JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.108 of 2008
M/s DANCOM Pakistan (Pvt.) Limited
Versus
Pakistan Telecommunication Authority

Dates of Hearing:	09.09.2020 and 16.04.2021.
Appellant by:	Mr. Mohammad Shahzad Shaukat, Advocate.
Respondent by:	Barrister Munawar Iqbal Duggal and Mr. Hassan Shehzad, Advocate. Mr. Khurram Siddiqui, Director (Law & Research), P.T.A. Mr. Zawar ul Hassan, Deputy Director (CPD), P.T.A. Ch. Adil Javed, Assistant Director (Legal), P.T.A.

MIANGUL HASSAN AURANGZEB, J:-Through the instant appeal under Section 7(1) of the Pakistan Telecommunication (Reorganization) Act, 1996 **("the 1996 Act")**, the appellant, M/s DANCOM Pakistan (Pvt.) Limited, impugns the order dated 07.08.2008 passed by the Pakistan Telecommunication Authority **("P.T.A.")** whereby a fine of Rs.10,00,000/- was imposed on the appellant under Section 23(3) of the said Act for its failure in provision of information pertaining to international telephony traffic data and thereby contravening Rule 12 of the Access Promotion Rules, 2004 **("the 2004 Rules")** and Regulation 11 of the Access Promotion Regulations, 2005 **("the 2005 Regulations").**

2. The record shows that the appellant is engaged in the business of operating a Long Distance and International **("LDI")** telecommunication system. On 03.08.2004, the appellant had been granted a non-exclusive Licence No.LDI-05(10)-2004 by the P.T.A. to establish, maintain and operate an LDI telecommunication system in Pakistan on the terms and conditions contained in the said licence. The licence obligated the appellant to comply with the prevailing regulatory laws (including the 2004 Rules and the 2005 Regulations). On 04.08.2004, the appellant and the Pakistan

Telecommunication Company Limited **("P.T.C.L.")** entered into an interconnection agreement.

Provisions in the 2004 Rules, 2005 Regulations and the appellant's licence to maintain accurate CDRs pertaining to international calls:-

(i) 2004 Rules:-

3. In exercise of the powers conferred by Section 57 of the 1996 Act, the Federal Government made the 2004 Rules. Rule 12(1) of the 2004 Rules requires an LDI licencee to submit monthly reports to the P.T.A. of information regarding (a) the total number of minutes of the incoming international telephony service that is carried by the LDI licencee and delivered to the telecommunication system of each local loop licencee and mobile licencee by the country of origin; and (b) the total payments made pursuant to Rules 4 and 5 of the said Rules to each local loop licencee and to the Universal Service Fund **("USF"),** and the country of origin of the incoming international telephony service to which the payments relate.

4. Under Rule 12(1) of the said Rules, the appellant (as an LDI licencee) was under an obligation to report to the P.T.A. on a monthly basis information including the total number of minutes of incoming international telephony service that is carried by it and delivered to the telecommunication system of P.T.C.L. (as a local loop licencee) and mobile licencee by country of origin.

5. Rule 12(2) of the 2004 Rules obligates a local loop licencee to report to the P.T.A. on a monthly basis information including the total number of minutes of incoming international telephony service that is delivered to the telecommunication system of that local loop licencee by each LDI licencee, by country of origin. Rule 12(5) of the said Rules requires a licencee to keep all books and accounts pertaining to payments made or received pursuant to the 2004 Rules and the telecommunication services to which such payments relate, including Call Detail Records ("**CDRs**") and itemized billing data, for a period of at least three years. Rule 12(7) of the said Rules empowers the P.T.A. to inspect any premises or facilities of a licencee to determine compliance with the 2004

Rules. Additionally, a licencee is obligated to cooperate with the P.T.A.'s representatives in the conduct of such inspection. Rule 13(1) of the said Rules prohibits a licencee from translating, altering or deleting the telephone number or other identification associated with the calling party of incoming international telephony service call.

