



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

Re:
Transworld Associates private Limited

Enforcement Order under Section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996

File No. PTA/LAW AND REGULATION/LAW AND REGULATION/LAW/TWA/290/2010/

Date of Show Cause:	1 st February, 2010
Date of Hearing:	20 th August, 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:

“Provision of services from points established beyond the scope of its license, sale of services/bandwidth/capacity to non-licensees without approval of the Authority and non-submission of interconnection and extension of connection agreements to the Authority”

Decision of the Authority

1. Brief Facts:

1.1. **Transworld Associates Private Limited** (the “licensee”) is a private limited company incorporated under the Companies ordinance, 1984 was awarded non-exclusive license No. Dir (C)/PTA/103/99 dated 22nd June, 2002 (the “license”) by Pakistan Telecommunication Authority (the “Authority”) to establish, maintain and operate a private fiber optic sub-marine cable landing station in Pakistan situated within fifteen miles of the costal boundaries of Pakistan on the terms and conditions contained in the license.

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

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

1.4. Clause 8.1 of Appendix-B of the Rules, and clause 25 of the license, obliged the licensee to observe the provisions of the license, the Act, the Rules and Regulations made thereunder.

1.5. vide sub-clause (2) of clause 3 of the license, *“the total control of the traffic/gateway will be installed alongwith landing point within the fifteen miles of coastal area of Pakistan at a location, which is approved by the Authority in advance”*.

1.6. vide sub-clause (10) of clause 3 of the license, *“the licensee shall notify to the Authority in writing the precise location at which the cable will land in Pakistan and such notice shall be given not latter than ninety days prior to commencing construction of the cable landing station”*.

1.7. vide sub-clause (7) of clause 3 of the license, *“the location of the cable system and the landing station within the territory of Pakistan shall be in conformity with the plans approved by the Authority and other Government Agencies (if required) and the cable shall be moved or shifted by the licensee at its own cost if needed in the public interest, security, defense or improvement of harbor for navigational purposes”*.

1.8. vide sub-clause (5) of clause 3 of the license *“the license shall enable the licensee to (a) to establish, operate and maintain a cable landing station situated within fifteen miles of coastal area of Pakistan the location of which is approved by the Authority under condition 3(2) of the license; (b) to sell capacity to the licensed operators in Pakistan for the licensed services. Circuits for international telephony can only be sold to PTCL till its monopoly period ends”*.

1.9. vide sub-clause (6) of clause 3, of the license, *“the capacity on Transworld through the landing station shall be sold on a right of use or lease basis only to the licensed operators in Pakistan and any person allowed by the Authority to acquire bandwidth but the capacity shall not be sold indifferently.”*

1.10. vide sub-clause (9) of clause 3, of the license, *“the licensee or any persons or companies controlling them, controlled by them or under direct or indirect common control with them shall not enjoy and acquire any right to connect, or operate cables or land lines within Pakistan unless such service is authorized by the Authority”*.

1.11. vide clause 5, of the license, *“the service provider shall be allowed to interconnect its licensed system with Company’s and private data network operator’s system on hierarchical level on grounds of economy, performance and other benefits for which interconnection*

agreement shall be negotiated between the company, the private data network operators and the service provider... the interconnect agreement shall be signed at least thirty days before the commencement of service and the signed copy of such agreement shall be provided to the Authority."

1.12. vide sub-clause (4) of clause 9 of the license *"all extensions of connection agreements shall be filed with the Authority within thirty days of the date on which they are entered into and the Authority may, in its discretion, require either the full terms of, or selected information about all such agreements to be placed on file"*.

1.13. In the instant case the Authority took notice of the following facts while enforcing the terms and conditions of the license that (a) the licensee has extended its sole landing point by establishing various points at (i) The Plaza (WBL) Clifton, (ii) PIDC (Beaumont Plaza), and (iii) Asia Pacific Building (Gulshan-e-Johar) at Karachi, Eden Centre at Lahore and Mobilink MSC in I-10/3 at Islamabad by entering into some arrangements contrary to license conditions and is providing services from such multi-points which are beyond its licensed physical range of fifteen (15) miles from the coastal area and (b) is also indifferently selling bandwidth/capacity to non-licensees without permission of the Authority contrary to the aforementioned licensed conditions, and (c) has also failed to provide signed copies of all its interconnect agreements and extension of connection agreements to the Authority within specified period contrary to aforementioned licensed conditions, hence, contravened the aforesaid license conditions, therefore, it was issued a show cause notice (the "Notice") dated 1st February, 2010 under section 23 of the Act, requiring it to remedy the aforementioned contravention by immediately stopping operations carried out by it from the aforesaid points established beyond the scope of its license and stop providing services/bandwidth/capacity to non-licensees for which no approval of the Authority has been obtained and submit compliance report alongwith details of all interconnect agreements and extension of connection agreements within seven (07) days of the issuance of this Show Cause Notice and also to explain in writing, within thirty (30) days of the issuance of this notice as to why the license should not be suspended, terminated or any other enforcement order should not be passed against the licensee under section 23 of the Act.

1.14. The licensee replied to the aforesaid Notice vide its letter of 8th February, 2010 and denied the allegation, which is reproduced as under:

*Subject: **SHOW CAUSE NOTICE UNDER SECTION 23 OF THE PAKISTAN TELECOMMUNICATION (REORGANIZATION) ACT 1996 (the "Act")***

Reference: PTA No 14-1/L&R/PTA/09/825 dated 01 February 2010

We refer to the show cause notice dated 1 February 2010 (the "SCN") to Trans World Associates (Private) Limited ("Trans World") in respect of the captioned matter, requiring Trans World to (a) immediately stop operations carried out from points established beyond the scope of its licensed area, (b) stop providing services/capacity/bandwidth to non-licensees for which approval from Pakistan Telecommunication Authority ("PTA") has not been obtained, (c) submit compliance report along with details of all interconnect agreements and extension of connection agreements within seven (7) days of the issuance of the SCN, and (d) explain, in writing, within thirty (30) 'days of the SCN as to why the license of Trans World (the "License") should not be suspended, terminated or any other enforcement order should not be passed against Trans World under Section 23 of the Act.

1. Establishing Points beyond Trans World's Licensed Area In the SCN, you have averred that the:

Licensee has extended its sole landing point by establishing various points at (i) The Plaza (WBL) Clifton ii) PIDC (Beaumont Plaza), and Hi) Asia Pacific Building (Gulistan-e-Jauher) at Karachi, Eden Center at Lahore and Mobilink MSC in 1-10/3 at Islamabad by entering into some arrangements contrary to License conditions and is providing services from such multi-points which is beyond its physical range of fifteen miles from the coastal area contrary to sub clause (2) of Clause 3 of the License.

First, we are surprised that these matters are brought up at this stage when each of the above has been in place for several years, with full notice to you and always within your knowledge, and has created multiplicity of third party rights.

We also, respectfully, submit that, in accordance with Clause 3(2) of the License, the total control of all services traffic of Trans World is established through DWDM, ADD / Drop Multiplexers, Core Routers and their Network Management Systems only at Hawksbay Cable Station situated within fifteen (15) miles of coastal area of Pakistan, duly approved by PTA in advance and all other related agencies.

With respect to the various other points specified in the foregoing paragraph of the SCN, our contention is as follows:

(1) Plaza (WBL) Clifton Karachi (the "Plaza Clifton") and Asia Pacific Building (Gulistan-e- Jauher) Karachi (the "Asia Pacific")

These are points where Trans World interconnects with World Call Broadband Limited ("WBL") and Link Direct International (Private) Limited ("Link Direct"), an associated company of Trans World. Both WBL and Link Direct are Long Distance International ("LDI") licensees of PTA. Clause 5 of the License specifically allows Trans World as the "Service Provider" to interconnect its licensed system with the private data network operator's systems on grounds of economy, performance and other benefits subject to execution of Interconnection Agreements in this regard. Similarly, Clause 9 of the License permits extension of connection between the landing station and other licensed operators on mutually agreed terms and conditions and in accordance with ITU recommendations.'

The customers in Karachi are interconnected from the Plaza Clifton by Trans World after executing the Interconnection Agreements with WBL on case to case basis on WBL Metro O.F network in Karachi as per Clause 5 of the License. At the Asia Pacific, Trans World network is interconnected with Link Direct mainly for extension of connection to customers in Pakistan in accordance with Clause 9 of the License. Copies of Interconnection and Extensions of Connection Agreements have already been provided to PTA. Therefore, both are valid Interconnection Points. Importantly, it may be also noted that both the Plaza Clifton and the Asia Pacific are also situated within fifteen (15) miles of coastal area of Pakistan.

Our Submarine -Network backup NMS is installed at the Plaza Clifton for disaster management in case of emergencies.

(2) PIDC (Beaumont Plaza) Karachi

Further, kindly note that Trans World has not established any point at PIDC (Beaumont Plaza) Karachi.

