



PAKISTAN TELECOMMUNICATION AUTHORITY
HEADQUARTERS. F-5/1, ISLAMABAD
Ph: 051-9225328 Fax: 051-9925338

Enforcement order under sub-section 3 of section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 in the matter of Annual Regulatory Dues of Telecard Limited for the Financial Year ended on 30th June, 2008

Date of Show Cause	2 nd October, 2009
Date of Hearing:	31 st December, 2009
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:

"Non payment of outstanding dues for the year ended 30th June, 2008"

Decision of the Authority

1. BRIEF FACTS:

1.1 Through this enforcement order of ours, we intend to dispose of the Show Cause Notice dated 2nd October, 2009 ("**the Show Cause Notice**") issued to Telecard Limited ("**the Licensee**") under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 ("**the Act**") on the issue of non-payment of Annual Regulatory Dues totaling Rs. 17,476,003/- ("**the Annual Regulatory Dues**") which comprise of Annual License Fee ("**ALF**") of Rs. 2,912,667/-, Research & Development Fund ("**R&D**") contribution of Rs.5,825 334/-and Universal Service Fund ("**USF**") contribution of Rs.8,73 8,002/- for the year ended on 30 June 2008,as well as late payment charges on ALF of Rs.525 235/- on R&D of Rs. 1,050,470/- and on USF of Rs. 1,575,705/-) calculated @ 2% per month and accruing till date of actual payment.

1.2 For easy understanding of the issue in hand, provisions of the relevant laws with the relevant terms and conditions of the Licensee's license No LDI-07(06)2004 dated 27th July, 2004 ("the License") are reproduced below

Section 23 of the Act - which empowers the Authority to issue the Show Cause Notice and pass an enforcement order:

"23. Issue of enforcement order and penalties. - (1) Where a licensee contravenes any provision of this Act or the rules made there under 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
(c) 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."

Clauses 4.1.2.(a) and 4.2.3 of the License relating to payment of fee.

"4.1 Payment of fees

4.1.2 The Licensee shall pay the following annual regulatory fees to the Authority:

(a) Calculated on the basis of 0.5% (or such lesser amount as the Authority may by Regulations, determine) of the Licensee's annual gross revenue from Licensed Services for the most recently completed Financial Year of the Licensee minus inter-operator payments and related PTA/PAB mandated payments. However initial license fee and initial spectrum fee shall not be deducted from the gross revenue. The amount of the annual fees referred to in Appendix 2 annexed hereto: and

4.2 General conditions concerning fees.

4.2.1 The Licensee shall pay all annual fees to the Authority and make contributions referred to in section 3.3.1 and 3.4.1 within 120 days of the end of the Financial Year to which such fees relate.

4.2.2 The Licensee shall make all contributions referred to in sections 3.3.1 and 3.4.1 within 120 days of the end of the Financial Year to which such contributions relate.

4.2.3 In addition to any other remedies available to the Authority, late payment of fees shall incur an additional fee calculated at the rate of 2% per month on the outstanding amount, for each month or part thereof from the due date until paid.

4.2.4 The Licensee shall annually submit to the Authority audited financial statements in support of its calculations of annual fees and contributions payable pursuant to this Article 4. The Authority shall have the right to audit such statements at any time. "

1.3. The Licensee failed to make the payment of Annual Regulatory Dues (ALF/R&D and USF) for the year ended on 30th June 2008, including late payment charges thereon calculated @ 2% per month within 120 days of 30th June, 2008. Hence, the Show Cause Notice under section 23 of the Act was issued to the Licensee on 2nd October 2009 against outstanding dues of the Licensee.

1.4. The Licensee replied to the Show Cause Notice vide its letter reference TC/AK/0373 of 5th November, 2009 ("the Licensee's Reply") which is reproduced with prayer as under:

"Subject: Show Cause Notice under Section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996 (the "Act")"

Dear Sir,

We act for Telecard Limited ("our client") and address you on its behalf with reference to your letters Ref: PTA/Finance/WLL/TELECARD49/2006/56 and Ref: PTA/Finance/LDI/TELECARD50/2006/57, both dated 2nd October, 2009,

regarding the captioned subject and containing a cumulative demand for payment of Rs.46,214,406/-on account of ALF, R&D and USF contributions (including late payment charges of Rs.8,333,7447-) allegedly outstanding against our client pertaining to the year ended 30th June, 2008.

