JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.127 of 2021
Pakistan Telecommunication Company Limited
Versus
Pakistan Telecommunication Authority

Date of Hearing:	23.06.2022
Appellant by:	Malik Omair Saleem and Mr. Abdullah Alim Qureshi, Advocates along with Khizer Ali, Manager (Legal), P.T.C.L.
Respondent by:	Mr. Faisal Bin Khurshid, Advocate along with Ch. Adil Javed, Assistant Director (Lit) and Shahmeer Shahid, MTO (Law), P.T.A.

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 7 of the Pakistan Telecommunication (Re-organization) Act, 1996 (**"the 1996 Act"**), the appellant, Pakistan Telecommunication Company Limited (**"P.T.C.L."**), impugns the order dated 08.11.2021 passed by the respondent, Pakistan Telecommunication Authority (**"P.T.A."**), whereby a fine of Rs.1 million was imposed on P.T.C.L. for providing incorrect data.

2. The facts essential for the disposal of the instant appeal are that on 13.01.2021, P.T.C.L. was issued a non-exclusive license by P.T.A. for establishing, maintaining and operating a telecommunication system and to provide telecommunication services on the terms and conditions contained in the license.

3. On 16.10.2019, P.T.A. issued a consultation paper on 'Identification of Relevant Markets and Significant Market Power (SMP) Operators' for the purpose of identifying relevant markets and to declare SMP Operators in these markets. All operators, including P.T.C.L., were required to provide relevant data to P.T.A. so as to enable it to calculate the total market size and individual operator's share in each relevant market. This data was required to be submitted by 07.11.2019 in the format provided by P.T.A. The deadline was extended to 02.12.2019 by P.T.A. vide letter dated 18.11.2019.

4. P.T.C.L claims to have provided the required data through an email. On the basis of the revenue data provided by P.T.C.L. through

its email dated 10.01.2020, P.T.A. prepared a draft determination and circulated it to all stakeholders for comments.

5. After the draft determination was shared with the other stakeholders, another licencee, Transworld Associate (Pvt.) Ltd. (**"Transworld"**), vide letter dated 07.04.2021, pointed out an error in the computation of the market share in the Wholesale International Leased Line Market. This caused P.T.A. to take up the matter with P.T.C.L. through an email dated 08.04.2021. P.T.C.L, through its email dated 15.04.2021, provided the revised revenue data to P.T.A. and took the position that the data provided by it earlier was incomplete and that this was the result of an *unintentional mistake"* on its part.

6. The provision of the correct revenue data by P.T.C.L. caused P.T.A. to issue a determination dated 23.07.2021 on SMP operators in wholesale international private leased line market in Pakistan.

7. Thereafter, on 06.08.2021, P.T.A. issued a notice under Section 23 of the 1996 Act to P.T.C.L. to show cause as to why an enforcement order should not be passed against it for failing to provide correct and complete information in response to P.T.A.'s letter dated 16.10.2019. P.T.C.L., in its reply dated 16.08.2021, acknowledged its mistake but took the position that once the mistake was pointed out by P.T.A., immediate remedial measures were taken and correct information was provided to P.T.A. vide email dated 15.04.2021. Furthermore, P.T.C.L. took the position that it had not contravened any of the terms and conditions of its license, the 1996 Act or the Rules and Regulations made thereunder. P.T.C.L. was afforded an opportunity of a hearing on 20.09.2021. Vide order dated 08.11.2021, P.T.A. came to the conclusion that P.T.C.L., by providing incorrect information to the Regulator / P.T.A., had contravened Regulations 47 and 48 of the Pakistan Telecommunication Authority (Functions and Powers) Regulations, 2006 (**"the 2006 Regulations"**). The said order has been assailed by P.T.C.L. in the instant appeal.

