

**IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

Present:

**Mr. Justice Jawwad S. Khawaja**  
**Mr. Justice Iqbal Hameedur Rahman**  
**Mr. Justice Mushir Alam**

**Civil Petition No. 1545 of 2009.**

(Against the judgment dated 20.7.2009 passed by the Islamabad High Court in FAO 7 of 2009)

Pak Telecom Mobile Ltd.

... Petitioner (s)

**VERSUS**

Pakistan Telecommunication Authority, Isl.

...Respondent (s)

For the petitioner (s):            Mr. Hamid Khan, Sr. ASC  
   Mr. Waqar Rana, ASC  
   Mr. M. S. Khattak, AOR

For the respondent (s):        Mr. M. Akram Sheikh, Sr. ASC  
   Mr. Khurram Siddiqui, Director (Law)  
   Mr. Faraz Khan Jadoon, Law Officer  
   Mr. Khalid Wazir, Asstt. Director, PTA

Date of Hearing:                    06.02.2014

**Judgment**

**Jawwad S. Khawaja, J.** The petitioner in this case is Pakistan Telecom Mobile Ltd. which is a Company incorporated under the Companies Ordinance, 1984. It is a wholly owned subsidiary of Pakistan Telecommunication Company Ltd. (PTCL). The petitioner provides mobile cellular services under the trade name "Ufone". The respondent is the Pakistan Telecommunication Authority (PTA) established under section 3 of the Pakistan Telecommunication (Reorganization) Act, 1996 (the Act). The respondent is mandated by law *inter alia*, to issue and administer licenses including those issued to mobile service providers.

2.        The petitioner is a licensee operating under a license issued by PTA. The license granted by PTA to the petitioner is consensual inasmuch as the terms thereof were drawn by PTA and agreed upon by the petitioner and PTA. The license is dated August, 1998 and amongst its various terms and conditions, specifies the charges, fees etc. which the petitioner is obliged to pay to PTA. The petitioner being a business organization had applied for and obtained a license under the licensing regime which was prevalent in 1998.

3. Previous to the petitioner, PTA had issued licenses to three mobile service providers namely, Paktel Limited (Paktel), Pak Com Limited (Instaphone) and Pakistan Mobile Communication Limited (Mobilink). The petitioner was the fourth company to which a license for mobile cellular services was issued. To enable the petitioner and the three companies mentioned above, to provide cellular phone services, it was necessary for them to be allocated frequency spectrums. After being granted licenses and being allocated frequency spectrums, the petitioner and the three other companies commenced the provision of mobile phone services to customers in Pakistan.

4. On 27.10.2008 i.e. 10 years after the grant of the above referred license in August, 1998, the petitioner received a show cause notice from PTA purporting to have been issued under section 23 of the Act. The salient features of the show cause notice which are relevant for the adjudication of the present case can briefly be set out. It was firstly stated therein that under clause 2.4 of the license, it was obligatory on the petitioner as licensee to pay charges for the use of the frequency spectrum. It was also stated in the notice that under the Pakistan Telecommunication Authority (Functions and Powers) Regulations 2006, PTA was empowered to charge and levy a fee for allocation and use of the radio frequency spectrum including an annual spectrum charge. At this point it is important to note that between the date of the license i.e. August, 1998 and the issuance of the show cause notice, the petitioner was duly paying all amounts payable by it as licensee without there being any demand by PTA for additional sums specified in the show cause notice. There was no dispute that the petitioner had omitted or defaulted in making payment of any amount due under the license. The show cause notice, however, demanded payment of an annual spectrum administrative fee (ASAF). At the time of issuance of the show cause notice, an amount of Rs.198,257,314/- was shown and demanded by PTA as outstanding ASAF payable by the petitioner. Today the amount is in excess of Rs.750,000,000/- (Rupees seventy five crores). In the show cause notice, the petitioner was also threatened with cancellation of its license in the event of its failure to make payment of the ASAF. The show cause notice was replied to by the petitioner vide letter dated 3.11.2008.

