discretion to consider and grant moratoria if the circumstances require it to.*
14. *If, however, the Authority considers that the ECC decision on the issue of granting moratorium is to hold the field, then it is humbly submitted that the Authority could not have moved to issue Show Cause Notices to our Clients without the Committee providing recommendations regarding optimal options for the Licensees to pay the remainder 50% Initial Spectrum Fee.*
15. *Furthermore, it is crucial that the Authority, as part of its responsibility to ensure that the Licensees' rights remain duly protected, should consider numerous pleas already made by the Licensees due to the unforeseen n circumstances regarding the state of the WLL industry including the request that the Licensees maybe permitted to pay the remainder Initial Spectrum Fee in installments spread over the last ten year term of their respective WLL Licenses. It is pertinent to reiterate that this proposal has been*

made by the Licensees to the Authority as well as the Ministry of IT on more than one occasion, however it is regrettably submitted that the Authority has failed to pay any heed to it.

16. *Finally, it is submitted that the challenges being faced by the WLL industry have only increased over time due to the Licensees being forced to compete with the Significant Market Player ("SMP") PTCL as well as the booming mobile cellular industry due to which the WLL industry has been adversely affected. It is hence contended that the purpose of the moratorium, which included given the Licensees a fair opportunity to find suitable ways of breaking into the market successfully, have by no means ceased to exist, nor have they improved in any way.*
17. *In the alternative, even if the Authority believes the moratorium as granted by the ECC has expired and conditions similar to when the initial moratorium was granted do not exist and hence no further moratorium can be granted by the Authority under its own powers, 50% of the Initial Spectrum Fee having been paid and the License being for a period of 20 years, the Spectrum is therefore, at the minimum paid for the first 10 years of the License term and therefore, the Authority would be required to either extend the moratorium until at least 2014 and then seek payment of the balance Initial Spectrum Fee or demand such balance Initial Spectrum Fee to be paid at a time prior to the completion of the first 10 year term of the License.*

The Authority must act in a fair and just manner:

18. *Section 24A(1) of the General Clauses Act 1897 provides that where a power to make any order or give any direction is conferred on any authority, office or person, such power shall be exercised reasonably, fairly, justly and for the advancement of the purpose of the enactment.*
19. *The principle set forth by virtue of Section 24A (1) of the General Clauses Act 1897 has been reaffirmed in a plethora of precedents including 1998 SCMR 2268. Wherein it was observed that public functionaries are obligated to act justly, fairly equitably, without any element of discrimination and squarely within the parameters of law. Furthermore, it was observed that any order or direction, so far as necessary or appropriate should reflect reasons for its making or issuance and, where the same is lacking, an affectee may demand the necessary reasons, which, in response, would be furnished.*
20. *Furthermore in 2010 SCMR 1475, it has been observed that public functionaries are duty bound to decide cases after due application of mind.*
21. *It is submitted that the Authority, as per the General Clauses Act 1897 is bound to exercise its discretion in passing orders and making directions in a fair and reasonable manner. The conduct of the Authority issuing Show Cause Notices to the Licensees demanding balance payment of Initial Spectrum Fee "IMMEDIATELY" lump sum is far from being fair and reasonable. Furthermore, the Authority has failed to consider provisions of the General Clauses Act as it has not provided any reasoning as to why the said payment is being demanded in such a manner especially in view of the decision of the ECC whereby a Committee was to be formed to provide alternate options with regard to payment of remainder Initial Spectrum Fee.*

The Licensees have taken steps in view of the ECC decision:

