

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3626 of 2019
China Mobile Pakistan Limited
Versus
Federation of Pakistan and others

Date of Hearing: 08.08.2024.

Petitioner/Appellant by: M/s Shahzada Naeem Bukhari, Kashif Nawaz Siddiqi and Muhammad Imad Khan, Advocates for the petitioner in writ petition No.3626/2019.
M/s Salman Akram Raja, Asad Ladha and Malik Ghulam Sabir, Advocates for the petitioner/appellant in writ petition No.3458/2020 and first appeal against order No.133/2020.

Respondents by: Barrister Qasim Wadood, learned Additional Attorney-General.
Mr. Arshid Mehmood Kiani, learned Deputy Attorney-General.
Barrister Munawar Iqbal Duggal along with M/s Sajjad Latif Awan, Director General (Law), Muhammad Khurram Siddiqui, Director (R&L), Naeem Ashraf, Consultant (Law), Shameer Shahid, MTO (Law) and Ch. Adil Javed, Assistant Director (L&R) for PTA in writ petitions No.3626/2019, 3458/2020 and first appeal against order No.133/2020.
M/s Ashtar Ausaf Ali, Barrister Muhammad Usama Rauf, Barrister Asad Rahim Khan and Ahmed Rehan-ur-Rashid, Advocates along with Mr. Ihsanullah Khan, Director (SP&M) for FAB in writ petition No.3458/2020 and first appeal against order No.133/2020.
M/s Abdul Rahim Bhatti, Yasser Rahim Bhatti and Qaiser Rahim Bhatti, Advocates along with M/s Ihsanullah Khan, Director (SP&M) and Adnan, Assistant Director (Law), FAB in writ petition No.3626/2019.

Assisted by: Mr. Umar Farooq, Deputy Registrar.

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, I propose to decide writ petitions No.3626/2019, 3458/2020 and the first appeal against order No.133/2020 since they entail certain common features.

2. Through writ petition No.3626/2019 filed on 19.10.2019, China Mobile Pakistan Limited (“ZONG”) impugns letter dated 17.10.2019 from the Pakistan Telecommunication Authority (“PTA”) whereby it was informed that in case its licence No.CMT-03/LL&M/PTA/2004 dated 23.10.2004, is not renewed by 22.10.2019, the same shall stand terminated. Furthermore, ZONG sought a direction to PTA to renew the said licence for another term of 15 years on the same terms and conditions by charging a licence renewal fee of not more than US Dollars 291 million. ZONG had also sought an injunction to restrain PTA from disturbing the additional compensatory frequency spectrum of 6.6 MHz in 1800 MHz Band (“Additional Spectrum”) allocated to it in the year 2007 due to the cross-border interference in its 900 MHz Band.

3. Through writ petition No.3458/2020 filed on 18.11.2020, ZONG and its Director, Kamran Ali, impugn the decisions taken by the Frequency Allocation Board (“FAB”) in its 42nd meeting held on 19.02.2016 and its 44th meeting held on 21.10.2019. Furthermore, the said petitioners seek a direction to PTA to renew ZONG’s two licences without being bound by FAB’s decisions taken in the said meetings. The said petitioners also seek the setting-aside of notices dated 11.03.2020, 29.10.2020 and demand note dated 03.11.2020 issued by PTA.

4. Through Appeal No.133/2020 filed on 19.12.2020 under Section 7 of the Pakistan Telecommunication (Re-organization) Act, 1996 (“the 1996 Act”), ZONG impugns the order dated 14.12.2020 passed by PTA holding that the utilization of the Additional Spectrum by ZONG since 23.10.2019 onwards is unauthorized and illegal. Furthermore, through the said order, ZONG was directed to vacate the Additional Spectrum within a period of 7 days. ZONG was also made liable to make payments for the unauthorized use of the Additional Spectrum at the rate of US Dollars 29.5 million per MHz for 15 years in accordance with the Policy Directive.

FACTUAL BACKGROUND:-

5. The record shows that on 19.04.1990, ZONG's predecessor-in-interest, M/s Paktel (Pvt.) Limited ("Paktel"), had been granted a non-exclusive licence by the Government of Pakistan for the provision of cellular mobile services in Pakistan. This licence was revalidated by PTA on 12.08.1997. Paktel was operating Advance Mobile Phones System (AMPS) in 850 MHz Band. On 23.09.2003 on Paktel's request, FAB allocated to it Extended Global System for Mobile Communication (E-GSM) Band. On 23.10.2004, Paktel's licence No.CMT-03/LL&M/PTA/2004 was renewed for a period of fifteen years under the Mobile Cellular Policy, 2004 against the payment of renewal fee of US Dollars 291 million. The licence was for frequency spectrum 7.6 MHz in 900 MHz Band and frequency spectrum 6 MHz in 1800 MHz Band.

6. In the year 2005, Paktel had reported interference in its 900 MHz Band at different locations in the Provinces of Punjab and Sindh. After the matter was referred to FAB, it was found that the interference was due to the Indian Code Division Multiplexing Access ("Indian CDMA") network services in 850 MHz Band operational across the eastern border of Pakistan.

7. FAB had conducted detailed monitoring and joint survey with Paktel between 04.01.2006 and 08.01.2006 in the areas of Sialkot, Pasrur, Narowal, Lahore, and Qasur. In FAB's report dated 16.01.2006, it was recommended that in order to address the problem of severe interference in Paktel's uplift band from across the border, Additional Spectrum in 1800 MHz Band be allocated to it. It was also recommended that the case be taken up with the Telecom Regulatory Authority of India for the removal of cross-border spectrum interference.

8. PTA had also taken up the matter regarding cross-border interference in Paktel's 900 MHz Band with the International Telecommunication Union ("ITU"). Letter dated 28.02.2006 shows that ITU had requested the administration in India in accordance with the applicable Radio Regulations to take necessary action to eliminate the interference.

9. On 20.03.2007, PTA approved the change in Paktel's name to China Mobile Pak Limited, which is being referred to in this judgment as "ZONG." The matter regarding cross-border interference came up for consideration in the 30th meeting of FAB held on 08.09.2007. The minutes of the said meeting show that ZONG had requested the grant of additional bandwidth in 1800 MHz range for Karachi and Hyderabad due to the cross-border interference in its 900 MHz Band. In the said meeting, FAB approved the allocation of additional frequencies in 1800 MHz Band (1760.1 – 1766.7/ 1855.1 – 1861.7 for affected areas in Sindh and 1769.3 – 1775.9/ 1864.3 – 1870.9 for affected areas in Punjab) for one year. The remarks of the Director, Ministry of Information Technology, were that the interference phenomenon had been reduced significantly; the said allocations were for one year; and that once the problem regarding interference is solved, the additional bandwidth would be retained by FAB.

10. Vide letter dated 15.04.2008, FAB informed ZONG as to the approval for the extension in the temporary allocation of frequencies in the 1800 MHz Band for the next three years, i.e. up to 18.04.2011 within the interference affected areas only. Apparently, a decision to the said effect had been taken by FAB in its 33rd meeting held on 29.02.2008.

11. Vide letter dated 25.04.2011, ZONG requested PTA for an extension in the allocation of the Additional Spectrum of 6.6 MHz in 1800 MHz Band to compensate for the interference faced in its 900 MHz Band from operators in India. In the said letter, it was asserted that the issue of interference had not been resolved and that the problem was still persisting.

12. There is nothing on the record to show that after the expiry of the said three-year period ZONG had either been required by FAB to vacate the Additional Spectrum or expressly permitted to utilize the same. PTA, however, through letter dated 04.09.2012, required FAB to process ZONG's case for extension in the allocation of the Additional Spectrum *"till such time permanent solution is explored / finalized."* Be that as it may, it is an admitted position that ZONG continued to utilize the

Additional Spectrum without any break beyond the said three-year period.

13. FAB, in its 39th meeting held on 07.03.2014, decided to allow ZONG to utilize the Additional Spectrum until 30.07.2014. The matter regarding cross-border interference in ZONG's 900 MHz Band also came up for discussion in the 40th meeting of FAB held on 03.02.2015. One of the proposals made by the Executive Director, FAB was that ZONG may be allowed to utilize the Additional Spectrum in the affected areas of Punjab and Sindh as compensation for the cross-border interference in its 900 MHz Band. It was also proposed that the Additional Spectrum would be for the remainder term of ZONG's existing 2G licence, and that no further extension would be granted to ZONG for the use of the Additional Spectrum after the expiry of the licence in 2019. In the said meeting, it was decided that the matter should be discussed with ZONG for an amicable solution, and to initiate a process for the resolution of the cross-border interference.

14. FAB, in its 41st meeting held on 14.10.2015, decided to constitute a four-member committee to give recommendations for the resolution of the issues faced by ZONG, including the issue of cross-border interference in its 900 MHz Band. The minutes of the said meeting show that ZONG was alleged to have been utilizing the Additional Spectrum in areas with no cross-border interference.

15. One of the recommendations of the said committee was that the *“current temporary assignment of [ZONG] in 1800 MHz (in lieu of interfered spectrum in 900 MHz Band) be changed with an assignment of 6.6 MHz that is contiguous to their allocated 1800 MHz assignment, for Sindh and Punjab only, till expiry of [ZONG's] (2G) license or removal of the interference whichever is earlier.”* It was also recommended that ZONG be informed that at the time of the renewal of its licence, a comprehensive survey will be conducted and if interference due to cross-border signals still persists then the licence will be renewed without the current frequency assignment in 900 MHz Band. These recommendations were submitted by the said committee vide letter dated 19.02.2016 to the Ministry of Information Technology and FAB.

