



**PAKISTAN TELECOMMUNICATION AUTHORITY**  
**HEADQUARTERS, F-5/1 ISLAMABAD**  
<http://www.pta.gov.pk>

**Enforcement Order of Pakistan Telecommunication Authority on Show Cause Notice Issued to Pakistan Telecommunication Company Limited (PTCL) Regarding Non-payment of Late Payment Additional Fee of Rs.161,702,400/- on Initial Spectrum Fee (ISF)**

File No. PTA. Finance/Finance/WLL/PTCL36/2006

Date of issuance of Show Cause Notices: 11<sup>th</sup> August, 2011

Venue of Hearing:	PTA HQs, Islamabad
Date of hearings:	26 <sup>th</sup> April, 2012
	20 <sup>th</sup> January, 2015

**The Hearing Panel:**

Mr. Abdul Samad:	Member (Compliance & Enforcement)
Mr. Tariq Sultan:	Member (Finance)

**The Issue:**

**Non-Payment of Late Payment Additional Fee of Rs.161,702,400/- on Initial Spectrum Fee**

**“Decision of the Authority”**

**1. Brief Facts:**

1.1 This enforcement order will dispose of Show Cause Notice (SCN) issued to Pakistan Telecommunication Company Limited (the "licensee") for non-payment of Late Payment Additional Fee of Rs.161,702,400/- levied due to delay in payment of Initial Spectrum Fee "ISF" which was due on 17<sup>th</sup> March, 2010. Relevant facts of the case are that due to non-payment of remaining 50% ISF payment, Pakistan Telecommunication Authority (PTA) under section 23 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the "Act") issued Show Cause Notice (SCN) on 11th August, 2011 to PTCL.

1.2 The licensee replied against the SCN vide letter No. RA/P&S/SCN/Sep/01/ISF dated 12<sup>th</sup> September, 2011 wherein the licensee denied the allegation on the basis of which SCN was issued. Further, the licensee, being aggrieved by the SCN filed a Writ Petition No.2531/2011 before the Hon'able Islamabad High Court. In the said petition, the licensee prayed as under:

- a. The impugned show cause notice dated 11<sup>th</sup> August, 2011 may be declared illegal and void.
- b. The license terms contained in clause 6.6 of the license dated 13<sup>th</sup> June, 2005 and regulation 23 (7) of Pakistan Telecommunication (Functions & Powers) Regulations, 2006 may be declared as *ultra-vires* of the Act, and Article 4 of the Constitution of Islamic Republic of Pakistan.
- c. The imposition of the “Additional Fee” being a penalty on account of payment of the Initial Spectrum Fee may be declared as being without authority, un-lawful and capricious exercise of its powers by the Respondent and be declared as void; and
- d. The Respondent may be directed to reimburse the Petitioner the amount of Rs.1,894.95 Million received unlawfully under the demand contained in the letter of 30<sup>th</sup> March, 2010 while receiving annual installment as per the terms of the letter dated 10<sup>th</sup> March, 2010.

1.3 The Honorable Court in the said petition vide order dated 13<sup>th</sup> September, 2011 issued notice and directed Respondents to proceed further with the SCN, however, no final adverse order shall be passed against the Petitioner. The matter was fixed for hearing on 26<sup>th</sup> April, 2012 before the Authority. Representatives on behalf of the licensee attended the hearing and reiterated the same as stated in their reply dated 12<sup>th</sup> September, 2011 and supplementary reply dated 26<sup>th</sup> April, 2012. The supplementary reply was almost identical to the prayer sought in W.P 2531/11.

1.4 On 17<sup>th</sup> November, 2014, the Honorable Islamabad High Court disposed of the Writ Petition No.2531/2011. For ready reference court order is reproduced below:

*With the consent of the learned counsels instant petition is disposed of in the following terms:*

- i. *The Authority i.e. Respondent No.1 shall proceed strictly in accordance with law by giving an opportunity of hearing to the petitioner and decide the Show Cause Notice within a reasonable time.*
  - ii. *The Authority shall not be influenced by any stance taken in its comments filed in the present petition and shall decide all questions raised, particularly the question relating to the vires of Regulation 23 (7) and clause 6.6, with an independent mind.*
  - iii. *This Court expects that the Authority shall not allow itself to be influenced by the question strictly in accordance with law.*
2. *The learned counsel for the Petitioner has expressed an apprehension that the Authority may initiate recovery proceedings before passing an order. This apprehension is without force as recovery proceedings can only be initiated after an order has been passed.*

1.7 Pursuant to the said court order, the matter was fixed for hearing on 20<sup>th</sup> January, 2015. Mr. Ghulam Mustafa, GM PTCL, Mr. M. Imran Qureshi, EVP (Regulatory Affairs) PTCL, Mr. Amir Shafiq, GM (Regulatory Affairs) PTCL, Mr. Ali Raza, Advocate Supreme Court, Mr. Aimal Khattak, Advocate and Mr. M. Abdullah Khan, Associate attended the hearing on the said

date. On behalf of PTCL, the representatives argued and reiterated the same as stated in SCN reply, supplementary reply as well as assertions made in the petition.