(3) Eden Center Mobilink Collection at Lahore ("Eden Center") and Mobilink MSC Collection in 1-10/3 at Islamabad ("Mobilink MSC")

Eden Center and Mobilink MSC points are established for IP_Traffic_aggregation in accordance with Clauses 5 and 9 of the License after, executing the relevant Agreement on hierarchical level to economize the LDI national long distance Media capacity usage and robust performance between Trans World and Link Direct on mutually agreed terms and conditions following ITU recommendations.

Due to extraordinary high DPLC tariffs and subsidization of IP services by Pakistan Telecommunication Company Limited ("PTCL") in Pakistan, the cost of leasing DPLC services by Trans World customers individually are prohibitive. Therefore, to facilitate its customers, and to keep the bandwidth cost at a reasonable level, Trans World has entered into an agreement with the Link Direct for extension of services under revenue sharing arrangement.

" Clauses 5 and 9 of the License allow Interconnection and Extension of Connection, respectively, on mutually agreed terms and conditions between the Licensee and LDI Licensees in technology neutral arrangement. Therefore, as per Clause 5 of the License, on grounds of economy, robust performance and cost benefits by economizing long distance media, Trans World and Link Direct mutually agreed that Trans World should bear the cost to supply, install, and maintain routers and LAN Switches in the Link Direct Co-Locations for IP Traffic aggregation only to economize the long distance media of Link Direct . Therefore, both the said points are well covered in the ambit of the License.

2. Sale of Capacity/Bandwidth to Non-Licensees without PTA's Approval You have also contended that:

The Licensee is indifferently selling bandwidth / capacity to non licensees without permission of the Authority contrary to the license condition in sub clause (6) of clause 3 of the License, *

Clause 3(6) of the License prescribes conditions for sale of the capacity. The said Clause provides:

(6) The capacity on Transworld through the landing station shall be sold on a right of use or lease basis only to the licensed operators in Pakistan and any person allowed by the Authority to acquire bandwidth but the capacity shall not be sold indifferently.

The Clause above authorizes Trans World to sell capacity, in addition to the licensed operators, to any person who is "allowed" by PTA to acquire bandwidth. From the foregoing Clause it is clear that if any person is allowed to obtain services from other licensed carrier including from PTCL, then the person is also allowed to obtain bandwidth from Trans World. The result of PTCL, and other licensees of PTA as Trans World, being able to provide services to other persons, would be that such persons are "allowed by the Authority". It is an essential aspect of our Constitution that it provides for non-discriminatory treatment of all.

We would also like to inform you that Trans World is regularly providing its list of customers in a monthly report to PTA. If the PTA has any objections to provision of services by Trans World to any customer in the list, then the same should have, been conveyed to Trans World with valid reasons and Trans World would have taken necessary action.

It is further submitted that, to date, Trans World has yet to come across a list of persons published by PTA, who are not allowed to acquire bandwidth / capacity services from the license service

providers. If PTA had the intention that Trans World shall first obtain PTA's permission before providing/selling bandwidth / capacity/ services to every person/customer, then the same should have been explicitly made a condition of the License.

Trans World is cognizant of its responsibility in serving the needs of licensed customers and the persons allowed by PTA to acquire bandwidth from any licensed service provider. Prior to provision of its services, Trans World obtains the necessary legal documentation from potential customers for validation and relevance. This ensures that the bandwidth / capacity is not sold indifferently.

3. Failure to provide Signed Copies of Interconnection Agreements and Extension of Connection Agreements to PTA within specified time period

In the SCN, you have further averred that

The Licensee has also failed to provide signed copies of all its Interconnect agreements and extension of connection agreements to the Authority within specified period contrary to aforementioned Licensed Conditions {sub clause (4) of clause 9 of the License}

Trans World currently has Interconnect Agreements with the WBL and Link Direct only. For metro access service to our customers from LDI's and Local Loop Licensees in Karachi, Lahore and Islamabad a one page "Service Order Form (SOF) cum" lease agreement is signed on case to case basis. Copies of some of these Agreements were provided to PTA in July 2009. Significantly, over the last seven (7) months, no objection was raised or conveyed by PTA with respect to the content or timing of such submissions and PTA, through its conduct and acknowledgments, approved and condoned any delay in their submissions.

In view of aforementioned replies, we understand that Trans World is operating within the ambit of the terms and conditions of the License. Further, Trans World is also ready to submit any further information required by PTA.

Without prejudice to our above submissions, and in no way admitting default, we submit that the contraventions alleged by you are not "grave or persistent" to warrant the threatened recourse to suspension/termination of the License or of any enforcement order under Section 23 of the Act.

As you are aware, the provision of up to approximately forty percent (40%) internet and International Telephony related services within Pakistan are dependent upon the International bandwidth capacity provided by Trans World through its network, including its sub-marine landing station situated at Karachi. Any adverse action, as considered in the SCN, against Trans World by PTA will not only severely affect the business of Trans World but also result in denying the international bandwidth for International Telephony/internet access to the general public. It will irreparably impair the ability of Trans World and other business enterprises, relying upon bandwidth/internet services provided by Trans World, to honor their business commitments within and outside Pakistan resulting in serious economic crisis which will ultimately lead to forced closure of their businesses. Such an action will have serious economic repercussions on the economy of Pakistan in general and the Internet Technology industry of Pakistan.

Trans World is operating within the ambit of its License which was granted by PTA in June 2002 before the deregulation of the telecommunication business in 2004 when LDI and LL Licenses were granted under the purview of the Deregulation Policy (July 2003) for the telecommunication sector. It is clear that PTA should not equate the Trans World License with the Infrastructure License available from PTA after the said Deregulation Policy.

We, therefore, request PTA to give favorable consideration to our submissions and not take any penal action by immediately stopping Trans World operations, suspending or terminating our License.

We request the opportunity of a personal hearing in support of our submissions."

2. The Hearing:

2.1. Since the licensee's reply was not satisfactory, hence, prior to issuing any enforcement order the licensee was required to appear before the Authority on 21st April, 2010 which was adjourned for 21st May, 2010 and 8th June, 2010 on the request of the licensee and then finally scheduled for 20th August, 2010, vide Hearing Notice dated 3rd August, 2010.

2.2. On the said date the licensee appeared before the Authority through Mr. Kamran Malik (President TWA), Mr. Parvez Hassan, Advocate, Mr. Asad Ahmed Ghani, Advocate, Syed Mukhtar Ahmad, (Technical Advisor TWA) and Brig (R) Fazal-ur-Rehman Adhami, (Advisor TWA).

2.3. During the hearing the licensee reiterated the same facts as mentioned in Para 1.14, above, and took the plea that it has not violated any provision of the law and the license and requested for withdrawal of show cause notice. In addition, it further made the following points for consideration of the Authority:

"Synopsis of Arguments submitted by Counsel of Trans World on 10 August 2010

A. Preliminary Submissions

B.

1. Regulatory Framework of the Authority

(1) The Pakistan Telecommunication (Reorganization) Act, 1996 (the "Act").

(2) Pakistan Telecommunication Rules, 2000 (the "Rules").

(3) Pakistan Telecommunication Authority (Functions and Powers) Regulations, 2006 (the "Regulations").

(4) The License dated 22 June 2002 (the "License") issued to Trans World by the Pakistan

Telecommunication Authority (the "Authority").

(5) De-Regulation Policy for the Telecommunication Sector, 2003 (the "Policy").

2. Interpretation of the Regulatory Framework

(1) Principles of interpretation of statutes and documents laid down by the Supreme Court of Pakistan and the High Courts of Pakistan, binding on the Authority under Articles 189 and 201

of the Constitution of Pakistan, are summarized in Annexure A and Annexure B.

(2) For the interpretation of the provisions of the License, the other relevant framework includes

(1) The Act, Rules and Regulations (License, page 1), (2) the Policy, which details the Policy Objectives of the Government (paragraph 3) and the Rights of the Licensees (paragraph 4) and
(3) the recommendatory regime of the International Telecommunication Union (License: clause 9; Rule 13(5) of the Rules; see also Section 43(4) of the Act.

3. Trans World

(1) Trans World is entirely foreign - owned by (a) Orascom Telecom Holding S.A.E., (b) Orastar Limited, (c) Dr. Omar Bin Abdul Muniem Al Zawawi.

(2) The total investment of Trans World in Pakistan is over US \$ 40 million. It provides upto approximately forty percent (40%) internet services in Pakistan as well as international telephony related services from the international bandwidth capacity sold in the market other than that provided by PTCL to its own broadband customers.

4. Show Cause Notice Allegations

(1) The Licensee has extended its landing station by establishing various points at (a) The Plaza (WBL) Clifton, (b) PIDC Beaumont Plaza, and (c) Asia Pacific Building (Gulistan-e-Jauher) at Karachi, Eden Center at Lahore and Mobilink MSC in I-10/3 at Islamabad by entering into some arrangements contrary to License conditions and is providing services from such multi-points which is beyond its physical range of fifteen (15) miles from the coastal area contrary to sub clause (2) of clause 3 of the License.

(2) The Licensee is indifferently selling bandwidth/capacity to non-Licensees without permission of the Authority contrary to the License condition in sub clause (6) of Clause 3 of the License.

