Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O NO. 51 OF 2018

Link Dot Net Telecom Limited.

Vs

Pakistan Telecommunication Authority (PTA), etc.

F.A.O NO. 52 OF 2018

PTCL.

Vs

Pakistan Telecommunication Authority (PTA), etc.

APPELLANT BY:	M/s Misbah Ul Mustafa Safir and Mr. Afnan Karim Kundi alongwith M/s Saima Kamila Khan, Chief Legal Officer, Fariha Khan, Manager Litigation and Mr. Nausherwan Niaz, Advocate/legal Advisor Regulatory Litigation in FAO No.51/2018. Mr. Muhammad Habib Kazi, Advocate alongwith M/s Khizer Ali Khan and Rafique Ahmed, Manager (Legal), PTCL in FAO No.52/2018.
RESPONDENTS BY:	Mr. Hassan Kamran Bashir, Mr. Mubeen Ali Husnain Awan, M. Arif Humayun, Advocates alongwith Mr. Muhammad Khurram Siddiqui, Director (L&R), Ch. Adil Javed, Assistant Director (L&R), Dr. Shahbaz Ahmed, Deputy Director (C.A) and Mr. Altaf Ahmed, Assistant Director (Licensing), PTA. M/s Waleed Khalid, Umair Mansoor and Anique Malik, Advocates for respondent No.2 in FAO No.51&52 of 2018.
DATE OF DECION**:**	31.10.2024.

==========

BABAR SATTAR, J.- This judgment will decide the afore-titled appeals filed under Section 7(1) of the Pakistan Telecommunication (Re-organization) Act, 1996 **("Telecom**

Act") against decision dated 14.05.2018 passed by Pakistan Telecommunication Authority **("PTA")** declaring that a Tripartite Indefeasible Right of Use Agreement **("JV Agreement")**, entered into by and between Pakistan Telecommunication Company Ltd. **("PTCL")**, Link Dot Net Telecom Ltd. **("LDN")** and HKT Global Singapore PTE Ltd. **("HKT")** dated 30.10.2015, for provision of broadband capacity to LDN is not permissible under the Telecom Act, the Rules framed thereunder and the Long Distance International License **("LDI License")** issued to LDN.

2. The relevant factual background is that Transworld Associates Pvt. Ltd. **("TWA")** filed a complaint with PTA stating that international bandwidth capacity within submarine cables was being sold in Pakistan by an unlicensed operator by offering Indefeasible Rights of Use **("IRUs")**. After receipt of this complaint on 04.03.2015, PTA directed all licensees to ensure strict compliance with the regulatory regime overseen by PTA. LDI licensees confirmed that they had no unauthorized agreements or arrangements for procuring international bandwidth capacity. PTCL informed PTA by letter dated 26.03.2015 that it had entered into a contractual arrangement with a foreign carrier in accordance with provisions of the Telecom Act, and the Rules and Regulations framed thereunder. To deliberate the issue of the right of LDI licensees to establish connectivity with providers of international bandwidth capacity, a meeting was convened by PTA on 21.11.2015. The LDI operators took a position that they were entitled to acquire international bandwidth capacity from foreign carriers on optical fiber

submarine cable systems and/or satellite systems. TWA took a position that LDIs could only purchase international bandwidth capacity by establishing their own submarine cable fiber system or from a licensee authorized by PTA to operate a submarine optical fiber Cable Landing Station **("CLS")**. PTA issued a clarification on purchase of international bandwidth by LDI operators in view of LDI License conditions and the De-Regulation Policy for the Telecommunication Sector issued in July 2003 **("De-Regulation Policy")** by letter dated 27.10.2015. PTA concluded, while interpreting clauses 4.1.4 and 4.1.5 of the De-Regulation Policy and clauses 1.1.3(g) and 2.2.1 of the LDI License conditions, that "*LDI operators may enter into agreement for IRUs either with the licensed operator or with submarine cable consortia and satellite service providers…"*. TWA impugned the clarification before this Court through **F.A.O No.100 of 2015 (*Transworld Associates Private Limited vs. Pakistan Telecommunication Authority*)**, which was disposed of by judgment dated 15.02.2018, whereby the clarification was set aside and the issue was remanded back to PTA to be decided afresh after affording the parties an opportunity to be heard. In compliance with such order, PTA convened hearings and issued its decision dated 14.05.2018, which has been impugned in the instant appeals. In its order, PTA held the following:

> *"What has been discussed above in light of applicable regulatory regime and terms and conditions of licenses, it is concluded that LDI operator(s) may enter into agreement(s) for IRUs either with licensed operator(s) or with submarine cable consortia and satellite service*

providers. Capacity of the submarine CLS licensee(s) shall be sold on right to sue or lease basis only to licensed operators in Pakistan. Therefore, agreement(s) made between PTCL, LDN and HKT Global (being a non-licensee in Pakistan) is not admissible under the current regulatory regime in Pakistan."