In this regard, we wish to invite your attention to the following

- 1. The matter of outstanding dues (including all account heads mentioned in your afore-referred letters) stands challenged by our client and is presently sub judice before the hon'ble Lahore High Court, Rawalpindi Bench, in FAO No.27 of 2008.*
- 2. PTA's demand for payment is in direct conflict -with the order dated 19.03.2009'(copy enclosed) passed by the then Islamabad High Court in FAO No.27 of 2008, whereby PTA's impugned determination dated 18.11.2008 has been suspended till the final disposal of the said FAO and our client had been allowed to pay its admitted liability of Rs. 36,62 7,5627/- as against PTA 's entire claim of outstanding dues against our client.*
- 3. In respectful compliance with the aforesaid order of hon'ble High Court, our client has already made the said payment amounting to Rs. 36,627,562/-- for the years 2006 to 2008 through cheque No. 6845580 dated 7th April 2009.*
- 4. This has been duly acknowledged by PTA vide its letter No.PTA/Fmance/LDI/TeleCard/2006 dated 8th April, 2009 (copy enclosed), wherein PTA admits that the payment made by our client pursuant to hon'ble High Court's order dated 19.03.2009 covers our client's admitted liability for up to, and including, the year ended 30th June, 2008 - to which your afore-referred letters relate.*
- 5. PTA's impugned determination dated 18.11.2008 that has been suspended by the hon'ble High Court relates to all account heads which have been claimed in your afore-referred letters including ALF, R&D and USF contributions.*
- 6. It may also be mentioned that the very legality of R&D and USF contributions stands further challenged by our client initially in writ jurisdiction of the then Islamabad High Court and thereafter in the august Supreme Court of Pakistan in CPLA No. 459 of 2009 which is currently pending. Please do note that the challenge thrown to these payments is only done by our client unlike other LDI operators who have confined themselves to assailing APCfor USF.*
- 7. PTA's determination dated 18.11.2009 having been suspended and the matter being sub judice, there is no occasion for PTA to reiterate its demand/claim for outstanding dues against our client.*
- 8. Needless to state that PTA having already passed an enforcement order vide its determination dated 18.11.2008 (now suspended), it has become functus officio to that extent and cannot reopen the matter, which is now exclusively*

within the judicial domain of the superior Courts and obviously cannot be encroached upon by PTA.

9. *No adverse action can thus be initiated against our client including proceedings for an enforcement order under section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996.*
10. *It may particularly be noted that the concluding paragraph of the suspended determination dated 18.11.2008 states that further enforcement proceedings under section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996 shall be undertaken in case of non-payment by our client. Needless to state that when the entire determination stands suspended, this part of the impugned determination also cannot be acted upon till the suspension order holds the field. Your letters under reference bearing Show Cause Notices as part of enforcement proceedings under section 23 of the Pakistan Telecommunication (Re organization) Act, 1996 are, therefore, in direct violation of the suspension order of hon'ble High Court.*
11. *It will only be in the fitness of things for PTA to await the disposal of the aforementioned litigation on the matter, which would also result in the settlement of issues raised in our client's appeal that are fundamental in nature and go to the very root of PTA's demands, and as such, require a binding judicial principle to be laid down by the superior Courts. Your letters under reference are premature, to say the least, and are liable to be withdrawn.*

In light of the foregoing, it is requested that your letters under reference may kindly be withdrawn and the outcome of aforementioned litigation be awaited before PTA decides to proceed further in the matter.