1.8 The points of consideration which have been raised by the licensee are that, it has paid full amount of Initial Spectrum Fee and thus not liable to pay any additional late payment fee. Moreover, the licensee agitated that the Authority has no power to levy late payment additional fee in accordance with the applicable law.

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

2.1 Matter heard, record perused. After hearing, the matter and examination of the record, findings of the Authority are as under:

2.1.1 There is no dispute on the issue of payment of Initial Spectrum Fee. The licensee has paid this amount in 2005. Later on, pursuant to decision of the Economic Coordination Committee (ECC) communicated through MoIT dated 17<sup>th</sup> March, 2006 the licensee was required to make the remaining 50% payment on account of Initial Spectrum Fee by 17<sup>th</sup> March, 2010.

2.1.2 As far as PTA's letters dated 10<sup>th</sup> March, 2010 and 19<sup>th</sup> March, 2010 are concerned, it is to clarify that the letter issued by the officers of the Authority dated 10<sup>th</sup> March, 2010 was withdrawn by the Authority through letter dated 19<sup>th</sup> March, 2010 wherein reason of cancellation of letter dated 10<sup>th</sup> March, 2010 was categorically given. By virtue of the said letter and other correspondence(s) made through letter dated 12<sup>th</sup> August, 2010, 17<sup>th</sup> March, 2011 and 8<sup>th</sup> June, 2011 clearly stipulates the exact / correct position of the issue but the licensee failed to make the payments within time despite the fact of knowing the date of payment which has already been determined through ECC decision and duly acknowledged by the licensee vide its letter dated 3<sup>rd</sup> May, 2011 wherein it has been stated that no doubt PTCL was aware of the deadline of 17<sup>th</sup> March, 2010 but due to issuance of letter by PTA, allowing payment in installments PTCL made other pressing payments. The said acknowledgement of the time period for payment of ISF amount as has already been determined through ECC decision leads to conclude that licensee was not only aware but also under obligation to make the payment within due time.

2.1.3 The licensee also took a plea that PTA's letter dated 10<sup>th</sup> March, 2010 was issued as a result of Ministry of Information Technology (MoIT) letter dated 24<sup>th</sup> February, 2010 which required comments and recommendations from PTA for judicious treatment of the issue. For the purpose of record, it is clarified that PTA vide letter dated 15<sup>th</sup> April, 2010 in response to MoIT's letter dated 24<sup>th</sup> February, 2010 (*supra*) replied that PTA is of the view that concession of four (04) years moratorium through WLL Operators was allowed by ECC and any further extension or revision as requested vide above referred letter can only be granted by ECC or highest forum i.e., Cabinet. However, no such decision from ECC or Cabinet has been received yet. Therefore, the plea of the licensee in the manner as portrayed, while extending arguments, that installment letter was issued upon the direction of MoIT is not correct, thus not entertainable.

2.1.4 The licensee also relied upon the license condition number 6.6 saying that the said condition is not applicable in the instant matter. For ready reference the license condition is reproduced below:

*6.6 In addition to any other remedies available to the Authority, late payment of fee shall incur an additional fee calculated @ 2% per month on outstanding amount for each month or part thereof from the due date until paid.*

Careful examination of the said condition construe that in case of non-payment of the outstanding dues the licensee is under an obligation to make late payment additional fee @ 2% per month or part thereof. Being a licensee, the licensee is required to make the payment on account of initial spectrum fee within the specific time, however, as a result of failure to make the payment as per license condition 6.6, late payment additional fee was rightfully levied under the License conditions and the licensee is bound to pay the same. The scope of the said license condition is not restricted to the extent of only annual license fee but includes outstanding dues payable to the Authority in accordance with prevailing regulatory laws. On the other hand, the licensee as per license condition number 23.1 of its license is required to observe the provisions of 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. Terms and condition duly agreed and signed by the licensee with his consent made it under an obligation to comply with the same.

2.1.5 On the point of jurisdiction of the Authority under the Act to levy late payment additional fee as agitated by the licensee, the Authority is of the view that section 5 (2) (p) of the Act empowers the Authority to 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. The said section explicitly empowers the Authority to levy fee and other charges. Accordingly the Authority in exercise of its powers under section 5 (2) (o) of the Act promulgated Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2006 wherein as per regulation 23 (7) of the said regulation in case of failure to make the payment of outstanding dues an additional fee @ 2% per month on the outstanding amount for each month or part thereof is levied. The said regulation is reproduced below:

*23 (7) The licensee shall pay such fees as mentioned in the license or otherwise determined by the Authority, as the case may be, within due dates. In case of late payment of any fee, the licensee shall pay an additional fee @ 2% per month on the outstanding amount for each month or part thereof.*

The said regulation read with license condition number 6.6 conveys that licensee is under obligation to make payment of outstanding dues to the Authority within the time as specified in license condition, decision of the Authority or required under applicable regulatory law. It is also

evident that licensee despite knowing the deadline for payment of ISF amount has not willingly paid the same within the stipulated time i.e., 17<sup>th</sup> March, 2010.

