



PAKISTAN TELECOMMUNICATION AUTHORITY
HEADQUARTERS, F-5/1 ISLAMABAD

<http://www.pta.gov.pk>

Re:

Pakistan Mobile Telecommunication Limited (Ufone)

Enforcement Order/Determination under Section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 on the issue of Annual Spectrum Administrative Fee

File No.PTA/Finance/Mobile/Ufone 17/2006

Date of Issuance of Show-cause Notice:	27 th October, 2008
Date of Hearing:	24 th December, 2008
Venue of Hearing:	PTA HQs, Islamabad

The Authority present:

Dr. Muhammad Yaseen:	Chairman
S. Nasrul Karim A Ghaznavi:	Member (Finance)

The Issue:

“Non-payment of Annual Spectrum Administrative Fee of Rs.198,257,314/- for the years 2006 to 2008 and late payment charges of Rs.3,838,757/- on account of late payment of Annual Royalty / Licence Fee for the year 2007”

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 27th October, 2008 (the “Notice”) issued to M/s Pakistan Telecommunication Mobile Limited (*Ufone*) (the “licensee”) under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the “Act”) on the issue of non-payment of annual spectrum administration fee (“ASAF”) for the years 2006, 2007 and 2008 amounting to Rs.198,257,314/-, including late payment charges and Rs.3,838,757/- as late payment charges on account of late payment of annual licence fee for the year 2007, both amounting to Rs.202,096,071/- (both hereinafter to be referred to collectively as the “Outstanding Amount”).
- 1.2. For easy understanding of the issue in hand, the reasons that led to issuance of the Notice, the licensee’s reply and our powers to issue show cause Notice and its disposal

through the instant enforcement order, provisions of the relevant laws with the relevant terms and conditions of the licensee's licence No.PTA/CMT(4)PTML dated August, 1998 (the "licence") are reproduced below:

Section 8 of the Act empowering the Fed. Govt. to issue policy directives and the Authority's obligation to implement it (relevant portion):

Powers of the Federal Government to issue policy directives.—(1) *The Federal Government may, as and when it considers necessary, issue policy directives to the Authority, not inconsistent with the provisions of the Act, on the matters relating to telecommunication policy referred to in sub-section (2), and the Authority shall comply with such directives.*
[Emphasis added]

Section 23 of the Act empowering the Authority to issue show cause Notice and pass an enforcement order:

Issue of enforcement orders and penalties.—(1) *Where a licensee contravenes any provision of this Act or the rules made thereunder or any term or condition of the licence, 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*
 - (a) *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 licence, 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 licence 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.

Clause 2.4 of the licence relating to charges for use of frequency spectrum:

“The licensee shall also pay the charges for the use of frequency spectrum and fee for the possession of wireless telegraphy apparatus as approved by the Board”

1.3. The licensee, which is a cellular mobile telephone service provider under the licence, was repeatedly required and instructed vide letters dated 4th September, 2007, 26th October, 2007, 7th November, 2007, 6th December, 2007, 27th December, 2007, 9th January, 2008, 25th January, 2008, 9th May, 2008, 14th May, 2008, 16th June, 2008, 5th August, 2008, 21st August, 2008 and, finally, vide letter dated 10th September, 2008 to make payment of the Outstanding Amount but all in vain. This act of non-payment of the Outstanding Amount by the licensee, as per our understanding, was in contravention of the terms and conditions of the licence read with the provisions of the Regulations quoted above. Hence, issuance of the Notice under section 23 of the Act, reproduced above, requiring it to remedy the contravention by making payment of the Outstanding Amount within seven days and also to explain in writing within 30 days of the issuance of the Notice as to why the licence should not be suspended, terminated or any other enforcement order should not be passed against it under section 23 of the Act.

1.4. The licensee replied to the Notice through its counsel M/s Aqlaal, Advocates & Corporate Counsel vide its letter of 3rd November, 2008 (the “Reply”) which is reproduced with prayer as under:

“1. Demand relating to Annual Spectrum Administrative Fee

i) Nature of ASAF

Annual Spectrum Administrative Fee ("ASAF") was first postulated under the Mobile Cellular Policy dated 28 January 2004 (the "Policy"). The Policy was issued by the Government of Pakistan pursuant to Section 8 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the "Act"). The demand of Pakistan Telecommunication Authority ("PTA") regarding ASAF ("PTA's Demand") is premised on clause 4.4 of the Policy, which provides for charging of ASAF by the Frequency Allocation Board ("FAB").

