JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.12 of 2014
National Telecommunication Corporation (NTC)
Versus
Pakistan Telecommunication Authority (PTA) and others

Dates of Hearing:	30.09.2020, 03.03.2022, 23.01.2023, 04.03.2022, 20.03.2023 and 22.03.2023
Appellant by:	M/s Syed Husnain Ibrahim Kazmi, Saleem Iqbal Janjua and Muhammad Akram Shaheen, Advocates
Respondents by:	M/s Salman Mansoor, Barrister Qasim Duggal, Shahmeer Shahid, Advocates along with Mr. Muhammad Naeem Ashraf, Director (Lit.) and Ch. Adil Javed, Assistant Director (Lit.) on behalf of P.T.A./respondent No.1 Ms. Zainab Janjua, Advocate for respondent No.3 M/s Rashid Hanif and Muhammad Bilal, Advocates for respondent No.5. Mr. Arshid Mehmood Kiani, learned Deputy Attorney-General. Lt. Col. (Retd.) Muhammad Naveed, Deputy Secretary, Cabinet Division.

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal under Section 7(1) of the Pakistan Telecommunication (Re-organization) Act, 1996 (**"the 1996 Act"**) the appellant, National Telecommunication Corporation (**"N.T.C."**), impugns the order dated 03.01.2014 passed by the Pakistan Telecommunication Authority (**"P.T.A."**) holding that there was no bar on the designated customers of N.T.C. from acquiring telecommunication services (**"telecom services"**) from the private telecom operators.

2. N.T.C. was established pursuant to the provisions of Section 41(1) of the 1996 Act which provides *inter alia* that the Federal Government shall establish a corporation to be known as N.T.C. which shall be a body corporate with the power to acquire and hold property. Section 41(3) provides *inter alia* that P.T.A. shall grant a licence to N.T.C. for the provision of telecommunication services within Pakistan

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"on a non-exclusive basis" only to the armed forces, defence projects, Federal Government, Provincial Governments or such other Governmental agencies or Governmental institutions (**"designated customers of N.TC."**) as the Federal Government may determine.

3. Vide letter dated 06.04.2010, the National Telecommunication and Information Technology Security Board (**"N.T.I.S.B."**), which operates under the administrative control of the Cabinet Division, expressed its reservations regarding Public Sector Organizations being approached by private telecom operators for the provision of telecom services (voice / internet and data services), and took the position that the security of information cannot be guaranteed when such services are provided by private telecom operators. N.T.I.S.B. recommended to all Secretaries of the Federal Government Departments that for obtaining telecom services, only N.T.C. may be approached. Furthermore, N.T.I.S.B. took the position that in case N.T.C. shows its inability to provide the desired services, a No Objection Certificate (**"N.O.C."**) must be obtained from N.T.C. and only then can the Pakistan Telecommunication Company Limited (**"P.T.C.L."**) or any other telecom operator be approached after taking all security measures.

4. Vide letter dated 20.05.2010, N.T.C. requested the Ministry of Information and Broadcasting (**"Ministry of I&B"**) to provide details of the services presently being acquired by the designated customers of N.T.C. from other telecom operators so that their shifting onto the N.T.C. network is arranged. In the said letter, N.T.C. also took the position that services acquired by such designated customers from private telecom operators may jeopardize security of information.

5. Paragraph 10(j) of the Email and Internet Policy for the Federal Government (**"the 2005 Policy"**) issued in the year 2005 provides *inter alia* that those government organizations where centralized email systems are not provided can use web-based email services provided by N.T.C. Furthermore, as guidelines on the provision and use of internet facilities for Government organizations, paragraph 11(a) of

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the said Policy provides that the internet connection should be taken from N.T.C., where available.

6. Paragraph 12(b) of the Internet and Email Policy for Government Departments-2011 (**"the 2011 Policy"**) provides *inter alia* that a Government organization can apply for an internet connection through N.T.C. provided their nature of work so warrants. Furthermore, paragraph 13(a) provides that as per the given mandate, N.T.C. is responsible for providing the internet / IT services to all Government organizations / departments where available, and therefore all Government organizations are required to approach N.T.C. for the provision of these services as foremost obligation. Paragraph 13(d) provides that N.T.I.S.B. will decide on a case-to-case basis and issue a time-bound N.O.C. for obtaining internet / IT services from other internet service providers subject to security / technical evaluation by the N.T.I.S.B. network security evaluation team.