22. *Section 21 of the General Clauses Act, 1897 provides that where by any central act/regulation, a power to issue notifications, orders, rules or bye laws is conferred then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any) to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.*
23. *Section 21 as highlighted hereinabove is subject to the equitable principle of locus poenitentiae which has been described in 1981 SCMR 604. It has been held that the rule as per Section 21 General Clauses Act 1897 is subject to exception that where decisive steps had been taken or where order sought to be recalled or rescinded has taken legal effect and in pursuance thereof, certain rights have been created in favour of an individual, locus poenitentiae came into effect and the order could not be rescinded or withdrawn thereafter to the detriment of those rights.*
24. *PLD 2009 Karachi 397: @pg 406 according to rule of locus poenitentiae, authority passing an order can recall the same unless it is acted upon. Such power is subject to three exceptions which are very common in its nature against such rule namely the order must not be obtained by its beneficiary through fraud or misrepresentation, secondly it must not be passed by an incompetent authority and thirdly, it must not be passed in violation of specific provisions of law.*
25. *The Licensees contend that the decision of the ECC granting moratorium in 2006 as well confirming the formation of a Committee to decide upon issues of repayment of the balance Initial Spectrum Fee is subject to the principle of locus poenitentiae; the business plan of our Clients has been structured keeping in view the decision of the ECC and representations made by the Authority regarding the same. Therefore the Authority is now estopped from completely changing its position and demanding the remainder Initial Spectrum Fee through demand letters and Show Cause Notices, the same being unjust, excessive and completely unreasonable.*
26. *Furthermore, the moratorium was as per the Authority's version granted for a fixed non renewable period of 4 years. Without prejudice to the submissions on behalf of the Licensees, even if this version of the Authority is presumed then the moratorium could only have been seen as being applicable from the date of the grant of the Licenses, hence, the moratorium would have as per the Authority's claim expired in 2008 whereas the Authority has sought payment of the balance Initial Spectrum Fee in 2010, two years after the moratorium expired by the Authority's own version. This conduct infact confirms that the Authority understood the moratorium as granted by the ECC to be continuing beyond 2008 or in the alternative in response to representations made by our Client's granted a further moratorium under powers vested in it directly and where such moratorium would continue either until the conditions upon which the moratorium was granted no longer exist or at the minimum the beginning of the last 50% term of the License.*

27. *That notwithstanding all the above submissions, the Authority has already received 50% payment of the Initial Spectrum Fee. The licenses being for a period of 20 years and the Spectrum also having been auctioned and assigned for a similar period, effectively and for all intents and purposes the Authority has received valuable and due consideration from the Licensees for the said Spectrum for a period of 10 years being 50% of the period of the licenses and the Spectrum assignment. Therefore, the Authority having received due and valuable consideration for a period upto 2014 for the said Spectrum, the issue relating to payment of the balance 50% of the Initial Spectrum Fee cannot be a premise or basis available to the Authority to suspend, terminate or otherwise threaten the license or the Spectrum as currently held by the Licensees until 2014 at the least*

The Moratorium Amended the License which cannot be amended or altered by the Authority unilaterally

28. *That the concession granted to the Licensees as approved by the ECC on the recommendation of the Ministry of Information Technology and the Authority amounts to an amendment of the Licensees respective WLL licenses and such amendment cannot be revoked, altered or amended by the Authority unilaterally in view of the provisions of the said licenses and the Pakistan Telecommunication (Re-organization) Act, 1996.*

29. *That the Authority is further estopped by its own conduct in that after withdrawing the first Show Cause Notices relating to the same demand as contained in the latter Show Cause Notices dated 2.6.2010, it could not have issued the second set of Show Cause Notices having withdrawn the first ones thereby acknowledging that the same had been issued in error and without any basis in law and fact. Hence, the Show Cause Notices dated 2.6.2010 are patently illegal and void.*

30. *In addition to the above submissions and especially in view of the show cause as to why the license should not be suspended, terminated or any other enforcement order should not be passed against the licenses, following are submitted for the kind perusal of the Authority:*

a) *The WLL subscribers which are in the sum of 1,543,747) (as per PTA web-site) will be adversely affected by such a decision by PTA. In addition, a drastic step by PTA such as cancellation of licenses will also reduce competition and choice to the masses. Given that increasing choice to consumers was the main objective of the Deregulation Policy of the MOITT, such a move by PTA will defeat the very purpose of the Policy which it is intended to serve.*

b) *There are hundreds of employees that are associated with these WLL operators and any adverse move by the PTA will also destroy their livelihood.*

c) *There are billions of rupees of investment made by the WLL Operators, and a*

substantial portion of these investments have been paid to the PTA/Government of Pakistan. Any premature cancellation of licenses will also destroy the billions of rupees of investments made by these operators. Such a step will be totally unnecessary when a viable alternative is being presented by the WLL Operators to the PTA and MOITT.