(3) Failure to provide signed copies of Interconnection Agreement and Extension of Connection Agreements to the Authority within the specified period contrary to aforementioned Licensed conditions (sub clause (4) of Clause 9 of the License).

5. Reply of Trans World

(1) General

Trans World was issued the License to establish, operate and maintain a private fiber optic submarine cable landing station in Pakistan. The License was issued before the promulgation of the Policy in 2003.

The Authority developed the new Submarine O.F Landing Infrastructure License (the "PTA Infrastructure License") after the promulgation of the Policy, that is, much after the issuance of the License to Trans World. The License and the PTA Infrastructure License are different in the following terms and conditions:

SN	Trans World License	PTA Infrastructure License
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1	<p>Clause 3 (6): Sale of capacity, including international, to "licensed operators and "persons" allowed by the Authority.</p> <p>"Person" means any individual, partnership firm, organization, association, joint stock company, joint venture, trust or corporation</p> <p><i>Clause 11(k) of the License)</i></p>	<p>6.10.1: The Licensee is not authorized under this license to provide international connectivity direct to the end users. However, the licensee shall provide only interface facility to the licensed Long Distance and International ("LDI") operators through submarine cable system.</p>
2	<p>Clause 4(f): Sets up a system to monitor the processing equipment and associated accessories at Trans World landing station which shall be available for purpose of monitoring by the Authority or its designated agency</p>	<p>6.3.1 The Licensee shall provide, at its own cost, suitable equipment at premises designated by the Authority, in order to measure and record traffic and quality of service in a manner specified by the Authority. The Licensee shall provide the</p>
3	<p>Clause (9): Extension of connection between the landing station and other licensed operators shall be according to mutually agreed terms and conditions and in accordance with the recommendations of International Telecommunication Union</p>	<p>Extension of connection is NOT allowed.</p>

It is understood that no group/entrepreneur has acquired the PTA Infrastructure License since promulgation of the Policy in 2003. It is a great challenge to prepare a feasible business plan keeping in view the terms and conditions of the PTA Infrastructure License. Besides PTCL, Trans World remains, till date, the sole Licensee of submarine cable landing operating in the telecommunications deregulated market under challenging business conditions. These challenges include the fact that the tariffs for the Domestic Private Leased Telecommunication Circuits ("DPLC") even today are higher than the tariffs of the International Private Leased Telecommunication Circuits ("IPLC"). The tariffs are led by the Authority's "Determination" dated 6 October 2006 re PTCL Bandwidth Tariffs (the "Tariff Determination"). Trans World, therefore, needs guidance and support from the Authority.

The License was issued for twenty five (25) years and still has seventeen (17) years of remaining validity. It is not permissible, under the License, law or equity, for the Authority to seek to apply, through a back door, the conditions of the PTA Infrastructure License to the License issued to Trans World. If Trans World is asked, unilaterally, to apply the terms and conditions of the PTA Infrastructure License, this would tantamount to changing the goal post and significant revision of the rights of Trans World against the express provisions of the Act and the License (Section 22 of the Act, Clause 3(21) of the License).

(2) Landing station and interconnection points are within fifteen (15) miles of coastal area.

It is clarified that The Plaza Clifton Karachi (with Worldcall) and Asia Pacific Building (Gulistan Jauher) Karachi (with Links Direct International) are Interconnection Points on defined hierarchical levels on grounds of economy, performance and other benefits with LDI Licensees allowed under the License. Clause 5 Interconnection of the License permits Trans World, as Service Provider, to acquire services of LDI by such Interconnection for which LDI gets its due share of the revenue. Both Interconnection Points are located within fifteen (15) miles of the coastal area of Pakistan. The Interconnections have been made by leasing dark fiber from LDI/Local Loop ("LL") licensee, Worldcall in Karachi, and the network was neither constructed nor owned by Trans World.

*The Eden Center Lahore and Mobilink MSC I-10 Islamabad are not only located on the national long distance network of Links Direct International but also owned by them and not by Trans World. Since under License Clause 9, Extension of Connection is permitted, Trans World, as Service Provider, initially negotiated the Interconnection and Extension of Agreement with Links Direct International effective from 1 August 2007 (copy submitted to the Authority in July 2009 and later detailed agreement effective 1 September 2009 was submitted on 8 April 2010) in order to exercise defined hierarchical levels on grounds of economy, performance and other benefits in compliance with ITU-T D.7 ("ITU-T D.7") recommendation **Concept and Implementation of "One Stop Shopping" for International Private Leased Telecommunication Circuits** (Annexure C). Under the Agreement, Trans World only paid the cost of routers/switches in order to facilitate revenue sharing with them. The LDI network is neither owned nor maintained and administered by Trans World. The amended Agreement has been negotiated, in good faith, on mutually agreed terms and conditions between Trans World and Links Direct International following ITU-T D.7.*

(3) Trans World sold Capacity/Bandwidth to licensed operators and "persons" "allowed" by the Authority.

Contrary to the PTA's Infrastructure License drafted after the promulgation of the Policy, Trans World, as Service Provider, is enabled under Clause 5 Interconnection and Clause 9 Extension of Connection, after agreements with Licensed Service Providers, to provide services throughout Pakistan in accordance with the recommended ITU-T D.7.

Clause 40) of the License requires Trans World to submit to the Authority a complete list of its Pakistan-based customers along with the details of capacity purchased or leased as and when required. The Agreements made by Trans World with LDI and LL Service Providers (such as Links Direct International, Worldcall, Nayatel and Braintel) duly get their share of revenue earned from the service provisioning under One Stop Shopping concept recommended in ITU-T D.7. This enables single-point billing and revenue sharing with the participating administration(s).

From these clauses, it is clear that the License permits provision of services to "persons" who are "allowed" to obtain bandwidth services from other such Licensed Service Providers.

Trans World is not required to obtain the prior approval of the Authority for the purposes of entering into the Interconnection and Extension of Connection agreements. Pursuant to Rule 13 of the Rules, enabled by Section 5(h) of the Act, Trans World is under an obligation to enter into Interconnection and Extension of Connection agreements with another operator on the request of such operator. The Authority has a limited role, on the request of any of the negotiating parties under Rule 13(7) of Rules, in the negotiations between the two (2) operators for the purposes of entering into Interconnection and Extension of Connection agreements. Unless so requested, the Authority is only entitled, under the Rules, to be intimated of the fact of the execution of Interconnection and Extension of Connection agreements between the operators by submitting copies of such executed agreements to the Authority.

(4) Copies of Agreements were provided to the Authority in July 2009. No objection was raised by the Authority with respect to the timing of the submission of the copies.

It is submitted that for Trans World, it was pioneering and most difficult challenge to provide country-wide service which was only possible after leasing DPLC from licensed LDI & last mile from LL operators. PTCL would never lease DPLC and last mile services to Trans World under the same cost benefits which they use for providing to their country-wide international bandwidth services. Even today, the DPLC tariffs in accordance with Reference Interconnection Offer ("RIO") and the Tariff Determination are prohibitive to provide services of International Private Leased Telecommunication Circuits from the landing station to customers in up country

cities like Islamabad, Rawalpindi, and Lahore. It was very hard and time-consuming negotiations for a commercial agreement with Links Direct International so that Trans World could competitively provide country-wide services of International Private Leased Telecommunication Circuits. This resulted in a delay in the signing of the Interconnection and Extension of Connection agreement. Trans World reiterates that the delay was beyond its control. However, due to the absence of any precedence, guidance and regulatory support, there is lack of understanding of international telecommunications connectivity business by the LDI's in the newly deregulated Telecom Business in Pakistan under prevailing DPLC tariffs in RIO as well as the PTA Tariff Determination October 2006.

(5) Clauses 5 and 9 of the License requiring the filing of the Interconnection and Extension of Connection agreements with the Authority within a prescribed time are directory and not mandatory in nature, the breach of which would not amount to a "grave or persistent" violation of the License conditions.

(6) Suspension is enabled only on "grave or persistent" violations.

(7) Trans World reiterates all its submissions in its Reply dated 9 February 2010 to the Show Cause Notice and incorporates them as a part of these submissions.

B. Preliminary Objections and Principal Submissions of Trans World

1. The Show Cause Notice is barred under Section 4 of the Act which requires a "complaint" as a condition precedent.

2. The provisions of Section 23 of the Act are to be read with and subject to the paramountcy of the "Functions" of the Authority under Section 4.

3. The Show Cause Notice is not in compliance with Section 23 of the Act read with the Rules.

4. The provisions of the License are to be interpreted in accordance with the (1) principles of interpretation of documents laid down by the superior courts of Pakistan, (2) the provisions of the Act, Rules, and the Regulations, (3) the Policy, and (4) the recommendatory regime of ITU.

5. The License grants to Trans World two basic rights (a) to set up a landing station under Clause 3(2) and 3(5)(a), and (b) sell/provide capacity/bandwidth to the licensed operators and "persons" allowed by the Authority and to undertake interconnection and extension of connection services under Clauses 5 and 9. Each of these rights are separate and "stand-alones". The requirement of the 15 miles coastal radius applies only to the geographical location of the landing station.