(ii) 2005 Regulations:-

6. In exercise of the powers conferred by Section 5(2)(o) of the 1996 Act, the P.T.A. made the 2005 Regulations. Regulation 11(1) and (2) of the 2005 Regulations require the LDI local loop and mobile licencees to submit information in accordance with Rule 12 of the 2004 Rules to the P.T.A. within thirty days of close of month to which the information relates. Regulation 11(4) of the said Regulations enables an LDI licencee to submit to the P.T.A. revised information where the traffic data is determined to be different from the information initially submitted to the P.T.A. Furthermore, LDI licencee is under an obligation to furnish the revised information within ten days of the resolution of disputes so agreed amongst the licencees.

7. Regulation 9 of the 2005 Regulations requires an LDI licencee and a local loop / mobile licencee to exchange CDR data within fifteen days of close of month to which such data relates. The reconciliation of such data is to be made by the LDI and local loop / mobile licencee concerned within thirty days of close of month to which the data relates. The said regulation also provides that in the event of disagreement between the LDI and the local loop or mobile licencees regarding CDR reconciliation, such licencees shall conduct negotiations and if the dispute is still not resolved through negotiations, the same shall be resolved in accordance with the dispute resolution mechanism under the interconnection agreement. Under Regulation 9(4) of the 2005 Regulations, it is categorically mentioned that in the event the dispute is not resolved by resort to such dispute resolution mechanism, any of the said parties can file an application to the P.T.A. for resolution of the dispute. In the case at hand, the dispute

between the appellant and P.T.C.L. regarding CDR reconciliation had not been referred at any material stage to the P.T.A. by any of the licencees, i.e. the appellant, P.T.C.L. / P.T.A.

The appellant's licence and Interconnection Agreement:-

8. On 15.04.1997, the P.T.A. granted a licence to P.T.C.L., whereby the latter was granted the right to operate and maintain its telecommunication network and provide telecommunication services. On 04.08.2004, the appellant and P.T.C.L. entered into an interconnection agreement for the provision of interconnection related services by P.T.C.L. to the appellant. Clause 13.13 of the said agreement provides that the parties thereto shall not manipulate the Calling Line Identification ("CLI") of the original calling party and the CLI shall be passed on in the conveyance of a call accordingly.

9. Clause 6.3.1 of the licence issued by the P.T.A. to the appellant requires the latter to provide, at its own cost, suitable equipment at premises designated by the P.T.A., in order to measure and record traffic, billing and quality of service in a manner specified by the P.T.A. The said licence also requires the appellant to provide the P.T.A. with access to such equipment and to information generated by the equipment. Clause 6.8.1 of the said licence requires the appellant to maintain call records including called and calling numbers, date, duration, and time with regard to the communications made on its telecommunication system for a period of at least one year for scrutiny by or as directed by the P.T.A. or required by the security agencies under any law.

10. Clause 6.12.2 of the said licence provides that the licencee shall not translate, alter or delete the telephone number or other identification associated with the calling party of an international telephony service call whereas clause 6.12.3 provides that the licencee shall not translate, alter or delete the signalling or other data associated with an international telephony service call to disguise the identification of the service provider of the calling party or the identification of the country of origin of the call.

11. The above referred clauses were incorporated in the appellant's licence so as to prohibit and keep a check on the menace of *"call masking,"* which has been explained in the judgment of the Indian Supreme Court in the case of Bharat Sanchar Nigam Limited Vs. Reliance Communication Limited (2011 (1) SCC 394), in the following terms:-

> *"38. Call masking takes place when a licencee deliberately alters the identity of an incoming international call before handing it over to another service provider at any interconnection point i.e. PoI. The international calling party's identity is obliterated (i.e. international CLI is wiped out) and the said international call is made to appear as it were from a domestic/national number. This technique enables evasion of ADC payments at enhanced rates for international calls. Today, all private automated branch exchanges (PBX) are computerized."*