Please note that the foregoing is without prejudice to the merits of our client's case regarding the various demands made by PTA in respect of its alleged outstanding dues and also to our client's right to initiate appropriate proceedings in respect of willful disregard of the hon'ble High Court's suspension order dated 19.03.2009. "

2. THE HEARING:

2.1. Since the Licensee instead of remedying the contravention by paying the Annual Regulatory Dues for the financial year ended on 30th June, 2008 amounting to Rs. 17,476,003/- as was required through the Show Cause Notice, made an attempt to justify its act of non-payment of the outstanding amount, which justification could not satisfy us, we, appreciating our responsibility under clause (d) of section 6 of the Act, fixed the matter for hearing and required the licensee to appear before us on 22nd December 2009, vide a hearing notice dated 14th December 2009. In response to this notice the Licensee requested for a short adjournment vide their letter dated 18th December 2009. The hearing was accordingly adjourned on their request and was re-

fixed on 31st December 2009, of which intimation was duly given vide hearing notice dated 23rd December 2009.

2.2. In response to our aforementioned hearing notice, the Licensee submitted some additional points vide letter reference TC/AK/0438 dated 29th December 2009, which are reproduced *in verbatim* hereunder:

Re: HEARING NOTICE

Please refer to our earlier letter Ref: TK/AK/0373 dated 5th November 2009 with reference to your letters Ref: PTA/Finance/WLU TELECARD49/2006/56 and Ref: PTA/Finance/WLL/TELECARD49/2006/57, both dated 2nd October 2009 regarding the show cause notices under section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996 and containing a cumulative demand for payment of Rs 46,214,406/- on account of ALF, R&D and USF contributions (including late payment charges of Rs.8,333,7447/-) allegedly outstanding against our client pertaining to the year ended 30th June, 2008.

We wish to submit some additional points which may be read with our earlier afore-referred response.

On account of WLL

- 1. The demand appearing in the show cause notice is for Rs.28,738,4037- including the late payment charges of Rs. 5,182,334. However, PTA's earlier demand for the same year stood at Rs. 17,638,4997- including late payment charges of Rs.998,434/- . Even if we take into account the increase because of late payment charges, there remains a principal difference of Rs. 8,436,948/-, suggesting either inclusion of a new head in the composition of sales figure or an under deduction in the heads of allowable deductions. Unless the difference is communicated to our client, it is unable to offer any comments as to the correctness of this demand.*
- 2. PTA continues to charge late payment charges (Rs.5,182,334/- in the show cause notice compared to Rs.998,4347- demanded during the month of February, 2009) despite the suspension order passed by the Islamabad High Court.*
- 3. On the basis of previous demand by PTA, the deductible interconnect charges were short by Rs.367, 584,959/-.*
- 4. As the vires of AP rules and AP regulations have been challenged by Telecard in the Supreme Court of Pakistan, any amount under the heads of R&D and USF are sub-judice, and, as, such, should not be made part of any calculations until adjudicated upon by the Court.*
- 5. Due to the aforementioned reasons, the amount for ALF worked out to be at 1,935,5037 and the same has been settled by Telecard in line with the directions of hon'ble High Court through our letter dated 8th April, 2009*

addressed to the Member Finance containing a cheque for Rs. 36,62 7,562/-.

On account of LDI

6. *It is pertinent to mention that there is no difference in the demand earlier raised by PTA on this account for the year 2007-08, and the present demand under the show cause notice dated 2nd October, 2009.*
7. *The interconnect charges were less by Rs.277, 198, 1367- as shown by PTA in the allowable deductions.*
8. *The deductible APC for USF was Rs. 70,530,612/-. The same was in the PTA's earlier working as Rs. 7, 789, 1777-. Therefore, there is an understatement of Rs. 62, 741, 4357-.*
9. *The sales tax figure was for Rs.4,197,6007- as against the amount of Rs.2,197,6007-charged by PTA,*
10. *As mentioned above, the vires of AP rules and AP regulations have been challenged by Telecard in the Supreme Court of Pakistan, any amount under the heads of R&D and USF are subjudice, and as such, should not make part of any calculations until adjudicated upon by the Court.*
11. *For the aforementioned reasons, the amount for ALF worked out to be Rs. 678,638/-. The same has been deposited by Telecard through afore-referred communication.*

The comparative working for the year 2007-08 is also enclosed for your consideration during the hearing.