8. Learned counsel for the appellant, after narrating the facts leading to the filing of the instant appeal, submitted that the inaccuracy in the data / information provided by P.T.C.L. in response to P.T.A.'s letters dated 16.10.2019 and 18.11.2019 was the result of a *bonafide* mistake and human error; that immediate corrective

measures were taken by P.T.C.L. after the said inaccuracy was pointed out by P.T.A. through its email dated 08.04.2021; that information provided by P.T.C.L. through its email dated 15.04.2021 is accurate and complete in all respects; that it was on the basis of the revised information that P.T.A. issued its determination on 23.07.2021; and that the imposition of an exorbitant fine of Rs.1 million is disproportionate to the admitted *bonafide* mistake committed by P.T.C.L. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned order dated 08.11.2021 to be set-aside.

9. On the other hand, learned counsel for P.T.A. submitted that P.T.C.L. did not provide the revised information on its own motion but only after the inaccuracy, in the information provided by P.T.C.L. through its email dated 10.01.2020, had been pointed out by P.T.A. through its email dated 08.04.2021; that P.T.A. had required P.T.C.L. to provide correct information after another licensee, namely Transworld, had, vide letter dated 07.04.2021, pointed out the errors in the computation of the market share in Wholesale International Private Leased Line Market; that P.T.C.L. has withheld vital documents by not filing the same along with the instant appeal; and that under Section 23 of the 1996 Act, P.T.A. can impose a fine up to Rs.350 million on a licensee but P.T.A. has been lenient to P.T.C.L. in imposing a fine of only Rs.1 million for the provision of incorrect information. Learned counsel for P.T.A. prayed for the appeal to be dismissed.

10. 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 7 above and need not be recapitulated.

11. The appellant does not deny that in response to P.T.A.'s letters dated 16.10.2019 and 18.11.2019 requiring the provision of data from licensees to calculate the total market size and individual operator's share in each market, P.T.C.L., vide its email dated 10.01.2020, had provided incorrect revenue data to P.T.A. It was on the basis of the data provided by P.T.C.L. that its competitor, Transworld, that P.T.A.

in its draft determination dated 01.04.2021 set out the market shares of the said two licensees as follows:-

Table-I Revenue Market Share (%)		
Years	**TWA**	**PTCL**
2017	84	16
2018	82	18
2019	87	13

12. It is not disputed that P.T.C.L., on its own, did not take any corrective measure by providing accurate data to P.T.A. It was Transworld which, in its letter dated 07.04.2021 to P.T.A., pointed out that there was a serious error in the computation of market share of Transworld in the wholesale international leased line market in Pakistan. Transworld had requested P.T.A. to share the relevant information on the basis of which the market size and shares of the telecom operators had been calculated. Vide email dated 08.04.2021, P.T.A. informed P.T.C.L. that as per the data provided by P.T.C.L., the revenue data relating to the Wholesale International Private Leased Line was only Rs.51.175 million despite the fact that P.T.C.L. had four or five cables. P.T.C.L. was asked to confirm that the data submitted by it for the years 2017 to 2019 was duly certified by its auditors. A reminder was sent to P.T.C.L. on 13.04.2021. P.T.C.L., through its email dated 15.04.2021, provided the accurate data by admitting that the information given previously was not complete.

13. Regulation 47(1) of the 2006 Regulations empowers P.T.A. to require a licensee to provide any information for the purposes of carrying out its functions, and a licensee, is under an obligation to provide the information sought by P.T.A. Regulation 47(3) provides that non-compliance with Regulation 47 shall be treated as a violation of the license condition and action under Section 23 of the 1996 Act may be initiated.

14. Furthermore, Regulation 48 provides that the licensee shall co-operate with the Authority in organizing public hearings, and in any investigation, adjudication, study, consultation or enquiry on any matter as the Authority may like to conduct, and shall comply with any directive of the Authority to furnish any relevant record, data or information under its control, and to produce any of their officer(s) and employee(s) before the Authority of its officer(s), as the Authority may summon for evidence or consultation.