The appellant's purported compliance with Rule 12 of the 2004 Rules and Regulation 11 of the 2005 Regulations in providing information to P.T.A. regarding total number of minutes of incoming international telephony service:-

12. In discharge of its reporting obligations under Rule 12 of the 2004 Rules and Regulation 11 of the 2005 Regulations as well as clause 6.12.2 of the licence dated 03.08.2004, the appellant on 09.03.2006 is said to have submitted a report regarding information as to the total number of minutes of incoming international telephony service carried by it and delivered to the telecommunication system of P.T.C.L. by country of origin. The reconciliation of the information provided by the appellant with that provided by P.T.C.L. caused the P.T.A. to find that the appellant had reported 2,654,292 incoming international telephony minutes less than that of the actual minutes. This discrepancy caused the P.T.A. to issue a show cause notice dated 22.08.2006 to the appellant.

Issuance of show cause notice dated 22.08.2006 by the P.T.A. to the appellant:-

13. On 22.08.2006, a show cause notice under Section 23 of the 1996 Act was issued by the P.T.A. to the appellant requiring the latter to show cause as to why the licence *"should not be suspended, terminated or any other enforcement order should not be passed under Section 23 of the 1996 Act against the licencee."* The allegation against the appellant was that it had contravened

Rule 12 of the 2004 Rules and Regulation 11 of the 2005 Regulations by providing incorrect information regarding the international incoming minutes. The international incoming minutes calculated from the appellant's CDR showed over two million less minutes when reconciled with P.T.C.L.'s CDRs. The appellant was alleged to have reported 2,654,292 less minutes. Furthermore, it was also alleged that the appellant had concealed the factum as to the letter dated 21.04.2006 from P.T.C.L. wherein the appellant was informed that the appellant's CDRs had been rechecked by P.T.C.L. and found to be incorrect; and that P.T.C.L. had provided its CDRs to the appellant for verification but no intimation had been received regarding the disputed traffic.

14. On 20.09.2006, the appellant submitted a reply to the said show cause notice wherein the position taken by the appellant was that the difference of the two million minutes referred to in the show cause notice was due to a misunderstanding, and that P.T.C.L. had erroneously levied Access Promotion Contribution **("APC")** on national calls. The P.T.A. was also informed that the appellant was in the process of resolving its disputes with P.T.C.L. in accordance with the dispute resolution mechanism enshrined in the interconnection agreement. The appellant stressed that since it had provided correct information to the P.T.A., the show cause notice should be withdrawn.

Application under Section 20 of the Arbitration Act, 1940 filed by the appellant seeking the reference of its disputes with P.T.C.L. under the interconnection agreement to arbitration:-

15. After the issuance of the said show cause notice, the appellant, on 02.09.2006 filed an application under Section 20 of the Arbitration Act, 1940 **("the 1940 Act")** before the learned Civil Court seeking the reference of the disputes between itself and P.T.C.L. arising from and related to the interconnection agreement to be referred to arbitration. In the said application, the dispute between the appellant and P.T.C.L. regarding the minutes of national calls being charged with international tariff was also sought to be referred to arbitration. Along with the said application, the appellant had also filed an application for interim

injunction. Vide ad interim order dated 13.09.2006, the learned Civil Court directed P.T.C.L. to restore the suspended circuits of the appellant. After the learned Civil Court referred the matter to arbitration, the learned arbitrator rendered award dated 25.01.2014 which is adverse to the appellant's interests. The appellant filed objections to the said award whereas P.T.C.L. is said to have applied for a judgment and decree to be passed in terms of the said award. Vide order dated 12.03.2019, the learned Civil Court set-aside the said award primarily on the ground that it had not been rendered within the time fixed by the Court. The learned Civil Court ordered that the matter be decided afresh either by a new arbitrator or the arbitrator that had rendered the award. The said order has been assailed by P.T.C.L. in an appeal (F.A.O.No.79/2019) before this Court. Vide interim order dated 10.05.2019, this Court directed status *quo* to be maintained. The said appeal is still pending adjudication. The appellant's challenge to the jurisdiction of the P.T.A. to pass an enforcement order against it is based on the ground that the P.T.A. should have waited until the final outcome of the arbitration proceedings.