Please note that besides the foregoing, entire record pertaining to the reconciliation of accounts between PTA and Telecard throughout may also be kept available during the hearing for purposes of reference/reliance. Complete record of FAO No. 27 of 2008 and CPLA No.459 of 2009 may also kindly be kept available during the hearing for the same purpose.

We hope though that PTA shall carefully examine our objections to the show cause notices and shall not bring itself in conflict with the proceedings pending before the hon 'ble High Court and august Supreme Court of Pakistan on the same issues.

Sincerely,"

2.3. Mr. Afnan Karim Kundi (Advocate, Supreme Court of Pakistan), Mr. Mamoon Karim Kundi (Advocate, High Court), Mr. Attaullah Kundi (Advocate, High Court), Maj. (Retd.) Sahid Naeem Butt, (Director, Regulatory Affairs) and Mr. Rizwan Cheema attended the hearing on the fixed date and time.

3. THE LICENSEE'S ARGUMENTS:

3.1. The Licensee argued its case on the same points as given in the Licensee's Reply however the counsel for the Licensee also submitted detailed written arguments after the hearing on 31st December, 2009 ("Licensee's Written Arguments"), which are reproduced hereunder:

"IN THE MATTER OF SHOW CAUSE NOTICES DATED 02.10.2009

PTA has issued letters Ref: PTA/Finance/WLL/TELECARD49/2006/56 and Ref: PTA/Finance/LDI/TELECARD50/2006/57, both dated 2nd October, 2009, regarding the captioned subject and containing a cumulative demand for payment of Rs.46,214,406/- on account of ALF, R&D and USF contributions (including late payment charges of Rs. 8, 333,744/-) allegedly outstanding against our client pertaining to the year ended 30th June, 2008.

We impugne these letters/SCNs on the following grounds:

Violation of order of Islamabad High Court dated 19.03.2009:

1. The matter of outstanding dues (including all account heads mentioned in your afore-referred letters) stands challenged by our client and is presently sub judice before the hon 'ble Lahore High Court, Rawalpindi Bench, in FAO No.27 of 2008.

2. PTA's demand for payment is in direct conflict with the order dated 19.03.2009 passed by the then Islamabad High Court in FAO No.27 of 2008, whereby PTA's impugned determination dated 18.11.2008 has been suspended till the final disposal of the said FAO and our client had been allowed to pay its admitted liability of Rs.36,627,562/- as against PTA's entire claim of outstanding dues against our client.

3. In respectful compliance with the aforesaid order of hon 'ble High Court, our client has already made the said payment amounting to Rs.36,627,562/-for the years 2006 to 2008 through cheque No. 6845580 dated 7th April 2009.

4. This has been duly acknowledged by PTA vide its letter No.PTA/Finance/LDI/TeleCard/2006 dated 8th April, 2009 (copy enclosed), wherein PTA admits that the payment made by our client pursuant to hon 'ble High Court's order dated 19.03.2009 covers our client's admitted liability for up to, and including, the year ended 30th June, 2008 - to which your fore-referred letters relate.

5. PTA's impugned determination dated 18.11.2008 that has been suspended by the hon 'ble High Court relates to all account heads under which again a claim has been made by PTA vide your afore-referred letters including ALF, R&D and USF contributions.

6. *Thus the PTA 's this subsequent claim under the same account heads amounts to defy the suspension order passed by the then Islamabad High Court. Thus the very act is susceptible to be interpreted as a contempt of court.*

7. *It may also be mentioned that the very legality of R&D and USF contributions stands further challenged by our client initially in writ jurisdiction of the then Islamabad High Court and thereafter in the august Supreme Court of Pakistan in CPLA No. 459 of 2009 which is currently pending. Please do note that the challenge thrown to these payments is only done by our client unlike other LDI operators who have confined themselves to assailing APC for USF.*

8. *PTA's determination dated 18.11.2008 having been suspended and the matter being sub judice, there is no occasion for PTA to reiterate its demand/claim for outstanding dues against our client.*