Since clause 5.4 of the Policy provides the option of "opting-in" under the Policy for the existing licensees "... before the expiry of their existing License" and those existing licensees who chose not to "opt-in" despite incentives were to remain out of the purview of the Policy, as such it is clear that ASAF is applicable only on those operators who decide to come under the purview of the Policy.

ii) Direct Enforcement of the Policy

Neither Section 8 of the Act under which the Policy was issued nor any other provision of the Act enables direct enforcement of the Policy; rather, the Act stipulates regulation by PTA through rules, regulations and licenses. Where a statute stipulates that the relevant statutory authority will 'prescribe' or make rules and

regulations in relation to certain specific matters, such matters cannot be regulated or governed by policy directives alone. Judicial support for this position is ample. For instance, in the case titled 'Messrs Polyron Limited vs. Government of Pakistan and others', reported at PLD 1999 Karachi 238, a Division Bench of Karachi High Court declined to recognize a policy directive of the Government relating to the provisions of the Customs Act, 1969, when it was not followed by an "appropriate order or Notification... under the statutory powers".

Also, section 42(2) of the Act provides that "... [T]he Board shall be funded by funds provided by the Authority in the prescribed manner". It is plain that Section 42(2) of the Act envisages that the funds to FAB be provided by the Authority shall be determined by rules, because the word 'prescribed' is defined in Section 2(1) of the Act to mean '...prescribed by rules'. Neither the Pakistan Telecommunication Authority (Functions & Powers) Regulations 2006 (the "Regulations"), nor the Policy, fulfill the mandatory requirement of promulgation of 'rules' envisaged under Section 42(2), which should be issued by the Federal Government under Section 57 of the Act, and not by way of the Regulations made by PTA itself under Section 5(2)(o) of the Act.

iii) Levying ASAF Mid-stream

It may please be noted that any fee can only be levied (i) either by stipulation in the license itself, or (ii) by rules or regulations made under the Act. However, in this case neither the Ufone's license carries any obligation for the payment of ASAF nor do we find any provision in the Act or Rules enabling PTA to levy a fee not expressly provided in the Ufone License at the time of its original grant.

Further still, and more to the point, a plain reading of Regulation 23 (1) of the Regulations stipulates that all fees can be charged only at the time of grant or renewal of the license, and not otherwise. The Regulations also do not expressly mention ASAF. Clause 1.21 of Ufone's license stipulates that it is subject to the provisions of the Act and the rules and regulations made thereunder. However, neither the Act nor the Pakistan Telecommunication Rules 2000 (the "Rules") and the Regulations enable charging of any fee 'mid-stream' of the running term of a license.

iv) No Retrospective Effect of Statutes

As to the power granted to PTA under section 5 (2) (p) of the Act to levy fee and other charges, and without prejudice to Ufone's position on payment of ASAF, it may be noted that the said section was inserted through an amendment on 1 March 2006, while PTA's Demand relates partially to the period before the said amendment, with no provision of the Rules or the Regulations stipulating payment of ASAF for the pre-amendment period. Therefore, there is no legal basis for PTA's Demand for the period prior to the amendment of the Act on 1 March 2006.

As regards the PTA's Demand for the period after the above amendment in the Act, it is established law that statutes do not have retrospective effect. This principle is applied even more strictly where financial consequences are involved (see, for instance, the case of 'Hashwani Hotels vs. Federation of Pakistan', reported at PLD 1997 SC 315). The amendments to the Act cannot therefore be given retrospective effect to impose any fee, even

if it was contemplated under the Policy. Similarly, the Regulations too cannot have a retrospective effect.

v) Nature and Applicability of Appendix B of the Policy

Where the applicability of Appendix B of the Policy is concerned, kindly note that it provides a table based on assumption that all the then existing cellular operators would join the purview of the Policy and therefore shall be liable to pay ASAF. However, Ufone's position in this regard is distinct as Ufone is currently the only cellular operator that was granted a cellular license before the issuance of the Policy and did not avail the option provided in clause 5.4 of the Policy to 'opt in' under the Policy before the expiry of its existing license. As such, Appendix B or any part thereof is not applicable on Ufone.

2. Demand relating to Late Payment Charges On Account of Royalty/License Fee

On the matter of demand of payment of an amount of Rs.3,838,7577- as late payment charges on account of annual royalty/ license fee for the year 2007, kindly note that in line with past practice, Ufone made the payment of royalty/license fee as per the calculation provided by PTA to avoid any difference in the amount of royalty/license fee. As such, Ufone received PTA's demand letter no. PTA/Finance/Mobile/Ufone 17/2006 on 8 November 2007 and the payment was duly made on 20 November 2007 with a request to condone the delay in payment thereof.