Litigation instituted by the appellant to thwart the proceedings pursuant to the show cause notice:-

16. The show cause notice dated 22.08.2006 was assailed by the appellant in writ petition No.2765/2006 before the Hon'ble Lahore High Court. Vide order dated 06.11.2006, the said writ petition was disposed of in the following terms:-

> *"Instant petition is accordingly disposed of with a direction to the [appellant] to raise all the objections before the [P.T.A.] who will decide those before taking any punitive action against the [appellant] through a speaking order, in accordance with law and will take remedial steps on the basis of its own inquiry/findings. [Appellant] will avail [its] remedies in accordance with law, against the order so passed by the [P.T.A.]. With these observations, this writ petition is disposed of."*

17. After the P.T.A. constituted a committee which included representatives of the appellant, P.T.C.L. and the P.T.A. to investigate the matter, an enforcement order was passed by the P.T.A. on 03.04.2008. In the said order, it was held *inter alia* that the appellant had concealed information regarding incoming

international telephony minutes from the P.T.A. by misusing its calling card platform and by using the masking techniques which are contrary to Rule 13 of the 2004 Rules and condition 6.12 of the appellant's licence, which resulted in reporting of less minutes and the transgression of Rule 12 of the 2004 Rules as well as Regulation 11 of the 2005 Regulations. Furthermore, P.T.A. decided to suspend the appellant's licence and required it to provide accurate information and an undertaking to the effect that it will not involve itself in such illegal practices in the future. It was also held that in the event that the appellant failed to fulfill its obligation of providing accurate information and an undertaking to the said effect, proceedings for the termination of its licence shall be initiated.

18. The said order dated 03.04.2008 was assailed by the appellant in an appeal (F.A.O.No.8/2008) before this Court. Vide order dated 16.07.2008, the said appeal was disposed of by setting-aside the said order dated 03.04.2008. Furthermore, the P.T.A. was directed to decide the question whether it could take cognizance of the matter during the pendency of the arbitration proceedings between the appellant and P.T.C.L. For the purposes of clarity, the operative part of the said order passed by this Court is reproduced herein below:-

> ***"7. In view of above said, the impugned judgment is set aside and the respondent is directed to decide the issue of jurisdiction to the effect that during pendency of arbitration proceedings before the Civil Court of competent jurisdiction in light of clause 28.4 (b) of interconnection agreement dated 04-8-2004 between the appellant and PTCL, the respondent can take cognizance of the matter with speaking order and reasons, manifesting application of judicial mind to the issues and points of controversy involved in the matter within a period of 15 days from the date of the receipt of this order. The appeal is disposed of accordingly."***

19. The proceedings before the P.T.A. pursuant to the said order passed by this Court culminated in the order dated 07.08.2008, whereby a fine of Rs.10,00,000/- was imposed on the appellant under Section 23(3) of the 1996 Act for contravention of Rule 12 of the 2004 Rules and Regulation 11 of the 2005 Regulations. In the said order, it was recorded that the P.T.A. had taken a lenient view in the matter since the appellant's management had changed and

the appellant had undertaken to abide by the regulatory requirements.

20. As regards the jurisdictional objection taken by the appellant to the proceedings initiated by the P.T.A. through show cause notice dated 22.08.2006, the P.T.A. in the said order dated 07.08.2008, held that the pendency of the dispute between the appellant and P.T.C.L. before a Court of law did not prevent the P.T.A. from proceeding against the appellant for providing incorrect CDRs in contravention of the requirements in the 2004 Rules and the 2005 Regulations.

