



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

**Enforcement Order under Section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 read with sub-rule (4) of Rule 9 of the Telecom Rules, 2000 in the matter of Pakistan Mobile Communications Limited (Mobilink) OoS**

**File N0.14-587/L&A/PTA/Q9**

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

**The Authority Present**

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

**The Issue**

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

**Decision of the Authority**

**I. Brief Facts:**

- 1.1. M/s Pakistan Mobile Communications Limited (Mobilink) (the "licensee") which is maintaining telecommunication systems and providing telecommunication services in the country under license No.MCT-05/WLL&M/PTA/2007 dated 7<sup>th</sup> July, 2007 (the "license") issued to it by Pakistan Telecommunication Authority (the "Authority") was, on 25<sup>th</sup> November, 2008 issued a show cause notice (the "notice") under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the "Act") for contravening the terms and conditions of the license.
- 1.2. **Powers of the Authority under Section 23 of the Act** whenever provisions of the Act, the rules framed there under or the terms and conditions of license are contravened by a licensee, the Authority may proceed against it with the issuance of a show cause notice. For ready reference, the said section is reproduce as under;
  - 1) *Where a licensee contravenes any provision of this Act or the rules made thereunder or any term or condition of the license, the Authority [ or any of its officers not below the rank of director] may by a written notice require the licensee to show cause within thirty days as to why an enforcement order may not be issued.*

- (2) *The notice referred to in sub-section (1) shall specify the nature of the contravention and the steps to be taken by the licensee to remedy the contravention.*
- (3) *Where a licensee fails to—*
- (a) *respond to the notice referred to in sub-section (1); or*
- (b) *satisfy the Authority about the alleged contravention; or*
- (3) *remedy the contravention within the time allowed by the Authority, or any of its officers not below the rank of director], the Authority [ or any of its officers not below the rank of director], may, by an order in writing and giving reasons—*
- (i) *levy fine which may extend to three hundred and fifty million rupees; or*
- (ii) *suspend or terminate the license, impose additional conditions or appoint an Administrator to manage the affairs of the licensee, but only if the contravention is grave or persistent.*
- (4) *Without prejudice to the provisions of sub-section (1) and sub-section (3), the Authority [or any of its officers not below the rank of director] may, by an order in writing, suspend or terminate a license or appoint an Administrator, if the licensee—*
- (a) *becomes insolvent or a receiver is appointed in respect of a substantial part of the assets;*
- (b) *being an individual, become insane or dies.*

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

**2. Relevant Provisions of the Act the Telecom Rules 2000 (the "Rules"), the Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2006 (the "Regulations") and the terms and conditions of the license Contravened by the Licensee regarding QoS:**

- 2.1. Under clause (d) of section 4 of the Act, the Authority is under obligation to promote the availability of a wide range of high quality, efficient, cost effective and competitive telecommunication services throughout Pakistan.
- 2.2. Clause (g) of sub-section (4) of section 21 of the Act, contain the licensee's obligations to provide telecommunication service to particular persons or areas to meet minimum standards for quality and grade of services requirements.
- 2.3. Under regulation 9 of the Regulations the licensee is obliged to provide good quality of services to its customers.

- 2.4. clause 6.5.1 of the license oblige the licensee at all times to meet or exceed the quality of service standards described in Appendix-3 and such other quality of service standards as the Authority may, by regulation, require.
- 2.5. Appendix 3 of the license prescribes the quality of service standards in detail manner and requires the licensee to take all reasonable and prudent measure to ensure that its Telecommunication System and Licensed Services are available and operate properly at all times and during each calendar month it shall meet or exceed the quality of services standards mentioned in clause 1.3 of Appendix-3 of the license.

3. **Issue within Show Cause Notice**

- 3.1. The Authority, through its Zonal offices at Rawalpindi, Peshawar, Lahore, Karachi and Quetta conducted surveys during the year 2009 [i.e., at: (i) Rawalpindi Zone from 21<sup>st</sup> March, 2009 to 10<sup>th</sup> April, 2009, (ii) Peshawar Zone from 15<sup>th</sup> June, 2009 to 18<sup>th</sup> June, 2009, (iii) Lahore Zone from 22<sup>nd</sup> October, 2009 to 31<sup>st</sup> October, 2009, (iv) Karachi Zone from 3<sup>rd</sup> November, 2009 to 10<sup>th</sup> November, 2009 and (iv) Quetta from 15<sup>th</sup> November, 2009 to 17<sup>th</sup> November, 2009].