PRAYER

In the circumstances, it is respectfully prayed that:

- i) the SCN may be withdrawn;*
- ii) the demand of late payment charges on account of annual royalty/ license fee may please be withdrawn and Ufone's request for condonation of delay in payment thereof may please be accepted;*
- iii) PTA's Demand for the payment of ASAF and associated late payment charges may please be withdrawn and Ufone's license may no longer be put in jeopardy of suspension or termination and no other enforcement order be issued against Ufone under section 23 of the Act in this regard; and*
- iv) in the event the SCN and the demand for payment of ASAF is not withdrawn, an opportunity of personal hearing may please be granted."*

2. The Hearing:

- 2.1 Since the licensee instead of remedying the contravention as was required through the Notice, made an attempt to justify its act of non-payment of the Outstanding Amount which justification could not satisfy us, we, not only allowing the licensee's prayer made at S.No.iv of the prayer in the Reply but also 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 24th December, 2008. Hence, today's hearing.

- 2.2 Syed Javed Akbar, Muhammad Ahmad Sheikh and Hafiz Muhammad Naeem Ashraf of *Aqlaal, Advocates & Corporate Counsel* alongwith Mr. Hamid Hassan Butt (GM), Mr. Nadeem Khan (CFO), Syed Muhammad Irfan (CS) and Mr. Yaser Aman Khan (Manager Legal & Corporate) appeared on behalf of the licensee.

3. The Licensee's Arguments:

- 3.1 The points formulated and argued by the learned counsel for the licensee are summarized below:

- i. The Notice is not maintainable under section 23 of the Act:

The learned counsel argued that the Notice cannot be issued under section 23 of the Act because there has been no contravention of the Act or the Rules framed under section 57 of the Act or any term and condition of the license.

- ii. ASAF cannot be legally recovered under Mobile Cellular Policy, 2004

The counsel next argued that in the entire correspondence prior to the Notice, the demand regarding ASAF from it with effect from the financial year ended 2004 is premised entirely on mobile cellular policy of the Federal Government of Pakistan dated 28.1.2004 (the "Policy") and argued that the demand is illegal and unlawful for the following amongst other reasons:

- a. that the Policy, which has been issued under section 8 of the Act, serves as a guideline to PTA itself and cannot be '*inconsistent with the provisions of the Act*'. The Act had no mention of ASAF on 28.1.2004, when the Policy was issued and that the term ASAF remains alien to the Act even after its amendments in March 2006 as mentioned hereinafter. Relying on this point, the counsel argued that the Policy is, therefore, inconsistent with the Act, hence, should not be implemented by the Authority.
- b. Referring to PLD 1999 Karachi 238 and 1992 SCMR 1652, the counsel argued that it is settled law that a policy can be given legal effect only through an appropriate order or notification issued under statutory powers.
- c. That there are no statutory powers under the Act allowing levy of ASAF. Consequently there is no subordinate legislation stipulating the procedure and manner for recovery of ASAF. The Policy cannot be enforced directly in absence of the said legislation.
- d. Drawing our attention to clause 10 of the Policy, the counsel argued that the Policy itself suggests that it is to be given effect through changes in the legal and regulatory framework. The said clause is reproduce below for ready reference:

"Appropriate changes in the legal and regulatory framework will be made expeditiously to support the Mobile Cellular Sector Policy. Changes may

result in amendments in Telecom Reorganization Act of 1996 and corresponding rules and regulations. Such changes shall be effected expeditiously after notification of the Policy”.

- e. It was further argued that the licensee, by not opting to get its license renewed under the Policy, got no conditions incorporated in its license corresponding to the Policy and the Policy is, therefore, not applicable to it on this score alone.
- f. Elaborating the aforementioned point, the counsel further said that mere mention of the licensee’s name (actually the mention of its trade name ‘Ufone’) and certain amount against the said name as its part of ASAF in appendix B of the Policy, does not follow that PTML has opted in for the Policy in terms of clause 5.4 of the Policy or otherwise and that ASAF can be levied on it. It was further submitted that the said appendix B was actually based on assumption that PTML would opt in for the Policy and would get its license renewed, which thing never came to pass.

iii. There is no legislation or subordinate legislation allowing recovery of ASAF.