21. The said order dated 07.08.2008 was assailed by the appellant in the instant appeal (F.A.O.No.108/2008) before this Court. Vide order dated 22.12.2014, the appeal was dismissed. In the said order, it was observed that the fine imposed on the appellant should be deposited and the same would be refunded upon the completion of the arbitration proceedings.

22. The said order dated 22.12.2014 was assailed by the appellant in civil petition No.226/2015 before the Hon'ble Supreme Court. Vide order dated 26.04.2016, the said petition was converted into an appeal and allowed; the said order dated 22.12.2014 was set-aside; and the matter was remanded to this Court with the direction to decide the appeal afresh. In the said order, it was recorded that the appellant had deposited the fine with the P.T.A. under protest. Furthermore, it was observed that the said amount shall not be refunded to the appellant as a result of the Supreme Court's order but shall be subject to the final adjudication of the appeal by this Court.

Contentions of the learned counsel for the appellant:-

23. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that the dispute regarding the calculation and differential in the CDRs maintained by the appellant and P.T.C.L. was beyond the purview and jurisdiction of the P.T.A.; that the functions and powers of the P.T.A. are circumscribed in Sections 4, 5 and 6 of the 1996 Act; that under Section 23 of the 1996 Act, the P.T.A. can issue an

enforcement order only when (i) there is contravention of any of the provisions of the 1996 Act or the rules made thereunder, and (ii) there is contravention of any of the terms and conditions of the licence; that the appellant had not transgressed any provision of the 1996 Act or the rules made thereunder as well as any term and condition of the licence; that the dispute between the appellant and P.T.C.L. arising from and related to the interconnection agreement has never been referred to the P.T.A. in terms of Rule 13(2) of the Pakistan Telecommunication Rules, 2000; that since the arbitration proceedings between the appellant and P.T.C.L. are still pending, the impugned order dated 07.08.2008 passed by the P.T.A. is bad for want of jurisdiction; that when the said order dated 07.08.2008 was passed, the *"Authority"* was not properly constituted inasmuch as only the Chairman and Member Finance were working, whereas the third Member was appointed on 16.03.2009; that since the impugned order was passed by the Chairman and one Member of the P.T.A., it could not be termed as an order passed by the *"Authority"* as defined in Section 3 of the 1996 Act; and that the P.T.A. had no jurisdiction to decide a dispute arising from and related to the interconnection agreement between the appellant and P.T.C.L. Learned counsel for the appellant prayed for the appeal to be allowed, and for the impugned order dated 07.08.2008 to be set-aside.

Contentions of the learned counsel for the P.T.A.:-

24. On the other hand, learned counsel for the P.T.A. submitted that a show cause notice dated 22.08.2006 was issued to the appellant after the comparison between the CDRs submitted by the appellant and P.T.C.L. showed a discrepancy of 2,654,292 incoming international telephony minutes; that the appellant has embroiled the P.T.A. in litigation so as to avoid its liability for not showing compliance with the 2004 Rules and the 2005 Regulations; that the pendency of the arbitration proceedings between the appellant and P.T.C.L. could not prevent the P.T.A. from exercising its regulatory responsibilities in accordance with the provisions of the 1996 Act and the rules and the regulations