15. In the case at hand, the consultation process was initiated by P.T.A. in exercise of its powers under Rule 17(2) of the Pakistan Telecommunication Rules, 2000 (“the 2000 Rules”) which empowers P.T.A. to determine that an operator with a market share of less than twenty-five percent, of the relevant market, has significant market power. P.T.A. has also been empowered to determine that an operator with a market share of more than twenty-five percent of the relevant market does not have significant market power. In each case, P.T.A. is required to take into account the operator's ability to influence market conditions, its turnover relative to the size of the relevant market, its control of the means of access to customers, its access to financial resources and its control over the means of access to customers, and its experience in providing telecommunication services and products in the relevant market. For the purposes of clarity, Rule 17(2) of the 2000 Rules is reproduced herein below:-

> ***"17(2) The Authority may, notwithstanding sub-rule (1), determine that an operator with a market share of less than twenty-five per cent of the relevant market has significant market power. It may also determine that an operator with a market share of more than twenty-five per cent of the relevant market does not have significant market power. In each case, the Authority shall take into account the operator's ability to influence market conditions, its turnover relative to the size of the relevant market, its control of the means of access to customers, its access to financial resources and its experience in providing telecommunication services and products in the relevant market."***

16. It is with respect to the process of consultation to determine the Significant Market Power in the telecom market that P.T.A., vide letters dated 16.10.2019 and 18.11.2019, had required information from P.T.C.L. A licensee's obligation under Regulations 47 and 48 is to provide authentic, correct and complete information, record or data to P.T.A. The provision of unauthentic, incorrect or incomplete information to the Regulator by a licensee without any plausible explanation for doing so can be met with a penalty under Section 23 of the 1996 Act.

17. Section 23(1) of the 1996 Act provides that where a licensee contravenes any provision of the 1996 Act or the Rules made thereunder or any term or condition of the license, P.T.A. or any of its officer(s) not below the rank of Director may, by a written notice,

require the licensee to show cause within thirty days as to why an enforcement order may not be issued. In the case at hand, P.T.A. issued a show cause notice dated 06.08.2021 to P.T.C.L. for providing incorrect revenue data during the process of consultation.

18. Section 23(3) of the Act *ibid* provides that if a licensee fails to (a) respond to the show cause notice, or (b) satisfy the Authority about the alleged contravention, or (c) remedy the contravention within the time allowed by the Authority, the Authority may, by an order in writing and giving reasons, *inter alia* levy a fine which may extend to Rs.350 million. Sub-clauses (a), (b) and (c) of Section 23(3) have to be read disjunctively.

19. It is ludicrous to assert that P.T.A. is bereft of the power to impose a fine on a licensee for not providing authentic, correct and complete information to P.T.A. unless the licensee has been given an opportunity to remedy the contravention. Such an interpretation of Section 23(3) would be an open license to the licensees to provide unauthentic, incorrect and incomplete information to P.T.A. with impunity, and hope for such contravention to never be detected. Such an interpretation would also render Section 23(3)(b) redundant which empowers P.T.A. to impose a fine on a licensee where a licensee is unable to satisfy P.T.A. as to the contravention of Rules or a term or condition of a license. In the case at hand, had Transworld not pointed out the errors in the draft determination made by P.T.A., the incorrect revenue data provided by P.T.C.L. would have formed the basis for a final determination. The provision of incorrect revenue data by P.T.C.L. is indeed a contravention of the terms and conditions of the appellant's license to provide correct and accurate information to the Regulator.

20. In the case at hand, the appellant did not bother to file along with its appeal emails dated 10.01.2020 (through which incorrect revenue data had been provided), 15.04.2021 (through which revised revenue data had been provided), the letter dated 07.04.2021 from Transworld and P.T.A.'s emails dated 08.04.2021 and 13.04.2021. It was only after this Court expressed its inability to decide the appeal in the absence of these documents that the learned counsel for the appellant handed over copies of these documents. This practice must

be deprecated. An appellant, in filing annexes to the appeal, cannot pick and choose among documents which formed part of the original proceedings. An appellant is under an obligation to file along with its appeal all the documents that are necessary for the just adjudication of the appeal. Failure to do so must be met with a penalty.

21. Since P.T.C.L. did not give any plausible justification either to P.T.A. or this Court for failure to provide correct revenue data in response to P.T.A.'s letters dated 16.10.2019 and 18.11.2019, I have no reason to interfere with the impugned order dated 08.11.2021. Consequently, the instant appeal is dismissed with costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 26/08/2022

(JUDGE)

Qamar Khan ***APPROVED FOR REPORTING***

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