16. ZONG's licence dated 23.10.2004 was valid for a term of 15 years. Clause 1.2.2 of the said licence provided that if the licensee wishes to renew the term of the licence at the expiration of the term (i.e. 22.10.2019), it shall submit to PTA a written request for renewal at least 45 months prior to the expiration of the said term. Under clause 1.2.3, PTA had a period of three months to decide whether or not to renew the licence.

17. On 20.01.2016, ZONG had applied to PTA for the renewal of its licence. The Telecommunications Policy of 2015 was in force when ZONG applied for the renewal of its licence. Paragraph 8.18.1 of the said policy reads thus:-

“Complaints and Enforcement: License holders expect the swift resolution of interference issues, which is essential for well managed spectrum. FAB is responsible for investigating interference complaints and the PTA and PEMRA are responsible for undertaking enforcement actions. PTA and PEMRA will attempt to resolve interference issues notified to them within 30 days of notification.”

18. The recommendations made by the four-member committee constituted pursuant to the decision taken in FAB's 41st Board meeting dated 14.10.2015 came to be considered by FAB in its 42nd meeting held on 19.02.2016. It was decided to withdraw ZONG's previous additional assignment of 6.6 MHz (i.e. 1760.1 – 1766.7 / 1855.1 – 1861.7 MHz for interference affected areas in Karachi and Hyderabad, and 1769.3 – 1775.9 / 1864.3 – 1870.9 MHz for interference affected border areas of Punjab) in 1800 MHz Band, and to approve additional assignment of 6.6 MHz (i.e., 1755.7 – 1762.3 / 1850.7 – 1857.3 MHz) due to cross-border interference from India in ZONG's 900 MHz Band. ZONG was also informed as to the conditions on which the said additional assignments had been approved. For the purposes of comparison and clarity, the previous and the new assignment as mentioned in the minutes of the said meeting are reproduced herein below:-

Previous Temporary Assignments	New Temporary Assignments
1760.1 – 1760.1 – 1766.7 / 1855.1 – 1861.7 (6.6 + 6.6 MHz) in Karachi & Hyderabad	1755.7 – 1762.3 / 1850.7 – 1857.3 MHz (6.6 + 6.6 MHz)

19. The said decision was taken subject to the following conditions:-

“a. The temporary additional assignments will be utilized by Zong in areas affected by cross border interference due to Indian CDMA signals in Punjab and Sindh till the expiry of GSM license i.e. Oct 20[19] or elimination of cross border interference whichever is earlier.

b. Zong will use the said frequencies for cellular services within the provisions of license issued by the PTA.

c. Zong will not deploy any non-tuneable equipment in the DCS (1800 MHz) Band and should re-tune their temporary additional assignments in future if so required.

d. PTA will issue a notice to Zong that renewal of 2G license (October 20[19]) to be offered without interfered portion of 900 MHz band. If Zong opt to keep its original 2G assignments of 900 and 1800 MHz (2 x 13.6 MHz) at the time of renewal then Zong will not claim compensation in terms of additional assignments.”

20. Vide letter dated 11.03.2016, FAB informed ZONG as to the decisions taken by FAB in its 42nd meeting dated 19.02.2016. Furthermore PTA, vide letter dated 03.05.2016, informed ZONG that the renewal of its 2G licence on 22.10.2019 will only be offered for the un-interfered portion of the 900 MHz Band, if available.

21. Vide letter dated 11.12.2018, ZONG expressed its desire to PTA for the renewal of its existing allocation along with the Additional Spectrum of 6.6 MHz in 1800 MHz Band. ZONG also expressed its desire to purchase the said spectrum for use not just in the interference affected areas of Punjab and Sindh but also in the remaining areas of Pakistan.

22. Regarding ZONG's desire to continue using the Additional Spectrum post-licence renewal PTA, vide letter dated 14.02.2019, reminded ZONG that through FAB's letter dated 11.03.2016 and PTA's letter dated 03.05.2016, it had been made clear that the Additional Spectrum will be utilized till the expiry of the licence in October, 2019 or the elimination of the cross-border interference, and that the renewal of the licence on 22.10.2019 will be offered with un-interfered portion of 900 MHz Band, if available.

23. Vide letter dated 14.02.2019, ZONG again requested FAB to consider its request of renewing its licence along with the Additional Spectrum of 6.6 MHz in the 1800 MHz Band. ZONG again expressed its desire to purchase the said Additional Spectrum for use in the remaining areas of Pakistan.

24. In their meeting dated 14.02.2019, one of the options given by FAB to ZONG as a solution for the cross-border interference in the latter's 900 MHz Band was for ZONG to abandon the E-GSM Band altogether and adopt Band 5 configuration. This option was given in view of the non-existent procedures for coordination with India. FAB had also expressed that the continuation of the Additional Spectrum of 6.6 MHz in 1800 MHz Band to ZONG in lieu of the interfered 900 MHz Band will result in a loss of millions of dollars to the national exchequer. It was also admitted that there existed a perennial phenomenon of cross-border interference from India in ZONG's 900 MHz Band.

25. Vide letter dated 11.03.2019, FAB was informed by ZONG that the latter would not be able to avail the Band 5 option but expressed its openness to consider any other option which may help it to keep its long term business strategy to the satisfaction of its customers. Through the said letter, ZONG pointed out that neither PTA nor the Ministry of Information Technology had issued any new policy framework for the renewal of licences, and that Ufone's 2G licence was last renewed in 2014 at a price of US Dollars 291 million. ZONG expressed its understanding that the same policy framework will be applied at the time of the renewal of its 2G licence.

26. In exercise of the powers conferred by Sections 8(2) and 22(3) of the 1996 Act, the Federal Government, on 09.05.2019, issued a Policy Directive ("Policy Directive") setting out a specific policy on cellular mobile licences, including ZONG's licence which was due for renewal on 22.10.2019. This Policy Directive was issued for compliance by PTA and FAB. The salient features of this Directive were that the renewal price for the right to use frequency spectrum included in the licences being renewed was to be in accordance with the per MHz price benchmarks from frequency spectrum auctions of 2016 and 2017, i.e. per MHz price for frequency spectrum in 900 MHz and 1800 MHz was to be US Dollars 39.5 million and US Dollars 29.5 million, respectively; the tenure of the renewed licences was to be continued for 15 years; the payment terms were 100% upfront or 50% upfront with remaining 50% in five equal annual installments on LIBOR + 3%. More particularly for

ZONG, the Policy Directive provided that FAB will provide options in lieu of ZONG's cross-border interfered spectrum in 900 MHz Band. Furthermore, it was provided that in case of non-acceptance of proposed options, the renewal of ZONG's licence and its associated spectrum shall be dealt in accordance with paragraph No.4(v) of the decisions taken in FAB's 42nd Board meeting (i.e. without any compensation in terms of additional frequency assignments).

27. After the Policy Directive was issued by the Federal Government, ZONG, vide letter dated 21.06.2019, requested PTA to confirm the availability of the un-interfered portion of 900 MHz Band or otherwise. It was also stated that in case of non-availability, alternate options be provided to ZONG. In the said letter, it was mentioned that ever since ZONG started facing interference in its 900 MHz Band, it had suffered a loss of approximately US Dollars 200 million. ZONG took the position that the Additional Spectrum of 6.6 MHz in the 1800 MHz Band had become an integral part of its network and that the same should not be forcibly withdrawn. It was asserted that ZONG had invested a huge amount to utilize the said Additional Spectrum with its other allocated/licenced spectrum. ZONG expressed a hope that during the process of renewal, PTA and FAB would provide continuous interference-free spectrum to support ZONG's business development in the next fifteen years of the licence term.

28. A reminder was sent to PTA by ZONG on 06.08.2019. Vide letter dated 29.08.2019, PTA informed ZONG in categorical terms that no compensation in the form of Additional Spectrum could be granted to ZONG.