made thereunder; that clause 6.3.1 of the appellant's licence requires it to provide the CDR to the P.T.A.; that Rule 12 of the 2004 Rules obligates a licencee to report to the P.T.A. the total number of minutes of incoming international calls on a monthly basis; that the P.T.A proceeded cautiously by not just relying on the CDR produced by the P.T.C.L but also constituted a committee of experts before passing the order impugned in this appeal; that the appellant also failed to provide the raw CDRs to the P.T.A.; that as a Regulator, it was the responsibility of the P.T.A. to curb the menace of grey traffic; that in dealing with the appellant for providing incorrect information in the CDR, the P.T.A. is not concerned with the disputes between the appellant and P.T.C.L. under the interconnection agreement; that in this appeal, this Court is only to determine whether the impugned order has been passed in violation of any provision of the 1996 Act or the rules or regulations made thereunder; that the appellant has not alleged any violation by the P.T.A of any provision of the 1996 Act or the rules or regulations made thereunder; that the P.T.A. has not embarked on settling any dispute between the appellant and P.T.C.L. arising from and related to the interconnection agreement; that the challenge to the *vires* of the 2004 Rules has failed as can be discerned from the judgment of the Hon'ble Supreme Court in the case of World Call Vs. P.T.A. (2016 SCMR 475); that the P.T.A. has already taken a lenient view in the matter by imposing a fine of only Rs.10,00,000/- on the appellant; and that in the impugned order, it is clearly mentioned that the issue regarding outstanding dues has been made subject to the outcome of the dispute between the appellant and P.T.C.L.

25. Learned counsel for the P.T.A. further submitted that the impugned order is not rendered unlawful on account of having been passed by the Chairman and one Member of the P.T.A.; and that under Section 3(9) and (10) of the 1996 Act, a decision of the P.T.A. cannot be held to be invalid by reason of the existence of a vacancy in, or a defect in the Constitution of the P.T.A. Learned counsel for the P.T.A. prayed for the appeal to be dismissed.

26. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 22 above and need not be recapitulated.

27. As mentioned above, the P.T.A., in its order dated 07.08.2008, has deferred the matter of the recalculation of the regulatory amounts pertaining to the (i) annual licence fee (LDI) for the period between 2005 to 2007, (ii) research and development contribution (LDI) for the period between 2005 to 2007, (iii) USF contribution (LDI) for the period between 2005 to 2007, (iv) annual licence fee (Cyber Physical Production System) for the year 2007, (v) APC for USF for the year 2007, and (vi) annual dues on under booked traffic for the year 2006, until *"the decisions of the Courts concerned on the issue of APC for USF and on its disputes with P.T.C.L."*

28. For contravening Rule 12 of the 2004 Rules and Regulation 11 of the 2005 Regulations, the P.T.A. imposed a fine of Rs.10,00,000/- under Section 23(3) of the 1996 Act. In the written arguments submitted on behalf of the P.T.A., it has been clarified that the issue as regards outstanding dues against the appellant has been made subject to the outcome of the dispute between the appellant and P.T.C.L., and that the matter had been left open till the conclusion of the said proceedings. Be that as it may, it is an admitted position that order dated 26.04.2016 passed by the Hon'ble Supreme Court shows that the appellant has already deposited the said fine under protest with the P.T.A.

29. Now, the vital question that needs to be decided is whether the P.T.A. had the jurisdiction to pass the enforcement order dated 07.08.2008 pursuant to the show cause notice dated 22.08.2006. One of the functions of the P.T.A., in terms of Section 4(1)(k) of the 1996 Act, is to regulate the Access Promotion Contribution. In order to structure regulation of the APC, the Federal Government made the 2004 Rules, whereas the P.T.A. made the 2005 Regulations.

30. Section 23(1) of the 1996 Act provides that where a licencee contravenes any provision of the said Act or the Rules made thereunder or any term or condition of a licence, the P.T.A. or any of its officers not below the rank of Director may, by a written notice, require the licencee to show cause within thirty days as to why an enforcement order may not be issued. Section 23(3) provides *inter alia* that where a licencee fails to satisfy the P.T.A. about the alleged contravention, the P.T.A. may, by an order in writing and giving reasons, levy a fine which may extend to Rs.350 million or suspend or terminate the licence, impose additional conditions or appoint an administrator to manage the affairs of the licencee, but only if the contravention is grave or persistent.