- 3.2. Results of the survey showed that the QoS being provided by the licensee was far below than the required standard. The detail of the average results of surveys is as under:

**Voice;**

| <b>Network Down Time &lt; 1%</b> | <b>Grade of Service &lt; 2%</b> | <b>Call Completion Ratio &gt; 98%</b> | <b>Call Connection Time &lt; 5 Sec</b> | <b>Call Quality (MOS) &gt;3</b> |
|----------------------------------|---------------------------------|---------------------------------------|--|---------------------------------|
| 0                                | 3.43                            | 97.06                                 | 8.09                                   | 2.18                            |

**SMS;**

| <b>Service Accessibility ≥ 99%</b> | <b>Access Delay ≤ 2 Sec</b> | <b>End to End Delivery Time &lt; 5 Sec</b> |
|------------------------------------|-----------------------------|--|
| 93.20                              | 4.36                        | 11.41                                      |

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

4. **Licensee's Response to the Notice**

- 4.1. The licensee replied to the notice which is reproduced in verbatim as under:

**REPLY ON BEHALF OF PAKISTAN MOBILE COMMUNICATIONS LIMITED (PMCL)**

*It is respectfully submitted as under:*

*Paragraphs 1 to 8 of the Show Cause Notice issued to Pakistan Mobile Communications Limited (hereinafter, "PMCL") referred to above (hereinafter, the "SCN") cite the legal provisions of the Pakistan Telecommunication (Re-organization) Act 1996 (hereinafter, the "Act"), Pakistan Telecommunication Rules, 2000 (hereinafter, the "Rules"), the Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2006 (hereinafter, the "Regulations") and the terms and conditions of the Mobile Cellular License dated 1 July 2007 issued to Pakistan Mobile Communication Limited (hereinafter, the "PMCL License"); hence, no response is required for the same.*

*With respect to the remaining Paragraphs 9 to 13 of the SCN, our response is as follows:*

### **I. PRELIMINARY OBJECTIONS**

*1. Clause 1.3 of Appendix 3 (hereinafter 'Clause 1.3') of the PMCL License lays down the minimum monthly average targets of quality of service standards to be achieved by PMCL. However, the surveys reportedly conducted by the Pakistan Telecommunication Authority (hereinafter the "Authority") do not fulfill the requirements of Clause 1.3 for formulating the survey results on a monthly basis and the results have instead been compiled on the basis of a single instance of tests conducted at various isolated locations. Therefore, the SON is contrary to the provisions of Clause 1.3 and, hence, totally unjustifiable.*

*2. The SCN is contrary to the provisions of Clause 1.3, which clearly provides for different quality of service targets for the first three (03) years from the date of the PMCL License, and for the period thereafter. Since the PMCL License was issued on 6 July 2007, PMCL is only obligated to achieve the short term targets as prescribed under Clause 1.3 till 5 July 2010. However, it is evident from the SCN that the above license condition has not been taken into consideration and the reported surveys have been conducted with inaccurate indicators by mean of using minimum targets on a long-term basis instead of using such indicators against minimum targets on a short-term basis, and therefore, the SCN is nontenable.*

*3. The SCN does not fulfill the mandatory requirements of Section 23 (2) of the Act, as it neither specifies the nature of the alleged contravention, nor the steps to be taken by PMCL to remedy such alleged contravention. Therefore, the SCN cannot be considered as a valid show cause notice under Section 23 (1) of the Act, and hence, merits withdrawal.*

*4. Under Regulation 10(3) of the Regulations, the inspecting officer of the Authority is obligated to prepare and provide the licensee -with a quality of send inspection report, which clearly spells out the shortfalls observed during the surveys conducted by such inspecting officer. Under Regulations 10(5), the Authority, or an officer of the Authority not below the rank of Director, may initiate legal action under Section 23 (1) of the Act only if the licensee fails to maintain quality of service, as set out in Clause 1.3, the Regulations and/or KPIs, fails to comply with any of the provision of the Regulations or fails to submit compliance report as per Regulation 10(3) mentioned above. It is plain that any legal action taken under Section 23 (1) of*