7. Vide letter dated 29.11.2008, the Ministry of Information Technology informed the Chairman, P.T.A. that as per the provisions of the 1996 Act, there was no bar on designated customers of N.T.C. from acquiring telecom services from private telecom operators other than N.T.C. Furthermore, in the said letter, it was mentioned that considering the role assigned to N.T.C. by Section 41(3) of the 1996 Act, N.T.I.S.B., vide letter dated 24.04.2008, required all designated customers of N.T.C. to approach N.T.C. for their telecommunication requirements. It is only in cases where N.T.C. services were not available that an N.O.C. had to be obtained from N.T.C. for acquiring telecom services from any private telecom operator. As per the Ministry of I&B, the policy requirement of obtaining an N.O.C. from N.T.C. had been made mandatory keeping in view the secured communication needs of the public sector.

8. M/s Nayatel (Private) Limited was one of the petitioners that filed writ petition No.1353/2012 before this Court impugning N.T.I.S.B.'s letter dated 06.04.2010 and the 2011 Policy. Furthermore, an injunction was sought against the Federal Government and N.T.I.S.B. from claiming an exclusive right for N.T.C. to provide telecom services

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to Government institutions or from making any policy or issuing any directive which does not provide an equal opportunity to all telecom service providers in accordance with the law or extends preferential treatment to any licencee. The said petition was disposed of vide order dated 21.10.2013 with the direction to P.T.A. to afford an opportunity of a hearing to the petitioners in the said writ petition and to pass a final order within a stipulated period. Furthermore, this Court restrained N.T.I.S.B. and N.T.C. from interfering with the business affairs of the petitioners in the said writ petition.

9. The proceedings pursuant to the said order dated 21.10.2013 culminated in P.T.A.'s decision dated 03.01.2014 holding that there was no bar on designated customers of N.T.C. from acquiring telecom services from the private telecom operators. The said decision has been impugned by N.T.C. in the instant appeal.

10. Learned counsel for N.T.C., after narrating the facts leading to the filing of the instant appeal, submitted that the directive dated 06.04.2010 had been validly issued by N.T.I.S.B. in order to protect and safeguard the communication of official information and to avoid the risk of security breach; that the said directive as well as N.T.C.'s letters dated 20.05.2010 and 25.11.2010 were in conformity with the provisions of the 2005 Policy which was made in terms of Section 8 of the 1996 Act; that P.T.A., while taking the impugned decision dated 03.01.2014, has completely ignored the fact that Section 8 of the 1996 Act provides that the policies made by the Federal Government would be binding on P.T.A.; that Section 8(2)(c) of the 1996 Act provides that the Federal Government may issue a policy directive on the requirements of national security; that the 2005 Policy issued pursuant to Section 8 of the 1996 Act and therefore the same was also binding on P.T.A.; that clause 11(a) of the 2005 Policy clearly states that an internet connection should be taken by government departments from N.T.C.; that P.T.A. could not declare that the 2005 Policy was not in consonance with Section 41(3) of the 1996 Act; that the directives issued by N.T.I.S.B. were with the purpose of filling gaps in the 2005 Policy which was permissible under paragraph 5(c) of the said Policy;

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that P.T.A. could not revisit or interpret the provisions of the 2005 Policy; that the meaning of the term *"non-exclusive"* in Section 41(3) of the 1996 Act is that more than one licence can be issued for the provision of telecom services to Government departments; that the term *"non-exclusive"* does not imply that private telecom operators, in competition with N.T.C., could also provide telecom services to Government departments; that the whole purpose behind establishing N.T.C. would be defeated if it were to be in competition with private telecom companies; and that the 2011 Policy has not been issued by the Federal Government. Learned counsel for the appellant prayed for the appeal to be allowed and for the impugned order dated 03.01.2014 to be set-aside.