The Notice was next assailed on the point that contrary to the stance taken earlier in the letters on the subject, it does not say that recovery of ASAF is premised on the Policy. It vaguely mentions clause 2.4 of the licence, section 5 (2) (p) of the Act and Regulation No.23 of the Regulations apparently as the bases for levy of ASAF.

The counsel termed the basis of the Notice as illegal and *ultra vires* for the following amongst other reasons:

- a. Under clause 2.4 of the licence, the licensee has to pay only fee for frequency spectrum and fee for possession of wireless telegraphy apparatus and that the licensee has been regularly paying the said fees since grant of the licence and that since the term ASAF is absolutely alien to the licence, clause 2.4 or any other clause of the licence cannot therefore be made basis for recovery of ASAF.
- b. Section 5 (2) (p) of the Act can not be made basis of for demanding ASAF as the same , which reads: “*levy fee and other charges at such rates and in respect of such services as may be fixed by it from time to time not exceeding the limits as specified by a Committee of the Cabinet*” and which was inserted through Pakistan Telecommunication (Re-organization) (Amendment) Act 2006 (hereinafter, the “Amending Act”), empowers PTA to levy fee in respect of such services as may be fixed by it but not exceeding the limits specified by the Committee of the Cabinet.

iv. ASAF cannot be levied under section 5 (2) (p) of the Act:

In support of the point formulated as above, the counsel made the following submissions;

- a) No fee can be levied without approval of the Federal Government granted through the Rules framed under section 57 of the Act. No such Rules have been framed till to date.
 - b) Before the levy of the said fee, the said subsection requires that a Committee of the Cabinet, constituted for the purpose, shall convene and specify the limits of such fee. There has been no such committee and no specification of limits. In fact the Cabinet is the Government, which can specify the said limits to be prescribed through Rules made under section 57 of the Act.
 - c) PTA cannot take place of the Committee of the Cabinet and the Policy or the Regulations cannot substitute the Rules or limits prescribed by such Committee.
- v. The Regulations can introduce and levy no fee including ASAF.

Questioning the legality of the Regulations and thus terming the demand for ASAF based on such Regulations as against the law, the following points were raised before us:

- a) That the Regulations have been framed under section 5 (2) (o) of the Act which could have been issued only for “*exercising its (PTA’s) powers and performance of its (PTA’s) functions*”, therefore, no fee or charges can be introduced and implemented through them. The Regulations, inasmuch as they empower PTA to charge and levy a fee not mentioned in the Act, are *ultra vires*.
 - b) That regulation 23 of the Regulations, although being *ultra vires* as aforesaid, mentions levying of fee only at the time of (a) grant and renewal of the licenses; and (b) any authorization granted under the Act. This Regulation is therefore irrelevant to the case of the licensee; and
 - c) That the Regulations have no mention of ASAF. The fee for use of radio frequency spectrum, mentioned in Regulation 23 (1) (c), by no stretch of imagination be termed as ASAF. The radio frequency spectrum fee is being regularly paid by the licensee under the terms of the licence but not under the Regulation.
- vi. ASAF can only be levied through modification of conditions of the licence under section 22 of the Act:

Modifying the terms and conditions of the licence as a pre-requisite was the other point raised by the learned counsel in support of which the following reasons were highlighted;

- a. ASAF is alien to terms and conditions of the licence and it cannot be levied unless the said terms and conditions are modified through the process given under section 22 of the Act;
- b. There has been no such modification. The levy of ASAF is therefore illegal;
- c. But it is pertinent to note that all the terms and conditions of the licence should have legislative backing contained in the Act and implemented through Rules framed under section 57 of the Act.
- vii. ASAF cannot be levied under section 42 of the Act:

The learned Counsel also objected to levying of ASAF under section 42 of the Act on the following grounds;

- i) Subsection 2 of section 42 of the Act provides that the Frequency Allocation Board (hereinafter, "FAB") shall be funded by the funds provided by PTA "*in the prescribed manner*".
- ii) Under section 2 (1) of the Act 'prescribed' means "*prescribed by rules made under this Act*".
- iii) As aforesaid, there are no Rules in the field to prescribe the manner of provision of funds by PTA to FAB.
- iv) The aforesaid provision of law was there at the time of grant of the License in 1998, but no corresponding fee specifically relating to the funds mentioned in subsection 2 of section 42 of the Act was levied in the License because there were no Rules to that effect.
- v) PTA has therefore no basis for recovering the said funds from the licensee. The amount already being recovered as fee for radio frequency spectrum may be allocated to meet the said funds but that too under the Rules to be framed by the Government under section 57 of the Act.
- viii. Section 21 of the Act

Referring to section 21 of the Act, the learned counsel submitted that it exclusively deals with the terms and conditions of the licenses and that its subsection (4) (b) stipulates that the provision for fees in the licenses is conditioned with '*grant or renewal*' of the licenses. PTA cannot therefore levy a fee including ASAF not expressly provided in the License at the time of its original grant and likewise, there has been no occasion for renewal of the licence ASAF cannot, therefore, be levied midstream.