29. On 03.09.2019, the Executive Director, FAB addressed a letter to ZONG on the subject of *"Renewal of Cellular Mobile License of M/s CM Pak-2019 to 2034."* The said letter makes reference to the Policy Directive and the minutes of the 42nd meeting of FAB held on 19.02.2016 as well as correspondence between ZONG and PTA on the subject. It also makes reference to the mandate given to FAB in the Policy Directive to provide options in lieu of cross-border interfered spectrum

in ZONG's 900 MHz Band. The options given by FAB, which are essential for the purposes of the instant case, are as follows:-

- "a. 1739.7 – 1745.7/ 1834.7 – 1840.7 (6 + 6 MHz) to be offered to M/s CMPak in 1800 MHz Band at the price of renewal as per the Policy Directive i.e. 29.5 million/ MHz for a 15-year license. This portion is the original 1800 MHz band licensed to M/s CMPak.*
- b. The temporary additional assignments in 1800 MHz Band i.e. 1755.7 – 1762.3/ 1850.7 – 1857.3 MHz (6.6 + 6.6 MHz) to be offered to M/s CMPak as a licensed spectrum upon renewal at the price of renewal as per the Policy Directive i.e. 29.5 million/ MHz for a 15-year license.*
- c. An additional 2 x 2.4 MHz (1781.1 – 1783.5/ 1876.1 – 1878.5 MHz) will be offered to M/s CMPak at the price of renewal as per the Policy Directive i.e. 29.5 million/ MHz for a 15-year license for making their spectrum holdings 2 x 25 MHz in 1800 MHz Band. The said spectrum will be re-farmed in future for making the spectrum assignments of M/s CMPak contiguous subject to agreement between concerned operators.*
- d. Un-interfered portion of 900 MHz Band i.e. 888.1 – 890.1/ 933.1 – 935.1 (2 + 2 MHz) to be offered to M/s CMPak at the price of renewal as per the Policy Directive for either the entire duration of renewed license or for a fixed period of time. The portion of frequency spectrum affected by cross border Indian Signal i.e. 882.5 – 888.1/ 927.5 – 933.1 (5.6 + 5.6 MHz) will not be offered for renewal considering M/s CMPak latest findings of more than 60% affected cells in Punjab and Sindh. The said assignment, subject to payment as per the Federal Government defined price, will help enable M/s CMPak to migrate to 1800 MHz for the said license."*

30. ZONG did not accept any of the options given in FAB's letter dated 03.09.2019. In its letter dated 05.09.2019, ZONG took the position that since cross-border interference in its 900 MHz Band was a continuing phenomenon, its licence ought to be renewed by continuing the *status quo* of 7.6 MHz in 900 MHz Band; 6 MHz in 1800 MHz Band; and the additional compensatory / free of charge spectrum of 6.6 MHz in 1800 MHz Band. ZONG also wanted the payment terms for the renewal of its licence to be same as the ones agreed with PTA for the grant of its 2G licence in 2004, ZONG's existing 2G licence payment installment plan, as well as the total price of US Dollars 291 million.

31. PTA, in its letter dated 12.09.2019 to the Secretary, Cabinet Division (which has administrative control over FAB), referred to paragraph (viii) of the Policy Directive which required FAB to provide options in lieu of ZONG's cross-border interfered spectrum in 900 MHz Band. The Policy Directive also provided that in case the options given by FAB are not acceptable to ZONG, the renewal of its licence shall be

dealt with in accordance with the decision taken in FAB's 42nd meeting to renew ZONG's licence without any compensation in terms of additional frequency assignments. PTA also reminded the Secretary, Cabinet Division that FAB, in its 42nd meeting, had decided that PTA will issue a notice to ZONG that the renewal of its 2G licence will be offered without the interfered portion of 900 MHz Band, and that if ZONG opts to keep its original 2G assignments of 900 MHz Band and 1800 MHz Band at the time of the renewal, ZONG will not claim compensation in terms of additional assignments. Regarding FAB's letter dated 03.09.2019, PTA expressed the following reservations:-

"2. The contents of the FAB HQs letter clearly indicates that the office misunderstood its mandate and perhaps by misinterpreting the task assigned to the Board by Federal Government has processed the subject case. The said action on part of FAB HQs may raise serious legal issues with regard to fate and legal status of decision as conveyed to the licensee. Without doubt section 43 of the Act exclusively empowers the Board to allocate and assign radio spectrum to the Government, providers of telecommunication services and telecommunication systems, radio and television broadcasting operations, public and private wireless operators and others. Whereas, under the said section read with section 43(3) of the Act, the legal status of Executive Directive is an employee of the Board. Thus, any action on the direction of the Executive Directive/ Vice Chairman on the matter related to scarce resource i.e. radio spectrum cannot be treated and considered as decision of the Board.

3. The said letter has been written without fulfilling the codal formalities under the Act and without discussion/ deliberation/ consent of the Board members and unilaterally shared decision with the licensee. As a matter of record, a series of meeting invitations were sent to FAB HQs by PTA for discussion on subject issue but no one from FAB participated. Later, FAB HQs responded through email giving reference to 42nd Board Meeting instead of further discussions as per Policy Directive. It is added that FAB issued Minutes of Meeting on 14th Feb 2019 which was held at FAB HQ in which PTA also participated, wherein CMPak was given three options in lieu of interfered spectrum. These options were not reflected in the final letter from FAB HQ to CMPak.

4. The decision conveyed by Executive Director FAB vide letter referred at (iii) above to CMPak for spectrum in lieu of cross border interference issue is not only against the mandate as per the Act but also against the spirit of GoP Policy Directive dated 9th May 2019. The Policy Directive does not specify additional frequency assignments (i.e. 2.4 + 6.6 making a total of 17 MHz instead of 13.6 MHz) through top-up or any further spectrum rationalization plans. Assignment of 2 MHz in 900 MHz band for a fixed period of time, less than 15 years, is also not catered for in the Policy Directive. Such leverage for a specific CMO and without a transparent process will raise doubts and create distortion in the entire cellular market.

5. Surprisingly, FAB HQs also suggested a base price of 850 MHz radio frequency spectrum which prima facie is against its mandate and contrary to the section 8 of the Pakistan Telecommunication (Re-organization) Act, 1996 (the "Act"). Furthermore determination of base price is mandate of GOP which is usually suggested by a Consultancy Firm and reviewed/ determined by the Government."

32. Through its letter dated 02.10.2019, the Executive Director, FAB justified the issuance of its letter dated 03.09.2019 wherein four options were given to ZONG for the renewal of its licence. The Executive Director, FAB took the position that the options communicated to ZONG were strictly in line with the Policy Directive, and that he had the executive authority to issue the said letter dated 03.09.2019. For the purposes of clarity, paragraph 8 of the said letter is reproduced herein below:-

"8. The revised options (proposal) was formulated in order to devise a suitable solution keeping in view the previous exercise of swap of spectrum from 900 MHz to 1800 MHz based on difference in coverage characteristics of the two bands. PTA objected to the proposal on grounds that the Policy Directive did not stipulate additional spectrum assignments in excess of existing one i.e. 13.6 MHz. However, it is pointed out that currently only two arrangements are available (4.8 MHz in 900 MHz Band, 8.8 MHz in 1800 MHz Band and 7.6 MHz in 900 MHz Band, 6 MHz in 1800 MHz Band). Assignment of 13.6 MHz to M/s CMPak could only be rational with the above two mentioned arrangements. Otherwise, restricting M/s CMPak's assignment to 13.6 MHz will not ensure level playing field, especially when M/s CMPak would be asked to vacate a major portion of its 900 MHz Band holdings, while M/s Jazz/Warid holds 12.6 MHz in the same Band. The principle of level playing field and rationality was not duly considered at the time of granting approval to the merger of M/s Mobilink and M/s Warid by PTA in 2015, which conveniently placed M/s Jazz at a dominant position through this undue favour, whereby, increasing its spectrum holding to 12.6 MHz in the 900 MHz Band in comparison to other operators. Therefore, objection of PTA on the proposal of FAB is not justified/ valid, whereas, the spectrum offered to M/s CMPak was at the price benchmarked by the market and duly approved by the Federal Government."

33. It appears that on 01.10.2019, a meeting was held between PTA and ZONG in which PTA gave four options to ZONG for the renewal of its licence. Vide letter dated 02.10.2019, PTA clarified to ZONG that any option extended to ZONG in accordance with the Policy Directive shall consist of a total of 13.6 MHz spectrum, and that the assignment of Additional Spectrum is beyond the mandate given under the Policy Directive. The four options that were given by PTA were attached with the said letter dated 02.10.2019 for ZONG's consideration.

34. ZONG's licence was due to expire on 22.10.2019. Vide letter dated 17.10.2019, PTA informed ZONG as to the decision taken by the Chairman, PTA that the renewal of ZONG's licence would be in accordance with paragraph (viii) of the Policy Directive and the decision taken in FAB's 42nd Board meeting. On 19.10.2019, ZONG filed writ petition No.3626/2019 with the prayer referred to in paragraph 2 above. Along with the said writ petition, ZONG also filed an application for interim injunction praying for an order of *status quo* regarding ZONG's licence and its use of the Additional Spectrum. Vide order dated 21.10.2019, this Court ordered the maintenance of *status quo*. It is on the basis of the said order that ZONG is continuing to use the frequency spectrum of 7.6 MHz in 900 MHz Band; 6 MHz in 1800 MHz Band; and the Additional Spectrum of 6.6 MHz in 1800 MHz Band without its licence having been formally renewed.

35. On 28.10.2019, this Court recorded the statements of the contesting parties that ZONG will deposit 50% of the licence renewal fee on or before 25.11.2019. The deposit of such fee was to be subject to the final outcome of the petition. On 25.11.2019, this Court was informed by the learned counsel for ZONG that due to administrative obstacles, 50% of the licence renewal fee could not be deposited. Apparently, on 22.11.2019 and 28.11.2019, ZONG paid US Dollars 120,000,000 and US Dollars 118,600,000, respectively as 50% of the licence renewal fee. This was confirmed by the learned Additional Attorney-General who had appeared before this Court on 02.12.2019 on behalf of PTA. On 27.01.2020, this Court ordered that PTA would be at liberty to proceed in accordance with the law and also issue a show cause notice regarding vacation of spectrum. On 24.02.2020, this Court ordered that PTA shall be at liberty to proceed in the matter, but the final order shall not be passed until the next date of hearing.