3. The learned counsel for LDN submitted that LDN had acquired bandwidth capacity through PTCL and not in a direct independent agreement with HKT. He submitted that provisions of the Telecom Act extended to the whole of Pakistan in terms of Section 1(2) of the Telecom Act and HKT was providing no telecommunication services to LDN within the territory of Pakistan and consequently did not need to procure any license from PTA. He submitted that in terms of Sections 20 and 25(3) of the Telecomm Act, LDI licensees were not barred from establishing interconnection with foreign operators and the only prohibition in terms of Section 25(3) of the Telecom Act was that no agreement entered into by a licensee should be inconsistent with the obligations of such licensee under the Telecom Act, the Pakistan Telecommunication Rules, 2000 **("Telecom Rules")** and the licenses issued by PTA. He submitted that under Clause 10 of Schedule 2 of Appendix B of the Telecom Rules, the only prohibition with regard to entering into agreements with overseas operators or satellite consortia was that such Agreement must not exclude other licensed operators from entering into similar agreements in relation to services or facilities related to submarine cables, satellite links and landlines links. He submitted that the right of an LDI licensee to enter into international agreements could not be curtailed. He submitted

that pursuant to clause 4.1 of the De-Regulation Policy, LDI licensees were authorized to obtain IRUs from submarine cable consortia apart from having the right to become part of submarine cable consortia. He submitted that in terms of clauses 1.1.3(g) and 2.2.1 of the LDI license conditions, two independent rights had been conferred on LDI operators. One, to establish, maintain and operate an international submarine cable or satellite transmission facility linking Pakistan with multiple countries. And two, the right to obtain access to submarine cable systems subject to reaching an agreement with the operators of such systems or install earth stations to establish connectivity with space station transmission facilities subject to reaching an agreement with the operators of such facilities. He submitted that in terms of seeking bandwidth capacity, LDIs could do so either in earning in submarine cable consortia or by obtaining IRUs from submarine cable consortia through commercial agreements. He submitted that under the provisions of the Telecom Act, Telecom Rules, De-Regulation Policy and LDI License conditions, LDI operators in Pakistan could seek international broadband capacity through submarine cable systems in one of two ways: either through a licensed operator such as PTCL or TWA who were licensed by PTA to operate a CLS; or by entering into a commercial agreement for provision of international bandwidth capacity made available through submarine cable consortia. He submitted that HKT was the member of a submarine cable consortia called AAE-I (Asia-Africa-Europe-I) and the capacity being afforded by HKT through IRUs within submarine cables was being provided through PTCL,

which had been licensed to manage its own cable connecting its CLS with an international submarine cable beyond the territory of Pakistan. He submitted that the use of the word 'operators' in clause 2.2.1 of the LDI License could not be confused with the use of the word 'Operator' as defined in clause 13.2 of the LDI license as where the operator was meant to be an operator licensed by PTA, the 'o' in the term operator was capitalized, being a defined term. He submitted that PTA did not license or regulate international operators and consequently the JV Agreement could not be declared to be in conflict with the regulatory framework on this basis.

4. The learned counsel for PTCL submitted that PTCL was part of the consortium that owns SMW4 and IMEWE cable systems, which operate on an Open Access System basis, and as a consortium member could procure and arrange the provision of broadband capacity at its landing station for its own use or for the use of a consumer. The cable landing system operated by PTCL is bound to provide interconnection and backhaul, as per the consortium construction and maintenance agreement for both cable systems. He submitted that under the JV Agreement the CLS being used belongs to PTCL, which is licensed to operate it. Similarly, the submarine cable linking the CLS with the submarine cable operated by the submarine cable consortia is also owned and operated by PTCL. He submitted that clause 9.2 of the Agreement clearly provided that HKT would provide LDN access to broadband capacity through interconnection of capacity from the submarine cables SMW4 and IMEWE to Pakistan at two points, which were PTCL exchanges in Karachi.

Under the terms of the JV Agreement, HKT was neither establishing any physical setup in Pakistan nor was providing any service to a consumer within Pakistan. It was through PTCL's CLS that LDN was able to interconnect with broadband capacity being afforded by HKT through international submarine cables. It was submitted that HKT was part of another submarine cable consortium and within the Open Access System it was customary for members of consortia to provide excess broadband capacity to other consortium members and/or LDI operators as no single submarine cable had access to all countries across the world. He submitted that PTCL had shared a draft of the JV Agreement with PTA on 25.05.2015 and PTA expressed no reservations in relation thereto. Further PTA's clarification dated 27.10.2015 provided ample room for LDN and PTCL to enter into the JV Agreement with HKT. It was only after the matter was remanded back to PTA pursuant to the order of Islamabad High Court dated 15.02.2018, in ***Transworld Associates Private Limited*** that PTA changed its view with regard to the acceptability of the Agreement. The impugned order did not provide any rationale or justification for such U-turn and also did not examine and address the provisions of the JV Agreement or how it violated the Telecom Act, the Telecom Rules, the De-Regulation Policy and conditions of the LDI License. He reiterated that HKT was not providing telecommunication services in Pakistan. HKT was merely affording broadband capacity through submarine cables. The interconnection for which was taking place by virtue of a submarine cable owned by PTCL at the CLS owned and managed by PTCL. As PTCL was a licensee and subject to the telecom

regulatory framework enforced in Pakistan and so was LDN, there was no question of any entity providing telecommunication services in Pakistan without a license. He read through Sections 20 and 25(3) of the Telecom Act and clauses 2.3 and 10 of Schedule 2 of Appendix B of the Telecom Rules to argue that the regulatory framework permitted LDIs to enter into commercial contracts for provision of broadband capacity through members of submarine consortia. He submitted that the JV Agreement was beneficial for consumers of telecommunication services in Pakistan as it afforded an LDI operator broadband capacity on comparative rates in a manner that would serve the interests of consumers as well as the LDI operator. And TWA and other LDI licensees were also at liberty to enter into such arrangements in their own interest as well as that of their consumers. He submitted that the impugned order was a non-speaking order in terms of the law laid down by the Supreme Court in ***Muhammad Amin Muhammad Bashir Ltd. vs. Government of Pakistan*** **(2015 SCMR 630)**.