2.1.6 It is also to point out that the contention of the licensee with regard to the imposition of restriction of fee and charges to be specified by the Committee of Cabinet needs deliberation and clarification. The Authority pursuant to policy directive issued by Federal Government, as defined under section 2 (fa) of the Act issued information memorandum containing therein the procedure for grant of license under applicable rules, regulations, policies as well as license terms and conditions on the basis of which licenses were issued. Similarly in this matter the Authority pursuant to clause 6.1 of the De-Regulation Policy dated 13<sup>th</sup> July, 2003 PTA shall prepare the requisite applications, license templates, information package and other necessary measures with the approval of Government to facilitate the licensing process. Accordingly after seeking input from all the stakeholders an Information Memorandum (IM) was prepared and published before issuance of licenses. Clause 4.2.3 of Annexure-H attached to the IM provides that in addition to any other remedies available to the Authority, late payment of fees shall incur an additional fee calculated @ 2% per month on the outstanding amount, for each month or part thereof from the date until paid. In light of the above circumstances and documents prepared and published no further approval of Government is required. In addition, no express and independent direction has been required from the Government on the instant issue, therefore, careful examination of the available documents leads to conclude that the Authority has a power to levy late payment additional fee @ 2% per month or part thereof on outstanding dues until paid. Thus sections 5 (2) (o) and 5 (2) (p) of the Act read with regulation 23 (7) of the PTA (Functions & Powers) Regulations, 2006, license condition 6.6 of the license issued to the licensee squarely applicable with regard to the imposition of late payment additional fee in case of late payment of any outstanding fee.

2.1.7. It is further to clarify that section 21 (1)(4) of the Act provides that "every license granted under this Act may, *inter alia*, contain..."The term, *inter alia*, construes that in addition to the condition as mentioned in the said section, other license condition may be included in the license, meaning thereby the list of condition as provided in the said section is non-exhaustive. Accordingly, the license conditions were agreed and signed by the licensee. The licensee has agreed to the terms and conditions without any protest and it has also acted upon the same over a period of 09 years. Therefore, now licensee cannot refuse to pay the late payment additional fee especially when all conditions have been agreed and signed by the licensee. In this regard, reliance is placed on 2011 PLD SC 44 titled "*Pakcom Limited Vs. Federation of Pakistan etc.*" wherein, the August Supreme Court of Pakistan has held that "where all the terms and conditions enumerated in the contract have been accepted by the parties freely and at their own, contract does not fall within the ambit of coercion, as defined in section 15 of the Contract Act, 1872 or "undue influence" as defined in section 18, or "fraud" as defined in section 17, or "misrepresentation" as defined in section 18 or "mistake" as enshrined in sections 20, 21, 22 of the Contract Act. The august Supreme Court further observed that "liability under a contract cannot be avoided for the simple reason that contract caused by one of the parties to it being under a mistake to a matter of fact. Considering the aforementioned dictum as laid down in the

said case, in instant matter, the Authority within ambit of its powers as provided under the Act issued the license with agreed terms and conditions whereby the licensee is required to pay late payment additional fee in case of delay payment in payment of outstanding dues. Thus on the basis of what has been discussed hereinabove and relevant correspondence, the Authority is of the considered view that the licensee is under an obligation to pay late payment additional fee @ 2% per month or part thereof i.e., Rs.161,702,400/-.

2.1.8 The licensee's assertion with regard to equating late payment additional fee with penalty is based upon misconception. The Authority is empowered under section 23 of the Act to issue show cause notice and may impose fine which may extend to Rs. 350 Million, suspend / terminate license while deciding the matter on merits. In this particular case due to non-payment of Initial Spectrum Fee on its due date, an additional late payment fee has been levied which is neither a penalty nor a fine under section 23 of the Act. In the instant matter, as per license condition and applicable regulation, 2% late payment additional fee has been levied which is required to be paid by the licensee failing which a show cause notice has been issued and proceedings have been initiated.

### **3. Order:**

3.1 The Authority, without being influenced by its earlier stance/ correspondence, is of the considered view that the licensee is under obligation to make payment of Rs.161,702,400/- as late payment additional fee on account of delay in payment of remaining 50% Initial Spectrum Fee.

3.3 The licensee i.e., Pakistan Telecommunication Company Limited is directed to make payment of Rs.161,702,400/- as late payment additional fee within seven (07) days from the date of receipt of this order. In case of non-compliance of the same, final order under rule 9 (5) of the Pakistan Telecommunication Rules, 2000 shall be issued without any further notice.

\_\_\_\_\_  
Abdul Samad  
Member (Compliance & Enforcement)

\_\_\_\_\_  
Tariq Sultan  
Member (Finance)

This order is signed on 6th day of March, 2015 and comprises of 6 pages.