



PAKISTAN TELECOMMUNICATION AUTHORITY
HEADQUARTERS, F-5/1 ISLAMABAD
Ph: 051-9214243 Fax: 051-2878113

Re:
Great Bear International Services (Pvt.) Limited

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

File No. PTA/Wireless Licensing/LL and Mobile/WLL Licensee/Great Bear 113/2006

Date of Show Cause:	8 th March 2010
Date of Hearing:	15 th June 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:

“Discontinuation of service without prior approval of the Authority”

Decision of the Authority

1. Brief Facts:

1.1. **Great Bear International Services (Pvt.) Limited** (the “licensee”) is a Wireless Local Loop licensee of the Pakistan Telecommunication Authority (the “Authority”) vide License No.WLL-13-2004 dated 8th November, 2004 and No WLL-17-2004 dated 28th September 2007 (the “license”) to establish, maintain and operate telecommunication system and to provide telecommunication services in all fourteen (14) licensed regions subject to the terms and conditions contained in the license (s).

1.2. As a licensee of the Authority, the licensee i.e. Great Bear International services (Pvt.) Limited is required to comply with the provisions of prevailing regulatory laws comprising of the Pakistan telecommunication (Re-organization) Act, 1996 (the “Act”), the Pakistan Telecommunication Rules, 2000 (the “Rules”) the Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2006 (the “Regulations”) and the terms and conditions of the licenses.

- (a). Clause 8.1 of the Appendix-B of the Rules and condition 3.1 of the license obliged the licensee to observe the provision of the Act, the Rules and the Regulations.

- (b). Clause 6.2.1 of the license makes it obligatory on the licensee *not to discontinue providing Licensed Services or a category of Licensed Services unless (a) the Licensee gives the Authority and affected customers at least 90 days prior written notice of such discontinuation, and (b) Authority's prior written approval to such discontinuation is obtained.*"

1.3. Section 23 (1) of the Act empowers the Authority to issue show cause notice in case where a licensee contravenes any provision of the Act, the rules made thereunder or any term and condition of the license and in case it fails to satisfy the Authority or remedy the contravention, any of the punishments provided in sub-section (3) of section 23 of the Act may be imposed on it.

1.4. In the instant case the Authority took notice of the fact through licensee's letter dated 5th January, 2010 that it had discontinued/suspended its licensed operations/services since 16th December, 2009 without prior approval of the Authority and without fulfilling the requirements mentioned in clause 6.2.1 of the license, hence, contravened the aforesaid license conditions, therefore, it was issued a show cause notice (the "Notice") dated 8th March 2010 under section 23 of the Act, requiring it to remedy the contravention by restoring its commercial operations immediately and also to explain in writing, within thirty (30) days of the issuance of the Notice as to why the license should not be suspended, terminated or any other enforcement order should not be passed against the licensee under section 23 of the Act.

1.5. The licensee replied to the aforesaid Notice vide its letter of 7th April, 2010 and denied the allegation, which is reproduced as under:

"BEFORE THE PAKISTAN TELECOMMUNICATION AUTHORITY

In The Matter of:

M/s Great Bear International Services (Pvt.) Limited

Show Cause Notice No. PTA/Wireless Licensing/LL and Mobile/916/WLL Licensee/Great Bear 113/2006//6 dated 8th March 2010 under Section 23 of the Pakistan Telecommunication (Re-organization) Act 1996.

Reply on behalf of M/s Great Bear International Services (Private) Limited

We act for, and address you on behalf of M/s Great Bear International Services(Private) Limited ("GBIS") in the matter of your Show Cause Notice No. PTA/Wireless Licensing/LL and Mobile/916/WLL Licensee/Great Bear 113/2006//6 dated 8th March 2010 ("SCN") whereby the Pakistan Telecommunication Authority ("PTA") has sought its reply with respect to, inter alia, the alleged violations and contravention of Clauses 3.1 and 6.2.1 of the WLL License No. WLL-13-2004 dated 8 November 2004 and No. WLL-17-2004 dated 28th September 2007 ("License") as well as of the provisions of the Pakistan Telecommunication (Reorganization) Act 1996 (the "Act of 1996"), the Pakistan Telecommunication Rules 2000 (the "Rules") and the Pakistan Telecommunication Authority (Functions & Powers) Regulations 2006 (the "Regulations"). We provide you with our response, as follows:

At the outset, we assure you that GBIS has always taken all possible measures to ensure full compliance to its license obligations as well as the Act, Rules and Regulations made there under. GBIS had informed PTA of its inability to continue commercial operations and suspension of its network vide its letter dated

5.1.2009 due to closure of BTS sites on account of the infrastructure providing company i.e. Modaraba Al-Mali ("MAM") having shut down the said BTS sites due to a dispute between GBIS and MAM. GBIS is aware that MAM is also a license-holder of PTA for providing infrastructure for other kinds of license-holders such as GBIS. The ongoing dispute between GBIS and MAM shall be put forth through this Reply as highlighted hereunder so that PTA is able to appreciate the circumstances which led to GBIS being left with no choice but to suspend its services until such time as the BTS sites are made available to it by MAM.

Preliminary Objections

1. That GBIS entered into a Machinery/Equipment Lease Agreement ("Lease Agreement") on 15th March 2005 with MAM whereby MAM was to lease 17 BTS sites to GBIS for which fixed rent was charged at Rs. 100,000 per month for each of the 17 BTS sites and variable rent of an average of Rs. 215,000 per month for electricity and Rs. 50,000 per month for fuel of all BTS sites payable to MAM. The rent payable to MAM was reduced vide an Addendum to the Lease Agreement dated 26.12.2007 to a fixed monthly rent of Rs. 78,000 per BTS site alongwith a security deposit of Rs. 240,000 which was to be increased yearly by 8%, which GBIS continued to pay to the best of its ability despite the rent being unreasonably high.

2. That GBIS informed MAM on 28th October 2008 of its inability to continue making monthly payments of the exorbitant rent charges as charged by MAM as the same was unreasonable and infact illegal in view of the provisions of the Telegraph Act, 1885 and the Pakistan Telecommunication(Re-organization) Act, 1996. GBIS, as a responsible provider of telecommunication services at no point considered suspending its commercial services till it was forced to do so due to the unreasonable actions of MAM in shutting down the BTS sites. GBIS in fact to resolve the dispute with MAM had also proposed to buy out all 17 BTS sites for Rs. 25million which offer was not even considered by MAM.

3. That the current dispute with MAM has infact arisen due to the Authority's failure to act in aid of its responsibilities defined under Section 6 of the Pakistan Telecommunication (Re-organization) Act, 1996 by ensuring that the rights of its licensee i.e. GBIS are duly protected in accordance with law. GBIS has a legal right under Section 10 of the Telegraph Act, 1885 to acquire sites for installation of its BTS units whether from local authorities or private individuals. MAM being a private individual is required to provide such sites to GBIS in return for a reasonable compensation for any damage caused to its properties. Contrary to this MAM is insisting on charging exorbitant amounts under the garb of rent, which is not permissible in law. The Authority having licensed MAM as an infrastructure provider is required to ensure that its licensee does not act in violation of the law, which in the current situation MAM is doing.

4. That no person other than the licensee i.e. GBIS is permitted by law to access operate and manage the BTS units specifically in terms of the licensed wireless equipment installed at such BTS sites. MAM has patently violated the provisions of the Act of 1996 and the Telegraph Act, 1885 by taking possession of the GBIS BTS sites and wireless equipment and hence are required to be proceeded against by the Authority. In the absence of GBIS having possession of the BTS units and equipment, it is not possible for

GBIS to operate the service and hence, GBIS has infact been forced to suspend it service due to a third parties (MAM) illegal actions for which GBIS cannot beheld responsible.

5. That until and unless the BTS units and equipment is not put back into GBIS's possession, GBIS effectively is hit by the force majeure clause of its License and hence cannot be proceeded against under Section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996.