5. The learned counsel for TWA submitted that HKT was selling broadband capacity to LDN, which constituted telecommunication service within the meaning of Section 2 of the Telecom Act. He submitted that under Section 20 of the Telecom Act only an entity that was licensed by PTA could provide telecommunication service. He submitted that pursuant to the TWA license, sale of capacity was a licensed activity under the telecom regulatory framework. HKT was however selling such capacity and LDN was receiving such capacity in breach of provisions of the Telecom Act, the De-Regulation Policy and the

LDI License provisions as correctly held by PTA. He submitted that TWA had a commercial stake as it had expended a serious amount of funds to procure the license and to provide telecom services in Pakistan. Any LDI operator in Pakistan was therefore free to procure a broadband capacity through TWA or PTCL who were licensed to provide such telecommunication service. Allowing HKT to provide broadband capacity would be discriminatory as TWA had been allowed to provide such telecommunication service after procuring a license, which HKT was not being required to do. He submitted that LDN was free under its license to set up its own submarine cable and subject to provision of a license, establish a CLS. But without investing in such infrastructure, it could not bypass TWA and PTCL to procure broadband capacity from an international operator. He submitted that pursuant to provisions of the Agreement, the interconnection between LDN and HKT networks was taking place at a handover point (HOP) in Karachi and payments were also to be made by LDN to HKT, which established that HKT was providing services to LDN in Karachi. He further submitted that HKT was not a member of the submarine cable consortia that served the subcontinent and consequently could not be argued that LDN had acquired capacity from a submarine cable consortium.

6. The learned counsel for the PTA also took the Court through the relevant provisions of the telecom regulatory framework. He submitted that the JV Agreement was based on misrepresentation insofar as LDN had represented that it was licensed to procure broadband capacity from HKT. He submitted

that LDI operators could obtain access to submarine cables in accordance with clauses 1.1.3(g) and 2.2.1 of the LDI License read with clause 4.5.1 of the De-Regulation Policy. These provisions, however, allowed the LDI operators to obtain access to submarine cable systems by reaching an agreement with the operators of such systems. The operator of such system in terms of clause 13.2 of the LDI License had to be a person licensed by PTA to provide telecommunication services. In the instant case, HKT was not a licensee of PTA and LDN could therefore not seek broadband capacity from HKT. He submitted that while PTCL had informed PTA that it had entered into the Agreement, the said JV Agreement was never approved by PTA. He asserted that HKT was not a member of a submarine cable consortium and the appellants had not discharged their obligations to establish that HKT was a member of a submarine cable consortium. Instead, PTCL by letter dated 21.09.2016 had maintained that HKT was not party to SMW4 or IMEWE consortia. He asserted that LDN could obtain capacity from TWA or PTCL, which were licensees of PTA and had established CLSs in Pakistan. As under the effective regulatory framework, only license holders were allowed to bring international telecommunication services into Pakistan. He submitted that the JV Agreement would have serious policy implications as in exercise of the sovereign right of a State it was for the public regulatory authorities of such State to be able to regulate those providing services within the territory of the State. This is why HKT could only afford broadband capacity to LDN or any other LDI operator if it was a licensee of PTA.

7. After the arguments, as part of rebuttal arguments, PTCL placed on record a copy of construction and maintenance agreement that HKT was a party too, in order to establish that HKT was a member of the Asia-Africa-Europe-I (AAE-1) submarine cable consortium. It was submitted that while HKT was not providing telecommunication services to LDN or any other LDI operator in Pakistan, the argument of PTA as well as TWA that HKT was not the member of any submarine cable consortium was factually incorrect. Neither PTA nor TWA furnished any arguments to contest the authenticity or validity of the construction and maintenance agreement placed on record by PTCL to establish that HKT was a member of the AAE-I submarine cable consortium.

8. Let us start with considering the relevant provisions of the telecom regulatory framework that impinge on the ability of LDI operators to enter into contracts whereby international operators not licensed by PTA to provide telecommunication services in Pakistan are able to provide broadband capacity through submarine cables. The foundational legal question in the instant appeals is whether an LDI operator licensed by PTA is competent to enter into a commercial arrangement with an international operator, not licensed by PTA, to procure broadband capacity being afforded through international submarine cables.

