

BEFORE THE HON'BLE ISLAMABAD HIGH COURT, ISLAMABAD

In Re:

FAO NO.56 OF 2011**Pakistan Telecommunication Company Limited**

Having its registered office at

PTCL Headquarters, G-8/4, Islamabad

Through Mr. Aamer Shafiq, General Manager (Regulatory)

.....APPELLANT**Versus**1. **Pakistan Telecommunication Authority**Through its Chairman,
PTA Headquarters, F-5, Islamabad2. **Wateen Telecom Limited**4th Floor, New Auriga Centre, Main Boulevard,
Gulberg II, Lahore3. **Sharp Communications (Private) Limited**World Trade Centre, Tower 'A', 10th Floor,
Clifton, Karachi4. **Wi-Tribe Pakistan Limited**14-N, F-3 Markaz,
Islamabad5. **Micro Broadband (Private) Limited**GD Arcade, 73-E, Fazal-ul-Haq Road,
Blue Area, Islamabad6. **Naya Tel (Private) Limited**GD Arcade, 73-E, Fazal-ul-Haq Road,
Blue Area, Islamabad

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Islamabad High Court
Islamabad**.....RESPONDENTS****APPEAL UNDER SECTION 7(1) OF THE PAKISTAN TELECOMMUNICATION (RE-ORGANIZATION) ACT 1996 AGAINST THE RESPONDENT NO.1'S ORDER DATED 16.09.2011****AMENDED MEMO OF APPEAL AS PER ORDER DATED 09-04-2013***Respectfully Sheweth:*

1. That the titled First Appeal arises out of the Impugned Order issued by the Respondent No.1 dated 16.9.2011 wherein the Respondent No.1 has imposed a fine on the Appellant of Rs.82.496 million without any reasoning and completely contrary to law.

ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

FAO No.56 of 2011

PTCL

Vs.

PTA & others

S. No. of order / proceedings	Date of order / proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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3.12.2013

Vice counsel for Mr. Ali Raza, Advocate for appellant,
Mr. Hasan Kamran Bashir, Advocate for respondent No.1,
Mr. Babar Sattar, Advocate for respondent No.2 to 6,
Mr. M.Khurram Siddiqui Director (Law) PTA,
Mr. Faraz Khan, A.D. (Law) PTA

CM No. 600/2013

The applicant/respondent2,3&4 pray for
permission to place on record additional documents
in support of the case.

The application is allowed, subject to all just
and legal exceptions and by providing complete set of
the documents to the other side.

CM No. 601-E/2013

Dispensation sought for is allowed subject to
all just and legal exceptions.

ORDER

MUHAMMAD ANWAR KHAN KASI CJ:

This appeal is directed against order dated
16.9.2011, passed by the Pakistan
Telecommunication Authority [hereinafter referred to
as "PTA"] whereby the respondent authority had
imposed fine of Rs.82.496 Million for unauthorized
use of extra radio frequency spectrum and same was
ordered to be paid within thirty (30) working days by
the appellant/licensee with direction to immediately
stop the unauthorized use of the same. It was also
directed that PTA Enforcement Division & FAB were
required to monitor the usage of extra radio frequency
spectrum and also to update the authority within one
month. In case of non-compliance of the order, the
license awarded to the appellant may be suspended.

2. The facts relevant for disposal of this appeal
are that the appellant is duly licensed by the
respondent No.1 vide License No.PTA/M(T)-014/A
to provide a broad range of telecommunication
services including local loop services, wireless local

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loop ["WLL"] services, local and long distance and international telephony services to a wide customer base within Pakistan. The said license is valid for a period of 25 years till 2021 and renewable thereafter. Respondent No.1 is a statutory authority responsible for assigning radio frequency spectrum and issuing licenses to telecommunication service providers for provision of various kinds of telecommunication services including WLL Services and its functions & obligations are thus set out and mandated in PTR, 1996. The appellant has been using frequency spectrum in the 450 Mhz, 3.5 Ghz & 1900 Mhz bandwidth as allocated to it by the respondent No.1 since 2004 with which it established a large CDMA network capable of delivering wireless internet services to a customer base of millions of people within the country.

3. On 14.12.2010, the respondent No.1 issued a letter to the appellant alleging that the appellant was using extra bandwidth than what had been assigned to it by the respondent No.1 in the 1900 Mhz band in Karachi, Lahore, Rawalpindi/Islamabad and Multan and the said letter provided an alleged survey in the form of a chart prepared by the respondent No.1. The said chart contained no specifications as to where or how the said survey was conducted and there was also no specification as to the technical equipment used for the said survey.