6. That in view of the foregoing paragraphs, this SCN is misconceived as it does not make any reference to GBIS's explanation for being forced to suspend its commercial operations which was made clear vide GBIS's letter to PTA dated 5th January 2009 wherein it stated the following:

"This is to inform you that our network is temporarily suspended since 16Dec'09, due to closure of BTS sites on account of nonpayment of lease charges to the infrastructure providing company (MAM). Approximately 7000 subscribers including 2500 subscribers of NTC are affected which is highly regrettable",

It is therefore submitted that there has been no default by GBIS as alleged in the SCN due to the third party actions of MAM as described above. GBIS requests that PTA fulfill its duties and responsibilities towards GBIS by ensuring that its rights are duly protected as required by Section 6(a) of the Act and MAM is proceeded against forthwith and the BTS units and equipment returned to GBIS.

Parawise Reply:

1. That the contents of para 1 are a matter of record and therefore are considered correct.

2. That the contents of para 2 are a matter of record.

3. That the contents of para 3 are a matter of record.

4. That the contents of para 4 are a matter of record.

5. That the contents of para 5 are misleading as Clause 6.2.1 of the License cannot be read and applied independently of the rest of the clauses of the license. For instance, Clause 12.2 of the License provides the following:

"..... if the Licensee shall be rendered unable to carry out the whole or any parts of Its obligations under this License for an reason beyond the control of the Licensee, including but not limited to acts of God, strikes, war, riots etc, then the performance obligations of the licensee as it is affected by such cause shall be excused during the continuance of any inability so caused..."

It should be noted that as per Clause 12.2, GBIS i.e. the Licensee was unable to carry out its obligations of continuing to provide services as required by the License due to a third party i.e. MAM closing its access to BTS sites leaving GBIS with no option but to suspend its commercial services.

6. That the contents of para 6 are correct to the extent that GBIS informed PTA that it had suspended its operations. However, GBIS was unable to fulfill the requirements contained in clause 6.2.1 of the License due to MAM being responsible for putting GBIS in a position where it was left no option but to

discontinue its services without being able to give notice to PTA or its customers. Had MAM, also a licensee of the Authority acted in accordance with law, firstly it could not have shut down the BTS sites of GBIS and secondly it would have given prior notice allowing GBIS to give sufficient notice under clause 6.2.1 of the License. GBIS hence is not in violation of the clause 6.2.1 of its License in view of the provisions of clause 12 of its License and the provisions of the Pakistan Telecommunication (Re-organization) Act, 1996 and Telegraph Act, 1885.

7. That the contents of para 7 are disputed as GBIS did not act in contravention of the license or the laws as it was MAM which was responsible for GBIS not being able to continue with its services as without access to BTS sites, it would be impossible to carry on with its services. Furthermore, para 7 is misconceived in that the provisions of Section 23 of the Act do not apply as it is contrary to justice for PTA to penalize GBIS for its inability to continue its services through no fault of their own. Levying a fine and/or permanently terminating the license held by GBIS in the said circumstances would be extremely unfair and contrary to the rights of GBIS.

It is submitted that on the basis of the above contentions of GBIS and further detailed submissions and consideration of record PTA may either withdraw this SCN or cancel the same without any further action thereon as being misconceived.

It is further submitted that as per the separate complaint being filed by GBIS against MAM, the Authority take action against MAM and require MAM to return the BTS units of GBIS forthwith to allow GBIS to resume services.

It is further submitted that GBIS be allowed an opportunity of hearing so as to respond in detail to the contents of the SCN if PTA refuses to withdraw the same.

In view of foregoing submissions, it is prayed that the SCN dated 8th March 2010 being unfounded, misconceived and untenable under the Act, the Rules and Regulations may kindly be withdrawn without a further action thereon.”

2. The Hearing:

2.1. Since the licensee's reply was not satisfactory, hence, prior to issuing any enforcement order the licensee was required to appear before the Authority on 18th May 2010, vide Hearing Notice No PTA/Wire line Licensing/LL& Mobile/WLL/Licensing/Great Bear113/2006/292 dated 3rd May 2010. In response to this notice the licensee made a request vide email dated 7th May, 2010 for adjournment, hence, the hearing was re-scheduled for 15th June, 2010 and communicated to the licensee vide letter dated 9th June 2010.