9. To consider this question, let us start with the relevant provisions of the Telecom Act, the Telecom Rules, the De-Regulation Policy and the LDI License. The telecommunication services in Pakistan are regulated under the Telecom Act. Section 1(2) states, as is customary, that the Telecom Act

"extends to the whole of Pakistan". Amongst the functions of PTA, listed under Section 4 of the Telecom Act are included that of promoting and protecting the interests of users of telecommunication services, promotion of *"availability of a wide range of high-quality, efficient, cost-effective and competitive telecommunication services throughout Pakistan"*, and *"rapid modernization of telecommunication systems and telecommunication services."* Section 6 lists the responsibilities of PTA, which include the obligation to protect the rights of licensees, the interests of users of telecommunication services, and to ensure that *"fair competition in the telecommunication sector exists and is maintained."* A collective reading of Sections 4, 5 and 6 of the Telecom Act reflects that in discharge of its powers, functions and responsibilities, PTA is under an obligation to protect the interests of users of telecom services, and to balance such interests against the interests of licensees in a manner that promotes fair competition in the telecommunication sector. This is consistent with the obligation of the State under Article 18 of the Constitution to regulate trade, commerce or industry *"in the interest of free competition therein."* What this mean is that PTA is under an obligation to exercise the powers vested in it pursuant to provisions of the Telecom Act to pursue the objects of the Act and in doing so, engender fair competition in the telecommunication sector in the interest of users of telecommunication services and to afford a level playing field to licensees of PTA. It is in this larger context that provisions of the Telecom Act, the Telecom Rules, the De-Regulation Policy and LDI License conditions have to be appreciated and interpreted.

Rule 7(4) states that *"a license granted in accordance with the provisions of the Act and these Rules shall be subject to the conditions applying to all licensed services contained in appendix B to these Rules."* Clauses 2.3 and 2.4 of Appendix B to the Telecom Rules state the following:

> *2.3 Subject to the other provisions of this license and sub-section 3 of Section 25 of the Act, the licensee shall be entitled to contract with any person to operate, on behalf of the Licensee, any of the Licensed System for the purposes of providing, and to provide, any Licensed Services, subject to the Licensee having given prior written notice to the Authority of the identity of the person concerned and the type of Licensed Services which that person is to provide.*
>
> *2.4 Without prejudice to the terms of this License, the Licensee shall be entitled, without reference to the Authority, to make any investments, enter into any contracts or other arrangements and do any other matter or thing for the purposes of and/or in the course of, exercising any of its rights under this License in its absolute discretion.*

Clause 10 of Schedule 2 to Appendix B of the Telecom Rules places fetters on the right of a licensee to enter into certain international agreements in the following terms:

> *10. Prohibition of exclusive international agreements:*
>
> *The Licensee shall not, except with permission from the Authority, enter into any agreements with overseas operators or satellite consortia which have the effect of excluding other licensed operators from entering into other agreements with that overseas operator or satellite consortia in relation to any services or facilities, including submarine cables, satellite links and land lines.*

10. The permission to enter into contracts as mentioned in clause 2.4 of Appendix B above and the prohibition in clause 10 of Schedule 2 to Appendix B (also reproduced above) must be appreciated in the context of Article 4(2)(b) of the Constitution, which provides that, *"no person shall be prevented from or be hindered in doing that which is not prohibited by law."* In the context of the subject-matter of the instant appeals, the question before the Court is whether the appellants are prohibited from entering into the JV Agreement under provisions of the Telecom Act and the Telecom Rules, the De-Regulation Policy and the licenses issued thereunder. And consequently, the regulatory framework has to be interpreted with the understanding that a licensee is permitted to do what it is not prohibited from doing under law.

11. Section 20(1) of the Telecom Act states that, *"no person shall establish, maintain or operate any telecommunication system or provide any telecommunication service unless he has obtained a license under this Act*..." Under Section 21(1)(b) provides that while considering an application for the grant of a license, PTA will take into account, *"the public interest and benefits to users of telecommunication services."* Section 21(3) provides that, *"no license shall confer exclusive rights".* Section 21(4) confers on PTA wide authority to tailor the license conditions to pursue the objects of the regulatory framework established under the Telecom Act. Section 25(3) states that, *"no licensee shall enter into any agreement or arrangement which is inconsistent with any obligation of the licensee under this Act, the rules or any condition attaching to its license, and*

any such agreement or arrangement shall to such extent be void."

12. The controversy in the instant appeals revolves around the application of Section 25(3) and to determine whether the JV Agreement is inconsistent with the obligations of the appellants under the Telecom Act, the Telecom Rules and the licenses issued to them.

13. It has been TWA's position that provision of broadband capacity through international submarine cables to an LDI in Pakistan constitutes provision of telecommunication service as defined under Section 2(v) of the Telecom Act, as such capacity is to be used for conveyance of intelligence from Pakistan, (with the term intelligence being defined under Section 2(g) of the Telecom Act). Telecommunication service under Section 2(v) of the Telecom Act is defined as follows:

> *"… a service consisting in the emission, conveyance, switching or reception of any intelligence within, or into, or from. Pakistan by any electrical, electro-magnetic, electronic, optical or optio-electronic system, whether or not the intelligence is subjected to re-arrangement, computation or any other process in the course of the service;"*

14. The policy objectives contained in clause 3 of the De-Regulation Policy mentions the increase of "*service choice for customers of telecommunication services at competitive and affordable rates"* as one of its foremost objectives. Further, clauses 4.1.4 and 4.1.5 are relevant for our present purposes, which state the following:

4.1.4 LDI licensees will have the right to sub-lease half-circuit capacity on the SEA-ME-WE-3 submarine cable system on non-discriminatory prices under commercial arrangements. In the event of capacity shortage on the system, PTCL shall allocate a minimum proportion of the total capacity employed for voice circuits to new entrants.