36. On 11.03.2020, PTA issued a notice under Section 23 of the 1996 Act requiring ZONG to forthwith close the usage of the Additional Spectrum of 6.6 MHz in 1800 MHz Band and show cause as to why its licence should not be suspended / terminated or any other enforcement order should not be passed against it. The position taken by PTA in the

said show cause notice was that after the expiration of ZONG's licence on 22.10.2019, it had unauthorisedly been using the Additional Spectrum of 6.6 MHz in 1800 MHz Band. Reference in the said notice was also made to the decision taken in FAB's 42nd meeting allowing ZONG to use the additional assignment of 6.6 MHz in 1800 MHz Band on the terms and conditions mentioned therein and reproduced herein below:-

"a) M/s CMPAK will re-tune their previous temporary assignments to 1755.7 – 1762.3 1850.7 – 1857.3 MHz (6.6 + 6.6 MHz) with immediate effect. The temporary additional assignments will be utilized by M/s CMPAK in areas affected by cross border interference due to Indian CDMA signals in Punjab and Sindh till the expiry of 2G (GSM) license i.e. Oct 2019 or elimination of cross border interference whichever is earlier.

b) M/s CMPAK will use the said frequencies for cellular services within the provisions of license issued by the PTA.

c) M/s CMPAK will not deploy any non-tuneable equipment in the DCS (1800 MHz) Band and should re-tune their temporary additional assignments in future if so required."

37. Apparently, the said show cause notice dated 11.03.2020 was challenged by ZONG in appeal (first appeal against order No.76/2020) before this Court. The said appeal was disposed of by this Court vide order dated 13.08.2020 with the observation that ZONG would be afforded an opportunity of a hearing before the matter is decided. ZONG had filed a reply to the said show cause notice on 10.08.2020.

38. On 20.10.2020, this Court modified its earlier injunctive order passed in writ petition No.3626/2019 and ordered that FAB and PTA would be at liberty to implement the Policy Directive. This Court referred to paragraph (viii) of the Policy Directive and recalled the earlier injunctive order to the extent of restraining FAB and PTA from implementing the Policy Directive. On 02.11.2020, this Court ordered that PTA will be at liberty to implement the decisions taken by FAB in its 42nd meeting.

39. The proceedings pursuant to the said show cause notice culminated in PTA's order dated 14.12.2020, the operative part whereof is reproduced herein below:-

"4. Decision of the Authority

In light of the foregoing discussion and findings, the Authority hereby concludes and decides as under:

4.1 The use / utilization of radio frequency spectrum by CMPak Ltd in 1800 MHz band ranging from 1755.7-1762.3 / 1850.7-1857.3 MHz (6.6 + 6.6 MHz) since 23rd October, 2019 onwards is unauthorized and illegal.

4.2 CMPak Ltd is hereby directed to vacate the Frequency Spectrum in 1800 MHz band ranging from 1755.7-1762.3 / 1850.7-1857.3 MHz (6.6 + 6.6 MHz) at the earliest but not later than seven (7) days from the date of receipt of this order and submit a compliance report thereof.

4.3 CMPak Ltd is liable to make payments for the period of unauthorized use of 6.6 MHz in 1800 MHz band at the rate of USD 29.5 Million per MHz for fifteen (15) years as fixed in the Policy Directive dated 9th May, 2019 including late payment additional fee as per applicable law.”

40. The said order dated 14.12.2020 was challenged by ZONG in appeal (first appeal against order No.133/2020) before this Court.

41. FAB, in its 44th meeting held on 21.10.2019, had taken a decision to the effect that the Additional Spectrum of 6.6 MHz in 1800 MHz Band shall stand withdrawn on expiry of ZONG's licence and the same shall be auctioned in accordance with the provisions of the 1996 Act and the Telecommunications Policy of 2015 as well as the Policy Directive of the Federal Government at the relevant time. PTA informed ZONG about the said decision vide its letter dated 02.01.2020.

42. On 18.11.2020, ZONG and its Director, Kamran Ali, filed writ petition No.3458/2020 to challenge FAB's decisions taken in its 42nd meeting held on 19.02.2016 and 44th meeting held on 21.10.2019. The petitioners in the said petition also sought a direction to PTA to proceed with the renewal of ZONG's 2G licence without being bound by FAB's decisions taken in its 42nd and 44th meetings.

43. On 04.11.2021, ZONG filed an application (C.M.No.4611/2021) seeking to amend its prayer clause in writ petition No.3626/2019 to challenge FAB's decision taken in its 42nd meeting dated 19.02.2016. This application was filed after arguments of the learned counsel for the petitioner as well as the respondents in the said petition had been heard and the learned counsel for the petitioner was addressing his arguments in rejoinder.

44. These cases were fixed for rehearing and the learned counsel for ZONG and PTA were asked to submit a breakup of the amount payable

by ZONG as the fee for the renewal of its licence. In terms of the Policy Directive, the licence renewal fee was US Dollars 477.2 million. ZONG had opted to deposit 50% upfront and the remaining 50% in five equal annual installments subject to markup at the rate of LIBOR + 3%. 50% of the fee amounting to US Dollars 238,600,000 was paid in two installments, i.e. US Dollars 120,000,000 on 22.11.2019 and US Dollars 118,600,000 on 28.11.2019. As per the calculations provided by PTA, the first four installments have been paid by ZONG, albeit with a delay for which markup has also been paid. The fifth installment for an amount of US Dollars 23,894,218 was due to be paid by ZONG in June, 2024. The total amount paid till date as renewal fee including the markup is US Dollars 485,640,485. In addition to this, PTA has also demanded US Dollars 62,304,000 calculated from 23.10.2019 till 08.08.2024 as a charge for the utilization of the Additional Spectrum of 6.6 MHz in 1800 MHz Band based on the spectrum price fixed by the Federal Government in the Policy Directive.

CONTENTIONS OF THE LEARNED COUNSEL FOR ZONG:-

45. Shahzada Naeem Bukhari, the learned counsel for ZONG, after narrating the facts leading to the filing of the instant petition, submitted that the Additional Spectrum of 6.6 MHz in the 1800 MHz Band should be incorporated in ZONG's licence; ZONG, through its letters dated 11.12.2018 and 14.02.2019 had requested PTA and FAB to include the said Additional Spectrum in its licence; PTA had consistently been assuring ZONG that the cross-border interference in the 900 MHz frequency would be cleared; and since the said interference still persists, it would be fair and equitable if the compensatory spectrum allocated to ZONG is incorporated in its renewed licence.

46. Mr. Salman Akram Raja, who also represented ZONG, submitted that on 23.10.2004, Paktel had been granted a licence for a period of fifteen years on payment of US Dollars 278 million; Paktel had been allocated a frequency spectrum of 7.6 MHz in the 900 MHz Band and 6 MHz in 1800 MHz Band; for the renewal of the said licence, ZONG had been charged US Dollars 477 million, out of which US Dollars 286 million had already been paid; upon installation of the requisite technological

infrastructure by ZONG and the commencement of its operations, it was discovered that 5 MHz out of the 7.6 MHz in the 900 MHz Band were severely affected by cross-border interference in large parts of the Provinces of Punjab and Sindh; as compensation for the interference, ZONG was allocated Additional Spectrum in 6.6 MHz in the 1800 MHz Band; this compensatory allocation continued for a period of three years on the basis of FAB's letter dated 15.04.2008; a survey carried out in the year 2012 showed that the cross-border interference in ZONG's frequency spectrum of 900 MHz Band was continuing; consequently, the Additional Spectrum of 6.6 MHz in the 1800 MHz Band was continued further; on 20.01.2016, ZONG applied to PTA for the renewal of its licence; FAB, in its 42nd Board meeting held on 19.02.2016, decided that the Additional Spectrum could be used by ZONG till the expiry of its licence on 22.10.2019; it was also decided that after the expiry of the licence, a clean frequency spectrum of 900 MHz would be allocated to ZONG; the decisions taken by FAB, in its 42nd meeting, envisaged the provision of clean 7.6 MHz frequency in the 900 MHz Band to ZONG at the time of the renewal of its licence in October 2019; the fact that ZONG's frequency spectrum in 900 MHz Band was interfered with is confirmed by FAB's letter dated 14.02.2019; since the cross-border interference in ZONG's 5 MHz frequency in the 900 MHz Band had not been cured, PTA could not deny the Additional Spectrum of 6.6 MHz in the 1800 MHz Band to ZONG at the stage of the renewal of its licence; PTA or FAB could not interpret FAB's decision taken in its 42nd meeting to mean that the Additional Spectrum could be availed by ZONG only until the expiry of its licence regardless of whether the cross-border interference in ZONG's allocated 7.6 MHz frequency in the 900 MHz Band continues; the minutes of FAB's 42nd meeting (in which it was decided that the Additional Spectrum could be used by ZONG till the expiry of its licence on 22.10.2019) were first revealed when they were brought on record by FAB through application (C.M. No.3231/2020) in writ petition No.3626/2019; FAB's letter dated 11.03.2016 to PTA about the decisions taken in the 42nd meeting of FAB is silent about the terms of the renewal of ZONG's licence; and FAB's

suggestion of ZONG's frequency spectrum to consist only of 1800 MHz Band and a complete removal of 900 MHz Band was rejected by ZONG through letter dated 11.03.2019.