2.2. On the said date the licensee appeared before the Authority through Mr. Ali Raza Advocate, Ms Mehreen Haider, Advocate, Mr. Kamil Khan (CEO) and Mr. Alaraj Faiz.

2.3. During the hearing the licensee reiterated the same facts as mentioned in Para 1.5, above, and took the plea that it has not violated any provision of the law and the license and requested for withdrawal of show cause notice. In addition, it further made the following points for consideration of the Authority:

- (a). That the standard infrastructure license issued by Pakistan Telecommunication Authority (PTA) under Section 21 of Pakistan Telecommunication (Re-organization) Act 1996, permits Modarba Al Mali (MAM) to charge rent and lease for the facilities provided as it may deem fit. This is a clear violation of an expressly stated statutory provision under Section 16 of the Telegraph Act, 1885. Further it violates the rights and privileges of Great Bear International (Pvt.) Ltd provided under Section 27(1) of the Pakistan Telecommunication (Re - organization) Act 1996.
- (b). That under the Telegraph Act, 1885, The Wireless Telegraph Act and the Pakistan Telecommunication (Reorganization) Act, 1996 the telecommunication equipment of Great Bear International (Pvt.) Ltd cannot be removed or taken into possession and the same amounts to tampering and restricting telecommunication services which are a criminal offence. The Licensee filed a complaint under Section 31 of the Pakistan Telecommunication (Re-organization) Act, 1996 with the Authority, however, the latter has failed to take any action whatsoever.
- (c). Lastly the licensee informed the Authority that it has filed a **Writ Petition No 2641 of 2010** before Lahore High Court, Rawalpindi Bench, which is fixed for hearing on **16th June 2010** wherein one amongst the other claimed relief is as follows,

“the removal of the Petitioner's (GBIS) telecommunication equipment by the respondent No.1 (MAM) and restriction of the Petitioner's access to the said BTS sites be declared as illegal and without due authority and the Respondent No.2(PTA) be directed to act against the Respondent No.1 in accordance with law”

3. Findings of the Authority:

- (i). Clause 8.1 of the Appendix-B of the Rules and condition 3.1 of the license obliged the licensee to observe the provision of the Act, the Rules and the Regulations. Clause 6.2.1 of the license makes it obligatory on the licensee *not to discontinue providing Licensed Services or a category of Licensed Services unless (a) the Licensee gives the Authority and affected customers at least 90 days prior written notice of such discontinuation, and (b) Authority's prior written approval to such discontinuation is obtained.*”, but the licensee has failed to comply the aforesaid conditions of the license by not giving 90 days notice to the affected customers and by not obtaining written approval of the Authority for discontinuation of services, hence, constitute contravention of the conditions of the license for which action under section 23 of the Act can be initiated, thus, the allegation leveled in the show cause notice is established.
- (ii). the argument of the licensee that infrastructure providing company, Modarba Almali (MAM), has closed its BTS sites due to dispute between the licensee and MAM and made it unable to fulfill the requirements of condition 6.2.1 of the license is not convincing. The licensee and MAM entered into a lease agreement which govern the terms and conditions relating to provision of facilities and payment of rents for such facilities and in case of dispute they can resolve the matter through arbitration as provided in clause 15 of the agreement or through court of law.

(iii). Notwithstanding the foregoing, the learned counsel also argued that the Authority instead of taking action against MAM issued a Show Cause Notice dated 8th March, 2010 alleging that the Great Bear had shut down its services and would be penalized for the same, whereas such shut down of services was the direct result of the illegal action of the third party (MAM). However when confronted with the query as to whether the Authority established under section 3 of the Act has the domain and jurisdiction to intervene with the third party settlement that was in field since 2005, the learned counsel could not satisfy the Authority.

