



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

Enforcement order under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 read with rule 9(4) of the Pakistan Telecommunication Rules, 2000 against, Pakistan Telecommunication Company Limited

Date of Issuance of Show Cause Notice: 9th August, 2011
Venue of Hearing: PTA HQs, Islamabad
Date of Hearing: 5th Oct., 2011

The Authority present:

Dr. Mohammad Yaseen: (Chairman)
Dr. Khawar Siddique Khokhar: Member (Technical)

The Issue:

“Non-payment of Numbering Charges”

DECISION OF THE AUTHORITY

1. Precisely stated facts of the case are that Pakistan Telecommunication Company Limited (the “licensee”) pursuant to terms and conditions of license bearing No.PTA/M(T)-014/A dated 15th April, 1997 as modified on 13th June, 2005 (the “license”) was required to pay annual number charges as per numbering plan regulations issued by the Pakistan Telecommunication Authority (the “Authority”) from time to time.

2. The licensee through various letters including reminder(s) was required to pay the same but it failed to comply with the same. Clause 6.4 of the license provides that the licensee following the Modification Date, pay the amount for all the number(s) allocated to it in accordance with Numbering Plan Regulations issued by the Authority from time to time. The Authority in 2005 promulgated Number Allocation and Administration Regulation, 2005 (which were replaced with Number Allocation and Administration Regulations, 2011). As per said Numbering Regulation, licensee is required to pay its annual number charges in advance issued by the Authority, hence, a Show Cause Notice (SCN) was issued on 9th August, 2011 to the licensee calling it upon to remedy the contravention by making payment of Rs. 46,043,950/- as an arrear on account of numbering charges up to financial years 2010-11.

3. Due to non-payment of the aforesaid amount the Authority in exercise of its powers under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the “Act”) issued SCN, requiring it to remedy the contravention by making payment of Rs.46,043,950/- on account of numbering charges up to financial years 2010-11 within seven (07) days of the issuance of the SCN and also to explain in writing, within thirty (30) days of the issuance of this Show Cause Notice, as to why the license should not be suspended, terminated or any other enforcement order as referred to above, may not be passed against the licensee under section 23 of the Act.

4. The licensee vide dated 7th September, 2011 replied the SCN wherein it denied allegations leveled contained therein. The main points on which the licensee relied upon are hereby reproduced below for ready reference:

- i. That the Authority does not have any jurisdiction with respect to the issue at hand because the Pakistan Telecommunication Company Limited (PTCL) has not committed any contravention of the provision (s) of any laws, rules or regulations, or the conditions of its license, actionable under Section 23 of the Pakistan Telecommunication (Re-Organization) Act, 1996(the “Act”).
- ii. That, without prejudice to the above, even otherwise, the Authority also does not have jurisdiction to proceed against PTCL under Section 23 of the Act owing to the fact that the Authority seems to allege that PTCL is in violation of Number Allocation and Administration Regulations, 2011 (the “2011 Regulations”) , while Section 23 of the Act does not confer on the Authority the power to issue show cause notices and /or to proceed against a licensee in respect of contravention(s) of regulations.
- iii. That, without prejudice to the above, even if it is assumed for the sake of argument that the Authority does have jurisdiction in the matter, even then subject show Cause Notice is extraneous, unwarranted and superfluous in view of the legal principle that subordinate/ delegated legislation, such as regulations, cannot be given retrospective effect unless the statute under which the delegation is made, expressly provided so. The effect unless the statute under which the delegation is made, expressly provided so. The Act does not confer on the Authority any such power. Hence, any application of the 2011 Regulations, 2005 (the “2005 Regulations”) (collectively, the “Regulations”), by the Authority on numbers vested in PTCL prior to the date of notification of such Regulations amounts to retrospective application of the same, which is illegal, unconstitutional and *ultra vires* the power of the Authority. Accordingly, PTCL is not liable to pay any annual or other charges in respect of numbers vested in it prior to the notification of the 2005 Regulations.
- iv. That, without prejudice to the above, it goes without saying that when PTCL is not liable to make payment of any annual charges with respect to numbers vested in it prior to the notification of the Regulations, a penalty on the alleged late or non-payment of the same cannot, obviously, be imposed on PTCL. Even otherwise, penalties cannot be imposed through delegated legislation and that any penalties for violation of executive rules and /or regulations must be fixed by the Parliament itself.
- v. That, without prejudice to the above, even if, for the sake of argument, we disregard the relationship of the Authority with PTCL as being that of a regulator-licensor and licensee, and rather equate the same with that of an ordinary licensor and licensee, even then the Authority is not entitled to any penalty for PTCL’s alleged late or non –payment of numbering charges

because, firstly, for any claim of compensation or penalty for an alleged default, a party is required to approach a court of law, which court (as opposed to the licensor itself) has the power to grant such relief upon being satisfied that a bona fide claim exists; and secondly, the Authority, as an ordinary licensor, will be required to prove the existence of actual loss or damage suffered by it as a consequence of PTCL 's alleged default.