4.1.5 LDI licensees will have the right to participate in, and obtain IRUs (Indefeasible Rights of Use) from submarine cable consortia and the right to install earth stations. They will have the right to co-locate in PTCL's international exchange buildings, and backhaul to and from them using their own fiber and/or own radio spectrum, where practicable. Licensees will have the right to participate in future landing points for new submarine cables. Access by licensees to PTCL's satellite earth stations will be on commercially negotiated terms between PTCL and the licensees, subject to PTA monitoring.

15. The information memorandum (**"Information Memorandum"**) for applicants interested in long-distance international and local loop licenses published on 08.03.2004, provided that an LDI licensee will offer long-distance and international telecommunication services to consumers and other operators. It was envisaged within such Information Memorandum read together with the Telecom Act and the Telecom Rules that LDI licensees will need to enter into agreements and arrangements for purposes of affording their customers long-distance and international telecommunication services. The provisions of clauses 28 and 29 of the Information Memorandum reproduced the representations in clauses 4.1.4 and 4.1.5 of the De-Regulation Policy. Clause 29.1 of the Information Memorandum provided that, *"LDI licensees will have*

the right to participate in, and obtain IRUs (Indefeasible Rights of Use) from submarine cable consortia and the right to install satellite earth stations to connect to international satellite networks. LDI licensees will negotiate such arrangements."

16. Clause 1.1.3 of the LDI License lists the actions that a licensee is not authorized to take. Sub-clause (g) of Clause 1.1.3 provides that an LDI licensee may not establish, maintain or operate a terrestrial transmission facility linking Pakistan with another country, but clarifies that, *"the licensee is permitted to establish, maintain and operate an international submarine cable and/or satellite transmission facility linking Pakistan with, and enabling connectivity with, multiple countries."* Clause 2.2.1 of the license provides that, *"the licensee has the right to obtain access to submarine cable systems, subject to reaching agreement with the operators of such systems, and to install earth stations for use with space station transmission facilities orbiting the earth space, subject to reaching agreements with the operators of such facilities."*

17. Clause 6.12.1 provides that, *"the licensee shall not, without the prior approval of the authority, give effect to any agreement or arrangement respecting international telephony service, whether oral or written, with a service provider that originates or terminates, or arranges for the origination or termination of, international telephony service outside of Pakistan."* Under clause 13.2 'Operator' has been defined to mean, *"any person authorized by a license, issued by the authority, to provide telecommunication services of any kind or to establish, maintain and operate a telecommunication system."*

18. It must be pointed out here that in the LDI license, the term 'Operator' has been used as a defined term, but the word operator has also been used in uncapitalized form signifying that such term has been used in the LDI license to refer to operators, that do not fall within the definition of an 'Operator' as defined. This is evident from a reading of clause 2.2.1 reproduced above for example, where the term operator has been used in its ordinary meaning with a small 'o' signifying that it doesn't refer to the term 'Operator' as defined in clause 13 of the LDI license.

19. TWA has been granted a license to establish, maintain and operate a private fiber optic submarine CLS. Clause 3(5) of the TWA license enables TWA, *"(a) to establish, operate and maintain a CLS situated within 15 miles of coastal area of Pakistan, the location of which, is approved by the authority under the condition 3(2) of the license, (b) to sell capacity to the licensed operators in Pakistan for the licensed services."*

20. A perusal of the TWA license manifests that a CLS license requires the licensee to own the fiber optic submarine cable connecting the landing station in Pakistan with the international submarine cable that then connects Pakistan with foreign countries. The license in accordance with the requirements of Section 21(3) of the Telecom Act is a non-exclusive license.

21. In view of the aforementioned provisions of the regulatory framework that exists to regulate the provision of telecommunication services in Pakistan, the questions to be answered are whether (i) HKT is providing telecommunication services in Pakistan for purposes of Section 2(v) of the Telecom

Act requiring a license from PTA, (ii) whether PTA treats operators of international submarine cable systems and/or operators of satellite/space station transmission facilities, as 'Operators' providing telecommunication services over which PTA exercises regulatory control and for which a license is required, and (iii) whether the JV Agreement is illegal for it includes HKT as a party that is not a licensee of PTA and entering into such agreement with an international telecommunications service provider falls foul of Section 25(3) of the Telecom Act.

22. Before considering the provisions of the telecom regulatory framework in place in Pakistan and how they apply to the facts before us, let us also take into account the international telecom framework within which state-systems operate. The United Nations Convention on the Law of the Sea and the Convention for the Protection of Submarine Telegraph Cables provide the foundation for the international legal regime governing submarine cables. The Open Access Regime that PTCL relies on in defense of the JV Agreement, has come to be understood as a reference to principles and regulations that govern the management of submarine cables, ensuring fair access and non-discriminatory treatment for all users.

23. The manner in which a country chooses to regulate connectivity with international broadband capacity is a matter of policy. There doesn't exist a one-size-fits-all regulatory model for regulating intelligence and data flowing through submarine cables. The arguments posited in favor of permitting provision of international broadband capacity subject to national licensing requirements include, *inter alia*, concepts such as state

sovereignty, the ability of the national regulator to ensure compliance of local laws, while protecting consumer interests and ensuring quality of service etc.