9. *Besides, all the proceedings being carried out by PTA are null and void from its very inception as in view of suspension order. PTA cannot raise the claim on the very grounds which are impugned and are sub judice in the Lahore High Court, Rawalpindi Bench, Rawalpindi. Following case law is relied upon to substantiate the forgoing contention:*

1992 SC MR 127

Supreme Court while granting leave to appeal, stayed proceedings meanwhile—Supreme Court's order having not been communicated to Trial Court, it decreed plaintiffs suit as per High Court's direction for fresh decision—Effect of non-communication of Supreme Court's stay order—Stay order would operate from the time when such order was made and not from the time it was communicated—Order made by a superior Court would operate when it was made—Non-knowledge or ignorance would not permit lower Court to render order of superior Court ineffective or nullity—Want of knowledge though would not entail liability for any action taken but such action would not be clothed with legality when legal authority to proceed had been stopped or stayed

—Trial Court notwithstanding such stay order decreed the suit under remand order passed earlier by the High Court—Proceedings taken and resultant decree after stay order by Supreme Court being nullity, Trial Court was directed to proceed to determine the suit afresh as regards declaration sought by plaintiffs—Validity of order assailed in plaint was not to be adjudged as Civil Court did not have jurisdiction—Trial Court was required to determine whether order in question was in fact, passed by the Authority or it had been forged. 2006CLD568

—Operation of stay granted by superior Court—Just as law would operate from the moment it was enacted and ignorance was no defence, a stay granted by a superior Court would operate from the time, the order was made and ignorance of the order, would not permit a lower Court to render the order of a superior Court ineffective or a nullity—Any or all proceedings taken by the Trial Court after order of High Court staying proceedings before it, were a nullity and totally without jurisdiction. 2002 CLC 601

—Court without passing *ad interim* order, issued notices to opposite party, which were served upon them—Effect—where notices of a *U*s were issued to the other side, the latter was expected to maintain a *status quo*.

Responsibility as public functionary:

PTA, being public functionary is even more obliged to act in accordance with law and to uphold the directions of the High Court. It is least expected from the PTA to defy the explicit order of the High Court. Following case law is relied upon to show that the courts here put much stress upon the public functionaries not to bypass the directions of courts:

2005 PCr.LJ 292

—Contempt of Court—Obedience to Constitution—Duty and function of public functionaries—Everybody was bound to obey command of Constitution in view of Art. 5(2) of Constitution—Nobody should be penalized by inaction of public functionaries and public functionaries were also duty bound to act in accordance with law in view of Arts.4, 189, 190 & 201 of the Constitution—Laws were made to act within the frame-work of law and Constitution and not merely on Statute Book—Constitution was based on Trichotomy —Public functionaries if allowed to by-pass the direction of High Court, then it would create chaos, which would bring a situation minimizing the State concept of Sovereign Islamic State minus a strong and independent judiciary which was unimaginable—If the judiciary of the country was stripped of, its power, the country would cease to exist as free nation—Everybody had to, work within the command of Constitution and law and should not hesitate to discharge his duties in accordance with law and Constitution otherwise the rule of Jungle would prevail which was not in the interest of country and nation-- People of Pakistan must be provided justice by all organs of State and everybody has to work honestly, fairly and justly for purpose of building of national character.

Functus Officio:

Black Law dictionary defines the term Functus Officio as follows: -"Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has been expired, and who has consequently no further official authority".

Needless to state that PTA having already passed an enforcement order vide its determination dated 18.11.2008 (now suspended), it has become functus officio to that extent and cannot reopen the matter, which is now exclusively within the judicial domain of the superior Courts and obviously cannot be encroached upon by PTA.

No adverse action can thus be initiated against our client including proceedings for an enforcement order under section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996.

It may particularly be noted that the concluding paragraph of the suspended determination dated 18.11.2008 states that further enforcement proceedings under section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996 shall be undertaken in case of non-payment by our client. Needless to state that when the entire determination stands suspended, this part of the impugned determination also cannot be acted upon till the suspension order holds the field. Your letters under reference bearing Show Cause Notices as part of enforcement proceedings under section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996 are, therefore, in direct violation of the suspension order of Hon'ble High Court.