5. Although the record of the case is extensive, the dispute between the petitioner and PTA is relatively straightforward. According to the petitioner, it is not obliged to pay

the ASAF demanded by PTA during the existence of its license. The term of the petitioner's license ends in May, 2014. The petitioner's reply to the show cause notice was dealt with by the PTA which passed its order on 26.3.2009 justifying the additional demand by way of ASAF. Some relevant aspects of the decision of PTA may now be briefly adverted to. It was observed by PTA that the show cause notice had been issued to the petitioner because of contravention of clause 2.4 of the conditions of the license. Much emphasis was placed on clause 2.4 during arguments. The same is, therefore, reproduced as under:-

*"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".*

6. At this juncture, it is important to note that the record as well as the stance adopted by PTA is that ASAF could be imposed on the petitioner by virtue of paras 4.4 and 5.4 of the mobile cellular policy issued by the Federal Government on 28.1.2004 read with clause 2.4 of the license. Para 4.4 *inter alia*, provides for the spectrum administrative fee i.e. the ASAF. Para 4.4 in relevant part provides as under:-

***"Spectrum Administrative fees***

*Administrative fees for radio spectrum will be set to recover the cost of administration of that spectrum. The total income generated from administrative fees for the whole spectrum should recover the reasonable operational costs of FAB incurred whilst managing, licensing and policing that spectrum".*

7. Upon a plain reading of the above stipulation of the Mobile Cellular Policy there can be no doubt that it provided a new charge by way of ASAF which was in addition to the charges which were payable by service providers under their existing licenses. It is also abundantly clear that the ASAF envisioned in para 4.4 of the Policy was the reasonable operational cost for *"managing licensing and policing"* and NOT for the *"use"* of the frequency spectrum. We are clear that use of the spectrum is by the licensee and is wholly distinct and different from the responsibility of PTA for managing, licensing and policing of the spectrum. It is equally clear that the petitioner, since 1998 had been using the frequency spectrum as there can be no mobile cellular service without actual use of the same. Learned counsel for the petitioner, with justification, asserted that the *"operational cost"* envisaged in the policy was meant to cover the expense incurred by PTA

for managing etc. of the frequency spectrum and could very well be imposed through new licenses to be issued by PTA pursuant to the policy or even in the case of renewal of the petitioner's license after its expiry. The existing license of the petitioner specifies each and every amount due from the petitioner as a licensee and thus includes the charges for the use of frequency spectrum in terms of clause 2.4 of the license. If at all there arises any issue as to charges for use of the frequency spectrum, it would firstly require the approval of FAB which would, in turn, be subject to challenge by a licensee or even by PTA under section 22 of the Act. Quite apart from the plain language of the license read in juxtaposition with the policy there is also a rational basis for distinguishing between use of the frequency spectrum on the one hand and managing, licensing and policing of such spectrum on the other. The charges for use of the spectrum are or can be market driven. Thus the licenses for use of frequency spectrum can be auctioned where prospective bidders can place a market value on the permission for use of the frequency spectrum. The ASAF under para 4.4 of the policy, however, is not market driven but is meant to recover only the *"reasonable operational costs"* for managing etc.

8. Para 5.4 of the policy is also relevant in helping us resolve the contention between the parties. It clearly specifies that mobile cellular licenses under the policy *"will replace the existing licenses as soon as possible or at least upon expiry of the current licenses"*. Thereafter there is a crucial sentence in the Policy stating that *"existing operators will be encouraged to come under the purview of Mobile Cellular policy even before the expiry of their existing license"*. It is thus clear from the policy itself that it was not meant to impact existing licensees who were merely to be encouraged but would not be obliged to come under the purview of the Mobile Cellular policy. This is a rational stipulation which ensures the rules of the game are not changed once the game has begun i.e. the license has become operational. Licensees entering the cellular market on commercial considerations are entitled to the certainty that financial assumptions on the basis of which they got their license remain unaltered during the currency of their licenses.

9. Learned counsel for the petitioner pointed out that the three companies namely, Paktel, Instaphone and Mobilink did voluntarily agree to the change of their license to bring the same in line with the aforesaid policy. The petitioner, however, chose not to opt for the policy and instead continued making payments in accordance with its license

which did not contain any requirement for paying ASAF. Here we are not required to embark on a determination if the ASAF being demanded from the petitioner amounts to a *“reasonable operational cost”* for managing etc. of the spectrum because the ASAF is outside the scope of the existing license of the petitioner. The reliance of PTA on the Mobile Cellular Policy is itself indicative of the fact that there is no room for ASAF in the petitioner’s license.