4. Upon issuance of show cause notice dated 27.4.2011, appellant submitted its reply on 26.5.2011 and a hearing was conducted by the respondent No.1 on 16.6.2011, wherein the appellant reiterated its stand relating to the legality of the monitoring survey conducted by the respondent No.1. The appellant also stated that fresh monitoring survey to be conducted by the respondent No.1, but instead of considering the request, the respondent authority issued order dated 16.9.2011, hence, this appeal.

5. Learned counsel, inter-alia, contends that the impugned order is based on no substantiated evidence and sole basis is an alleged survey report, wherein it is alleged that the appellant was using extra bandwidth in excess of the bandwidth allocated to it and the said survey report was prepared by the respondent No.1, but in fact, said

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survey was neither carried out in the presence of the appellant nor the appellant was provided with technical report for verification of the same. The alleged survey was based in the form of chart, but no specification was contained in it as to where or how the said survey was conducted. Furthermore, no specifications were given as to the technical equipment used for the said survey.

6. It is further added that the appellant has not provided an opportunity to examine and confront the evidence and its particulars being produced by the respondent No.1, therefore, the same cannot be made basis for passing the impugned order.

7. It is next submitted that the respondent No.1 has solely relied upon the alleged survey, which is ostensibly an act undertaken in absence of the appellant & since the ex-parte survey is the sole basis of the impugned order, such evidence can neither be considered as evidence in law, nor it can be the sole basis of a finding and consequent imposition of penalty.

8. It is further averred that the impugned order fails to fulfill the legal requirement of being a speaking order and the respondent No.1 has provided no convincing reasons other than simply relying on a disputed document i.e. monitoring survey and the respondent authority unjustifiably refused to consider any of the specific objections raised by the appellant in reply and during the course of hearing of show cause notice. None of the arguments have been mentioned in the impugned order, therefore, respondent No.1 as a quasi judicial authority under the Pakistan Telecommunication (Reorganization) Act, 1996, cannot be permitted to produce a document prepared by itself and to use the same as the sole basis for a finding without permitting the same to be contested in evidence in accordance with law.


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9. Lastly it is submitted that the show cause notice issued by the respondent authority itself was not maintainable as the appellant had already responded with the request to provide details of the mentioned survey but the respondent authority failed to acknowledge it, therefore, the impugned order is to be set aside by declaring the same as void & bad in law. Learned Counsel for appellant placed reliance on cases of MICRO NET BROAD BAND PVT VS PTA [2004YLR 1139], ABDUS SABOOR KHAN VS KARACHI UNIVERSITY ETC [PLD1966SC536], UNION OF INDIA VS T.R. VARMA[PLD 1958 SC (Ind.) 98], ABDUL HAMEED VS MALIKKARAM DAD [PLD 1966 (WEST PAKISTAN-LHR) 16], KHUDA BAKHSH CHANDIO VS SATTAR [1999 MLD 3199-KARACHI], MIAN AYAZ ANWAR VS FEDERATION OF PAKISTAN [PLD 2010 LAHORE 230], TARIQ AZIZ UD DIN & OTHERS human rights cases [2010 SCMR 1301], FARIDULLAH KHAN VS PROVINCE OF NWFP[2008 CLC 10-PESHAWAR], CHAIRMANREGIONAL TRANSPORT AUTHORITY RWP VS PAKISTAN MUTUAL INSURANCE COMPANY LTD.[PLD 1991 SC 14]. The Authorities are on the point that actions must be based on fair, open & just consideration to decide matters especially when powers are to be exercised on discretion. The case law reported in 2004 YLR 1139 is on the point that Authority is under duty to take decision in strict compliance with provisions of Section 6 of Pakistan Telecommunication (Re-organization) Act, 1996, after giving notice to affected persons.

10. The contention of the respondent No. 1 on the other hand, was that the appellant has violated the license conditions contained in Schedule 6, Appendix-2 and clause 32.1 of the license by unauthorizedly using extra radio frequency spectrum bandwidth, which was not allocated or assigned by FAB, at different cities, which fact was reported by Frequency Allocation Board (FAB) on the basis of its inspection results carried through highly sophisticated tool i.e. NFMMS [National Frequency Management & Monitoring System] hence, the enforcement order passed under Section 23 of the Act for violating the terms and conditions of license duly agreed by the appellant & respondent, therefore same is in accordance with law.