It is therefore submitted, on the basis of the above submissions of the Licensees, that the Authority may either withdraw the Show Cause Notices or cancel the same without any further action thereon as being premature and clearly misconceived in view of the fact that the moratorium as granted is continuing and if not then the Authority in exercise of its powers is required to grant a moratorium for similar reasons as on which the original moratorium was based.

It is further submitted that notwithstanding the above submission, the Authority is required to withdraw the Show Cause Notices in question as the same have been issued without due authority.

It is further submitted that in the larger interest of the WLL industry, the Authority may constitute a committee with due representation of the industry and fairly consider the serious issues currently being faced by the ailing WLL industry as a whole as was decided vide the decision of the ECC dated 17.3.2006 and thereupon consider how to support the industry and its revival.

1.7 The matter was again fixed for hearing on 31st March, 2011. However, upon request and non-availability of legal Counsel of the licensees, the same was adjourned for 8th April, 2011 and after hearing the matter, the Authority vide order dated 18th May, 2011 disposed of the joint application and the matter was fixed on 2nd June, 2011 for giving another hearing opportunity to the licensees for further proceeding of SCN issued to the Company. Mr. Amil Khattak, Legal Counsel attended the hearing on the 2nd June, 2011 and filed letter as given below:

02 June, 2011

*The Chairman
Pakistan Telecommunication Authority
PTA Headquarters,
F-5/1, Islamabad.*

Subject: *Decision of the Authority dated 18th May, 2011 and Hearing Scheduled for the 2nd of June, 2011*

Dear Sir,

We write on behalf of our Clients, M/s DVCOM Data (Pvt) Ltd, Great Bear International Services (Pvt) Ltd and Telecard Limited with reference to the Decision of the Authority dated 18 May, 2011 and the hearing thereof scheduled for today, the 2nd of June, 2011 at 3:00 pm.

We have instituted Writ Petition No. 1770 of 2011 in the Islamabad High Court impugning the decision of the Authority dated 18 May, 2011, and in this regard the Honourable Chief Justice has issued notices. Furthermore, the next date of hearing has been fixed for the 13th of June, 2011.

As the impugned Decision of the Authority dated 18th May, 2011 is now Sub Judice and pending before the Honourable High Court, it would be inappropriate to hear the Show Cause Notice in terms of final arguments and therefore it is requested that in view of the pendency of the aforementioned Writ Petition the hearing may adjourned for a date after 13th June, 2011.

Kind Regards

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Ali Raza

Advocate Supreme Court of Pakistan

2. Finding of the Authority

2.1 Based upon the aforementioned letter the legal Counsel of the company requested for adjournment of hearing. The Authority heard the argument, perused the record and concludes the following findings:

- i. SCN was issued on 2nd June, 2010, after receipt of reply of SCN, the Company being aggrieved by SCN filed Writ Petition in Lahore High Court, Rawalpindi Bench, Rawalpindi. The Honorable Court vide order dated 7th December, 2011 disposed of the case with a direction to dispose of preliminary issues and after providing an opportunity of fair hearing to the Company within three weeks decided the matter. Therefore, in light of court order, all requisite directions have been complied with and ample fair opportunities of hearing have been afforded to the Company, but even then the license is trying to delay the proceedings by invoking jurisdiction of the courts so as to void payment of remaining outstanding Initial Spectrum Fee of Rs. 1,308,167,205/- which was due on 17th March, 2010.
- ii. The Licensee has impugned the order dated 18th May, 2011 of the Authority passed on joint application filed on 12th January, 2011. The proceeding in the instant matter relates to SCN and does not relate to the order impugned in the Islamabad High Court vide W.P. No.1770 of 2011.
- iii. Despite providing several opportunities of hearing pursuant of Court order. The Company does not seem willing to pay the defaulted outstanding dues on account of remaining initial spectrum fee.