24. The arguments against such licensing by each nation-state, which would result in overregulation, include, *inter alia*, the lack of effective ability of a national regulator to regulate consortia that have no physical presence in the country, the lack of need to seek such regulation in the presence of international agreements (overseen by ITU and WTO etc.) that already govern submarine cable operations, the technical complexity of seeking to regulate submarine cables, and the concern that over-regulation could stifle competition and increase costs for consumers and operators within the licensing country.

25. There is no uniform global practice when it comes to regulating submarine cable consortia/operators. Some states require consortia to register with the national regulator. Some impose a requirement that the consortia notify the national regulator of their operations. Others rely on multilateral agreements to ensure adherence to international standards. The object of regulation of course is to ensure compliance with industry standards and best practices. The United States for example does not require cable operators to seek a license if they have no physical presence on US territory. Singapore, on the other hand, requires registration but not licensing for submarine cable operators.

26. A member of a submarine cable consortium can sell broadband capacity to LDI operators in third countries through

various arrangements: consortium members can resell their allocated IRUs capacity to third-party LDI operators; they can lease excess capacity to LDI operators through short-term or long-term agreements; they can establish network-to-network interface with LDI operators, enabling direct interconnection and bandwidth exchange; they can allow LDI operators to connect with the international submarine cable system through their CLS. This list is obviously illustrative and not exhaustive.

27. From a regulatory perspective it is not desirable to regulate all arrangements for provision of international broadband capacity. Where a state doesn't seek to regulate submarine cable consortia beyond its territorial waters, it would make no sense for it demand that individual members of such consortia seek a license for provision of international broadband capacity to an LDI operator (through primary or secondary market), when such individual members establish no physical presence within the state. This is because the regulatory goals of the state, including concerns surrounding state sovereignty and the ability to enforce regulatory principles and standards, can still be realized by regulating the LDI operator within the state, the operator of the CLS established within the state and the submarine cable within the territory of the state.

28. If the object of the telecom regulatory framework is to facilitate innovation, competition and modernization while protecting consumer interest, requiring individual submarine cable consortium members to procure independent licenses from a state to sell broadband capacity to its LDI operators might be counterproductive if, (i) such submarine cable consortium

members provide no onshore telecommunications services and only international transit or backbone services, and (ii) do not establish physical presence in the host state. And this appears to be the policy approach adopted by Pakistan as is evident from the Telecom Rules, the De-regulation Policy and LDI and CLS license conditions, as will be discussed later in this judgment.

29. International submarine cable consortia or the individual members of such consortia have no physical presence in Pakistan, except PTCL or TWA, that are appropriately licensed by PTA. Providing international transit or backbone services falls within the domain of international telecommunications regulations and regulatory framework overseen by the ITU, which has been incorporated by reference as part of the framework in force in Pakistan under the Telecom Act. To the extent that there is a submarine cable within Pakistan's territory connecting the international submarine cable with a CLS in Karachi, the licenses of PTCL and TWA require that such cable be owned by the licensees. Similarly, the CLS is regulated through a license and so are the LDIs that connect with the world through the CLS and the international submarine cables.

30. 'Telecommunication service' as defined under section 2(v) of the Telecom Act can be given an expansive meaning and it can then be argued that providing international broadband capacity through submarine cables is a telecommunication service, subject to licensing requirements under the Telecom Act. But that is not the interpretation of 'telecommunication service' adopted by PTA itself, as it does not require submarine cable consortia providing international broadband capacity to LDI

operators within Pakistan (through PTCL or TWA) to seek a license from PTA. Likewise, PTA does not require satellite facility providers to seek a license from PTA in order to provide international transit services to LDI operators in Pakistan.

31. Even while making policy choices, it has to be borne in mind that there exists a secondary market for purchasing broadband capacity through submarine cables. Secondary market transactions for provision of international broadband capacity include capacity resale agreements (with existing capacity holders selling excess capacity to other operators), resale of leased capacity, and sale or transfer of secondary IRUs. The secondary market transactions can allow buyers to acquire capacity without long-term commitments, save costs when secondary market prices are lower than primary market rates, and get fast and more flexible access to capacity for emergent needs. It would be irrational to bar secondary market broadband capacity acquisition transactions, when primary market transactions with submarine cable consortia are permissible without the cable consortia seeking a license from PTA.

32. HKT, according to the Construction and Maintenance Agreement that has been placed on record by PTCL, is part of the Asia Pacific Cable Network consortium, a major submarine cable system connecting Japan, Korea, China, Taiwan, Hong Kong, Philippines, Malaysia, and Singapore. HKT can therefore make broadband capacity available as it participates in submarine cable consortia. It is also possible for HKT to sell international broadband capacity on the secondary market to LDI operators in states across the globe, who can then use such

capacity through the submarine cables linking their countries with the rest of the world. It is in the broader context of the aforementioned regulatory framework and policy considerations that the legality of the JV Agreement ought to have been considered by PTA.

33. It is a settled principle of interpretation that the provisions of a statute are to be interpreted in such manner that promotes the objects of the statute. It has already been discussed earlier in this judgment that PTA is to exercise its functions and powers, and discharge its responsibilities under Sections 4, 5 and 6 of the Telecom Act in a manner that promotes competition in the telecom sector while protecting the interests of consumers as well as those of licensees. Section 20(1) prevents the provision of telecommunication service in Pakistan by any person without obtaining a license. This has to be read with Section 25(3), which prohibits a licensee from entering into any agreement or arrangement inconsistent with the obligations of a licensee. Consequently, a licensee entering into any agreement or arrangement with another person who is providing telecommunication services in Pakistan without a license would be in breach of requirements of Section 25(3) of the Telecom Act.