Review by PTA:

The impugned letters/show cause notices whereby PTA has again raised the claim on the basis of very grounds which were basis of its earlier determination which stands suspended, amounts to reopening the issue. This amounts to reviewing the issue already decided by PTA which course is not at all open to PTA, as law has not conferred upon PTA any power to review its decision.

It will only be in the fitness of things for PTA to await the disposal of the aforementioned litigation on the matter, which would also result in the settlement of issues raised in our client's appeal that are fundamental in nature and go to the very root of PTA's demands, and as such, require a binding judicial principle to be laid down by the superior Courts. Your letters under reference are premature, to say the least, and are liable to be withdrawn.

In light of the foregoing, it is requested that the impugned letters may kindly be withdrawn and the outcome of aforementioned litigation be awaited before PTA decides to proceed further in the matter.

Sincerely,"

4. FINDINGS OF THE AUTHORITY:

4.1. On the points formulated by the Licensee as above, we heard the Licensee at length and carefully considered each of its contentions. Our analysis of the aforementioned points, in light of the relevant statutory provisions including but not limited to the Constitution of Islamic Republic of Pakistan, 1973, the Code of Civil Procedure, 1908, the Act and the terms and conditions of the License and in light of the relevant case law is as under.

i) Contents of the Show Cause Notice unambiguously suggest that the same was issued for contravening clause 4.1.2(a) and 4.2.3 read with 3.4.1 and 3.6.1 of the License conditions by not paying the Annual Regulatory Dues for the financial year ended on 30th June, 2008 and the grounds taken by the licensee in FAO 27/2008 (currently re-marked as FAO 114/2008 upon being transferred to the Rawalpindi Bench of the Lahore High Court) not specifically challenged any of the account heads given in the show cause notice rather they are exorbitant and it is

evident from the Show Cause Notice that it is only in relation to the annual regulatory dues for the year ending on 30th June, 2008. In particular, the fifth recital to the Show Cause Notice provides as follows:

"AND WHEREAS, the Authority has taken notice of the fact that the licensee has not deposited Annual Regulatory Dues of Rs.17,476,003/- on account of (ALF Rs.2,912,667/- R&D Rs 5,825,334/- and USF Rs. 8, 738,002/-) for the year ended on 30th June 2008, including late payment charges on ALF Rs.525,235/- R&D Rs. 1,050 470/- and USF Rs. 1,575, 7 05/-calculated @ 2%per month. "

ii) In respect of the Licensee's contention that PTA's demand for the said payments is directly in conflict with the order dated 19th March, 2008 passed by the erstwhile Islamabad High Court in FAO 114/2008 ("the Stay Order"), it is necessary to first ascertain the scope of the Stay Order, which is still operative after the transfer of FAO 114/2008 to the Rawalpindi Bench of the hon'ble Lahore High Court. The relevant part of the Stay Order provides as follows:

"In view of the statements made by the learned counsel for the parties, the impugned Judgment will remain suspended subject to payment of Rs. 36.00 million till 15.04.2009 and appeal is adjourned for final arguments. Date be fixed by office" [emphasis added]

The term "*impugned judgment*" in the Stay Order is a reference to the order of the Authority assailed by the Licensee in FAO 114/2008, that is to say, the order of PTA dated 18th November, 2008 which was in respect of the Annual Regulatory Dues for the financial years 2005 - 2006 and 2006 - 2007. It is clear from the operative part of the Stay Order that it only suspends the operation of the "*impugned judgment*" and has no bearing upon or application to any other matters between the parties, namely the Licensee and PTA. As such, there is no nexus between the Show Cause Notice and the Stay Order in FAO 114/2008 and the Stay Order has no bearing upon other matters between PTA and the Licensee, such as the Annual Regulatory Dues for any periods other than 2005 -2006 and 2006 - 2007.

iii) The Licensee has paid Rs.36 million in compliance with the Stay Order, as an admitted liability on the part of the Licensee towards the payments mentioned in the determination which was being impugned in FAO 114/2008, which was specifically in relation to the Annual Regulatory Dues from the Licensee for the years 2005 -2006 and 2006 - 2007.