- iv. Frequency spectrum is a scarce resource which was granted through bidding in 2004 subject to making payment of winning auctioned price within certain timelines as per the Information Memorandum, license condition of ECC decision which is effective as 17th March, 2010 (relaxed by Federal Government)..Hence, being executing agency/Licensor/Regulatory body, the Authority has all the powers to demand the said fee and enforce the terms and conditions of the license under the provisions of the Act, rules/regulations, which the Company is obliged to comply with and adhere to.
- v. Since, the Company which originally was bound to pay the remaining part of the 50% Initial Spectrum fee by February, 2005 under the terms and conditions of the license which were extended up to March, 2010, hence, the enforcement of the said license conditions become effective from March, 2010 and in case of failure, it constitute a contravention of the license condition, hence, to enforce the said license conditions action under section 23 of the Act can be initiated, hence, the initiation of proceedings under section 23 of the Act were validly initiated against the Company.
- vi. The Authority after hearing the arguments, perusal of record and court order dated 7th December, 2010 has reached at the conclusion that under section 8 of the Act, the Federal Government has the powers to issue policy directive to PTA on matters relating to the telecommunication services and system. As per deregulation policy radio spectrum frequency for provision of wireless services were auctioned. Accordingly, successful bidder were required to pay auctioned winning prices in two installment i.e., 50% at the time of issuance of license and remaining 50% on or before the time frame given in the license.
- vii. Later in 2006, MoIT vide letter No.19-1/2005-DT dated 17th March, 2006 conveyed a decision of ECC to PTA whereby all WLL Company having frequency spectrum in the bands of 1900 MHz and 1900MHz were given a grace period of 4 years to pay remaining 50% Initial Spectrum Fee which was originally due on or before 18th February, 2005 as per license clause 1.3.1 (b) of Appendix 2 of the LDI License. It would be pertinent to mention here that due to the said ECC decision, the time period given in the license for payment of remaining initial spectrum fee was extended to 17th March, 2010. Therefore, non-payment of the same by 17th March, 2010 is tantamount to a contravention of license condition. The Authority rightly in exercise of its power conferred under section 23 of the Act issued the show cause notices due to contravention of license condition, hence, the same are maintainable as being issued within the statutory jurisdiction of the Authority.
- viii. It would be pertinent to mention here the licenses bearing No. WLL-18-2004 dated 28th September, 2007 (*with effective date 4th November, 2004, WLL-06-2004 transferred to it*

from DV Com Limited) awarded to M/s DV Com Data (Pvt.) Ltd. for establishment, maintenance and operation of telecommunication system and to provide telecommunication services in licensed regions of CTR, HTR, ITR, KTR, LTR, NTR-I, NTR-II, RTR, and WTR awarded to the Company has already been cancelled by the Authority vide letter No. DV Com Data 03/11/WLL&M /PTA/1877 dated 28th February, 2011.

3. Order:

3.1. In view of the above facts and findings, the Authority hereby requires the Company i.e., M/s DV Com Data (Pvt.) Ltd. to pay the outstanding defaulted amount pertaining to remaining Initial Spectrum Fee of Rs. 1,664,860,796 inclusive of Late Payment Additional Fee calculated @ 2% per month or part thereof within seven (7) days from the date of issuance of this order.

3.2. In case of non-payment of outstanding defaulted amount as stated above (i.e., para 3.1) recovery proceedings under section 30 of the Act shall be initiated by the Authority against the Company for recovery of all payable dues as arrear of land revenue.

Dr. Khawar Siddique Khokhar
Member (Technical)

Dr. Mohammed Yaseen
Chairman

This order is signed on ___ day of June, 2011 and comprises 17 pages.