*the Act can be initiated only if an inspection report is provided to the license as required under Regulation 10 (3) and the licensee fails to comply with the instructions of the Authority.*

*However, no inspection report was provided by the Authority pursuant to any of the surveys mentioned in the SCN, and therefore, the SCN has been issued without fulfilling the prerequisites prescribed under the Regulations for the issuance of a show cause notice. As such, the SCN is not tenable.*

*5. The SCN is liable to be withdrawn without further proceedings because no quality of service standards have been provided in Appendix 3 of the License for SMS, and the service quality indicators used for voice cannot be used across the board for SMS. Thus, we fail to understand the kind of parameters employed by the Authority to conduct the noted surveys during the period mentioned in the SCN and how the veracity of such surveys can be accepted by PMCL for the purposes of SMS.*

## **II. DETAILED RESPONSE**

*Without prejudice to the legal objections above, we further state as follows:*

*1. Paragraph 9 of the SCN provides the zones in which the Authority has conducted surveys at various times in the year 2009. The SCN states that the Rawalpindi zone was reportedly surveyed from 21 March 2009 to 10 April 2009 and Peshawar zone was reportedly surveyed during the period falling between 15 June 2009 and 18 June 2009. However, the SCN fails to provide the result of any recent surveys conducted in these zones, whereby it may have confirmed if PMCL has taken any action to counter the results by improving the quality of service in these zones. Where the SCN has been issued in December of 2009, and by using old survey results for the said zones, it has been implied that, since the first surveys, no action has been taken by PMCL to mitigate or circumvent the discrepancies in the quality of service surveys conducted at the time, which is an inaccurate implication/assumption.*

*2. While alleging that PMCL has contravened the long term targets prescribed under Clause 1.3, the Authority has failed to take into consideration that Clause 1.3 only obligates PMCL to achieve the short term targets prescribed thereunder for the first three (03) years of the PMCL License, i.e. till 5 July 2010.*

*3. Instead of following the criteria provided in Clause 1.3, whereby the service standards are to be measured on the basis of a monthly average of the quality of service provided by PMCL, the survey results are compiled on the basis only of one time surveys conducted unilaterally by the Authority at selective locations. In view of this, the Authority has failed to identify the nature of calls made during the survey. Moreover, the QoS does not deteriorate because of on-net calls only, off-net calls too play a vital role in determining the QoS.*

*4. The SCN fails to provide details of the methodology applied by the Authority to conduct the quality of service surveys or to specify the problems associated with the survey results conducted unilaterally by the Authority reportedly in Rawalpindi, Peshawar, Lahore, Karachi and Quetta for the period from March 2009 to November 2009. Mere average results of surveys with reference to voice and SMS do not*

*identify the exact problems with the quality of service, PMCL, vide letters dated 6 January 2010 and 7 January 2010, requested the Authority to provide details of the methodology, exact time and location of the surveys as well as the log files of the survey results. However, both the above letters remain unanswered by the Authority.*

5. *Appendix 3 of the PMCL License lays down the parameters only for voice services, however, the Authority has without distinction and/or basis, applied the same standards for the quality of service with respect to SMS.*

6. *Further still and more to the point, the Authority, by conducting the surveys unilaterally, has ignored past practice of conducting joint surveys with PMCL personnel and sharing survey data with PMCL to enable PMCL to further improve the quality of service. Also, as mentioned in our preliminary objections above, the SCN fails to fulfill the requirements of section 23 (2) of the Act, which requires the Authority to specify steps to be taken by PMCL to remedy the alleged contraventions.*

*However, upon receiving the SCN. PMCL, in order to identify the alleged shortfalls in the quality of service, conducted nation-wide drive tests, which reflect that PMCL's quality of service falls well within the parameters prescribed under Clause 1.3. A copy of the said drive test results, which have been conducted by PMCL while using the most advanced TEMS survey equipment, is enclosed as Annex 1.*