34. The question before us is whether provision of international broadband capacity by an operator who has no physical presence in Pakistan and provides such capacity through an international submarine cable linked with a CLS operated by a licensee of PTA through a submarine cable within Pakistan's territorial waters connecting the CLS with the international

submarine cable, also owned by a licensee of PTA, falls within the scope of telecommunication service in terms of Section 2(v) of the Telecom Act. The definition of telecommunication service has been reproduced above. It is arguable that provision of broadband capacity through an international submarine cable qualifies as conveyance, even if indirect, of intelligence from Pakistan through an optical fiber system. The other interpretation of the definition of telecommunication service is that such definition only captures direct conveyance of intelligence from Pakistan and not indirect conveyance as the definition is to be read with Section 1(2) of the Telecom Act, which extends provisions of the Telecom Act to the whole of Pakistan and not to territories beyond Pakistan. And consequently, there will always be operators at the end of the spectrum that will be conveying intelligence in other countries that emanated from Pakistan, either by terminating calls or by delivering data etc., but such telecom operators functioning outside the territories of Pakistan with no physical presence in Pakistan are not to be treated as providing telecommunication service in Pakistan. Had the legislature intended otherwise, it could have given extraterritorial effect to provisions of the Telecom Act or otherwise included within the definition of telecommunication service language suggesting that any conveyance of intelligence into or from Pakistan, whether direct or indirect, would be captured by the concept of provision of telecommunication service in Pakistan. The legislature has not done so. And this appeals to reason, as the contrary would make the regulatory regime in Pakistan extremely cumbersome and

almost infeasible to implement as it would require all players across the spectrum from the origination of intelligence to its termination to seek a license from PTA. This would increase the cost of providing telecom services in Pakistan and make the enforcement of a telecom regulatory framework seeking to regulate and control international telecom service providers near impossible.

35. PTA understands that telecom operators providing international telecommunication service, especially in the form of international broadband capacity, do not qualify as providers of telecommunication service in Pakistan. This is evident from provisions of the Telecom Rules, the Deregulation Policy and provisions of the LDI License reproduced above.

36. Clause 2.4 of Appendix B to the Telecom Rules endows licensees of PTA with the freedom to enter into contracts and arrangements in the course of providing telecom services in their discretion. Clause 10 of Schedule 1 to Annex B of Telecom Rules places one prohibition on such freedom to contract with international parties as it provides that where the effect of an international agreement entered into with overseas operators or satellite consortium has the effect of excluding other licensed operators from entering into a similar agreement with the overseas operator or satellite consortia *"in relation to any services or facilities, including submarine cables, satellite links and landlines"* such agreement can only be executed with prior permission from PTA. In the instant case, it is not denied that HKT is an overseas operator. That the JV Agreement involves provision of broadband capacity through international submarine

cables. And the JV Agreement does not have any non-compete clause preventing any other licensee of PTA, including TWA, from entering into a similar agreement with HKT or any other member of a submarine cable consortium.

37. Clauses 4.1.4 and 4.1.5 of the Deregulation Policy have also been reproduced above. Clause 4.1.4 permits LDI licensees to sublease capacity on a submarine cable system linking Pakistan to the rest of the world. Clause 4.1.5 explicitly confers on LDI licensees the right to obtain IRUs from submarine cable consortia (and also the right to install earth stations). While affording such rights to LDIs, the Deregulation Policy does not state that submarine cable consortia or individual members of such consortium are also required to seek licenses from PTA as by providing broadband capacity for conveyance of intelligence from Pakistan to other countries, they would in effect be providing telecommunication service in Pakistan. Similarly, the Deregulation Policy does not limit the right or ability of LDI licensees to obtain IRUs from the primary market alone, barring any acquisition of the same from the secondary market. The Information Memorandum while reiterating the aforementioned rights of LDI licensees provides in clause 29.1 that it is for LDI licensees to negotiate arrangements for obtaining IRUs from submarine cable consortia.

38. The regulatory requirements as explained in the De-Regulation Policy and the information memorandum dovetail with provisions of the LDI license. Clause 2.2.1 of the LDI license (which has also been reproduced above) affirms the right of an LDI licensee *"to obtain access to submarine cable systems,*

subject to reaching agreement with the operators of such systems..." The use of the term operator in clause 2.2.1 is not the operator as defined in clause 13.2 of the LDI license to mean a person licensed by PTA to establish, maintain and operate a telecommunication system. Clauses of the LDI license where the reference to an operator was to a person licensed by PTA, the defined term with capitalized 'O' has been used. This is evident from the very next clauses (i.e. clauses 2.3.1 and 2.4.1) where the capitalized term 'Operators' refers to persons licensed by PTA. PTA in its clarification dated 27.10.2015, appears to have correctly appreciated the regulatory framework and regulatory policy as discussed above. PTA in such clarification had noted that LDI licensees were free to enter into agreements for IRUs with submarine cable consortia and satellite service providers as well as from licensed operators. In the impugned order, in Para 6.1, PTA has reiterated this clarification. However, it has gone on further to then state that the JV Agreement is not admissible under the regulatory regime in Pakistan without providing any explanation as to how the JV Agreement falls foul of the regulatory regime. In the impugned order PTA has not held that operators of submarine cable consortia are providing a telecommunication service in Pakistan and require to be licensed or that operators of satellite transmission facilities are providing telecommunication services in Pakistan and require a license for provision of such services. The impugned order also does not hold as a matter of fact that HKT is not the member of a submarine cable consortium or that it does not qualify as the operator of a submarine cable consortium. As a factual matter,