- vi. That, without prejudice to the above, the subject Show Cause Notice is frivolous and vexatious, as it fails to establish any cause of action against PTCL, and suffers from malice in law, owing to the fact that up until now, the Authority had been claiming the amount of Rs 46,043,950/- as account or penalty under the 2005 Regulations, owing to the fact that penalties cannot be imposed through delegated legislation, and then that the Authority also cannot unilaterally claim any amounts as penalty by relying on its relationship with PTCL as that of an ordinary licensor-licensee, the Authority immediately changed its stance and issued the subject show Cause Notice claiming the said amount of Rs 46,043,950/- as outstanding annual charges of numbers allocated to PTCL, and threatening, inter alia, to impose a penalty under Section 23 of the Act up to a maximum of RS. 350,000,000/-.
- vii. That, without prejudice to the above, it is axiomatic that "what cannot be done directly, cannot be done indirectly". Once the Authority could not claim the amount of Rs 46,043,950/- as penalty under the 2005 Regulations in view of the deficiency and non- maintainability of the same in law, it cannot now turn around and adopt a different mechanism by calling the said amount of Rs . 46,043,950/- as outstanding annual charges and make a claim in respect thereof under the Act. Such attempt to circumvent the law is unbecoming of a regulator and is not tenable in law.
- viii. That the show Cause Notice is also tainted with *mala fides* in as much as the Authority, on realizing the fact that it has illegally charged and recovered numbering charges in respect of the numbers vested in PTCL has to refund an amount of approximately Rs 232 Million to PTCL, has now come up with his Show Cause Notice so as to pre-empt any claims as well as action(s) of PTCL for recovery of said amount.
- ix. That the issuance of the Show Cause Notice is ex facie illegal as it is against logical coherence, is violative of the principles of natural justice, fails the test of sound reasoning , and is based on conjectures and surmises which do not constitute any contravention by PTCL, particularly one under Section 23 of the Act.
- x. With respect to Paragraph 4 of the Show Cause Notice, while there is no denying that PTCL is required to conform with Clause 23.1 of its license. However, with respect to the compliance obligation contained therein, your attention is drawn in particular to the words " in accordance with its powers" used therein . The text of the said Clause 23.1 is reproduced below for ready-reference

"23.1 The Licensee shall observe the provisions of this License, the Act, the Rules and the Regulations and shall comply with all orders, determinations, directions, and decisions of the Authority made or issued by the Authority in accordance with its powers under the Act, the Rules, and the Regulations." (Emphasis added)
- xi. That clause 6.4 of the license on which the Authority is seeking to rely therein has not been presented in its entirety. We shall begin by referring to the text of the said Clause 6.4 of the license, which provides as under:

"6.4 The Licensee shall, following the Modification Date, pay the amount for all the number(s) allocated to it in accordance with Numbering Plan Regulations issued by the Authority from time to time" (Emphasis added)

- xii. For avoidance of doubt, we may state that the Modification Date, as used in Paragraph 6.5 above, is defined to mean 13th June, 2005 in Schedule 1 to the license (the “Modification Date”). The preliminary observation to make with respect to Clause 6.4 is that it obligates PTCL to pay numbering charges after the Modification Date in accordance with applicable regulations issued by PTA from time to time. In other words, there is no obligation on PTCL to pay any charges prior to the Modification Date with respect to any numbers vested in it: and even after the Modification Date, PTCL’s payment obligation will be triggered only upon the notification of applicable regulations.
- xiii. Above, the Regulations cannot operate retrospectively; it goes without saying that no liability and /or penalty whatsoever may be imposed on PTCL in respect of payment of numbering charges for numbers allocated prior to the publication/coming into force of the 2005 Regulations. It also goes with saying that when the number in issue do not fall within the ambit of the 2005 Regulations, the same cannot be subjected to the 2011 Regulations. Hence, reliance on Clause 6.4 by the Authority is out –of-context flawed and extraneous.
- xiv. Paragraph 6 of the Show Cause Notice is vehemently denied. Regulation 19 (1) of the 2011 Regulations, on which the Authority is seeking to rely on in Paragraph 6 of the Show Cause Notice, is reproduced below for ready reference:

1.9 Number Allocation Fee --- (1) for each number in use whether allocated/assigned to a person on or before the promulgation of these regulations, the annual charges payable in advance by 31st July each year on such terms and conditions as determined (sic) the Authority from time to time.” (Emphasis added)

- xv. As established above, the Act, under which the power to issue regulations enacted, does not confer on the Authority the power to issue regulations retrospectively. Hence, the Authority is deemed to be conferred with the power to issue regulations with prospective effect only. Accordingly, any application of Regulation 19(1) of the 2011 Regulations to number allocated prior to the date of notification of 2005 regulations is *ultra vires* and unconstitutional, and PTCL reserves its right to challenge the same at appropriate forum. In this behalf, the word, “ whether allocation/ assigned to a person on or before the promulgation of these regulations”, contained in the said Regulation 19(1) can only reasonably means the allocation or assignment of numbers on or after the notification of the 2005 Regulations, and cannot be extended to means any and /or all numbers whenever allocation /assigned or vested in a person. Hence, the numbers vested in PTCL prior to 31st to the notification of the 2005 Regulations cannot be subjected to the Regulations cannot be subjected to the Regulations, and accordingly, the question of payment in respect thereof prior to 31st July each year does not even arise.
- xvi. That PTCL has not failed to make the payment of the alleged outstanding amount/ penalty in the amount of Rs 46,043,950/-, or to comply with the demands/ reminders to make the said alleged payment. On the contrary, PTCL is not obligated to make any such payment for numbering charges, and /or any penalty in respect thereof, owing to the fact the numbers in issue were vested in PTCL prior to the notification of the 2005 Regulations: and hence, the question of making payments of numbering charges for such numbers, or complying with any demands in respect thereof does not even arise. Our detailed replies contained in the preceding paragraphs of this Reply may kindly be read as an integral part of our reply hereunder to the extent applicable.