31. The requirement of providing accurate information to the P.T.A. regarding the total number of minutes of incoming international telephony service that was carried by the appellant and delivered to the communication system of P.T.C.L. by the country of origin is not just an explicit requirement under Rule 12(1)(a) of the 2004 Rules but also a requirement of the licence issued by the P.T.A. to the appellant. The provision of inaccurate information by an LDI licencee to the P.T.A. is most definitely a contravention of the explicit provisions of the 2004 Rules and the 2005 Regulations alluded to in paragraphs 3 to 7 hereinabove. It is also a violation of the terms and conditions of the appellant's licence referred to in paragraph 10 hereinabove. Therefore, it is held that the P.T.A. does have the jurisdiction to issue a show cause notice to an LDI licencee who is alleged to have contravened its obligations under Rule 12 of the 2004 Rules and Regulation 11 of the 2005 Regulations, and to pass an enforcement order under Section 23 of the 1996 Act against an LDI licencee who is found to have violated the said Rules and Regulations in the proceedings pursuant to the show cause notice. Such proceedings cannot be avoided or stalled merely on account of the pendency of arbitration proceedings between an LDI licencee and local loop licencee / a mobile licencee under an interconnection agreement.

32. Since in the case at hand, the basis for the issuance of the show cause notice was the discrepancy regarding the number of

minutes of incoming international telephony service provided by the appellant and P.T.C.L., which dispute became the subject matter of the arbitration, the P.T.A. deferred the recalculation of the amounts due by the appellant until the outcome of the arbitration and the decision of the Court. The learned arbitrator has rendered his award, but this Court has yet to decide whether it was lawful for the learned Civil Court to have decided to remit the award to the arbitrator for a decision afresh.

33. Not commenting on whether (in the presence of Regulation 9(5) and 10(4) of the 2005 Regulations, which require an LDI licencee to deposit APC for USF contribution regardless of its disagreement regarding CDRs data reconciliation with the corresponding operator) it was lawful or proper for the P.T.A. to have deferred the recalculation of the amounts (which included the issue of APC for USF) to the outcome of the arbitration proceedings and the decision of the Court, the fact remains that Rule 5(1) of the 2004 Rules provides that for each month that an LDI licencee provides telecommunication services, it shall pay to the Universal Service Fund an amount determined by multiplying the access promotion contribution for the USF contribution for that country by the monthly volume of incoming international telephony service from that country, measured in call-minutes, carried by the LDI licencee and terminated on the telecommunication system of any mobile licencee. This provision shows that the quantum of the amount payable by an LDI licencee to the USF is determined on the basis of the call minutes of the incoming international telephony service from a particular country carried by an LDI licencee. Assuming that the arbitrator and the Court holds that the CDRs reported by P.T.C.L. were correct and those reported by the appellant were inaccurate, i.e. short by 2,654,292 incoming international telephone minutes, the amount payable by the appellant as USF would be for these inaccurately reported call minutes. It is my view that the P.T.A., while deferring the calculation of the USF payable by the appellant until the outcome of the arbitration proceedings and decision of the Court, could not have imposed a fine under Section 23 of the 1996 Act. This is

because a fine under the said provision could be imposed where the P.T.A. determined that the appellant had violated Rule 12(1)(a) of the 2004 Rules by misreporting the number of minutes of the incoming international telephony service by 2,654,292 call minutes. The P.T.A.'s decision to defer the calculation of the amount payable by the appellant towards USF, and its decision to impose a fine on the appellant under Section 23 of the 1996 Act, are decisions which are mutually exclusive and contradictory. In this case, the imposition of the fine on the appellant could be justified only if the P.T.A. had held conclusively that the appellant had violated its reporting obligations under Section 12(1)(a) of the 2004 Rules. Since the recalculation of the amounts due from the appellant has been subjected to the outcome of the arbitration proceedings and the decision of the Court, the fine deposited under protest by the appellant is liable to be returned to the appellant. The P.T.A. would be at liberty to issue a show cause notice to the appellant if the arbitrator finds the number of minutes of incoming international telephony service claimed by P.T.C.L. to have been carried by the appellant to be correct.