10. From the contents of the decision of the PTA dated 26.3.2009, it is evident that PTA has misconstrued the extent and scope of its regulatory authority. It has proceeded on the erroneous assumption firstly, that the Mobile Cellular Policy contain directives and secondly, that PTA was obliged to implement such directives of the Federal Government. On both counts, the PTA has fallen in error. It is true that under section 8 of the Act, the Federal Government may issue policy directives to PTA but section 8 itself stipulates that the policy directives cannot be inconsistent with the provisions of the Act. Section 22 of the Act provides that PTA *“shall have the right to modify the license or its conditions with the consent of the licensee”*. The only statutory provision which allows modification of a license is sub section 2 of section 22 of the Act. This provision also envisages modification of the license by agreement between the licensee and PTA. This provision has been examined later in this judgment. The PTA, therefore, has proceeded on the premise that it is obliged to implement the policy directives which have been issued by the Federal Government by means of the Mobile Cellular Policy, 2004. Sub paragraphs viii, ix and x of para 4.1 of the decision of the PTA dated 26.3.2009 can specifically be adverted to, to highlight the misconception on the part of PTA. For ease of reference, these extracts from the order of PTA dated 26.3.2009 are reproduced as under:-

- 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/licencees, 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.”*

11. It is obvious from the above reproduced portion of the order dated 26.3.2009 that PTA has conceived itself as a subordinate department of the Federal Government rather than the independent regulator envisaged by sections 3, 4 and 5 of the Act. If section 5(1)(d) of the Act is read with section 22 thereof, it will become immediately evident that the Federal Government has no role in modifying a license issued by PTA or varying any condition thereof. This power is vested in PTA and is subject to the constraints of section 22 of the Act. The rationale for creating PTA as a regulator independent of the Federal Government by means of an Act of Parliament is to ensure that the Government has no power to interfere in the working of PTA in matters of grant and administration of licenses. The Policy directives issued by the Government under section 8 of the Act, therefore, cannot have binding affect to compel PTA to modify the terms of an existing license.

12. The decision rendered by PTA dated 26.3.2009 was challenged by the petitioner by way of appeal before the Islamabad High Court under section 7 of the Act. The appeal was dismissed by the High Court and the reason for doing so is contained in para 10 of the impugned judgment. The learned Judge-in-Chambers in the High Court agreed with learned counsel for the petitioner that PTA did not have the power to amend and enhance unilaterally the fees and charges mentioned in the license but, in our opinion, the Court fell in error by holding that the distinction between “use” and “administration” is “*too technical to be accepted*”. For ease of reference, para 10 of the impugned judgment is reproduced as under:-

*"I am in agreement with the learned counsel for the appellant that the phrase used "from time to time" does not mean that the authority has the power to amend and enhance the fees and charges mentioned in the license unilaterally without the consent of the licensee and without referring the matter to Corporate Law Authority. For example under Clause 2.2 of the license, the appellant is liable to pay initial fee of Rs. 50 million. The authority has no jurisdiction to modify the license fee unilaterally without resorting to the provision of Section 22. Similarly, the rate of annual Royalty cannot be changed unilaterally by the authority. The learned counsel for the appellant is right in saying that a policy can only be given legal effect through an appropriate order or statutory notification. There is no cavil with this preposition also that Clause (p) of Section 5(2) is prospective in nature and would not apply retrospectively. I am also in agreement with the learned counsel for the appellant that terms of a concluded contract cannot be changed unilaterally by one of the contracting party. However, the difficulty of the appellant is that Clause 2.4 makes the licensee liable to pay the charges for the use of Frequency Spectrum but the amount of charges has not been mentioned in the said clause nor any mechanism has been given to determine the same. I am unable to agree with the learned counsel for the appellant that the words "use" and "administration" cannot be equated together. The argument is too technical to be accepted. The learned counsel for the appellant may be correct in saying that the mechanism to determine the liability of the licensee to pay Annual Spectrum Administrative Fee was introduced in 2004 policy. But the fact of the matter is that the appellant was liable to pay under clause 2.4 of the license, charges for use of Frequency Spectrum. The liability to pay charges for use of frequency spectrum was already there under Clause 2.4 and the same was not created by the policy. The amount of charges was not provided in this clause. The charges payable were as approved by the Board. The only thing which policy 2004 in this respect has done is to provide mechanism for determination of the amount of the said charges. It cannot, therefore, be said that the appellant is not liable to pay the Annual Spectrum Administrative Fee (ASAF). One of the arguments of the learned counsel for the respondent was that the appellant was allocated a different frequency as is established from letter dated 13.5.2004 and the allocation can be treated as if the appellant has opted for the new policy. However, I am of the opinion that the allocation of frequency in GSM 1800 Band in lieu of vacation of 2.4+2.4 MHz of Bandwidth in GSM 900 Band is in terms of Clause 5.3 of the license of the appellant. The allocation of the frequency does not mean that the appellant has come within the purview of the Policy 2004".*

