



**Decision of the Pakistan Telecommunication Authority on “Inter-Operator”**

No: PTA/Finance/LDI/Link Direct International/159/2006/54.

Venue of Hearing: PTA HQs, Islamabad  
Date of Hearing: 24<sup>th</sup> December, 2020

**Panel of Hearing**

Maj. Gen. Amir Azeem Bajwa (R): Chairman  
Dr. Khawar Siddique Khokhar : Member (Compliance and Enforcement)  
Muhammad Naveed : Member (Finance)

Issue:

**“Non-deduction of amount paid to foreign carrier by LDI Operators”**

**1. Facts of the case:**

1.1 Precisely stated facts of the case are that Pakistan Telecommunication Authority (the “**Authority**”) in exercise of its powers conferred under section 5 read with section 20 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the “**Act**”) granted a Long Distance & International (LDI) license No.03(03)-2004 to LinkDotNet Telecom Limited, on 17<sup>th</sup> July, 2004 (the “**licensee**”). By virtue of the license, the licensee is authorized to provide licensed services in Pakistan and to establish, maintain and operate telecommunication system subject to the terms and conditions of the license.

1.2 As per license condition 3.1.3 of the license, the licensee is under obligation to comply with all orders, determinations, directions and decisions of the Authority. The licensee is also required to pay Annual Regulatory Dues (ARDs) as provided in license conditions 3.4.1, 3.6.1 and 4.1.2 (a) of the license that expressly provide parameters for calculation of ARDs. For ready reference the license condition 4.1.2(a) is reproduced below:

*“4.1.2 The licensee shall pay the following annual regulatory fees to the Authority:*

- a. Calculated on the basis of 0.5% (or such lesser amount as the Authority may, by regulations, determine) of the licensee’s annual gross revenue from Licensed Services for the most recently completed Financial Year of the Licensee minus inter-operator payments and related PTA/ FAB mandated payments. However, initial license fee and initial spectrum fee shall not be deducted from the gross revenue.*

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1.3 In accordance with the terms and conditions of the license and regulation 23 of the Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2006, all annual license fee / dues are required to be paid by the licensee. For the purpose of determination and authenticity of the dues, licensee is also required to submit annual audited account in accordance with license condition No. 4.2.4 of the license which provides as under:

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

1.4 While examining the financial statement for the year 2019 and relevant record submitted by the licensee, it has been found that the licensee has deducted amounts paid to the foreign carries claiming therein or considering as “**inter-operator**” payments as provided in license conditions 3.4.1, 3.6.1 and 4.1.2 (a). The Authority is of the view the payment made to “foreign carrier” does not fall within the ambit of the term “**inter-operator**” on the premise that “foreign carriers” are not licensee of the Authority, therefore allowable deduction as calculated by the licensee while submitting financial statement is not in consonance with the license terms and conditions. As a result thereof, the Authority issued provisional demand notes dated 23<sup>rd</sup> April, 2020 and 11<sup>th</sup> May, 2020 requiring therein to pay Annual Regulatory Dues for the year ended 31<sup>st</sup> December, 2019. Detail of outstanding dues with breakup is give as under:

Description	Principal	LPAF till 31 <sup>st</sup> July, 2021	Total
Annual License Fee	5,336,348	1,625,807	6,962,155
Research & Development Fund	5,336,348	1,625,807	6,962,155
Universal Service Fund	16,009,043	4,877,422	20,886,465
<b>Total</b>	<b>26,681,739</b>	<b>8,129,037</b>	<b>34,810,776</b>

1.5 Being aggrieved from demand notes issued by the Authority, the licensee under section 7 (1) of the Act filed F.A.O No. 67 of 2020 before the Honorable Islamabad High Court. The Honorable Islamabad High Court vide order dated 10<sup>th</sup> September, 2020 disposed of the matter in following terms:

*“5. Be that as it may, instant appeal is **DISPOSED OF** with the direction to respondent PTA to adjudicate upon the matter on primary question as to whether the foreign carries fall within the term “inter-operator” as provided in the license and any cost sustained by the appellant has to be considered as an allowable deduction, till then the respondent shall not take any coercive measure against the appellant for payment referred in the provisional demand note dated 23.04.2020 and 11.5.2020.”*



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## 2. Hearing before the Authority:

2.1 In respectful compliance of the court, the matter was fixed for hearing on 24<sup>th</sup> December, 2020. Mr. Mudassar Husain Vice President Jazz, Mr. Asif Raza, Manager Financial Reporting, Mr. Zulfiqar Ali, Manager Regulatory Affairs, Ms. Fariha Khan, Manager Litigation, Mr. Afnan Karim Kundi Advocate Supreme Court of Pakistan, and Barrister Adeel Aftab, Advocate High Court attended hearing on the said date before the Authority.