6. To the repeated denial of the Authority, Trans World has continued to reiterate that the landing station is within the 15 coastal mile radius as per the provisions of the License. Trans World requests the appointment of a fact-finding inquiry (enabled under Section 5(2)(i) of the Act and Regulation 37) to conclusively determine this dispute between the Authority and Trans World.

7. The License is the creature of a statute, the Act, and, in addition to the principles of interpretation of documents, the principles of interpretation of statutes would also apply to it.

8. Clause 9 of the License shall prevail over any alleged inconsistency with any earlier Clause of the License.

9. Clauses 5 and 9 of the License, being special clauses, shall prevail, in case of any inconsistency, over the general clauses of the License.

10. The License was drafted and issued by the Authority. In case of its vagueness and inconsistency, its provisions are to be interpreted in favour of the Licensee, Trans World, under the doctrine of contra proferentum.

11. The License grants important economic rights to Trans World and these are protected under Articles 18, 23 and 25 of the Constitution which guarantee the enjoyment of rights to property, equality and non-discrimination.

12. The rights of Trans World in the License are also protected in the Foreign Private Investment (Promotion and Protection) Act, 1976.

13. The provisions of the Act, particularly the powers and the regulatory functions of the Authority, are inconsistent with the requirements of the Constitution with respect to the separation of powers and well-accepted principles of rule of law and natural justice and are, accordingly, void to that extent.

14. The judicially-approved doctrine of promissory estoppel is pleaded based on the subsequent conduct of the Authority after the License and the delayed timing of the Show Cause Notice.

15. Trans World has substantially complied (the doctrine of substantial compliance has also been approved by the superior courts of Pakistan) with all the requirements of the Act and the License.

16. The requirements in the License for the filing of agreements within a prescribed time are merely "directory" and not "mandatory".

17. There were no "grave or persistent" violations by Trans World under the Act or the License. The remedy of "suspension" is available to the Authority only in exceptional circumstances which are not present in this matter.

C. Reliance to Preliminary Objections and Principal Submissions

1. The Show Cause Notice is barred under Section 4 of the Act which requires a "complaint" as a condition precedent.

(1) No complaint

(2) No suo moto power of Authority

(3) Section 23 is qualified by Section 4

(4) Rule 9 and Regulation 31

(5) It is permissible under the principles of interpretation of statutes to discover the intention of the Legislature by comparing various provisions of the same statute or of the different statutes of same nature; Kaloodi International vs. Federation of Pakistan, PLD 2001 Karachi 311, at 336 (DB). The Corporate Regulatory Framework in Pakistan Shows that the investigations and inquiries are generally allowed only on "complaints" and suo moto powers of the regulatory

Authority are available only when specifically and clearly provided under law:

(a) Companies Act 1913

(i) Section 138 - "competent" person test; complaint: 10% threshold

(ii) Section 139 - complaint must be supported by such evidence as, among others, to show not actuated by malicious motives;

(iii) Section 141 - Report to Federal Government

(iv) Section 141A - Institution of proceedings if "it appears" to the Federal Government - references to Advocate General or Public Prosecutor who need to further consider that the case is one in which a prosecution ought to be instituted

(b) Companies Ordinance, 1984 (i) Section 263 -

(aa) "Competent" person test

(bb) Complaint, 10% threshold

(ii) Section 264 - Complaint must be supported by evidence (iii) Section 265 -

(aa) "Competent" person test in sub clauses (a) and (b)

(bb) SECP may inquire if general meeting or Court or circumstances require (iv) Section 266 -

(aa) Inspector to be court for certain purposes under CPC

(bb) Violation or contravention, CPC/PPC applicable (v) Section 270 - Prosecution, criminal

(vi) Section 271 - Power of SECP to initiate action against management; SECP of the opinion; SECP may apply to Court - and Court may after evidence order...

(vii) Section 275 - Application for winding up in Court or Section 290 application

(c) Securities and Exchange Ordinance, 1969

(i) Section 21 - (a) SECP may cause an inquiry on its own motion, or on representation of 10% shareholders

(ii) Every director, manager or other officer of affected company shall provide information and documents to inquiry officer.

(iii) Proceedings before inquiry officer "judicial proceedings" within meaning of Section 193/228 of PPC and "court" under CPC

(d) Monopolies and Restrictive Trade Practices (Control) Ordinance, 1970

(i) Section 10 - Functions of Authority

(aa) To conduct inquiries into general economic conditions

(bb) To conduct inquiry into affairs of undertakings on its own or by the Central Government

(ii) Section 14 - Special inquiry - 25 complainants - unless frivolous or vexatious or insufficient facts

(iii) Section 15 - Same powers as civil court plus judicial proceedings

(e) Securities and Exchange Commission of Pakistan Act, 1997

(i) Section 29 -

(aa) Investigations and proceedings (bb) SECP may appoint investigators (ii) Section 30 -

(aa) Powers of Investigators

(bb) Aggrieved person may lodge complaint against investigating officer

(cc) Commission to within fifteen (15) days commence hearing re complaint

(iii) Section 32 - Commission may require any person acquainted with case to appear before Investigation Officer

(f) Competition Ordinance, 2010

(i) Section 37

(aa) on its own - conduct inquiries (bb) on complaint - conduct inquiries

(cc) if after (aa) or (bb), Commission of opinion, necessary in public interest, initiate proceedings

(ii) Functions and powers of Commission (aa) S. 28(1)(a) - to initiate proceedings.

(5) Suo Moto Powers in the Telecom Regulatory Authority of India Act, 1997

Functions of Authority include the power to make recommendations, including suo moto for the revocation of the license (Section 11(1)(a)).

(6) Deducible Principles re "Complaints" and Sua Moto Jurisdiction

(a) There is a need for a representative capacity or competence of the complainant(s) - thresholds of 10%, for example, are provided to highlight the stake and interest of the complainant and, in other words, its representative capacity. Thresholds and a representative character need to be established under the corporate regulatory framework of Pakistan.

(b) The complaint made should be supported by evidence and documents which show a prima facie case to proceed with the inquiry/investigation - vexatious, frivolous or complaints with insufficient facts to be rejected.

(c) Complaints and inquiries usually precede prosecutions by regulatory authorities.

(d) A regulatory authority can exercise suo moto powers only when it is specifically provided in the statute.

(e) The requirements in (a) and (b) relate to investigations and inquiries based on complaints and are not applicable when the Government or the Commission, suo moto, initiate, on the basis provided in the statute, investigations/inquiries. Distinguishable from these regulatory regimes, the Act, importantly, does not provide for a suo moto proceeding by the Authority.

2. The provisions of Section 23 of the Act are to be read with and subject to the paramountcy of the "Functions" of the Authority under Section 4.

The interpretation of Section 23 is guided by the principles of interpretation:

(a) plain, natural, ordinary meaning;

(b) the statute must be interpreted in its entire context;

(c) harmonious interpretation;

(d) a special requirement in a statute prevails over a general requirement;

(e) the statutory provisions and jurisprudence of other regulatory regimes in Pakistan such as the Companies Ordinance, 1984, the earlier Companies Act, 1913, Securities and Exchange Ordinance, 1969, Securities and Exchange Commission of Pakistan Act, 1997, Competition Commission Ordinance, 2010 and the earlier Monopolies Control Ordinance, 1970 which require a procedure of complaints, provide thresholds of such complainants, inquiries, fact finding and investigations before major actions are proposed to be

taken by the regulators; and

(f) Regulations 31, 32, 33, 34, 35, 36 and 37 of the Regulations, provide for a detailed process of complaints and their investigation; this should have been invoked by the Authority before the present proceedings under Section 23 of the Act.

3. The Show Cause Notice is not in compliance with Section 23 of the Act read with the Rules.

The Show Cause Notice directs Trans World to remedy the alleged breaches and submit a compliance report within seven (7) days and also to explain within thirty (30) days as why the License should not be suspended or terminated or be subjected to any other enforcement order. In doing so, the Authority has failed to follow the following procedure provided by Section 23 of the Act and particularized in Rule 9 of the Rules before terminating the License:

(1) Service of a written notice (such as the Show Cause Notice) requiring Trans World to show cause, within thirty (30) days, as to why the enforcement order should not be issued (Rule 9(2));

(2) In the event of failure of Trans World to respond to the Notice or satisfy the Authority, the issuance of an enforcement order (the "First Order") requiring Trans World to remedy the contravention within a period not exceeding thirty (30) days from the date of service of the First Order (Rule 9(4)).

(3) If Trans World fails to comply with the First Order within the aforesaid period, the Authority may, by further enforcement order (the "Final Order") in writing:

(a) levy a fine which may extend to three hundred and fifty million rupees; or

(b) in the case of a grave or persistent contravention of the License, require Trans World to cease that contravention within a period not exceeding thirty (30) days from the date of service of the Final Order (Rule 9(5)).