5. In order to proceed further; the matter was fixed for hearing on 5th October, 2011. Mr. Azid Nafees, Advocate, Mr. Ghulam Mustafa, G.M. Reg. Affairs, Mr. Amer Shafiqe, SM Reg. AH and Mr. Sikandar Naqi, SEVP attended the hearing on behalf of the licensee on the said date. The representative(s) of the licensee reiterated the same as asserted in the SCN.

6. After hearing and perusal of record, the Authority reached at the conclusion that the Authority under section 5 (2)(k) is empowered to develop national telecommunication numbering plans. Section 5 (2) (o) of the Act also empowers the Authority to make regulations for exercise of its powers and performance of its functions. Accordingly, the Authority has issued Number Allocation and Administration Regulations, 2005 which have been replaced with Number Allocation and Administration Regulations, 2011. As pre section 2(qc) of the Act, number is a scarce resource. The scarce numbering resource is required to be allocated on competitive and transparent manner. By virtue of the powers conferred upon the Authority, administration of primary assignment of numbering resource lies with the Authority and not otherwise.

7. The licensee in accordance with the license condition No.6.4 of its license is obliged to pay the numbering charges in accordance with the numbering regulations. The said license condition states that the licensee shall, following the Modification Date, pay the amount for all the number(s) allocated to it, in accordance with Numbering Plan Regulations issued by the Authority from time to time. The license condition expressly provides that the payment of numbering charges is required to be paid in accordance numbering regulations and not otherwise. The Authority in 2005 issued Number Allocation & Administration Regulations, 2005 (the “repealed regulations”) which were replaced with the Number Allocation & Administration Regulations, 2011. It would be pertinent to mention here that in accordance with the regulation 18(2) of the repealed regulations, a penalty on outstanding dues was @10% which has been substituted/modified with @2% by promulgation of the Number Allocation & Administration Regulations, 2011 with effect from 20th July, 2011 however, only penalty @10% on outstanding dues as per applicable numbering regulations of 2005 for the post-2005 period has been levied after the promulgation of regulations i.e., 3rd August, 2005.

8. Since, the licensee has failed to pay the outstanding dues on account of number charges in accordance with license conditions and regulations up to financial years 2010-11 hence, a penalty @ 10% was levied whereby the licensee was and is still required to pay Rs.46, 043,950/-. It is further noted that the licensee was required to pay Rs.127,241,950/- (inclusive of penalty as mentioned above) on account of number charges up to financial years 2010-11 in accordance with applicable regulations, but the licensee has paid an amount of Rs.81,198,000/- excluding penalty as stated above.

9. Charges on number(s) allocated to the licensee were levied from 2005 prospectively i.e., after promulgation of regulations in 2005 and not otherwise. Number(s) were allocated to the licensee under numbering regulations issued in 2005 and as shown in table 3 annexed to the numbering regulations 2005 and 2011, respectively Therefore, the licensee’s stance with regard to levying and demanding of numbering charges on account of number allocation by the Authority retrospectively; is not valid and not justifiable on the ground that the charges have been levied in accordance with the applicable regulations prospectively.

10. Order of the Authority:

10.1 In view of the foregoing, the Authority is of the view that there is no justification to consider the assertion of the licensee with regard to non-payment of amount of Rs.46,043,950/- (as an arrear on account of numbering charges up to financial years 2010-11). The said penalty has been levied in accordance with applicable regulations. Therefore, the Authority hereby passes the following order:

- a) The licensee, i.e., Pakistan Telecommunication Company Limited pursuant to sub-rule 4 of rule 9 of the Pakistan Telecom Rules, 2000, is hereby directed to remedy the contravention by making payment of Rs.46,043,950/- as arrears on account of numbering charges up to financial years 2010-11 within fifteen (15) days from the date of issuance of this “Enforcement Order” and submit compliance report to the Authority, accordingly; and
- b) In case of the licensee’s failure to comply with Para 10.1 (a) above, further proceedings for a “Final Enforcement Order” under sub-rule (5) and (6) of Rule 9 of the Pakistan Telecom Rules, 2000 (without prejudice to any other action as per enabling provisions of law) shall be initiated against the licensee.

Dr. Mohammed Yaseen
(Chairman)

Dr. Khawar Siddique Khokhar
Member (Technical)

This order is signed on 3-5-2012 and comprises of 06 pages only.