There are, we say with respect to the learned Judge, inconsistencies in the above extract which arise from the untenable observation that the distinction between the “use” of frequency spectrum and its “administration” is too technical to be accepted. Far from being technical, the distinction is too obvious to be ignored. Furthermore, the financial implications of the same are enormous as has been noted above.

13. We are unable to agree with learned counsel for the PTA that it was open to PTA to decide on its own to impose an additional charge on the licensee by way of ASAF. Clause 2 of the license contains provisions setting out the entire financial obligation of the petitioner as a licensee. The frequency spectrum was allocated at the time the license was issued to the petitioner in August, 1998. The financial obligations were also put in place at the same time. The terms of the license including financial commitments were, therefore, well settled in August, 1998. Learned counsel for PTA contended that the ASAF is not a tax or a license fee but is an amount charged to recover the administrative expenses of the PTA and the Frequency Allocation Board (FAB). According to him, the amount being demanded by ASAF was on account of services rendered by PTA and FAB. This argument is not legally tenable because the PTA had set out all relevant terms and conditions including those relating to services etc. which were to be provided to licensees. Furthermore, even after the Frequency Allocation Board was established the terms of the license could not have been varied without a statutory provision empowering PTA to impose an additional levy by way of ASAF.

14. Learned counsel for the PTA next contended that imposing ASAF on licensees other than the petitioner established discrimination and violation of Article 25 of the Constitution. This contention is also misconceived because there is no discrimination. The petitioner was distinctly placed as the sole licensee which had not opted for bringing its existing license into line with the Mobile Cellular Policy. The other service providers who held licenses prior to the Mobile Cellular Policy namely, Paktel, Instaphone and Mobilink had consciously opted for such change while the petitioner had not done so. In these circumstances, it cannot be said that the petitioner was similarly placed to the other licensees. In any event since the Policy by itself and without the backing of a statute cannot suffice for the purpose of imposing an additional burden on the petitioner as



licensee, we do not see how the PTA can demand an additional payment not covered by the existing license issued to the petitioner in August, 1998.

15. Since the ASAF is held by us to be distinct from a charge for the use of the frequency spectrum and because the ASAF has for the first time been specified by the Mobile Cellular Policy in 2004, the same cannot be forced onto an existing licensee who chooses to continue operating under an existing license. We may add at this point that even if PTA is desirous of making a modification in a license or any condition thereof the PTA is obliged to resolve any difference between it and a licensee, through consultation and negotiation. Under section 22(2) of the Act, it has been stipulated that *“if the licensee and [PTA] fail to amicably resolve such difference or dispute, either party may make an application to the High Court or Tribunal”* to adjudicate the difference/dispute between the parties and to settle all matters connected therewith. In the present case there is no question of PTA imposing ASAF on the petitioner. But even if PTA were desirous of imposing a user charge on the petitioner for the use of frequency spectrum, it would firstly require the approval of the FAB and thereafter it would be open to the petitioner to invoke the provisions of section 22(2) of the Act.

16. These are the reasons for our short Order dated 6.2.2014 whereby this petition was converted into an appeal and allowed.

Judge

Judge

Judge

ISLAMABAD, the  
6<sup>th</sup> February, 2014  
A. Rehman

APPROVED FOR REPORTING.