(4). In the event of non-compliance with 3(b) above, the Authority may terminate the License on service of not less than thirty (30) days notice in writing to Trans World; provided the Final Order has not been set aside by, or is not the subject of any appeal or other proceedings before any court (Rule 9(6)).

(5). The above procedure would also specifically apply to all licenses granted under the Rules (see Rule 7(1)(4) and its Appendix B, Clause 5).

(6) Importantly, Rule 9 nor Clause 5 of Appendix B provide for suspension of the license.

4. The provisions of the License are to be interpreted in accordance with the (1) principles of interpretation of documents laid down by the superior courts of Pakistan, (2) the provisions of the Act, Rules, and the Regulations, (3) the Policy, and (4) the recommendatory regime of ITU.

(1) The most relevant principles of interpretation of documents are that the entire document must be interpreted harmoniously (see Principles of Interpretation of Documents, Annexure B, para 1) and that, if necessary, the specific clauses of the document shall prevail over its general clauses (Principles of Interpretation of Documents, Annexure B, para 14). Thus Clauses 3, 5, and 9 of the License would need to be, first, interpreted harmoniously and, if necessary, the specificity of Clauses 5 and 9 of the License would prevail over the generality of Clause 3 of the License.

(2) The Policy declares Policy Objectives (Clause 3) and the Rights of Licensees (Clause 4) which will bear importantly on the interpretation of the License.

(3) The recommendatory regime of the ITU is fully recognized in the Act, Rules and the Policy (see Section 43(4) of the Act, Rule 13(5), and Clauses 2.7.2 and 4.4.6 of the Policy).

5. The License grants to Trans World two basic rights (a) to set up a landing station under

Clause 3(2) and 3(5)(a), and (b) sell/provide capacity/bandwidth to the licensed operators and "persons" allowed by the Authority and to undertake interconnection and extension of connection services under Clauses 5 and 9. Each of these rights are separate and "stand-alones". The requirement of the 15 miles coastal radius applies only to the geographical location of the landing station.

(1) The above is supported by a contextual reading of the License:

(a) Landing Station

(i) Location

l(g), 3(2), 3(5)(a), 3(7), 3(10), 3(12), 3(13), 3(22), 4(a), 4(f), 6(1), 10. (ii) Other Requirements
3(3) state of art, 3(4) ownership, 3(8) concealment of cable facilities.

(b) Sale of Capacity

3(5)(b), 3(6), 3(9) not operate cable or land lines without approval of authority. 4(d) service description, tariffs re monitoring and regulation of services. 4(h), 4(i)(j) licensed operators and Pakistan-based customers.

5. Interconnection

8. Tariff and billing

9(1)(3)(4) Extension of connection

(2) Interconnection is an important feature of any telecommunication activity and has a pivotal role in the regulatory framework; see, e.g., Section 5(2)(h) of the Act, Rule 2(l)(c)(h)(i)(j)(o), Rule 7, and Annexure B (Clauses 1.1, 2.3 and Schedule 1 (definitions) of Annexure B and Part 3 dealing with Interconnection in Schedule 2 which provides conditions applicable to all licensees).

(3) The Policy also reflects an expansive vision on Interconnections (Clause 4.5).

(4) TWA has followed the recommended ITU-T D.7 for the "One - Stop Shopping" Concept.

6. To the repeated denial of the Authority, Trans World has continued to reiterate that the landing station is within the 15 coastal mile radius as per the provisions of the License. Trans World requests the appointment of a fact-finding inquiry (enabled under Section 5(2)(i) of the Act and Regulation 37) to conclusively determine this dispute between the Authority and Trans World.

7. The License is the creature of a statute, the Act, and, in addition to the principles of interpretation of documents, the principles of interpretation of statutes would also apply to it.

8. Clause 9 of the License shall prevail over any alleged inconsistency with any earlier Clause of the License.

9. Clauses 5 and 9 of the License, being special clauses, shall prevail, in case of any

inconsistency, over the general clauses of the License.

See, *Principles of Interpretation of Documents*, Annexure B, para 14, and *Principles of Interpretation of Statutes*, Annexure A, para 15.

Under the principles of interpretation of statutes (Annexure A, para 16), in case of an irreconcilable conflict between two (2) sections of a statute, the section which appears later in the statute prevails over the earlier one. Thus, Clause 9 of the License shall prevail over any alleged inconsistency with any earlier Clause of the License.

10. The License was drafted and issued by the Authority. In case of its vagueness and inconsistency, its provisions are to be interpreted in favour of the Licensee, Trans World, under the doctrine of contra proferentem.

The principle of contra proferentem would be applicable in the interpretation of the License. Under this principle, commercial instruments must be construed against the party by whom they are drafted. See, for example, Sadharan Bima Corporation v. Bengal Liner Limited, 1997 MLD 1758 at 1769 (Bangladesh Supreme Court). In Eastern Counties Building Society v. Russell, [1947] 1 ALL ER, Hilberry J observed:

It must be borne in mind that the plaintiff society was the party putting forward the written instrument as expressing the terms on which they were willing to contract. If therefore, there be a doubt about how an expression in the instrument is to be interpreted, it is to be construed contra proferentes (at 503).

In State of Maharashtra v. Dr. M.N. Kaul AIR 1967 SC 1634, the Supreme Court of India observed:

In case of ambiguity, when all other rules of construction fail, the Courts interpret the guarantee contra proferentem that is, against the guarantor or use the recitals to control the meaning of the operative part where that is possible (page 1636).

Halsbury's Laws of England (4th Ed.), provides the following guidance:

146. Construction against grantor. *In case of ambiguity when other principles of construction fail, what is sometimes termed the contra proferentem rule applies.... (Vol. 20, para 146).*

1472. Construction against grantor or covenantor. *If a doubt arises upon the construction of a grant, and the doubt can be removed by construing the deed adversely to the grantor, this will be done.... The obligatory part of a bond, being in the benefit of the obligee, is always construed most strongly against the obligor.... (Vol. 12, para 1472).*

1473. Qualifications of the rule.... *There is no rule that a contract of guarantee is to be construed with special favour to the grantor.... (Vol. 12, para 1473)*

Chitty on Contracts (23 Ed), in para 636, states in respect of the contra proferentem principle:

636. Construction against grantor. *Another rule of construction is that a deed or other instrument shall be construed more strongly against the grantor or maker thereof....*

11. The License grants important economic rights to Trans World and these are protected under Articles 18, 23 and 25 of the Constitution which guarantee the enjoyment of rights to property, equality and non-discrimination.

18. Freedom of trade, business or profession.-Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business;

Provided that nothing in this Article shall prevent:

- (a) the regulation of any trade or profession by licensing system; or*
- (b) the regulation of trade, commerce or industry in the interest of free competition therein; or*
- (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.*

23. Provision as to property.-Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public Interest.

25. Equality of citizens (1) All citizens are equal before law and are entitled to equal protection of law.

- (2) There shall be no discrimination on the basis of sex alone.*
- (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.*

12. The rights of Trans World in the License are also protected in the Foreign Private Investment (Promotion and Protection) Act, 1976.

5. Protection of Agreements

Where the Federal Government considers it necessary in the public interest to take over the management of an industrial undertaking having foreign private investment or to acquire the ownership of the shares of citizen of Pakistan in the capital of such industrial undertaking, any agreement approved by the Federal Government relating to such undertakings entered into between a foreign investor or creditor and any person in Pakistan shall not be affected by such taking over or acquisition

Foreign capital or foreign private investment in an industrial undertaking shall not be acquired except under the due process of law which provides for adequate compensation therefore to be settled in the currency of the country of origin of the capital or investment and specifies the principles on and the manner in which compensation is to be determined and given.

13. The provisions of the Act, particularly the powers and the regulatory functions of the Authority, are inconsistent with the requirements of the Constitution with respect to the separation of powers and well-accepted principles of rule of law and natural justice and are, accordingly, void to that extent.

- (1) The Authority is Licensor, Prosecutor and Judge in this matter.*
- (2) No one shall be judge in his own cause.*
- (3) The SCN is against the Constitutional provisions on separation of powers; the Authority,*

being a body constituted by the Authority itself, and consisting of members of the Authority who lack independence and security of tenure cannot be relied upon to act impartially. Moreover, judicial powers cannot be lawfully conferred on the members of the Authority [The Authority can not, however, consider or decide the constitutional and issues re its competence; see, e.g., (1) Pir Sabir Shah vs. Shad Muhammad Khan, Member Provincial Assembly N.W.F.P. PLD 1995 SC 66; (2) Akhtar Ali Parvez vs. Altafur Rehman, 1963 (W.P.) Lahore 390; (3) Mehr Dad vs. Settlement and Rehabilitation Commission's, PLD 1974 SC 193; (4) Champak (Private) Limited vs. Sindh Employee's Social Security Institution (Sesri), 2003 PLD 380; and (5) Federation of Pakistan vs. Aitzaz Ahsan, PLD 1989 SC 61]

(4) The parallel The Telecom Regulatory Authority of India Act, 1997 (the "Indian Telecom Act"), sets up an independent Telecom Disputes Settlement and Appellate Tribunal (the "Tribunal") (Section 14) whereunder the Chief Justice of India is consulted to the appointment of members of the Tribunal including from former Judges of the superior courts of India. The practical application of the doctrine of separation of powers can be best seen in the Indian telecom sector. In India, the Telecom Regulatory Authority of India, established under the Indian Telecom Act, in addition to regulating the telecommunication sector, recommends the grant or revocation of any telecommunication license to the Central Government/Telegraph Authority. The Central Government/Telegraph Authority, pursuant to the Indian Telegraph Act, 1885, possesses the exclusive power to grant or revoke the telecommunication licenses. Any person aggrieved by the order of (a) the Central Government/Telegraph Authority refusing to grant or revoking the telecommunication license, or (b) the Telecom Regulatory Authority of India, can appeal to the Tribunal.