- ix. Swap-over of Radio Spectrum Frequencies cannot be made a basis to charge ASAF.

The learned counsel next formulated the above point and made his submissions as under:

- a. The licensee is entitled, under Article 5.3 of the License, to re-allocation of frequencies in GSM 1800/1900 MHz band if sufficient frequencies are not available in GSM 900 MHz band, originally granted to the licensee;
- b. The licensee has changed the frequency under its use twice: once to facilitate PTA when PTA was working towards the circumvention of interference between AMPS and GSM; and the second time, again at behest of PTA/FAB, to facilitate two new mobile operators pursuant to the Policy; and
- c. The said swap-over of frequencies was initiated by PTA/FAB and was in accordance with the terms and conditions of the License. The licensee has been regularly paying the charges for use of the said frequencies according to the terms of the License. The aforesaid swap-over cannot therefore be made a basis for levy of ASAF, which is an additional fee and is not warranted under the License.
- x. Late Payment Charges on Account of Royalty/License Fee:

On the second part of the Notice/the Outstanding Amount i.e. late payment fee on account of late payment of annual licence fee for the year 2007, the learned counsel submitted that in line with the past practice, the licensee made the payment of royalty/license fee per the calculation provided by PTA to avoid any difference in the amount of royalty/license fee and the licensee received PTA's demand in this behalf on 8.11.2007 and made the payment on 20.11.2007 with the request to condone the delay in the payment, which request is reiterated here.

4. Analysis of the arguments by the Authority:

4.1 On the points formulated by the licensee as above, we heard the learned counsel at length. Our analysis of the aforementioned points, in light of the relevant statutory provisions, licence terms and conditions and relevant policy directives is as under:

- i. Contents of the Notice unambiguously suggest that the same was issued for contravening clause 2.4 of the licence conditions. However, we did not find a single word in the Reply, which is now part of the record and also reproduced above, addressing the said allegation so specifically leveled. We would, therefore, be acting right under the law to assume that the licensee has conceded the Notice to this extent. Taking the said position a little further, arguing the matter on clause 2.4 of the licence was beyond the learned counsel's scope of arguments and we are under no obligation to consider arguments on the points not addressed in the Reply.
- ii. Without prejudice to the foregoing fact on record and law on the subject, our invoking of section 23 of the Act on the basis of contravention of clause 2.4 of the

licence and all the points raised/argued today before us shall be fully addressed to make the instant order of ours a speaking one.

- iii. At the cost of repetition of the contents of the Notice, it is stated that clause 2.4 of the licence clearly require that the licensee shall also pay charges for the use of frequency spectrum and at the time of issuing the Notice, we had the clear understanding that the licensee is not complying the said condition. It is very explicitly mentioned in the Notice that the Notice is being issued for contravention of clause 2.4 of the licence. Hence, the argument that the Notice is not maintainable has no force and is, therefore, repelled. Now how the licensee is contravening the said licence clause, we will address this in the following paras.
- iv. In the Notice there is no mention of the Mobile Cellular Policy, 2004 or recovery of the Outstanding Amount under it. The Notice is very clear and specific. We fail to understand as to what led the learned counsel to resist payment of ASAF on the ground that it can not be recovered under the Policy. As mentioned above, the main ground of our demand is clause 2.4 of the licence and not the Policy. The arguments on this point being irrelevant, are not considered.
- v. Notwithstanding the foregoing, the learned counsel also argued that the Policy is inconsistent with the Act, therefore, can not be implemented. However, when confronted with the query as to whether the Authority established under section 3 of the Act has the domain and jurisdiction to declare the Policy as inconsistent and refuse to implement it as such, particularly keeping in view our binding obligation to implement it under section 8 of the Act, the learned counsel could not satisfy us.
- vi. In response to one of our queries, it was also argued that “Guidelines” and a “Policy” issued under section 8 of the Act are synonymous. We respectfully disagree to this understanding of the above two phrases. Guidelines are mere guiding principles on a certain issue which we may or may not adopt, or we may follow to a certain extent and leave to adopt rest of it. While in the case of a policy directive issued under section 8 of the Act, we have no choice but are under statutory obligation, under the said section, to give effect to it.
- vii. It is totally incorrect to suggest that the term ASAF is alien to the licence. As repeatedly mentioned above, under clause 2.4 of the licence, the licensee is required to pay charges/fee for the use of frequency spectrum and we have been requiring the licensee to pay nothing new or beyond the licence but a fee for the use of frequency spectrum already provided in the licence. It is probably title of the said fee i.e. ASAF which has confused the licensee as we agree that there is no mention of the term ASAF in the licence but it may hardly be of any difference/value to charge a certain fee provided for in the licence with or under a title not provided in the licence.