47. Furthermore, it was submitted that clause 1.2.2 of ZONG's licence dated 23.10.2004 requires that the application for the renewal of the licence has to be made at least 45 months prior to its expiration; clause 1.2.3 of the licence obligates PTA to decide the application for renewal within a period of three months of its receipt; the intent behind requiring an application for the renewal to be made 45 months before the expiration of the licence is to allow at least 42 months after the acceptance or the rejection of the renewal application to the licensee to make necessary arrangements regarding the future; on 20.01.2016, ZONG applied to PTA for the renewal of its licence; ZONG's application dated 20.01.2016 for the renewal of its licence has not been decided by PTA at any material stage; had PTA taken a timely decision on ZONG's renewal application, there would have been a period of 42 months for ZONG to make necessary arrangements without disturbing its existing frequency package.

48. It was further submitted that PTA, through its letter dated 14.02.2019, has accepted ZONG's right to continue using the compensatory frequency spectrum of 6.6 MHz in 1800 MHz Band and for the frequency spectrum of 7.6 MHz in 900 MHz Band at the renewal stage to be un-interfered; the 900 MHz frequency is the most valuable frequency available with high propagation ability; the Federal Government's Policy Directive also values the 900 MHz frequency above all other frequencies; the Vice Chairman / Executive Director of FAB, in his letter dated 03.09.2019, acknowledged ZONG's entitlement to a compensatory band as long as the interference in its 900 MHz Band remains; this position of the Vice Chairman / Executive Director of FAB was opposed by PTA in its letter dated 12.09.2019; FAB, in its letter dated 02.10.2019, correctly interpreted the Policy Directive to require giving options to ZONG to ensure a level playing field; the options given by PTA through its letter dated 02.10.2019 were not acceptable to ZONG since each of the options required ZONG to work with the

interfered 900 MHz Band with no compensatory allocation in the 1800 MHz Band or to give up the 900 MHz Band entirely and migrate to Bands such as 2100 MHz or 850 MHz; ZONG cannot be excluded from using the 900 MHz Band which is admittedly the most valuable frequency from a commercial standpoint; the technical infrastructure put in place by ZONG since 2007 at the cost of millions of Dollars and the business model established on the basis of this infrastructure that serves nearly forty million customers is critically based on the availability of the 900 MHz Band; and if ZONG is to be ousted from the 900 MHz Band and into the 2100 MHz Band or 850 MHz Band frequencies, it would cause a financial cost outlay running into hundreds of millions of Dollars besides having serious consequences for the retention of its customer base.

49. It was further submitted that the decision taken by FAB, in its 42nd meeting dated 19.02.2016, envisaged the provision of clean 7.6 MHz frequency in the 900 MHz Band to ZONG at the time of the renewal of its licence in October 2019; since the cross-border interference in ZONG's 5 MHz frequency in the 900 MHz Band has not been cured as yet, PTA cannot deny the compensatory spectrum of 6.6 MHz in the 1800 MHz Band to ZONG; and that PTA or FAB cannot interpret FAB's decision taken in its 42nd meeting to mean that the compensatory spectrum could be availed by ZONG only until the expiry of its licence regardless of whether the cross-border interference in ZONG's allocated 7.6 MHz in the 900 MHz Band continues or not.

50. It was further submitted that PTA does not have an unbridled power to allocate any frequency package to ZONG at the time of the renewal of its fifteen year old licence; that the licences of all other telecom operators have been renewed on the basis of their existing frequency packages, but ZONG alone has been required to give up its frequency package that was allowed to it in 2007; that there would be huge cost implications for ZONG to move from 900 MHz frequency range to 2100 MHz or 1800 MHz frequency ranges; that the equipment already installed by ZONG was not re-tuneable from 900 MHz frequency range to 2100 MHz or 1800 MHz frequency ranges; that re-tuneability of telecom equipment can only be within a particular frequency range; that

it would be unjust, unreasonable and discriminatory to disrupt the frequency package that ZONG has employed since 2007; that the denial of the 900 MHz frequency to ZONG, while allocating the said frequency to its competitors, would create a disparity and competitive disadvantage for ZONG; that ZONG has always disagreed with PTA and FAB's interpretation of FAB's decision taken in its 42nd and 44th meetings; and that ZONG's challenge to FAB's decision taken in its 42nd meeting through an application (C.M.No.4611/2001) seeking an amendment in the prayer clause of writ petition No.3626/2019 does not change the nature and complexion of the said writ petition. The learned counsel for ZONG prayed for writ petitions No.3626/2019 and 3458/2020 as well as the first appeal against order No.133/2020 to be allowed in terms of the reliefs sought therein.

CONTENTIONS OF THE LEARNED COUNSEL FOR PTA:-

51. Barrister Munawar Iqbal Duggal, the learned counsel for PTA, submitted that during 2007, ZONG started receiving intermittent interference in its 900 MHz E-GSM uplink band at multiple locations in the Provinces of Punjab and Sindh; pursuant to the decision taken by FAB, in its 30th Board meeting held on 08.09.2007, the Additional Spectrum of 6.6 MHz in the 1800 MHz Band was temporarily given to ZONG for a period of one year in the affected areas of Punjab and Sindh; FAB, in its 33rd Board meeting held on 29.02.2008, decided to extend the Additional Spectrum of 6.6 MHz in the 1800 Band for a period of three years; vide letter dated 15.04.2008, FAB informed ZONG about the extension of the Additional Spectrum till April 2011; vide letter dated 25.04.2011, ZONG sought an extension in the period of the Additional Spectrum till the problem of cross-border interference is resolved; vide letter dated 01.12.2011, FAB requested ZONG to take mitigating steps or to swap to DCS Band, i.e. 850 MHz Band on permanent and on all-Pakistan basis; vide letter dated 02.04.2012, FAB informed PTA and ZONG that the interference in some portion of the 900 MHz frequencies near the Indian border can be mitigated by adopting certain techniques; alternatively it was suggested that ZONG ought to opt for relinquishing its 900 MHz Band in lieu of permanent assignment in 1800 MHz Band;

vide letter dated 17.08.2015, FAB informed PTA that ZONG was utilizing the Additional Spectrum in different areas of Pakistan where there was no cross-border interference; and FAB, in its 41st Board meeting held on 14.10.2015, decided that the Executive Director FAB would offer options to ZONG with the aim of finding an amicable and permanent solution to the issue but all options given by the Executive Director FAB were turned down by ZONG.

52. Furthermore, it was submitted that vide letter dated 02.12.2015, FAB reported the matter of cross-border interference to ITU for resolution; the Radio Communication Bureau, on 11.12.2015, acknowledged receipt of FAB's request and apprised that the administration in India had been requested to cooperate; on 20.01.2016, ZONG formally requested for the renewal of its licence; vide letter dated 19.02.2016, PTA recommended to the Ministry of Information Technology and FAB that the Additional Spectrum be extended for two years and ZONG be informed that if at the time of the renewal of the licence interference persists, the licence will be renewed without the current frequency assigned in 900 MHz Band; FAB, in its 42nd Board meeting held on 19.02.2016, decided that the Additional Spectrum will be available to ZONG till the expiry of its licence; the minutes of the said meeting were documented and issued on 23.02.2016; vide letter dated 11.03.2016, FAB informed ZONG about the decisions taken in its 42nd Board meeting; vide letter dated 03.05.2016, PTA informed ZONG that the renewal of its licence will only be offered with uninterfered portion of 900 MHz Band if available; vide letter dated 30.05.2016, ZONG responded to FAB and PTA by taking the position that it had shifted to 1800 MHz Band and it would not be possible to go back to 900 MHz Band even if it is clean; vide letter dated 21.05.2018, FAB informed PTA that ZONG was found to be operating the Additional Spectrum in Islamabad and Lahore; ZONG did not want to opt for the 850 MHz Band and wanted to continue utilizing the 900 MHz Band along with the Additional Spectrum; on 09.05.2019, Government of Pakistan issued a Policy Directive whereby the price per MHz for the 1800 MHz Band and the 900 MHz Band was fixed; regarding interference in

ZONG's Spectrum, a direction was issued in paragraph (viii) of the said Policy Directive in line with the decision taken in FAB's 42nd Board meeting; vide letter dated 21.06.2019, ZONG took the position that the Additional Spectrum had become an integral part of its network; furthermore, FAB was asked to inform ZONG as to the availability of uninterfered portion of the 900 MHz Band and in case of its non-availability, to provide alternative options; after several correspondences between the parties ZONG, vide letter dated 25.09.2019, informed PTA that it would like for the *status quo* of its existing spectrum to continue; the four options given to ZONG by PTA in the latter's letter dated 02.10.2019 were all rejected by ZONG; PTA, in its letter dated 17.10.2019, took the position that the renewal of ZONG's licence would be in accordance with the provisions of the Policy Directive and the decisions taken in FAB's 42nd Board meeting; the draft licence sent by PTA to ZONG did not contain the Additional Spectrum; vide letter dated 17.10.2019, PTA also cautioned ZONG that in case its licence was not renewed on/or before 22.10.2019, the earlier licence awarded to it shall stand terminated; on 21.10.2019, the 44th meeting of FAB's Board took place with the single agenda of the renewal of ZONG's licence; it was decided that the renewal of ZONG's licence could only be in accordance with the provisions of the Policy Directive and FAB's 42nd Board meeting; the decision taken in FAB's 42nd Board meeting was conveyed to ZONG vide PTA's letter dated 02.01.2020; on 11.03.2020, PTA issued a show cause notice to ZONG regarding its unauthorized use of the Additional Spectrum; on 10.08.2020, ZONG submitted its reply to the said show cause notice and on 20.10.2020, this Court recalled its injunctive order passed in writ petition No.3626/2019 and observed that PTA and FAB may implement the Policy Directive; vide letter dated 29.10.2020, PTA directed ZONG to stop utilizing the Additional Spectrum; on 14.12.2020, PTA passed an enforcement order directing ZONG to forthwith vacate the Additional Spectrum and to make payment for its unauthorized use; the said enforcement order was assailed by ZONG in first appeal against order No.133/2020; vide order dated 21.12.2020, interim relief was granted by

this Court by directing the parties to maintain *status quo*; and earlier writ petition No.3458/2020 was filed by ZONG on 18.11.2020 challenging the decisions taken in FAB's 42nd Board meeting as well as FAB's 44th Board meeting dated 21.10.2019 regarding withdrawal of the Additional Spectrum of 6.6 MHz in the 1800 MHz Band.