(iv.). Regarding the licensee's submission that its case is covered by *Force Majure* clause as is provided in Clause 12.2 of the WLL License, which goes by saying that,

“ Notwithstanding anything contrary to the one contained in this License, if the Licensee shall be rendered unable to carry out the whole or any parts of its obligations under this License for any reason beyond the control of the Licensee, including but not limited, to acts of God, strikes, wars, riots etc, then the performance obligations of the licensee as it is effected by such cause shall be excused during the continuance of any inability so caused, provided that the licensee has taken all appropriate precautions and reasonable measures to fulfill its obligation and that it shall within fourteen days of its first occurrence notify to the Authority the same and cause of such inability and its effects to remove such cause and remedy its consequence.”

The aforesaid *force majeure* clause cannot be attracted in the instant matter because, firstly none of the circumstances stipulated within the reply and arguments refer to an unforeseen events (refers to clauses 9.4 and 11 of the lease agreement) and secondly no notice, as required in the aforementioned clause, was ever given to the Authority. Furthermore, failure of the licensee to settle its dispute to avoid suspension/termination of facilities as per the lease agreement is not an excuse/instance that can be covered under *Force Majure* clause. Hence the Authority is not inclined to consider Licensee's argument on this point.

(v). Licensee's assertion as to filing of a complaint dated 8th April, 2010 under Section 4(f) of the Pakistan Telecommunication (Re-organization) Act, 1996 read with regulation 31 of the Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2006 by it and PTA's failure to act in aid of its responsibilities under section 6 of the Act to ensure that rights of licensee are duly protected, is vehemently denied. The aforesaid complaint was examined at PTA and was found incomplete, hence, the same was returned to the licensee vide PTA's letter dated 24th May, 2010 for provision of specific contravention and grievances alongwith detailed information as required under the said regulation so that legal action, if required, may be initiated, but the licensee neither responded to the aforesaid letter nor filed fresh complaint as per procedure, which showed its disinterest to pursue or agitate its alleged grievance before the Authority.

(vi). Instead, the licensee has filed **Writ Petition No 2641 of 2010** before Lahore High Court, Rawalpindi Bench, whereby challenged the terms and conditions of the lease agreement including the charging of rent for the facilities being provided by MaM, the rights available to it under the provisions of the Telegraph Act, 1885, the Pakistan Telecommunication Corporation Act, 1991 and the Pakistan Telecommunication (Re-organization) Act, 1996 and the conditions of infrastructure

license for leasing and charging of rent for the facilities, hence, the Authority is unable to comment or give its findings on the aforesaid issues being *sub-judice* before the aforesaid Court to decide.

- (vii). The court vide order dated 16th June, 2010 in the aforesaid writ petition granted the following relief to the licensee:

“....In the meanwhile the access of the petitioner company to the BTS sites in question shall not be denied or blocked in any manner.”

In the light of aforesaid order, the licensee can rightly be demanded to restore its operations and to provide licensed services in the licensed regions to remedy the contravention as was required vide the aforesaid show cause notice. Moreover, since the court has not restrained the Authority from exercising its statutory powers under section 23 of the Act nor the licensee has contested the same before the court, therefore, the Authority can require the licensee to enforce the license conditions under section 23 of the Act.

4. Order of the Authority:

- 4.1. The foregoing shows that the contents of the aforesaid show cause notice stand established, therefore, the Authority hereby passes the following order:

(a). Under sub-rule 4 of rule 9 of the Telecommunication Rules, 2000, the licensee, i.e. M/s. Great Bear International (Pvt.) Ltd, is hereby directed to **“Restore”** its licensed operations within (30) days from the date of the issuance of this “Enforcement Order” and submit compliance report to the Authority accordingly.

(b). In case of the licensee’s failure to comply with Para 4.1 (a), above, “Final Enforcement Order” under sub-rule (5) and (6) of Rule 9 of the Telecommunication Rules, 2000 shall be issued against the licensee.

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

(Dr. Khawar Siddique Khokhar)
Member (Technical)

(Dr. Mohammed Yaseen)
Chairman

Signed on 24th of August, 2010 and comprises of (08) pages