14, The judicially-approved doctrine of promissory estoppel is pleaded based on the subsequent conduct of the Authority after the License and the delayed timing of the Show Cause Notice.

(1) Doctrine of Promissory Estoppel

If on the basis of representation made, any third party bona fide and legally enters into any transaction, contract or deal which gives rise to right and liabilities enforceable at law, then a vested right is created and the benefits or concessions arising from the representation made cannot be suddenly and abruptly withdrawn.

(2) Reliance

(a) Supreme Court

Al-Samrez Enterprise vs. The Federation of Pakistan, 1986 SCMR 1917; Pakistan vs. Salahuddin, PLD 1991 SC 546; Army Welfare Sugar Mills Limited vs. Federation of Pakistan, 1992 SCMR 1652; and Gadoon Textile Mills vs. WAPDA, 1997 SCMR 641.

(b) High Courts

Shadman Cotton Mills vs. Federation of Pakistan, 2001 CLC 385 (Lahore); and Lucky Cement Limited vs. Central Board of Revenue, PLD 2001 Peshawar 7.

(c) Indian Supreme Court

Union of India vs. Anglo Afghan Agencies, AIR 1968 SC 718; and Motilal Padampat Sugar Mills vs. State of Uttar Pradesh, AIR 1979 SC 621.

(d) English Cases

Council of Civil Services Union vs. Minister of State, [1984] 3 All ELR 935; and R vs. Secretary of State for the Home Department, [1985] 1 All ELR 40

15. Trans World has substantially complied (the doctrine of substantial compliance has also been approved by the superior courts of Pakistan) with all the requirements of the Act and the License.

- (1) Copies of agreements were provided to Authority
- (2) The Authority was duly informed of the agreements
- (3) No objections were raised and no action was taken for several years
- (4) Doctrine of substantial compliance:

The principle of 'substantive compliance', particularly with regard to the requirement of statutory rules, has been accepted by the Superior Courts of Pakistan. The Pakistani Superior Courts while insisting on compliance with the statutory rules in accordance with their provisions as also the parent laws; have also by and large accepted the rule of 'substantial compliance' with a view to see that they are not applied and operated as "stumbling blocks", instead of "stepping stones". They should also not be used simply to trap people by technicalities of these Rules instead of advancing the purpose for which they are framed. The distinction has to be made between one type of rules and others, for example, even the rules relating procedure could be divided into those relating to Court proceedings or the proceedings before other forums including quasi-judicial, and those relating to other matters. It would depend upon circumstances of each case; whether or not the relevant rule deals with an ordinary subject or a specific question of public policy. When dealing with matters of public policy, it would also have to be seen whether the law required compliance with the rules or made it essential also as a matter of public policy, (at p. 227) (Nishat Mills Limited vs. Superintendent of Central Excise, PLD 1989 Supreme Court 222).

16. The requirements in the License for the filing of agreements within a prescribed time are merely "directory" and not "mandatory".

17. There were no "grave or persistent" violations by Trans World under the Act or the License. The remedy of "suspension" is available to the Authority only in exceptional circumstances which are not present in this matter.

- (1) The relevant provisions are Section 23 of the Act, Rule 9, Rule 7 and Annexure B and Clause 5 of Annexure B. Clause 8.2 of Annexure B provides when licensee is not liable.
- (2) "Grave or Persistent" Violations

(3). Indian Law

- (a) The ability to recommend revocation is included in suo moto powers of Authority (Section 11).
- (c) Authority in India (Section 3) is separate from Licensor (Central Government or telegraph authority);
(Section 1(ea)) and from the Appellate Tribunal (Section 14)

(3) U.K. Law

Communication Act, 2003 establishes Ofcom which can suspend licenses only on "serious" and "repeated" contraventions (Section 100).

(4) Trans World Compliance with License

(a) Compliance with (Clauses 1, 3, 4, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29).

b) Dispute re Compliance (Clauses 2, 5, 6, 7, 9, 25).

(1) Above bona fide disputes cannot be "grave" and "persistent" violations.

D. Prayer

It is respectfully prayed that the Authority withdraw the Show Cause Notice and provide such other relief to Trans World as the Authority may deem fit and just in the circumstances.

Annexure A to Reply to Show Cause Notice dated 22 June 2002 Principles of Interpretation of Statutes

The Supreme Court of Pakistan, in Reference By President of Pakistan under Article 162 of the Constitution of Islamic Republic of Pakistan, PLD 1957 SC 219, relied on the following principles of interpretation:

(1) *The first object of the Court is to discover the intention of the author, and such intention is to be gathered from the words used in the statute.*

(2) *The second rule is that the intention of the legislature in enacting a statute ought to be derived from a consideration of the whole enactment in order to arrive at a consistent plan. It is wrong to start with some prior idea of that intention and to try by construction to wedge it into the words of the statute.*

(3) *The third rule is that a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made.*

(4) *The fourth rule is that whenever there is a particular enactment and a general enactment in the same statute, and the later, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other part of the statute to which it may properly apply.*

(5) *The fundamental principle of constitutional construction has always been to give effect to the intent of the framers of the organic law and the people adopting it.*

(6) *Another elementary rule of construction of constitutional instruments is that effect should be given to every part and every word of the constitution. Hence as a general rule, the Courts should avoid a construction which renders any provision meaningless or inoperative and must lean in favour of a construction which will render every word operative rather than one which may make some words idle and nugatory.*

(7) *The next rule in construing a constitutional provision is that it is the duty of the Courts to have recourse to the whole instrument, if necessary, to ascertain the true intent and meaning of any particular provision. The best mode of ascertaining the meaning affixed to any word or sentence by a deliberative body is by comparing it with the words and sentences with which it stands connected, and a constitutional provision or a phrase to a constitutional provision must be read in connection with the context. Noscitur a Sociis is the rule of construction applied to all written instruments. Therefore, particular phrases of a constitution must be construed with regard to the remainder of the instrument and to the express intent of the constitutional convention in adopting it.*

If there be any apparent repugnancy between different provisions, the Court should harmonize them if possible. The rule of construction of constitutional law requires that two sections be so construed, if possible as not to create a repugnancy, but that both be allowed to stand, and that effect be given to each.

It is a cardinal principle of interpretation of statutes that the interpretation must clearly advance the objects and each provision must be read in the overall context of such objects. In this regard, Crawford on Statutory Construction (1940 ed.) asserts:

...when construing a statute, the reason for its enactment should be kept in mind, and the statute should be construed with reference to its intended scope and purpose. The court should seek to carry out this purpose rather than to defeat it. Of course, if the language is unambiguous and the statute's meaning is clear, the statute must be accorded the expressed meaning without deviation, since any departure would constitute an invasion of the province of the legislature by the judiciary. And even where the statute is ambiguous, considerable caution should be exercised by the court lest its opinion be substituted for the intent of the legislature. In other words, the court must not ascribe to the lawmakers a purpose not actually that of the legislature. To do so would result in ascribing to the statute a different intent than that of the legislature, at pp. 249-250.

Interpretation must also advance the legislative intent evident from the contextual examination of the entire Act. In support of this, Crawford on Statutory Construction (1940 ed.) states:

...a statute should be construed as a whole because it is not to be presumed that the legislature has used any useless words, and because it is a dangerous practice to base the construction upon only a part of it, since one portion may be qualified by other portions. In addition to being subject to qualification, words are not always used accurately by the legislature. The thought conveyed by the statute in its entirety may reveal the inaccurate use. Hence, the court should, when it seeks the legislative intent, construe all of the constituent parts of the statute together, and seek to ascertain the legislative intention from the whole act, considering every provision thereof in the light of the general purpose and object of the act itself, and endeavoring to make every part effective, harmonious and sensible, at pp. 260-261.

Other recent guidelines:

(1) The fundamental principle of construction is that the word used in a Statute must be understood in their ordinary grammatical sense. This will, however, not prevent the Court to depart from the ordinary grammatical meaning of a word, if it appears from the context or a consideration of the other provisions of the Statute that it was not the intention of the Legislature to give it another meaning... Similarly, if the ordinary grammatical meaning of a word results in creating absurdity or anomaly or rendering the legislation to no effect, then narrower or broader meaning may be given to the word or it may be construed in such a way as to obviate the absurdity or anomaly on the principle that it could not have been the intention of the Legislature to create absurdity or anomaly or to render its enactment of no effect. The Courts are not slaves of words, but their masters, Dr. Anjum Syed vs. Federal Public Service Commission, 2005 PLC (C.S) 138, at 143 and 145 (Lahore High Court).