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11. In addition, it is submitted that since the frequency spectrum is a scarce resource, and the unauthorized & extra usage of the said frequency spectrum without permission of FAB by the appellant is not only illegal under Section 31 of the Act, but has also deprived the national exchequer of its lawful and significant amount of revenue as well as contravention of license conditions duly agreed by the appellant and the respondent, which the respondent has illegally mandated to enforce under the Act, therefore, the appeal is not maintainable and same may be dismissed. Learned counsel relied on cases of MUHAMMAD AHMED VS MST. AZIZ BEGUM [1985 SCMR1962], GHULAM MUHAMMAD VS MALIK ABDUL QADIR [PLD 1983 SC 68] & MST.NEELAM MAWAZ VS THE STATE [PLD 1991 SC 640]

12. Learned counsel for respondents 2 to 6 [Mr. Babar Sattar] submitted that the subject matter of the appeal relates to expropriation of radio frequency spectrum, which is not a private dispute between the appellant & PTA, but affects the interests of other telecom service providers, users of telecom services and a matter of public interest as it involves regulatory efficacy of the respondent authority and its ability to protect public interest served by enforcement of the provisions of the Act and the rules, regulations and licenses promulgated and issued thereunder and the financial detriment caused to the public exchequer due to utilization of precious state resource such as radio frequency spectrum without payment of prescribed fees.

13. It is further submitted that the order impugned is to be sustained with further direction to the respondent-authority to weave a mechanism for having constant check of such type of breach, which ultimately affects the efficacy, proficiency and reputation of the other Telecom Service Providers.

14. It is finally argued that appellant's abuse of the license conditions and the law is creating a

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competitive advantage and undermining the right of the respondent competitors to a level playing field guaranteed under Article 9, 18 & 25 of the Constitution of Islamic Republic of Pakistan, 1973. Learned Counsel referred to cases of JUSTICE KHURSHID ANWAR BHINDAR VS FOP [PLD 2010 SC 483], PETROSIN PRODUCTS PAKISTAN PVT LTD VS FOP [2001 CLC 820-LAHORE], UNION OF INDIA VS W.N. CHADHA [1993 SCMR285]. The case laws are on the point that such rule of hearing can be discarded in an emergent situation and prompt action is required. It has further been held that if a person has acted illegally & in violation of laws, the order by the Authority cannot be considered as an adverse order against him.

15. Heard & record perused.

16. Radio Frequency Spectrum Bandwidth is capacity of virtual communication network and its size is allocated in the license against payment of fee and when an operator uses the bandwidth above the allowed specification it means that the channel capacity grows without payment of additional fees. In order to cope with such situation, the operator is asked to covenant the observation of allowed frequency spectrum while on the other hand under Section 42 of Pakistan Telecommunication Re-organization Act, 1996, Pakistan Frequency Allocation Board is constituted which is empowered under Section 43 of the Act *ibid* to allocate frequency and to monitor observation of frequency spectrum by licensees. In furtherance of this purpose, FAB through its mobile and permanent stations, monitors the observation of Frequency Spectrum using technical equipment NFMMS [National Frequency Management & Monitoring System].

17. FAB during its usual analysis observed that the appellant is using radio frequency Spectrum bandwidth beyond the specification allowed in license. Respondent authority issued notice specifying the details of cities and areas where violation of bandwidth was observed. Initially appellant was asked to refrain from using extra bandwidth and upon repetition, a Show Cause Notice was issued. In reply, the appellant contradicted the violation and thereafter inquiry proceedings were conducted. The authority provided opportunity of hearing to the parties. It was alleged that during hearing, the violation continued.

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The authority seized with the inquiry after appraisal of report and reply of appellant imposed fine of Rs. 82.496 millions through impugned order under Section 23 of Pakistan Telecommunication (Re-organization) Act (XVII of 1996).

18. Admittedly the appellant is legally bound to observe the frequency spectrum as articulated in license at clause 23.1 and clause 46 and 47 of Schedule 6, Appendix II. The ground that appellant was not associated with monitoring procedure, is weightless as it is exclusive mandate of the FAB to monitor the Frequency Spectrum and nature of their duty requires subtle check. It would not be practicable to do any effective monitoring with prior information to those, who are being monitored. Moreover, only relevant technical staff could analyze the working of monitoring equipment. The report cannot be considered as unlawful which was prepared as part of their official duty where no mala fide or ill will has even been alleged against the officials.

19. On the other hand reply to Show Cause Notice tendered by appellant also provides a hint respecting his [appellant] efforts to procure extra bandwidth, which is pending for want of auction proceedings. Bypassing of legal procedure not only causes great loss to the national exchequer but also disturbs the level playing field amongst the players of telecom industry.

20. In view of above, the appellant has failed to point out any illegality or infirmity in the impugned order, hence the appeal is dismissed.

21. Before parting with the order, it is observed that respondent authority shall consider issuance of periodical reports on frequency spectrum usage after periodical usual intervals, in order to ensure further transparency and additional evidentiary value.

M.Suhail*

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SD
(CHIEF JUSTICE)