- viii. Regarding the licensee's submission that it has been complying with clause 2.4 of the licence by regularly paying fees/charges under it, this could be true to the extent of making payments but since the payment is not as per our demand based on the Federal Government's directive, we are not taking the same as payment of ASAF and, resultantly, compliance of clause 2.4 of the licence is not made out.
- ix. On January 02, 2006 the matter of payment of ASAF by two mobile operators/licensees, including the licensee was referred to the Federal Government for clarification vide letter No.15-26-MOB-04/FIN/PTA. Clarification regarding Mobilink was also sought as Mobilink's licence was also not renewed at that time and had the same status as that of the licensee. Responding to the said letter, the Federal Government very clearly instructed that payment of ASAF is not in any case a new issue and that the Policy ensures that the existing as well as new entrants pay the ASAF as laid down in clause 4.4 of the Policy. We were further directed by the Federal Government vide the said response that PTA may determine the bench mark of ASAF as per policy and set ASAF on non-discriminatory basis across the board for all cellular operators.
- x. It was, therefore, implementation of the above directives of the Federal Government regarding payment of ASAF by the licensee that we sought to enforce through our letters mentioned in para 1.3, above, and subsequently through the Notice.
- xi. Thus it goes without saying that after the Federal Government's clarification/directives communicated to us vide No.2-30/2003-DT dated 1st March, 2006 the only fee/charge which the licensee is liable to pay under clause 2.4 of the licence is ASAF as is being demanded from it through the Notice and the letters preceding it.
- xii. Since, it is made clear in the foregoing paras that ASAF is being demanded under clause 2.4 of the licence and the Notice was issued when the said clause/condition of the licence was contravened by the licensee and section 23 of the Act, as quoted above, give us the power to issue a show cause notice and proceed accordingly whenever any provision of the Act, the Rules or any terms and conditions of the licence is contravened by a licensee, we are not inclined to consider the learned counsel's arguments addressed on the rest of the points including section 5(2)(p) of the Act, the Regulations particularly regulation 23 of the Regulations, modification of the licence under section 21 of the Act, levying of ASAF through Rules under section 57 of the Act, swap over of radio spectrum frequency etc. all being not relevant.
- xiii. We are also unable to understand relevancy of section 42 of the Act to the issue in hand, as argued before us, as nowhere in the Notice or in any of our correspondence with the licensee on the subject matter, reference to the said section of the Act was made.

- xiv. Regarding second part of the Notice and the licensee's request for condonation of delay and waiver of late payment charges, it is admitted that the licensee had approached us for waiver of the late payment charges, however, the same request was never allowed. The same position is reiterated as the licensee has failed to establish exceptional circumstances responsible for the delayed payment justifying suspension of the relevant provisions of the Regulations for waiver of the late payment charges by us.
- xv. The upshot of the above discussion is that the licensee has not paid ASAF which it was required to pay under clause 2.4 of the licence from the years 2006, 2007 and 2008 alongwith the late payment charges accrued on it so far and the late payment charges for making late payment of annual licence fee for the year 2007.

5. Order of the Authority:

5.1. The licensee is, therefore, directed:

- (a). to pay an amount of **Rs.220,385,405/-** out of which Rs.217,986,635/- is Annual Spectrum Administrative Fee (ASAF) with late payment charges till March 2009 and Rs.2,398,770/- as late payment charges @ 2 % on annual license fee for the year ended June 30, 2007 within a period of thirty (30) days from the date of issuance of this order;

and

- (b). in case of the licensee's failure to comply with the aforementioned directions within the aforementioned time, the licence shall stand suspended and proceedings for termination of the licence shall be initiated.

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

(Dr. Mohammed Yaseen)
Chairman

Signed on 26th Mach, 2009 and comprises 13 pages.