53. It was also submitted that ever since 2008, FAB and PTA have been asking ZONG to relinquish the 900 MHz Band in lieu of permanent allocation of 1800 MHz Band as a permanent solution to the cross-border interference; ZONG rejected all the options given to it by FAB and PTA and remained adamant in keeping the Additional Spectrum even after the expiry of its licence; the Government of Pakistan, in its Policy Directive, also addressed the issue of interfered spectrum of ZONG; under paragraph (viii) of the said Policy Directive, FAB was to provide options to ZONG in lieu of the cross-border interference in its 900 MHz Band and in case of non-acceptance of the options, the renewal of ZONG's licence was to be dealt with in accordance with the decisions taken by FAB in its 42nd Board meeting.

54. It was further submitted that the provisions of the 1996 Act and the Rules and the Regulations made thereunder do not cater for an eventuality of a licence issued for an interfered spectrum; the Additional Spectrum has not been made a part of ZONG's licence at any stage, thus the question of its extension beyond the expiry of ZONG's licence does not arise; since efforts to cure the interference have not been successful and since spectrum is a scarce resource with a rising demand, it was decided by FAB in its 42nd Board meeting that the availability of the Additional Spectrum to ZONG would only be till the expiry of its licence; ZONG does not have a vested right for its licence to be renewed on the same terms along with the Additional Spectrum; there is no restraint on the Government to change its spectrum policies and Section 22(3) of the 1996 Act provides that a licence will be renewed consistent with the policies of the Federal Government; in the instant case, the Regulator acted in a reasonable manner since all efforts were made to address the issue of cross-border interference; out of the 7.6 MHz, only 2.6 MHz is clean and 5 MHz is interfered with by

cross-border signals; in 900 MHz Band, a total of 35 MHz has been earmarked by ITU for utilization out of which 32.5 MHz has already been assigned; the 2.5 MHz which is available is also interfered with from downlink of 850 MHz Band from India. Despite these options having been given to ZONG, it wants to keep the interfered portion of the 900 MHz Spectrum as well as the Additional Spectrum; and this conduct of ZONG is most unreasonable and cannot be countenanced in the Constitutional jurisdiction of this Court. The learned counsel for PTA prayed for the writ petitions and the appeal to be dismissed.

CONTENTIONS OF THE LEARNED COUNSEL FOR FAB:-

55. Mr. Ashtar Ausaf Ali, the learned counsel for FAB, adopted the arguments of the learned counsel for PTA. He further submitted that the challenge made by ZONG to the decisions taken by FAB in its 42nd Board meeting is hit with severe *laches*; after the said decisions were taken, ZONG filed writ petition No.3626/2019, first appeal against order Nos.76 and 77/2020 and first appeal against order No.133/2020 and did not challenge the said decisions of FAB. FAB had offered alternatives to the interfered portion of ZONG's 900 MHz Band but the same were not acceptable to ZONG as it was using the Additional Spectrum in areas where there was no cross-border interference. In making his submissions, the learned counsel for PTA placed reliance on the judgments in the cases of Pakistan Vs. Salahuddin (PLD 1991 SC 546), Al-Jehad Trust Vs. Federation of Pakistan (1999 SCMR 1379), Fecto Belarus Traders Limited Vs. Pakistan (2001 PTD 1829), Rehmatullah Khan Vs. Government of Pakistan (2003 SCMR 50), Member (S&R)/Chief Settlement Commissioner, Board of Revenue Punjab, Lahore Vs. Ashfaq Ali (PLD 2003 SC 132), Messrs M.K.B. Industries ((Pvt.) Ltd. Vs. Chairman, Area Electricity Board, WAPDA (2005 SCMR 699), Federation of Pakistan Vs. Haji Muhammad Sadiq (PLD 2007 SC 133), Pakcom Vs. Federation of Pakistan (PLD 2011 SC 44), Dassani Travels (Pvt.) Ltd. Vs. Messrs Travels Shop (Pvt.) Ltd. (PLD 2014 SC 1), DV Com Data Vs. Pakistan Telecommunication Authority (PLD 2017 Islamabad 177), Ministry of Information Technology and Telecommunications, Islamabad Vs. C.M. Pak (Pvt.) Ltd. (PLD 2020 SC 551), Petroleum

Exploration (Pvt.) Ltd. Vs. Federal Government of Pakistan (PLD 2020 Islamabad 214), Dawakhana Hakim Ajmal Khan (Pvt.) Ltd. Vs. Federation of Pakistan (PLD 2020 Lahore 899) and Ghulam Sarwar Vs. Federation of Pakistan (2020 PLC (C.S.) 1211).

56. 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 writ petitions No.3626/2019, 3458/2020 as well as first appeal against order No.133/2020 under disposal have been set out in sufficient detail in paragraphs 5 to 44 above and need not be recapitulated.

57. Before dealing with the merits of the case, I deem it appropriate to make reference to the provisions of the 1996 Act as well as the Rules and Regulations made thereunder which govern the grant and renewal of licences.

58. Section 5 of the 1996 Act empowers PTA to grant and renew licences for any telecommunication system and any telecommunication service on payment of such fees as it may, from time to time, specify. Section 22(3) provides that after the expiry of the initial or renewed term, the licence may be renewed on terms and conditions consistent with the Policy Directives of the Federal Government at the relevant time. Section 8(1) empowers the Federal Government to issue Policy Directives to PTA on matters relating to telecommunication policy referred to in Section 8(2). Section 8(1) obligates PTA to comply with such Policy Directives.

59. In exercise of the powers conferred by Section 5(2)(o) of the 1996 Act, PTA made the Pakistan Telecommunication Authority (Functions and Powers) Regulations, 2006 (“the 2006 Regulations”). These Regulations deal with a range of matters including the criteria for evaluating licence applications and the grant and renewal of licences. Regulation 18(1) provides that subject to the 1996 Act and the Rules made thereunder, a licence shall be granted for an initial term of not more than twenty-five years consistent with the Policy Directive of the Federal Government for the time being in force. Regulation 18(2) provides that subject to Regulation 18(3) and the conditions of the

licence, after the expiry of the initial term, the licence may be renewed on terms and conditions consistent with the Policy Directive of the Federal Government in force at the relevant time. Regulation 18(3) provides that if the licence is not to be renewed, PTA shall inform the licensee by a written notice that the licence shall not be renewed on the expiry of the initial term, and that such notice shall be served on the licensee at least on or before the start of last quarter of the initial licence term. It may also be mentioned that Section 43(1) of the 1996 Act gives FAB the exclusive authority to allocate and assign portions of the radio frequency spectrum to *inter alia* providers of telecommunication services.

60. The non-exclusive licence granted by PTA to ZONG's predecessor-in-interest, Paktel, was to expire on 22.10.2019. ZONG submitted an application for the renewal of its licence on 20.01.2016. ZONG wanted its licence to be renewed with the initially granted frequency allocation of 7.6 MHz in the 900 MHz Band and 6 MHz in the 1800 MHz Band as well as the Additional Spectrum of 6.6 MHz in the 1800 MHz Band that was 'temporarily' granted to it as compensation for the cross-border interference in 5 MHz out of the 7.6 MHz frequency in the 900 MHz Band.

61. FAB and PTA are resisting ZONG's claim on the ground that in FAB's 42nd Board meeting dated 19.02.2016, it had been made clear that the Additional Spectrum of 6.6 MHz in the 1800 MHz Band had been granted to ZONG for utilization in the areas affected by the cross-border interference but this was only until the expiration of ZONG's licence in October 2019. FAB and PTA are also in unison on their position that in the said meeting, it had been decided that if ZONG opts to keep its original allocation of 7.6 MHz in the 900 MHz Band and 6 MHz in the 1800 MHz Band at the time of the renewal of its licence, it "*will not claim compensation in terms of additional assignment.*"

62. As mentioned above, in FAB's 42nd Board meeting, it was indeed decided that the temporary additional assignment of 6.6 MHz in the 1800 MHz Band would be available to ZONG till the expiry of its licence in October, 2019 or the elimination of the cross-border interference,

whichever was earlier. It was also decided that PTA would issue a notice to ZONG that the renewal of its licence would be offered without the interfered portion of 900 MHz Band, and that if ZONG opts to keep its original assignments at the time of renewal, it will not claim compensation in terms of the Additional Spectrum. PTA had all alone remained consistent in its position that the total spectrum assignment to ZONG at the stage of renewal, while catering for the interfered spectrum, shall not exceed 13.6 MHz, and that no compensation in terms of Additional Spectrum shall be granted. This was clearly stated by PTA in its letter dated 13.09.2019 in response to ZONG's letter dated 05.09.2019.