iv) The perusal of the covering letter dated 8th April, 2009 submitted by the Licensee together with the payment of Rs. 36.627/- million as well as the calculations annexed

thereto reveals that the payment was made by the Licensee "in compliance with the above-referred order [dated 19th March, 2008] of the Islamabad High Court". However, the Licensee has attempted to assert, through its calculations accompanying the covering letter that the said payment also covers the period of 2007 - 2008. This assertion is incorrect and untenable for the following reasons:

- The appeal before the Islamabad High Court, namely FAO 114/2008, was only in relation to payments due for 2005 - 2006 and 2006 - 2007. The payments for 2007 - 2008 had no relevance to FAO 114/2008 and thus the Stay Order of the Islamabad High Court could only be in respect of the dues for 2005 - 2006 and 2006 - 2007.
- The statement of the counsel for the Licensee, as set out in Para. 2 of the said order, makes it clear that an amount of Rs.36 million was admitted in respect of the dues for 2005 - 2006 and 2006 - 2007. Therefore, to the extent that the Licensee has attempted to show in its detailed calculations that is the break-up of Rs.36.627 million the amount for 2007 - 2008 is Rs.35.847 million its assertions are contradictory and nugatory of what was stated by their counsel in Court. Incidentally, seen in this perspective, the Stay Order which suspended PTA's Determination 18th November, 2008 was given in light of this statement of the counsel for the Licensee.

v) The officers of the Authority issued an acknowledgment letter dated 8th April 2009 in which there was an administrative error pertaining to partial payment covering financial year 30th June 2006 to 2008 (when factually it covers only until 30th June, 2007). This error cannot in anyway be read in context of Authority exonerating the Licensee of its remaining dues or to include it in the scope of aforesaid determination and court orders. Furthermore the calculation of the dues for 2007 - 2008 has to be based upon the Annual Audited Accounts and the calculation of dues for 2007 - 2008 does not reconcile with the Annual Audited Accounts of the Licensee for the relevant period.

vi) Therefore, in so far as the Show Cause Notice does not pertain to the amounts covered in the Stay Order, that is, the Annual Regulatory Dues for the years 2005 - 2006 and 2006 -2007, the same is not in violation or contravention of any orders of the erstwhile Islamabad High Court or the Rawalpindi Bench of the hon'ble Lahore High Court in FAO 114/2008. Consequently, there is no issue of contempt of court raised by the issuance of the Show Cause Notice or the passing of an enforcement order pursuant thereto. Furthermore, for the aforementioned reasons, the matters set out in the Show Cause Notice are not *sub judice* before the Rawalpindi Bench of the hon'ble Lahore High Court as contended by the Licensee.

vii) In respect of the assertion of the Licensee that PTA may not proceed with the Show Cause Notice since "the legality of R&D and USF contributions" stand challenged by the Licensee before the august Supreme Court of Pakistan, we note that the writ petition filed by the Licensee before the erstwhile Islamabad High Court assailing the legality of the R&D and USF contributions and the APC for USF was dismissed vide order dated 21st January, 2009, whereas the august Supreme Court has

not granted any stay order in this regard, therefore, in the absence of any such orders the Authority can rightly demand and enforce the relevant license conditions of R&D and USF. Reliance in this regard is placed on the following judgment of the apex court:

PLD 1966 SC 983

".....It is well settled that the operation of a decree, passed by a court of first instance is not automatically suspended, on the mere filing of an appeal therefrom...,"

Moreover the provisions of the Code of Civil Procedure, 1908 clearly provides that an appeal shall not operate as stay of the proceedings under a decree or order appealed from. Sub-rule (1) of rule 5 of Order XLI of the Code provides as follows:

"5. Stay by Appellate Court-(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree."

viii) The case law relied upon by the counsel in support of their contention can be distinguished in the instant matter for the reason that the cited cases relate to instances where interim orders of stay had been issued by the appellate court, communication of the stay order and consequence of non-compliance when the stay order was communicated. However, there is no stay order passed by any superior court in respect of the *vires* of the Access Promotion Rules, 2004 or the legality of the R&D and USF contributions. In support of this contention by the Authority reliance is placed on the following:

PLD 1964 SC 520.