34. As regards the contention of the learned counsel for the appellant that the impugned enforcement order having been passed by the Chairman and one Member, and not by the *"Authority"* as defined in Section 3(2) of the 1996 Act to mean three Members, is invalid: suffice it to say that Section 3(10) of the said Act provides *inter alia* that no act, proceedings or any decision of the *"Authority"* shall be invalid by reason of the existence of a vacancy in, or a defect in the Constitution of the *"Authority."* It is not disputed that the third Member of the *"Authority"* was appointed on 16.03.2009, i.e. after the impugned enforcement order was passed. Therefore, the impugned enforcement order cannot be held to be illegal solely on the ground that it was passed only by the Chairman and one Member of the Authority.

35. I have gone through the judgments in the cases of National Silk and Rayon Mills Vs. Federation of Pakistan (2015 MLD 995) and SNGPL Vs. OGRA (PLD 2014 Lahore 167) wherein a provision in *pari materia* to Section 3(10) of the 1996 Act in the Oil and Gas

Regulatory Authority Ordinance, 2002 was interpreted by the Hon'ble Lahore High Court. If I were to hold that the impugned enforcement order passed by the Chairman and a Member of the P.T.A. was unlawful on account of the vacancy of one Member, it would not be without doing violence to the words in Section 3(10) of the 1996 Act, which clearly sets out the intent of the legislature. In the case of Pakistan Sugar Mills Association Vs. Federation of Pakistan (PLD 2021 Islamabad 55), the Division Bench of this Court held as follows:-

> *"44. The principles of statutory interpretation are well settled. The Court cannot recast or reframe legislation for the very reason that it has no power to legislate. The Court cannot add words to a statute or read words into it which are not there. Similarly the Court cannot ignore words in a statute by attributing redundancy to them. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule by making structural changes or substituting words in a clear statutory provision under the guise of interpretation will pose a great risk as the changes may not be what the Legislature intended or desired. Legislative wisdom cannot be replaced by a Judge's views."*

36. It is not the appellant's case that the third Member had absented himself from the proceedings culminating in the impugned enforcement order. As mentioned above, the third Member of the *"Authority"* had not even been appointed when the impugned enforcement order was passed.

37. Article 218(2) of the Constitution provides *inter alia* that the Election Commission of Pakistan **("E.C.P.")** shall consist of the Commissioner, who shall be the Chairman of the Commission, and four Members, each of whom has been a Judge of a High Court from each Province. The mode and procedure to be adopted by the E.C.P. to perform its duties and discharge its functions has not been prescribed by the Constitution. Section 8(1) of the Election Commission Order, 2002 provides that all decisions of the E.C.P. shall be expressed in terms of the opinion of the majority of its Members, including the Chairman, whereas Section 8(2) of the said Order provides that no election conducted or other action taken or thing done by the E.C.P. shall be invalid or called into question only on the ground of the existence of a vacancy therein or of the

absence of any Member from any meeting thereof. Section 8(2) of the said Order is couched in a language similar to Section 3(10) of the 1996 Act. In the case of Sardar Sher Bahadur Khan Vs. Election Commission of Pakistan (PLD 2018 SC 97), the Hon'ble Supreme Court held that an order passed by three Members of the E.C.P. regarding a declaration as to the defection of the petitioner in the said case was confirmed, was validly passed. In the said report, it was *inter alia* held as follow:-

> *"From the perusal of the above provisions, it is clear that the ECP is comprised of five members but at nowhere it has been provided that any decision of the ECP shall be taken by all of its five members. Contrary to it, in section 8(2) of the Order, 2002 any order passed by the ECP by lesser members of its total strength has been protected by specifically proving that no action taken or thing done by the ECP shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof."*

38. In view of the above, the instant appeal is allowed in the above terms. The amount deposited by the appellant with the P.T.A. shall be returned to the appellant. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 29.04.2021.

(JUDGE)

APPROVED FOR REPORTING

*Sultan**