63. FAB, through letter dated 11.03.2016, had brought to ZONG's notice the substance of the decisions taken in the said meeting. In the said letter, FAB made it explicitly clear that the "*temporary additional assignment*" of 6.6 MHz in the 1800 MHz Band would be available to ZONG for the areas affected by the cross-border interference till the expiry of ZONG's licence on 22.10.2019 or the elimination of cross-border interference, whichever was earlier. ZONG has not denied receipt of this letter, rather it had on 30.05.2016 sent a reply to the said letter. Additionally, vide letter dated 03.05.2016, PTA informed FAB that ZONG will be offered renewal of its licence which was expiring on 22.10.2019 for only the un-interfered portion of the 900 MHz Band, if available. This letter was also copied to ZONG. Through letter dated 14.02.2019, PTA responded to ZONG's desire to continue using the Additional Spectrum post-renewal by referring to *inter alia* its letter dated 03.05.2016 as well as FAB's letter dated 11.03.2016 informing ZONG that the Additional Spectrum will be utilized by ZONG till the expiry of its licence or elimination of interference, and that the renewal on 22.10.2019 will be offered for the un-interfered portion of the 900 MHz Band, if available. Despite being well aware of FAB and PTA's stance since 2016, which was based on the decision taken in FAB's 42nd Board meeting, ZONG did not challenge the said decision until after the expiry of its licence.

64. The Policy Directive (reference to which has been made in paragraph 26 herein above) specifically deals with the cross-border interference in ZONG's 900 MHz Band. This Policy Directive was issued by the Ministry of Information Technology pursuant to the decision taken by the Cabinet on 07.05.2019 on the summary dated 03.05.2019 submitted by the said Ministry. The said decision of the Cabinet was brought on record by the learned Additional Attorney-General.

65. The said Policy Directive also makes reference to the decisions taken in FAB's 42nd Board meeting dated 19.02.2016. It appears that when this Policy Directive was issued, the Federal Government was aware about the assertion by ZONG of what it considered its right to utilize the Additional Spectrum of 6.6 MHz in the 1800 MHz Band beyond 22.10.2019 and the repudiation of such right by PTA and FAB. In order to address this dispute, the Federal Government decided *inter alia* that FAB will provide options to ZONG in lieu of the cross-border interference in its 900 MHz Band included in its current licence, and that in case of non-acceptance of the proposed options, the renewal of ZONG's licence and its associated spectrum (i.e. 7.6 MHz in the 900 MHz Band and 6 MHz in the 1800 MHz Band) shall be dealt with in accordance with the decision referred to in paragraph-4(v) of the minutes of FAB's 42nd Board meeting, which was that the renewal of ZONG's licence will be without any compensation in terms of the additional frequency assignments. As mentioned above, ZONG did not challenge the decision taken in FAB's 42nd Board meeting until after the expiry of its licence despite being well aware of the consequences it would hold for it.

66. Since the decisions taken in FAB's 42nd Board meeting were adequately communicated to ZONG, the latter will be deemed to be fully aware that it was FAB and PTA's stated position that ZONG had no right to retain the Additional Spectrum beyond the expiry of its licence in October 2019. Paragraph (viii) of the Policy Directive has not undone the decision taken in FAB's 42nd Board meeting but in reiteration of the same has provided for options to be given by FAB to ZONG in lieu of the free of charge Additional Spectrum beyond the expiry of the latter's

licence. The options that were given to ZONG included (a) 5.6 MHz in 850 MHz Band plus 2 MHz in 900 MHz Band minus 7.6 MHz already allocated to ZONG, (b) 7.6 MHz in the 850 MHz Band, (c) 2 MHz in the 900 MHz Band plus 5.6 MHz in the 1800 MHz Band, and (d) 7.6 MHz in the 900 MHz Band. It is an admitted position that none of the options given by FAB to ZONG contained in FAB's letter dated 03.09.2019 were acceptable to ZONG which simply wanted the status-quo to continue.

67. Pursuant to paragraph (viii) of the Policy Directive and the decision taken in FAB's 42nd Board meeting dated 19.02.2016 FAB, through its letter dated 03.09.2019, gave ZONG the options reproduced in paragraph 29 above. In short, the options that were given to ZONG included (a) 7.6 MHz in 850 MHz Band plus 2 MHz in 900 MHz Band minus 7.6 MHz already allocated to ZONG, (b) 7.6 MHz in the 850 MHz Band, (c) 2 MHz in the 900 MHz Band plus 5.6 MHz in the 1800 MHz Band, and (d) 7.6 MHz in the 900 MHz Band. ZONG, vide letter dated 05.09.2019, rejected the options and wanted the status-quo to continue. In these circumstances, the continuation of the status-quo was not possible especially in the presence of the decisions taken in FAB's 42nd meeting and paragraph (viii) of the Policy Directive under which ZONG could not retain the Additional Spectrum beyond the expiry of its licence. It is, however, not understandable as to why ZONG wanted retention of the 900 MHz Band when a portion of it is interfered with. In matters regarding the grant of licences or their renewal by statutory bodies or regulators, Courts must exercise their discretionary power of judicial review with circumspection and only in the furtherance of public interest. In the case of Muhammad Akbar Khan Vs. Province of West Pakistan (PLD 1961 SC 17), it was explained that *"a license is in the nature of a privilege conferred to do that which it would not have been permissible for the licensee to do, otherwise."* Additionally, in the case of Government of Pakistan Vs Zamir Ahmad (PLD 1975 SC 667), it was held as follows:-

"...Law is well settled that in the generality of cases, licence (simpliciter) is a privilege and not a legal right; much less there is a legal duty for its grant. Therefore, exceptional cases apart, mandamus would not issue in such cases. Speaking generally in such cases the

emphasis is on policy, and any discretion vesting in the authorities is directed towards attaining the policy objective.”

68. With the objective to continue with the status-quo ZONG, through writ petition No.3626/2019, challenged the Policy Directive a day before the expiry of its licence but left the decision taken in FAB's 42nd Board meeting unchallenged. During the course of the arguments before this Court, ZONG realized that if the decisions taken in FAB's 42nd Board meeting were to remain unchallenged, it would not be possible for it to retain the Additional Spectrum beyond the expiry of its licence. In order to overcome this difficulty, ZONG filed a belated application (C.M. No.4611/2021) on 04.11.2021 to seek an amendment in writ petition No. 3626/2019 so as to challenge the said decision. The said application was filed when the arguments of the contesting parties were at an advanced stage and the learned counsel for the petitioner was making submissions in rejoinder.

69. ZONG attempted to explain the delay in the filing of the said application by pleading that ZONG came to know about the minutes of FAB's 42nd Board meeting when they were annexed with PTA's written comments. The record shows that these written comments were filed on 25.01.2020, whereas the application for amendment in writ petition No.3626/2019 was filed on 04.11.2021, i.e. after 22 months. Even if it is assumed that ZONG did not have sight of such minutes until 25.01.2020, the essential particulars of the decision taken in the said meeting were communicated to ZONG by FAB through letters dated 11.03.2016, 14.02.2019 and 03.09.2019, and by PTA through letters dated 11.03.2016, 03.05.2016, 13.09.2019, 02.10.2019 and 17.10.2019, reference to which has been made hereinabove. The learned counsel for ZONG could not explain as to how the minutes were any different from the information communicated to ZONG through the said letters. ZONG had not denied receipt of these letters. In the first paragraph of writ petition No.3626/2019 filed by ZONG on 19.10.2019, it is clearly pleaded that ZONG is aggrieved by the Policy Directive to the extent whereby the renewal of ZONG's licence was to be in accordance with the decisions taken in FAB's 42nd Board meeting. It is also pleaded that

in the said meeting, it was decided that the renewal of ZONG's licence would be "*without any compensation in terms of the additional frequency assignment.*" Therefore, it is safe to conclude that prior to the filing of the said writ petition, ZONG was well aware of PTA and FAB's stance that the Additional Spectrum of 6.6 MHz in the 1800 MHz Band was to be available to ZONG only until 22.10.2019 and not beyond, and that this stance was based on decisions taken in FAB's 42nd Board meeting.

70. FAB's 42nd meeting took place on 19.02.2016; writ petition No. 3626/2019 was filed on 19.10.2019; whereas the application for amendment was filed on 04.11.2021 (i.e. more than five years after the said decision). Such a belated application, in my view, is only an effort to protract these proceedings while deriving benefit from the injunctive order passed by this Court. Even if the said application was to be allowed, the prayer for challenging FAB's said decisions would be liable to be dismissed due to severe *laches*. Therefore, the said application is **dismissed**.