Institution of an appeal merely makes the subject matter of the case/dispute between the parties *sub judice*. This is all that the Supreme Court of Pakistan has laid down in its judgment reported in PLD 1964 SC 520. However, the *sub judice* status of the case does not render the order of subordinate court impugned in the appeal as unenforceable.

1993 CLC 2130

The Lahore High Court in case reported in 1993 CLC 2130 has further observed in this regard as follows:

"...till such time, an appeal or revision is not filed, or such proceedinss are pendins but no stay order has been issued, such decree remains capable of execution..." [Emphasis added]

ix) The Authority established under section 3 of the Act is fully aware of its responsibilities as a public functionary and the issuance of show cause notice against the accrued liability for the financial year ended 30th June, 2008 is also a function in furtherance of Authority's duties as a public functionary. The Show Cause Notice proceeds to deal with the Licensee as a defaulter for the financial year ended 30th June, 2008 for which the Authority is competent to act under section 23 of the Act and has not become *functus officio* in the instant matter as these are fresh proceedings having no nexus with the due of the previous financial years.

x) The argument put forth by the Licensee to the effect that the Authority has reopened a pending issue, which amounts to reviewing the issue already decided by it and which course is not at all open to the Authority, since the law has not conferred upon it any power to review its decision is also entirely misconceived. Without going into the merits of the contention of whether or not the Authority has the power to review any orders, the issue in hand is totally an independent matter which does not in any way come under the purview of review and as such the issue of review is irrelevant and not germane to the issue. The issuance of the Show Cause Notice for the year 2008 is not the re-opening of any issue since it is a fresh issue.

xi) The additional points raised by the Licensee vide letter reference TC/AK/0438 dated 29th December 2009 (referred to above in Para 2.2) pertaining to a difference of Rs. 2,291,935/- between demand note and show cause notice issued by the Authority is not agreed for the reason that the demand note issued to the Licensee dated 22nd January, 2009 amounting to Rs. 15,184,068/- including penalty of Rs. 859,476/- for three months November, 2008, December, 2008 and January, 2009. Whereas the amount in Show cause notice issued 2nd October, 2009 was of Rs. 17,476,003/-containing eleven (11) months penalty (up to September, 2009).

xii) Licensee's contention regarding interconnection charges is declined for the reason that the figure of interconnect charges was taken as per figures reflected in books of accounts of the Licensee as certified by auditor and submitted by the Licensee vide their letter NO:TCL/DRA/Finance/PTA/01-01/F.37 dated 1st January 2009. Further interconnect payments are deducted subject to provision of documentary evidence by the Licensee as inter-operator payments.

xiii) The upshot of the above discussion is that the Licensee has not paid the outstanding amount as set out in the Show Cause Notice which it was required to pay under clause 4.1.2 (a) and 4.2.3 of the license for the financial year 2007-2008 along with the late payment charges.

5. ORDER OF THE AUTHORITY:

5.1 The foregoing shows that the contents of the Show Cause Notice stand proved and since the Licensee has not complied with financial obligations contained

under the conditions of the License, the Authority hereby disposes off the Show Cause Notice dated 2nd October 2009 in the following terms:

- a) Under sub-rule (4) of Rule (9) of the Telecommunication Rules 2000, the Licensee is directed to remedy the contravention by paying Rs. 19,481,446/- on account of Annual Regulatory Dues, comprising of Annual Licensee Fee(ALF), contributions towards Research & Development Fund(R&D) and Universal Access Fund(USF) inclusive of late payment charges till April 2010 of Rs.5,156,853/- for the year ended on 30th June 2008 along with compliance report of such payment within **twenty five (25)** days of the issuance of this "Enforcement Order".
- b) In case of Licensee's failure to comply with Para 5.1 (a), above, "Final Enforcement Order" under sub-rule (5) 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 this 30th day of April, 2010 and comprises of **16** pages.