7. *PMCL has always endeavoured to comply with the provisions of the applicable laws, the directions of the Authority as well as the terms and conditions of the PMCL License, to provide the highest quality of service to its subscribers. Keeping in view fierce competition in the Telecom sector PMCL seeks to exceed the QoS Standards without compromise. Although no remedial measures have been advised in the SCN, we bring to your kind knowledge that since June 2009. PMCL has been running a quality of service improvement campaign under the banner of "No Samjhota", which has in a matter of only six (06) months further improved the network quality by a significant magnitude. Such improvement could be gauged from the enclosed survey results. "No Samjhota " campaign is still going on and PMCL shall keep the Authority informed of all the developments being taken under the said campaign. A list of measures already taken by PMCL under the "No Samjhota " campaign is enclosed as Annex 2,*

8. *It appears from the survey results that no consideration has been given to the joint letter dated 8 July 2009 written by representatives of all the cellular operators to the DG Enforcement of the PTA whereby the Authority's attention was sought towards the adversely-affecting and persistent problems of acute power outages, prevailing law and order situation, and most importantly, external interferences in the allocated spectrum. It was requested that since the said problems minimize the impact of all measures taken by the cellular operators with regard to improving the quality of service above the required standards, the quality of service parameters may please be revised.*

*Vide the letter referred above, the cellular operators also provided their recommendations to the Authority with regard to quality of service surveys. It was recommended that the methodology adopted by the Authority for such surveys be changed, joint surveys be conducted,*

the weightage formula under which 50-50 weightage is given to on-net and off-net calls be abolished and that since the cellular operators are using state-of-the-art TEMS equipment, the Authority should also procure the same equipment for accurate results. However, the SCN and the survey results show that the Authority has paid no heed to any of the requests and recommendations of the cellular operators.

9. *We would also like to draw the Authority's attention towards an other important factor of external interference leading to degradation in QoS, which is beyond our control. High external interference in our allocated spectrum is a major cause of degradation in service, if any. It is pertinent to note that it is of little significance as to whether or not surveys are conducted in the interference affected areas because all interference cases adversely affect our overall QoS. This not only affects PMCL's business it also hurts our reputation regarding network quality. During 2009, there have been ample examples of external interference through jammers at central locations such as jails, provincial assemblies, offices of the defense forces, security agencies, public offices, and VIP Escort vehicles in various cities, including but not limited to. Karachi, Rawalpindi. Islamabad and northern region. It may kindly be noted that most of the sources of external interference belong to government organizations, which could not be eliminated despite our repeated requests to the Authority. Hence, these factors of degradation in QoS are hurting PMCL's business and we urge the Authority for taking appropriate measures to enable PMCL to exceed the QoS standards. For the reason PMCL, in its own business interest can not compromise on its QoS standards.*

10. *In view of these problems, it is imperative that the existing KPIs parameters for QoS are revised and the market is permitted to manage it through cut throat competition in their self interest. Some recommendations have already been submitted to the Authority in this regard and are reiterated as follows:-*

- *the Authority's survey teams should always be accompanied by CMTO's engineers/ reps. Aim of the surveys is to improve QoS for the customers and not to pin point an operator's weaknesses. Presence of operators' reps will allow CMTOs to have knowledge of the actual problems observed by the Authority and appraise the Authority team if there is a genuine problem beyond operator's control in a particular area.*

- *Weightage of 50-50 for on net & off net calls has been kept as standard for all tests, which is not at all a justified criteria. Unlike testing of own network, off net calls depend equally on QoS of other networks. As such deficiencies of other operator's network are counted towards the originating network. Only on net calls should form the basis of QoS surveys.*

- *the Authority is using NEMU Tool for conducting the surveys, whereas all operators are using TEMS for their testing service quality optimization of BTSs. Being an industry standard, it is requested that TEMS may kindly be used by the Authority for the QoS survey,*

11. *Due to the reasons mentioned above. PMCL does not find itself in a position to agree to the results of the surveys reportedly conducted by the Authority and categorically denies committing the contraventions alleged under the SCN. Thus the Show Cause Notice as submitted earlier is misconceived and not maintainable.*

12. It is reiterated that PMCL has always endeavoured to comply with the provisions of the applicable laws, the directions of the Authority as well as the terms and conditions of the PMCL License including but not limited to the QoS standards, in order to provide the highest quality of service to its subscribers. Keeping in view fierce competition in the Telecom sector. PMCL seeks to exceed the QoS Standards without compromise, PMCL would continue to ensure that it would vigorously carry on with its "No Samihota" policy on Quality of Service and perceives it as a cause critical to its own growth .