2.2 On behalf of the licensee, legal counsel submitted that the Authority's calculation for not allowing deduction of amount paid to foreign carries is not in line the applicable regulatory regime. In addition, the term "**inter-operator**" as provided in the license conditions does not postulate to restrict its scope only to the extent the licensee of Pakistan. Since the said term has not been defined neither in the license nor in any other regulatory instrument thus it is construed that the term "**inter-operator**" include foreign carries. Legal counsel also argued the nature of the license is LDI and by any means whatsoever the licensee has to make arrangement with the foreign carriers for termination of international traffic. Therefore, application of the term "**inter-operator**" excluding therefrom foreign carries is neither the intent nor the scope the said term. It is very much clear that the payment made to foreign carriers pursuant to LDI license is allowable deduction. In order to substantiate the above submission legal counsel referred and relied upon the following grounds:

- i. From the detailed grounds below, it would become evident that the impugned Provisional demand Notes have been issued in contravention of the provisions of the parent statute i.e, PTSA 1996 including, *inter-alia*, clauses (a), (b),(d), (h),(o) and (q) of section 5(2), section 6,8(2)(a), 9, 20(1) read with section 21(4), sub-section (1) and (2) of section 22,section 33A(b),33c(4)(b) and 57(in particular), clauses(ae) and (af) thereof.
- ii. Under clause 3.4.1, 3.6.1 and 4.1.2 of the license, the licensee is obligated to pay ARD under the head of ALF, R&D and USF at certain fixed percentages of the licensee's annual gross from the licensed services minus inter-operator payment and related PTA/FAB mandated payments.
- iii. The licensee is providing carriage, switching, routing and termination of the international telephony services to customers in and out of the country through respective Access Providers i.e., LL, WLL and CMOs after entering into interconnect agreements with them and further corresponding interconnect

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agreements with foreign operators in accordance with the provisions of the license, the PTR 1996, the Access Promotion Rules 2005 which together govern/regulate the origination, carrying and termination of the international telephony by LDIs.

- iv. Section 2(i) of PTR 1996 define "international telephony services" as under:  
*"International telephony service means any direct or in direct telecommunication service, whether or not in digital form, conveyed by any means between a point in Pakistan and a point in another country, other than radio/broadcasting or television broadcasting."*
- v. In the context of carriage, routing and termination of international calls from and into Pakistan, the licensee has invariably been incurring certain costs for providing and maintaining infrastructure for connectivity of international calls from foreign operator and *vice versa*, which the licensee is in variably entitled to recover besides certain margin within permissible range that is commercially viable.
- vi. These operator exchanged traffic and costs duly fall within the purview of 'inter-operator' payments liable to be deducted/ subtracted from Annual Gross Revenue (AGR) as per clauses 3.4.1, 3.6.1 and 4.1.2 of the licenses for the purpose of calculating the licensee's liability of paying ARD.
- vii. The above-mentioned position is duly accepted, adopted and practiced by the Authority and ever since the first award of LDI license to the appellant in the year 2004, it has remained the consistent long-held established practice and interpretation of the Authority of clauses 3.4.1, 3.6.1 and 4.1.2 of the licensee's licenses to allow deduction of these costs from AGR as "inter-operator payments" for the purpose of calculating ARDs
- viii. In a first ever departure from the Authority's abovementioned long-established practice and interpretation of the phrase "inter-operator payments", the Authority has recently through the impugned PDNs suddenly taken a U-turn and calculated and imposed ARD on the licensee without considering allowable deduction for inter-operator traffic settlements with foreign operator/carriers undertaken by the licensee.