11. On the other hand, learned counsel for respondent No.3 / Nayatel (Pvt.) Ltd. submitted that the appellant is claiming exclusive rights for provision of telecom services to all the designated customers of N.T.C. on the basis of (i) the 2005 Policy, (ii) N.T.I.S.B.'s letter dated 24.04.2008, (iii) the Ministry of Information Technology's letter dated 29.11.2008, (iv) the 2011 Policy issued by N.T.I.S.B., and (v) N.T.I.S.B.'s letter dated 06.04.2010; that in the memo of the appeal, it is admitted that the 2011 Policy has not been made by the Federal Government; that the 2011 Policy has not been issued pursuant to Section 8 of the 1996 Act as it has not been issued by the Federal Government; that Section 2(fa) of the 1996 Act defines *"Federal Government"* to mean the Ministry of Information Technology and Telecommunication; that Section 21(3) of the 1996 Act provides that no licence shall confer exclusive rights; that Section 41(3) of the 1996 Act empowers P.T.A. to grant a licence to N.T.C. for the provision of telecom services within Pakistan *"on a non-exclusive basis;"* that it is P.T.A.'s duty to foster competition amongst telecom service providers and to ensure a level playing field; that since P.T.A. is a regulator, it cannot impose an unreasonable restriction on respondent No.3; that P.T.A. cannot force parties to obtain services from a particular licencee; that communication security is the responsibility of the Cabinet Division; that the law does not require for an N.O.C. to be

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obtained by a private telecom operator for the provision of telecom services to the designated customers of N.T.C.; that presently respondent No.3 is providing telecom services to several Government bodies and institutions; and that the impugned order dated 03.01.2014 passed by P.T.A. does not suffer from any legal infirmity. Learned counsel for respondent No.3 prayed for the appeal to be dismissed.

12. Learned counsel for respondent No.1 / P.T.A. submitted that by virtue of the De-regulation Policy issued on 13.07.2003, the telecom sector has been liberalized by encouraging fair competition among the operators; that various categories of licences, including Long Distance and International, Local Loop, Fixed and Wireless Licences have been issued by P.T.A.; that Section 41(3) of the 1996 Act clearly provides that the mandate of N.T.C. is to provide telecom services on *"non-exclusive"* basis only to the entities mentioned in the said Section; that the 2011 Policy has been issued by N.T.I.S.B. and not the Federal Government; that there is no restriction on designated customers of N.T.C. referred to in Section 41(3) from obtaining services from private telecom operators; that the Ministry of Information Technology, in its letter dated 29.11.2008, has also stated that as per the provisions of the 1996 Act there is no bar on the designated customers of N.T.C. to acquire telecom services from private telecom operators; that N.T.C. is restricted to provide telecom services only to its designated customers mentioned in Section 41(3); and that in the light of the prevailing legal framework, the designated customers of N.T.C. have not been prohibited from acquiring services from private telecom operators. Learned counsel for respondent No.1 prayed for the appeal to be dismissed.

13. 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 3 to 9 above and need not be recapitulated.

14. The question whether N.T.C. has the exclusive right to provide telecom services to its designated customers (i.e., armed forces,

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defence projects, Federal Government, Provincial Governments or other Governmental agencies or Governmental institutions as the Federal Government may determine) can be answered by reference to Section 41(3) of the 1996 Act which clearly provides that P.T.A. shall grant a licence to N.T.C. for the provision of telecom services in Pakistan to such designated customers on a *"non-exclusive"* basis.

15. A non-exclusive telecom licence is a type of licence granted by a government or regulatory authority that allows a telecom operator to provide communication services without any exclusivity. This means that other operators may also be granted a licence to operate in the same area and to provide similar services to customers whether governmental or non-governmental. A non-exclusive telecom licence is typically granted to promote competition and prevent a single operator from monopolising the market. It allows multiple operators to provide services to customers which can lead to better quality, pricing and innovation in the market.