(2). It is a basic and fundamental principle of interpretation of statutes that where a situation is specifically dealt with by a provision of law then any general provision relating to the same subject would not be attracted in cases specifically catered for, Federal Bank for Cooperatives. Islamabad vs. Ehsan Muhammad, 2004 SCMR 130, at 134 and 135.

(3). Nothing could be added to a statute to re-write the same because it would be a plain violence to the enactment and against accepted the principles of interpretation, Messrs Crescent Jute Products Limited vs. Government of the Punjab, Agriculture Department PLD 2004, at 708

(Lahore High Court).

(4). It is now well-settled that where primary construction defeats manifest purpose of a statute, leads to unjust results, absurdity, repugnancy, inconsistency or manifest contradiction departure from the plain or primary meaning is permitted, Messrs Gharibwal Cement Limited vs. Secretary Revenue Division. Islamabad. 2003 PTD 2872, at 2883 (Federal Tax Ombudsman).

(5). A statutory rule cannot enlarge the scope of the section under which it is framed and if a rule goes beyond what the section contemplates, the rule must yield to the statute. The authority of executive to make rules and regulations in order to effectuate the intention and policy of the Legislature must be exercised within the limits of mandate given to the rule making authority and the rules framed under an enactment must be consistent with the provisions of said enactment. The rules, which are inconsistent with the provisions of the statute, shall be invalid. The rule-making authority cannot clothe itself with power which is not given to it under the statute and thus the rules made under a statute, neither enlarge the scope of the Act nor can go beyond the Act and must not be in conflict with the provisions of statute or repugnant to any other law in force, Pakistan through Secretary Finance, Islamabad and 5 others vs. Aryan Petro Chemical Industries (Private) Limited, Peshawar and others. 2003 PTD 505, at 523 (Supreme Court).

(6). The elementary rule of interpreting the provisions of the Constitution is to give effect to every part and every word of the Constitution. The Courts have to reconcile Constitutional provisions harmoniously, instead of pointing out inconsistencies and contradictions between the different provisions. The Courts have to avoid interpretation which renders any article meaningless or inoperative and should construe the provisions in a manner which renders every word operative rather than leaning in favour of one which may render some words idle and inoperative, Muhammad Akram and others vs. Selection Committee for Admission in First Years M.B.B.S., Bolan Medical College 2003 CLC 18, at 29 (Quetta).

(7). The piece of legislation having an overriding effect has to be interpreted in the light of phraseology and the language used by the Legislature, Pakistan vs. Fecto Belarus Tractors Limited. PLD 2002 SC 208, at 226.

(8). One of the fundamental principles of interpretation of statutes is the principle of equitable construction. It mandates that in construction of law both the purpose and the spirit of the law should be kept in view, Umar Ahmad Ghumman vs. Government of Pakistan. PLD 2002 Lahore 521, at 548.

(9). Legislative intent can be discovered from parliamentary debates, Umar Ahmad Ghumman vs. Government of Pakistan. PLD 2002 Lahore 521, at 549.

(10). Under the principles of interpretation of statutes, it is one of the recognized method to discern and ascertain the purport of legislation by comparing different provisions of the same statute or analogous provisions contained in different statutes. If on comparison of different provisions contained in a statute it is found that different expressions have been used then it shall be inferred that the provisions of law convey the different intentions, Salahuddin vs. Federation of Pakistan. 2002 CLC 1275, at 1292 (Karachi).

(11). The principle of construction of statutes always drew upon first on the express language of the statute, next the context, then the subject and purposes and last of all on the policy. If the

express language presents no difficulty in interpretation resort cannot be had to the context, Naseem Ahmed Khan vs. Messrs MA Avesha Memorial Centre, 2001 PLC 39, at 42 (Sindh Labour Appellate Tribunal).

(12). *While interpreting a statutory provision, the intention of the Legislature is to be ascertained in view of the phraseology used therein. If the intention of the Legislature is conveyed clearly by plain words, the same should not be by-passed by twisting the law in derogation to the well-settled principles of interpretation, The State vs. Mirza Javed Iqbal and others, 2001 P.Cr.L.J. 1257, at 1271 (Supreme Court (AJ&K)).*

(13). *As a general rule, a statute is understood to be directory when it contains matter merely of direction, but it is mandatory when those directions are followed by an express provision that in default of following then the effect shall be null and void, Maulana Nur-ul-Haq vs. Ibrahim Khalil, 2000 SCMR 1305, at 1307.*

(14). *While interpreting Constitutional provisions, the Courts should keep in mind, social setting of the country, growing requirements of the social/nation, burning problems of the day and the complex issues faced by people, which the Legislature in its wisdom through legislation seeks to solve. The Judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid, Messrs Elahi Cotton Mills Limited and others vs. Federation of Pakistan, PLD 1997 SC 582, at 586.*

(15). ***If two sections in one Act of Parliament are in conflict with each other the person seeking to find their meaning should first look to the nature of each of those sections. If one makes a general provision on the matter and the other deals with the matter specifically, the specific section will prevail over the general one: S.M Zafar, Understanding Statutes: Canons of Interpretation, at 76 (1997).***

(16). *In case the conflict is one in which both the sections are general sections or both are specific sections, and if it is impossible to reconcile the two sections, the section which appears later in the Act prevails over the earlier section. S. M. Zafa, supra, at 76-77.*

Annexure B to Reply to Show Cause Notice dated 22 June 2002

Principles of Interpretation of Documents (License)

The superior courts of Pakistan have laid down the following principles of interpretation of documents:

(1) *It is a fundamental principle of interpretation of documents and statutes that they are interpreted in their entire context following a full consideration of all provisions of the document or statute, as the case may be. Every attempt is to be made to save the document. In Allah Baksh vs. Muhammed Ishaque, PLD 1984 SC 47, the Supreme Court ruled:*

An elementary principle applicable to all cases of interpretation of documents is to read the document as a whole, to differentiate between the general statements and particular statements contained therein and to exert and attempt to save the document rather than destroy or nullify it (at page 53).

(2) *In order to arrive at a decision as to the nature and scope of an agreement between the parties, it should be construed strictly carefully keeping in view the purpose for*

which the same was executed, Societe Genrale De Surveillance S. A. vs. Pakistan, 2002 SCMR 1694 at page 1722.

(3) It is a well settled principle of construction of documents that no provision of the document has to be read in isolation or in bits and pieces but the entire document has to be read as a whole to gather the intention of the parties, M/s Pakistan State Oil Company Limited vs. Muhammad Tahir Khan and others, PLD 2001 SC 980 at page 1007.

(4) It is well settled proposition of law that in case of ambiguity in a contract document, the Court in order to resolve it and to ascertain the real intention of the parties, can have resort to the correspondence preceding and/or subsequent to the execution of the contract document, conduct of the parties and the attending circumstances, Sandoz Limited vs. Federation of Pakistan and others, 1995 SCMR 1431 at page 1447.

(5) In construing the deeds, the words are to be taken in their literal, plain and ordinary meaning. Where the plain and ordinary meaning may lead to inconsistency with other expressions used in the document or absurdity then such plain and ordinary meaning can be modified to avoid absurdity and inconsistency because the law favours to save a deed, if possible. In order to avoid inconsistency and absurdity resulting from plain and ordinary construction the Courts are always anxious to adopt a reasonable construction by which the intention of the parties can be spelt out, House Building Finance Corporation vs. Shahinshah Humayun Corporative House Building Society and others, 1992 SCMR 19 at page 29.

(6) ... a court will lean to an interpretation which will effectuate rather than one which will invalidate an instrument, Ghazanfar Hussain vs. Rehmat Bibi, 1989 CLC 310 (Supreme Court AJ&K), at page 320.

(7) In order to interpret an agreement, it is necessary to see the intention of the parties as can be gathered from the circumstances leading to the agreement itself and the words of various clauses used therein, Habib Bank Limited vs. Malik Atta Muhammad, 2000 CLC 451 (Lahore High Court), at page 459.

(8) Where the plain and ordinary meaning may lead to inconsistency with other expressions used in the document or absurdity then such plain and ordinary meaning can be modified to avoid absurdity and inconsistency, because the law favours to save a deed, if possible. Courts are always anxious to adopt a reasonable construction by which the intention of the parties can be spelt out. Followed 1992 SCMR 19: Haii Adam Ali Aearia vs. Asif Hussain and 2 others, 1996 MLD 322 (High Court of Sindh), at page 328.

(9) Every contract is to be construed with reference to its object and the whole of its terms — Whole content must be considered in endeavoring to collect the intention of an isolated clause — Sense and meaning of the parties in any particular part of instrument may be collected ex antecedentibus et consequentibus fit optima interpretation (every part of document may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done), Mst. Iqbal Begum vs. Abdul Ghaffar, 1995 CLC 105 (Lahore), at page 108..