*It is submitted that the PMCL may be afforded an opportunity of a hearing so as to respond in detail to the contents of the Show Cause Notice and its policy of "No Samjhota" on QoS.*

#### PRAYER

*In view of the above, it is respectfully prayed that the SCN may be withdrawn as being untenable under the Act of 1996 and the Rules and Regulations.*

#### The Hearing

5. 5.1.

The matter was fixed for hearing on 21st April, 2010. The licensee appeared through Mr. Agha Qasim (Vice President), Mr. Jawad Aslam (HoD QoS), Mr. Niaz Brohi (Director Legal), Mr. Ejaz Ishar (Counsel), Mr. Mohammed Ahmed Shaikh (Counsel) and reiterated the points it had raised in its reply to the notice that there was no provision of inspection report of the survey mentioned in the show case notice hence the notice was issued without fulfilling the requirements of the Regulations and thereby not tenable.

5.2.

The licensee submitted the following arguments on the day of the hearing and which are reproduced in verbatim:

#### LEGAL submissions

*Written Arguments supplementary to the Reply*

*These written arguments are supplementary to the Respondent's reply dated 15.1.2010 ("Reply") to the show cause notice dated 17.12.2009 ("SCN") and are to be read in conjunction therewith.*

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

*Capitalized expressions used but not defined herein have the same meaning given in the SCN and the Reply. Submissions on Without Prejudice basis As described in more detail in the ensuing paras, the Respondent is unable to put up a meaningful defence without having reviewed the Inspection Report forming the basis of the SCN.*

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

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

#### *Role of Authority as an Impartial Tribunal*

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

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

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

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

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

*the Authority is to rule on the admissibility of the oral and documentary evidence sought to be relied on by the case officer, before asking the Respondent to respond to such evidence - no item of evidence which is not formally "admitted in evidence" (and in respect of which the Respondent is not given the opportunity to cross-examine the relevant witnesses) can be used by the Authority in its final determination; and*

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

*Failure to provide Inspection Report Despite requests to this effect in the Reply, and subsequently through letter dated 6.1.2010 and 7.1.2010, the Inspection Report has not been provided to the Respondent in disregard of Regulation 10(3) of the Pakistan Telecommunications (Functions and Powers) Regulations 2006 (the "Regulations").*

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

*The SCN merely sets forth the 'results' of the survey presumably conducted by PTA, which are not a substitute for the detailed narrative of the survey itself;*



*the results of an inquiry are not the same as the inquiry report itself. The 'charge' cannot be equated -with the "evidence" substantiating such charge. By way of illustration:*

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

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

*Application of Qanun-e-Shahadat Order, 1984*

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

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

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

*Even assuming, but not conceding, that the QSO is not applicable in the strict sense, the underlying principles are applicable (see 2005 PLD (C.S.) 1015, 1993 PTD 2Q6(DB)). Even in cases where the QSO was held not applicable in the strict sense, the Courts examined whether the procedure adopted (including consideration of underlying evidence) resulted in any miscarriage of justice. The cardinal principles of the law of evidence enshrined in the QSO, in so far as relevant to the context are that:*

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

*The tribunal can only act on the basis of evidence;*

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

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

*In order to rely on evidence 'generated by electronic means' - which is the case when OoS monitoring loss are relied upon, it is incumbent to show before the tribunal -transparently to the respondent - that the equipment was in "working order" (Section 46~A, Explanations 3 and 4 to Article 73, and Article 78-A, added vide Electronic Transactions Ordinance 2002 ("ETO "). These requirements were introduced by the ETO, and have found judicial recognition in the case reported at PLD 2009 Lahore 254. The equipment being in 'working order' means not just that it operates, but that it operates consistently with its specifications, is properly calibrated, was properly operated and the outputs*

*thereof were properly correlated to the parameters it was intended to measure. Further, the Respondent denies the allegations contained in the QoS logs forming the basis of the survey results, and therefore the burden lies on the case officer to demonstrate the application of the "security procedure.*