16. Section 41(3) of the 1996 Act has to be read with Section 21(3) which provides that no licence shall confer exclusive rights. Given these clear and unambiguous statutory provisions, N.T.C. cannot claim to have an exclusive right to provide telecom services to the designated customers of N.T.C. referred to in Section 41(3) of the 1996 Act.

17. A licence had originally been granted to N.T.C. on 22.09.1998 for establishing, maintaining and operating telecommunication systems and provision of telecom services. This licence was modified on 28.08.2008 and renewed on 19.11.2021. The said licence explicitly provides the same to be non-exclusive in nature.

18. Paragraph 10(j) of the 2005 Policy which provides that Government organizations where centralized email systems are not provided can use web-based email services provided by N.T.C., and paragraph 11(a) of the said Policy which provides internet connection by Government organizations should be taken from N.T.C. where available, are not in conformity with Sections 21(3) and 41(3) of the 1996 Act. This is also true as to the Ministry of Information

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Technology's letter dated 29.11.2008 and N.T.I.S.B.'s letter dated 06.04.2010, reference to which has been made in paragraph 7 above.

19. Section 8(1) of the 1996 Act makes it clear that the policy directive that is issued by the Federal Government to P.T.A. cannot be *"inconsistent with the provisions of the [1996] Act."* Therefore, a policy directive issued by the Federal Government in exercise of the powers conferred by Section 8(1) of the 1996 Act would be subservient to the provisions of the 1996 Act. Assuming that the 2005 Policy had been made by the Federal Government in terms of Section 8 of the 1996 Act (which empowers the Federal Government to issue policy directives to N.T.C.), the same cannot also override the provisions of the 1996 Act.

20. The 2011 Policy which has admittedly not been made by the Federal Government (i.e., the Prime Minister and the Cabinet) or the Federal Government as defined in Section 2(fa) of the 1996 Act cannot override the provisions of the 1996 Act.

21. It is well settled that a policy decision/directive issued by the Federal Government by way of an executive instruction cannot override statutory rules far less the statute. In the case of Sikandar ul Mulk Vs. Capital Development Authority (PLD 2019 Islamabad 365), it has been held that in case of a conflict between statutory provisions and a policy made by the Government, the statutory provision will prevail even if the policy has been approved by the Cabinet. In the case of Abdullah Vs. Province of Balochistan (2021 PLC (CS) 272), it was held that the Revised Teaching Staff (BPS-09 to 15) Recruitment Policy, 2019 would not have an overriding effect over the Balochistan Education Department (Schools Branch) (Men's Section) (Basic Pay Scale 01 to 15) Service Rules, 1984. In the case of Muhammad Naveed Vs. District Education Officer (2019 PLC (CS) 1223), it was held that any rule or policy made by an Authority under a particular statute cannot enlarge or restrict the scope of the statute. Law to the said effect is also laid down in the cases of Muhammad Iqbal Vs. Government of the Punjab (2020 PLC (C.S.) 747), Mohsin Shahzad Vs. Secretary, Food Department, Government of the Punjab (2017 PLC

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(C.S.) 730) and Shahmir Transport Co Ltd. Vs. Member (Colonies and Transport) Board of Revenue (PLD 1964 Lahore 710).

22. The only way that the desire of N.T.C. or N.T.I.S.B., that N.T.C. should have the exclusive right to provide telecom services to Government organizations or that the Government organizations can obtain telecom or internet services from private telecom service providers only after obtaining an N.O.C. from N.T.C., can be fulfilled if Sections 21(3) and 41(3) of the 1996 Act are amended so as to give the N.T.C. the exclusive right to provide telecom or internet services to Government organizations. This desire cannot be achieved by issuing a policy directive since it would be inconsistent with the said provisions of the 1996 Act.

23. The impugned decision taken by P.T.A. that there is no bar on the designated customers of N.T.C. to acquire telecom services from private operators is in conformity with and not in derogation of Sections 21(3) and 41(3) of the 1996 Act. Since I do not find any legal or jurisdictional infirmity in the impugned decision dated 03.01.2014 taken by P.T.A., the instant appeal is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 20/04/2023

(JUDGE)

Qamar Khan **APPRORVED FOR REPORTING**

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