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- ix. It may be re-emphasized that the above practice of netting off is in vogue since inception ever since the grant of license and the impugned PDNs and the first ever departure from this long-held consistent established practice of the Authority.
- x. In this context, it may be highlighted here that the licensee is obligated under clause 6.12.1 of its license to give effect with the approval of the Authority to any agreement or arrangement respecting international Telephony Service with any service provider that originates or terminates International Telephony Services outside of Pakistan, or makes arrangements thereof.
- xi. Pursuant to its license conditions as aforesaid, the licensee has entered into arrangement with corresponding foreign operators in respect of international telephony and, as such, inter-operator payments to such foreign operators are duly covered by "inter-operator payments" liable to be subtracted from the Annual Gross Revenue (AGR) as specified in clauses 3.4.1, 3.6.1 and 4.1.2 of the license, as likewise interpreted and implemented by the Authority itself since inception and without exception, hence, having become a long-held consistent established departmental/ institutional interpretation and practice of the law as held in various authorities authoritative judgments of the superior courts.
- xii. Disturbing as establish legal position vis-à-vis interpretation and implementation of clauses 3.4.1, 3.6.1 and 4.1.2 of the LDI license is also not permissible under the principal of *locus poenitentie* and the impugned PNDs deserve to be set at naught on that ground too.
- xiii. The impugned PDNs not only part with the established interpretation and practice of the Authority prevalent over the years since inception but are also violative of the AGR adjustment formula as per provision of the PTR 1996, the applicable GoP Policies and the terms and conditions of the licenses.
- xiv. Until the issuance of the impugned PDNs, the Authority has throughout without exception given effect to the phrase "inter-operator" as to include both domestic and foreign operators regardless of whether or not such operator is a licensee of the Authority. Such practice of the Authority as a regulator cannot

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be deviated from at such belated stage when vested rights have been created in the licensee's favour who having relied upon the same has since inception acted to its detriment assuming obligations to the foreign operators.

- xv. This is more so since the very nature of the licensee's licensed operations does not admit of any other interpretation. To restrict the word "operator" in the term "inter-operator" employed in clauses 3.4.1, 3.6.1 and 4.1.2 of the LDI license would result in an absurdity. The licensee has to per se inter-connect with the foreign operators who are not subject to the Authority's regulatory jurisdiction and as such cannot be licensed by it.
- xvi. Since the impugned PDNs have sought to modify the established legal position vis-à-vis the license conditions i.e, clauses 3.4.1, 3.6.1 and 4.1.2, the impugned PDNs in effect amount to a unilateral modification of the said license conditions to the sole detriment of the licensee which is not permissible under the provisions and scheme of PTR 1996, in particular under section 22 thereof prohibiting and such modification of the license terms and conditions without the express consent of the licensee.
- xvii. The impugned PDN dated 11.5.2020 is a non-speaking, unreasoned order which fails to deal with or discuss the detailed grounds taken by the licensee before the Authority, hence, the impugned PDNs are liable to be set aside and the matter remanded for a decision afresh on the detailed merits of the case.
- xviii. The impugned PDNs are in clear violation of section 6 of PTR 1996 as well as section 24A of the General Clauses Act, 1897 and hence liable to be set aside.
- xix. The impugned PDNs are in clear violation of the fundamental right of fair trial and due process of determination of civil rights guaranteed under Article 10A read with Article 2A and 4 of the Constitution of the Islamic Republic of Pakistan
- xx. To the extent the impugned PDNs unlawfully deprive the licensee of its revenue also adversely affecting its finances, the same are in direct violation of Article 18, 23 and 24 of the Constitution.



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- xxi. Without prejudice to the foregoing grounds, it is submitted that in case the impugned PDNs have been issued without the approval of the Authority and in the absence of any delegation of the relevant powers either by name or ex-officio, then of course the impugned PDNs are liable to be set aside on that ground alone.
- xxii. Further without prejudice to the immediately preceding grounds, no delegation of relevant powers could be made in the first place due to the bar on delegation of powers under section 5(2)(a) of PTR 1996 contained in the proviso to section 10 thereof.