PTA through C.M No. 277 of 2022 has placed on record the construction and maintenance agreement dated 27.01.2014, under which a submarine cable system connecting Asia, the Middle East, East Africa and Europe has been established and HKT is a signatory to such agreement and part of such submarine cable consortium. Notwithstanding that HKT is part of a submarine cable consortium, it is not denied that the broadband capacity being provided to LDN is through the submarine cable owned and operated by PTCL linking the international submarine cable outside Pakistan's territorial waters with the CLS owned and operated by PTCL. Thus, whether provision of the broadband capacity by HKT is by virtue of HKT being a member of a submarine cable consortium or by virtue of it having procured such capacity through the secondary market, the capacity is being provided through the international submarine cable through an agreement negotiated by LDN with PTCL and HKT in terms of clause 2.2.1 of its license. In the impugned order PTA does not appear to have engaged with provisions of the JV Agreement. PTA appears not to have considered that PTCL under the licenses issued by PTA remains at liberty to procure broadband capacity from international operators and afford such capacity to LDI operators in Pakistan through its CLS. Thus, in a sense, even if the JV Agreement is seen as two distinct transactions, one, between PTCL and HKT with HKT affording broadband capacity to PTCL for which access is to be provided at the CLS owned and operated by PTCL, and a second transaction between PTCL and LDN with PTCL affording broadband capacity to LDN, no objection to such structure can

be fathomed. It is the structuring of the transaction in the form of a tripartite agreement with LDN bearing the risk and cost for provision of international broadband capacity as opposed to PTCL, that has resulted in PTA throwing its hands up and declaring that the JV Agreement is void in terms of Section 25(3) of the Telecom Act. PTA has clearly misapplied itself to the requirements of Section 20(1) read with Section 25(3) of the Telecom Act. LDN is not prohibited from entering into an agreement or arrangement to obtain IRUs from a submarine cable consortium. To hold that while LDN can obtain IRUs from a submarine cable consortium, it cannot do so by entering into an arrangement with an individual submarine cable consortium member is irrational. PTA could take a position that provision of broadband capacity through international submarine cables where such capacity is used by an LDI operator in Pakistan falls within the definition of providing telecommunication service in Pakistan, which is a licensed activity. This PTA has thankfully not done. Otherwise, acquisition of broadband capacity by licensees in Pakistan would become extremely cumbersome. But once it is acknowledged that the operators of international submarine cables and/or satellite transmission facilities linking Pakistan with other countries are not providing a telecommunication service requiring a license within the meaning of Section 2(v) read with Section 20(1) of the Telecom Act, it cannot be logically argued that an individual member of a submarine cable consortium or another international service provider with no presence in Pakistan who sells IRUs on the primary or secondary market

would fall within the scope of providing telecommunication service in Pakistan.

39. For the aforementioned reasons, this Court finds that PTA has wrongly concluded that the JV Agreement between LDN, PTCL and HKT (which is a member of a submarine cable consortium with no presence in Pakistan) is a void agreement within the meaning of Section 25(3) of the Telecom Act. HKT has no physical presence in Pakistan and is not providing telecommunication service within the meaning of Section 2(v) of the Telecom Act, much as submarine cable consortia with no presence in Pakistan are not providing telecommunication service in Pakistan. The broadband capacity being provided by HKT within international submarine cables is being provided through the submarine cable linking the CLS owned by PTCL. And provision of such broadband capacity does not undermine the regulatory control of PTA to the extent that it continues to regulate LDN as a LDI licensee and PTCL as a licensee authorized to establish the CLS, which also owns the submarine cable linking the CLS to the international submarine cable.

40. In evaluating and appreciating the provisions of the JV Agreement while interpreting and applying provisions of the Telecom Act, the Telecom Rules, the De-Regulation Policy and the LDI License, PTA ought to have kept in view the fact that such agreements for provision of broadband capacity promote competition. It is the position taken by TWA, as a competitor providing broadband capacity to LDI operators in Pakistan, that is restrictive and anti-competitive. TWA is also free to structure agreements and arrangements including tri-party or multi-party

arrangements for provision of cheaper broadband capacity to LDI operators in Pakistan. But merely because it has a CLS license does not entitle it to prevent and preempt arrangements that could have the effect of making available high quality, efficient, cost effective and competitive telecommunication services in Pakistan in terms of Section 4(1)(d) of the Telecom Act.

41. For the aforementioned reasons, these appeals are ***allowed***. The impugned order is ***set aside*** for having misapplied Section 20(1) and 25(3) of the Telecom Act read together with relevant provisions of the De-Regulation Policy and LDI License discussed above while also being irrational in the manner in which it has applied the aforementioned provisions.

(BABAR SATTAR)
JUDGE

Announced in open Court on **03.12.2024.**

JUDGE

Approved for reporting.

Shakeel Afzal/-