(10) Court, in the construction of all documents, should not confine itself to the force of particular expression, but to collect the intention of parties from the whole instrument taken together but, whereby use of general words such intention was clearly and unequivocally expressed, Court would be bound by it, however capricious it may be, unless it be plainly

controlled by other parts of the instrument, Mst. Iqbal Begum vs. Abdul Ghaffar, supra. at page 108.

(11) When words in operative part of any instrument were ambiguous, recitals could be used as a test to discover the intention of parties and to fix the true meaning of those words — Clear words in the operative part of an instrument, however, cannot be controlled by recitals, Mst. Iqbal Begum vs. Abdul Ghaffar, supra. at page 108.

(12) It is an elementary principle of construction of documents and pleadings that one has to examine the entire document and then come to the conclusion, Saeed Mahmood vs. Halima Bai, 1990 MLD 1789 (Karachi) at page 1791.

(13) It is the substance of the document and the real intention of the parties rather than the form and the use of any particular phraseology in the document which is to be looked into Najmul Hassan Farooqui vs. Messrs. United Carpets Limited, 1990 ALD 412, at page 413, and Fariduddin vs. Syed Wasif Ali, 1988 CLC 1827, at page 1832 (Karachi).

(14) When special provision has been made on a subject and there is also a general provision susceptible of covering the same field and the matter was covered by both the provisions, the presumption would be that general provision is not intended to interfere with operation of special provision and the case would have to be dealt with under the latter provision (see, generally, United Bank Limited vs. Jameela Mumtaz, 2010 SCMR 229)”

3. Findings of the Authority:

(i). The allegation of establishing multipoints for provision of capacity to licensed operators is not established as per the reports of the concerned Divisions of the Authority. However, the licensee failed to provide the copies of interconnection agreements and extension of connection agreement within the specified period. The justifications extended by the licensee in this regard are not acceptable.

(ii). The argument of the licensee that Show Cause Notice is barred under Section 4 of the Act which requires a “complaint” as a condition precedent is misconceived and is against the law, hence, is not acceptable. Section 23 of the Act provides that the Authority can impose any of the penalties in case of violation of the provisions of the Act, the rules/ and license conditions.

(iii). The argument that the provision of Section 23 of the Act are to be read with and subject to the paramountancy of the “functions” of the Authority under Section 4 is misconceived. Section 23 of the Act is a separate section which provides powers to the Authority to enforce the provisions of the Act, the rules and the license conditions.

(iv). The argument that the Show Cause Notice is not in compliance with the Rules is misconceived, hence, not accepted.

(v). There is no denial that the provision of the license are to be interpreted in accordance with the principles of interpretation of documents laid down by the superior courts and the principles of interpretation of statutes, but in the instant case there is no contradiction or ambiguity in the terms and conditions of the license. The terms and conditions are very much clear about the scope, extent and limits of the license.

(vi). The argument that clause 9 of the license shall prevail over any alleged inconsistency with any earlier clause of the license is also misconceived. There is no inconsistency with earlier clauses of the license.

(vii). The argument that Clauses 5 and 9 of the license are special clauses and shall prevail over the general clauses of the license is also misconceived. Clause 5 and 9 of the license do not provide for any special thing or object rather they allow rights to the licensee for interconnection and extension of connections while exercising its rights granted under the license and for the purposes of the license.

(viii). There is no vagueness or inconsistency in the provisions of the license, therefore, the argument of applying doctrine of “contra proferentum” is irrelevant to the subject.

(ix). The argument of the licensee that “*license grants to Trans World two basic rights (a) to set up a landing station under Clause 3(2) and 3(5)(a), and (b) sell/provide capacity/bandwidth to the licensed operators and “persons” allowed by the Authority and to undertake interconnection and extension of connection services under Clauses 5 and 9. Each of these rights are separate and “stand-alones”. The requirement of the 15 miles coastal radius applies only to the geographical location of the landing station*” is misinterpreted by the licensee. To set up landing station and provisions of services are not separate, distinct or stand alone rights rather are inter-dependable to each other. Any of such rights cannot be imagined to be exercised or executed independently without the existence of other. The scope of the license is crystal clear and provides that “*a non-exclusive license to establish, maintain and operate a private fiber optic submarine cable landing station in Pakistan situated within fifteen miles of the coastal boundaries of Pakistan. This grant is subject to the terms and conditions contained in the license, the provisions of the Pakistan Telecommunications (Re-organization) Act, 1996 and all rules and regulations made thereunder, any treaties or conventions relating to communications/telecommunications to which Pakistan is or may hereafter become a party; any action by the Authority or the Federal Government rescinding, changing or amending any rights accruing to any person hereunder and changes or modifications including new enactments as may be considered necessary from time to time*” and the terms and conditions set in the license and referred in para 1.5 to 1.12, above, clearly spell out its jurisdiction and area of exercise and

the requirements to be completed by it for violation thereof action under section 23 of the Act has been initiated.

(x). It is undisputed that the license grants important economic rights to the licensee under Article 18, 23 and 25 of the Constitution which guaranteed the enjoyment of rights of property, equality and non-discrimination. However, the licensee has not substantiated the nature of rights available to it under the Foreign Private Investment (Promotion and Protection) Act, 1976 which the Authority has to protect under the license. In the instant case, since, the licensee has violated certain provisions of the license for which action under section 23 of the Act, has been initiated, therefore, in such circumstances Articles 18, 23 and 25 of the Constitution do not bar the Authority for enforcing the provisions of the Act, the rules made thereunder of the terms and conditions of the license.

(xi). The argument of the licensee that *“the provisions of the Act, particularly the powers and the regulatory functions of the Authority, are inconsistent with the requirements of the Constitution with respect to the separation of powers and well-accepted principles of rule of law and natural justice and are, accordingly, void to that extent”* is not within the domain of the Authority to decide, hence, is irrelevant to the subject proceedings. However, the Authority has been performing its functions and exercising the powers given by the act of Parliament “the Pakistan Telecommunication (Re-organization) Act, 1996, therefore, the licensee has to comply with the provisions of the Act, the rules/regulations, directions of the Authority and the terms and conditions of the license and in case of failure proceedings under section 23 of the Act can be initiated.

(xii). The legislations and the case law mentioned and relied by the licensee in response to the show cause notice is distinguishable and seems irrelevant to the instant proceedings rather provides insight on laws such as Companies Act, 1913, Company ordinance, 1984, SECP, 1997, MRTPO, 1970 and Competition Act, 2010, etc without co-relating them to the instant proceedings. The Authority has been granted powers under section 5 of the Act to enforce license conditions by exercising powers under section 23 of the Act. The Authority can with or without information about violations of the Act, the rules or license condition can initiate actions under section 23 of the Act, which itself is of inquiry nature. If licensee satisfies the Authority, no penalty is imposed, however, if it failed to satisfy any of the penalties given in section 23 of the Act can be imposed by recording reasons.

(xiii). The procedure of complaints provided in regulations is not applicable in the instant case on the ground that the complaints/claim mentioned in regulations is received either from licensees or consumers, but in the instant case the Authority has investigated the matter to ensure compliance of the terms and conditions of the license granted by it and upon confirmation that it has violated license conditions, the Authority has initiated actions under section 23 of the Act.

(xiv). As the licensee has not provided the required information earlier, hence, made the Authority unable to take corrective measure earlier. Moreover, the information was obtained during investigation which revealed that the licensee has entered into Interconnect Agreement and extension of connection agreements without approval and notification to the Authority. In addition, show cause notice was not delayed. The Authority has thoroughly investigated the matter and when it reached to the conclusion that certain violations have been committed by the licensee the Authority initiated action under section 23 of the Act, therefore, the doctrine of promissory estoppel is not attracted.

(xv). The licensee was required to provide copies of interconnection agreements and extension of connection agreements within thirty days, but it failed to comply with this requirement. The argument of the licensee that it has already provided such information, hence, no violation existed is not based on correct information.

(xvi). Since the licensee has apologized for delay in submitting the copies of Interconnection Agreements, therefore, the Authority through this determination directs that in future, the licensee shall submit to the Authority all its new Interconnect agreements with LL and LDI operators within the specified period provided in the license and applicable rules/regulations for approval of the Authority and will not delay the same. In addition, the licensee cannot provide any bandwidth to a customer without involving LL and LDI licensed operator and there should be no violation of the license conditions.

4. Order of the Authority:

Keeping in view the above mentioned facts coupled with the available record, the Authority has considered the submissions of the licensee and took a lenient view for this time and decided to dispose of the show cause notice dated 1st February, 2010 in the following terms:

(a). the licensee is WARNED not to repeat the aforesaid contravention in future and sell the capacity as per the clause 3(6) of TWA License , otherwise a strict legal action shall be taken against it under the provisions of the Pakistan Telecommunication (Re-organization) Act, 1996.

(Dr. Khawar Siddique Khokhar)
Member (Technical)

(Dr. Mohammad Yaseen)
Chairman

Signed on 3rd of June, 2011 and comprises of 29 pages