*No reliance on any document can be placed unless that document is produced by a witness before the tribunal. Especially, when a 'notice to produce' has been given, the document cannot be relied upon in proceedings unless it is produced before the tribunal and shared with the respondent (Article 160 of the QSO). As noted above, the Respondent has already given this notice to produce vide its Reply and its letters dated 6.1.2010 and 7.1.2010.*

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

*Respondent's mobile cellular licence dated 6.7.2007 ("License") provides as an exception to the QoS obligations the "causes attributable to another Operator". Further, Article 12.4 provides for the defence of Force Majeure. It is critical for the Respondent to have a copy of the Inspection Report (and to cross-examine the surveying officer if required) to determine whether such defences are available on a factual plane.*

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

#### *Principles of Natural Justice*

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

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

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

*"What these principles of natural justice are it is not possible to lay down with any exactness, for, they have been variously defined in various cases.*

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

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

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

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

#### *Purpose of QoS obligations*

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

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

*Frequent use of jammers, and the PTA not taking any action to prevent the consequent offence under Section 31(l)(f) of the Act (refer to letters dated 25.9.2006, 16.7.2008, 15.12.2008, 20.2.2009, 16.4.2009, 8.7.2009, 19.11.2009, 01.12.2009, 24.12. 2009, 6.1.2010 and 19.2,2010);*

*Severe interference in the frequency band allocated to the Respondent (refer to letters dated 19.11.2008, 4.12.2008, 12.8.2009 and 24.3.2010). Such interference continues to date, as recently notified to the PTA vide letter dated 24.3.2010; and*

*Severe load-shedding in the country which necessitates use of gensets, which too can only be operated for a limited number of hours. The business case*

*when the Licensed QoS were established clearly did not take into account such heavy operation of the standby power sources, or else a discount on the auction price would have been factored in (use of gensets over thousands of BTS Sites accrues to very high Opex).*

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

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

#### *Methodology for the Survey*

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

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

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

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

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

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

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

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

#### *TEMS versus NEMO Equipment*

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

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

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

#### *In seriatim Submissions*

##### *Para; 1*

*Clause 1.3 of Appendix 3 of the License provides for two different QoS targets; one for the first three (03) years from the date of the License (short term targets) and for the period thereafter (long term targets). Since the License was issued on 6.7.2007, Respondent is only obligated to achieve the short term targets prescribed under Clause 1.3 of Appendix 3 till 5.7.2010. However, it is evident from the SCN that the above License condition has not been taken into consideration in holding the Respondent to the long term targets. This is a fundamental oversight. Without prejudice to all submissions made herein, the survey results noted in the SCN place the Respondent in substantial compliance with the short term targets.*

##### *Para 2*

*No comment is called for.*

##### *Para 3*

*The statutory obligations of PTA also include the following:*

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

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

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

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

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

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

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

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

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

*Para 4*

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

*Para 5*

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

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

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

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

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

*Para 6*

*This obligation is subject to defences of Force Majeure and Clause 1.3 of Appendix 3 of the License.*

*Para 7*

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

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

*Para 8*

*The obligations expressed here are a matter of record. However, as noted in this para of SCN itself, the compliance is to be calculated on a monthly average basis. This objection to the SCN on this score has already been taken in para 1(1) of the Reply.*

*Para 9*

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

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

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

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

*In other words, no off-net calls can be considered for measuring Call Connection Time. However, PTA's own consultation paper seems to give an equal weightage of 50-50 to off-net calls. This is not only contrary to the recommendation of the highest regulatory body in the world in this sector, but also disregards the pleas of the industry as well as Clause 1.3 of Appendix 3 of the License. As the Respondent has not had the benefit of the Inspection Report*

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

*SMS QoS cannot be used by PTA to claim a contravention of the licence. Para 11(5) of the Reply and para 2.5.4 hereof are reiterated.*

*Para 10*

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

*Para 11*

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

*Para 12*

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

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

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

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

**Prayer**

*In view of the foregoing:*

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

b) *Withdraw the SCN.*

## **6. Findings of the Authority**

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

## **7. Order of the Authority**

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

S.Nasrul Karim A. Ghazanvi  
Member (Finance)

Dr. Mohammed Yaseen  
Member (Technical)

Dr. Mohammed Yaseen  
Chairman

This order comprises of 18 pages and is signed on 25<sup>th</sup> of May, 2010.