2.3 Legal Counsel further argued the term “**Operator**” has been defined in the license which means a license holder. The term “**Operator**” with capital “O” indicates the specific purpose of the term “**Operator**” used in the license will refer to the licensee. Whereas, the term “**operator**” used with word “**inter**” cannot be equated with the term “**Operator**” on the ground the word “**operator**” when used or referred to will be any operator either licensee or non-licensee. Preferably would refer to any company dealing with the business of telecommunication services. Since the mandate of the licensee is to provide LDI service which requires agreement with “foreign carrier” therefore, the term inter-operator in general

2.4 parlance has been used so as to include all kind of telecom operators either local or foreign in hominization of telecom regulatory regime.

2.5 Legal counsel further advanced argument that the demand on account of disallowance of deduction of amount paid to foreign carrier tantamount modification of the license. The modification of license cannot be concluded without consent of the licensee.

2.6 In addition, Legal Counsel also pointed out that the license was awarded in 2004 and since the date of issuance of license and payment made by the licensee on annual fees no such demand ever been made earlier and the licensee was given the benefit of payment made to “**foreign carriers**” under the existing prevailing regime. Now, at this belated stage when the license period will expire in 2024 such demand contrary to long practice has been raised. Persistent conduct of the licensee lead to establish that the licensee as per its legitimate understanding as well as legal regime rendered is financial obligation without any delay and does not require to pay amount / dues as claimed / demanded by the Authority.

2.7 With the aforesaid arguments, legal counsel stated that demand raised by the Authority is neither consistent with applicable legal regulatory regime nor it was

the practice. Thus, interpretation of the Authority for excluding foreign carries from the term “**inter-operator**” is misconceived. Thus, the licensee is not liable to make any dues as claimed by the Authority.

### **3. Findings of the Authority:**

3.1 Matter heard. After hearing argument advanced by legal counsel and careful perusal of record, the moot point of discussion is to adjudicate as to whether the foreign carrier falls within the term “**inter-operators**” as provided in the license condition i.e. 4.1.2 and any cost sustained by the licensee in this regard has to be considered as an allowable deduction.

3.2 While examining the terms and conditions of the license, it has been observed that license condition No. 13.2.1 of the license provides that unless the context otherwise requires, capitalized words and expressions in this license that are not otherwise defined in this license shall be defined in the same manner as these words and expressions are defined in the Act and the Rules.

3.3 In addition, clause 13.2.2 of the license further provides that unless the context otherwise requires, the following terms used in this license shall have the same meaning as mentioned in the license. Similarly, the term Operator has been defined in the license which states that any person authorized by a license issued by the Authority to provide telecommunication services of any kind or to establish, maintain and operate a telecommunication system. Meaning thereby the word operator wherever used in this license will mean and intend a license holder with reference to the context and in the manner, it has been used.

3.4 Most importantly, it is also relevant to point out that with the small “o” the term “operator” has also been defined in the Pakistan Telecommunication Rules, 2000 which means any person authorized by a license to run a connectable system. A holistic overview of the term “operator” as provided in the license either with capital “O” or small “o” will be treated and considered as a licensee by all means. Thus, careful reading of the term “inter-operator” as provided in the license condition No. 4.1.2 of the license excludes foreign carriers or foreign operators. As a result thereof, any cost sustained by the licensee in this regard cannot be considered as an allowable deduction for the purpose of calculation of Annual Regulatory Dues as provided in the license terms and conditions.

### **4. Order:**

4.1 What has been discussed above, it is concluded that the term “operator” has been defined in the license which means any person authorized by a license issued by the Authority to provide telecommunication services to establish, maintain and operate a telecommunication system. Thus, careful perusal of the definition of the term “inter-



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operator” postulates that it only relates to the payment made to other licensees and not otherwise. Since, PTA has not issued license to foreign carriers therefore any payment made to foreign operators / carrier cannot be considered or treated as “inter-operator” payment.

**Maj. Gen. Amir Azeem Bajwa (R)**  
Chairman

**Muhammad Naveed**  
Member (Finance)

**Dr. Khawar Siddique Khokhar**  
Member (Compliance & Enforcement)

Signed on 8<sup>th</sup> day of April 2022 and comprised (09) pages only.