71 In essence, through writ petition No.3626/2019, what ZONG is seeking for this Court to do is to issue a writ of *mandamus* to FAB and PTA directing them to continue with an arrangement that had been made in the year 2007 of allowing ZONG to use the Additional Spectrum of 6.6 MHz in the 1800 MHz Band beyond the date of the expiry of its licence in October, 2019. In other words, ZONG wants this Court to issue a writ commanding PTA to renew its licence with the same frequencies as were being utilized by it at the time prior to the expiry of its licence and thereafter on the basis of the injunctive order passed by this Court. This claim of ZONG is premised on compensation to which it claims to be entitled due to the continuation of cross-border interference in its 5 MHz frequency in the 900 MHz Band in certain areas of Sindh and Punjab. The vital question that needs to be determined is whether this Court, in exercise of its jurisdiction under Article 199 of the Constitution, can compel FAB or PTA to compensate ZONG by allowing it to continue utilizing the Additional Spectrum of 6.6 MHz frequency in

the 1800 MHz Band despite the fact that it has not at any material stage been made a part of its licence.

72. It is well settled that when a contract is entered into by the State or its instrumentality, on the one hand, and a private party, on the other, the parties' relationship is no longer governed by Constitutional provisions, but by the terms of the contract. Hence, when the State or its instrumentality purporting to act within the field allotted to it under the terms and conditions of a contract performs an act, the rights and obligations of the parties would be, ordinarily, governed by the terms and conditions of the contract. The mere fact that one of the parties to such a contract is the State or its instrumentality will not make a contract amenable to writ jurisdiction. In the case of Jaffar Bros. Ltd. Vs. Islamic Republic of Pakistan (PLD 1978 Karachi 585), it was held that in matters of contract, the parties are governed by the provisions of the Contract Act, 1872 and that the Court has no power or discretion to qualify the contract and depart from the express terms thereof in order to apply it to the changed circumstances on the ground that it seems just and reasonable to do so, because the change of circumstances was unforeseen by the parties at the time they entered into the contract or because the performance of the contract had become more onerous.

73. Whether or not FAB or PTA are bound to compensate ZONG for the interference in its 900 MHz Band, the question is whether such a demand can be raised at all in a writ petition and be enforced by a writ to be issued in the nature of *mandamus*. Is it possible to recover from the Government compensation arising out of a contract or a licence by invoking writ jurisdiction merely because of the fact that one of the parties to the contract is the State or its instrumentality? That a writ petition, under Article 199 of the Constitution, will not lie for the payment of compensation or damages under a contract, against the Government is clear from a spate of judicial precedents from the Superior Courts.

74. Writ petition No.3626/2019 was filed by ZONG on 19.10.2019, whereas writ petition No.3458/2020 was filed by ZONG on 18.11.2020. In the latter writ petition, ZONG had challenged the decisions taken in

FAB's 42nd Board meeting but not in the former writ petition. Although on 04.11.2021, ZONG filed an application for an amendment of writ petition No.3626/2019 so as to challenge the decisions taken in FAB's 42nd Board meeting, this Court has dismissed the said application on the ground that it had been filed with an extraordinary delay at the tail end of the proceedings. The question that remains to be decided is whether ZONG having not challenged the decisions taken in FAB's 42nd Board meeting in writ petition No.3626/2019 could do so in the subsequently filed writ petition No.3458/2020. In other words, the question, in essence, is whether ZONG's challenge to the decisions taken in FAB's 42nd Board meeting in writ petition No.3458/2020 is hit by Order II, Rule 2 of the Code of Civil Procedure, 1908 ("CPC"). The said provision provides that when a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. When ZONG filed writ petition No.3626/2019 on 19.10.2019, it omitted to challenge the decisions taken in FAB's 42nd Board meeting. On account of such omission, ZONG would be deemed to have intentionally relinquished such right and cannot be permitted to challenge the said decisions in the subsequently instituted writ petition No.3458/2020. The principle enshrined in Order II, Rule 2 C.P.C. has been held to have been based on the salutary and cardinal principle that all disputes must be settled once and for all and no person ought to be vexed twice for one and the same cause. Since ZONG could have challenged the decisions taken in FAB's 42nd Board meeting in writ petition No.3626/2019, its omission in this regard would cause this Court to hold that it had relinquished its right to challenge the said decisions and thereby could not subsequently have challenged the said decisions in writ petition No.3458/2020. Since the said decisions were taken in FAB's 42nd Board meeting held on 19.02.2016 and ZONG was well aware of the said decisions when it filed writ petition No.3626/2019, the challenge to the said decisions in writ petition No.3458/2020 is also hit by the principle of constructive *res judicata*.

75. As far back as 01.08.2007, in a meeting that had taken place between the representatives of ZONG, FAB and PTA, one of the subjects under discussion was the cross-border interference in ZONG's 900 MHz Band. It is also not disputed that PTA, through its letters dated 03.08.2007 and 01.12.2011, required ZONG to carry out measures for mitigating the effects of the cross-border interference. One of the measures suggested was for the height of ZONG antennas to be reduced. Additionally FAB, through its letter dated 01.12.2011 to ZONG, reiterated its position that cross-border interference *"would hardly be removed without mitigation techniques such as reduction in antennas' height."* As a mitigating measure, ZONG was required to reduce the height of its antennas. ZONG had taken the position that they would be installing a large number of cell sites resulting in the heights of antennas to be automatically reduced. There is nothing on the record to show that ZONG had taken steps in accord with the said suggestion or that it had reduced the height of any of its antennas with a view to mitigate the effects of the cross-border interference. FAB, along with its written comments filed in writ petition No.3458/2020, annexed the data showing the heights of the antennas of different cellular mobile operators including ZONG. The information contained in this document was not denied by ZONG. This document shows that the height of the antennas installed by ZONG was more than those installed by its competitors. This shows that no mitigating measure had been taken by ZONG to reduce the effect of the cross-border interference. Be that as it may, it is not for this Court, while exercising jurisdiction under Article 199 of the Constitution, to ascertain the exact nature and extent of the cross-border interference in ZONG's 900 MHz Band or the compensation for such interference. This Court can undoubtedly not determine all these issues in its Constitutional jurisdiction.

76. PTA, in its letter dated 12.09.2019, took the position that FAB had not identified the areas affected by cross-border interference, and that no technical analysis had been shared with PTA showing the quantum of interference and utilization of the Additional Spectrum by ZONG. Through the said letter, PTA requested the Secretary, Cabinet Division

to intervene in the matter by directing FAB to perform interference analysis in Punjab and Sindh in order to identify the interference affected areas along with the usage of spectrum by ZONG. It is an admitted position that no interference analysis was conducted after 12.09.2019 by FAB on its own volition.

77. This Court did suggest to the parties that a joint survey be carried out in order to make such determination but ZONG took the view that this process would take several months since the interference is intermittent and weather related. In this regard, order dated 25.05.2021 passed by this Court is reproduced herein below:-

“Arguments of the learned counsel for the petitioner (Mr. Salman Akram Raja, ASC) in W.P. No.3458/2020 could not be concluded. During the course of the arguments, learned counsel for the petitioner submitted that it has consistently been the petitioner’s position that if the Frequency Allocation Board (“F.A.B.”) and/or the Pakistan Telecommunication Authority (“P.T.A.”) could provide 7.6 MHz in the 900 MHz band as originally allocated to the petitioner without any cross-border interference, the petitioner would not seek any compensation. It is a matter of record that compensation in terms of 6.6 MHz in the 1800 MHz band was given to the petitioner in lieu of cross-border interference in the 7.6 MHz in the 900 MHz band allocated to the petitioner in certain areas of the Provinces of Punjab and Sindh. This compensation was given on a provisional basis until the interference was cured or the expiry of the license.

It is an admitted position that cross-border interference is still continuing. Whether the petitioner is entitled to any compensation for the cross-border interference and to what extent, can be effectively and purposively determined after an exercise is carried out to identify the areas affected by the cross-border interference and determine the quantum of the interference. Indeed, this is a position taken by the P.T.A. in paragraph 6 of its letter dated 12.09.2019. The said letter was also sent to F.A.B.

Mr. Abdul Rahim Bhatti and Barrister Usama Rauf, advocates have tendered appearance on behalf of F.A.B. and seek a short adjournment so as to take instructions on whether this exercise has been carried out by F.A.B. They may do so.”

78. After the said order was passed ZONG, vide letter dated 01.06.2021, informed PTA and FAB that ZONG would extend full support and cooperation in the process of conducting a joint assessment / study to determine the nature and extent of the cross-border interference. Vide letter dated 07.06.2021, FAB required ZONG to provide the following information:-

“a. the area in which cross-border spillover is being observed (wherein towers and sides require Identifying).

- b. the duration of interference at the identified areas.*
- c. the quantum of interference and its impact on the provision of service to consumers at the identified areas.*
- d. nature of complaints by the customers of the identified area.*
- e. mitigation measures taken; and remedial steps, among other aspects.”*

79. FAB's letter dated 11.06.2021 shows that a comprehensive joint monitoring survey was carried out between 08.06.2021 and 10.06.2021 for ascertaining the presence and impact of the cross-border interference. This survey had reaffirmed the findings in FAB's earlier monitoring report which showed intermittent weather-related interference.

80. ZONG, through its letter dated 14.06.2021, proposed to FAB a joint survey over a period of one year covering all seasons, tropospheric effect, demographic impact, etc. FAB, through its letter dated 21.06.2021, complained about the non-provision of the essentially required information by ZONG and disagreed with the proposal for conducting a year-long survey. Vide letter dated 23.06.2021, FAB once again expressed its readiness for carrying out a joint exercise subject to the limitations under the law and existing technology. ZONG, through its letter dated 28.06.2021, reiterated its earlier position.

81. FAB's letter dated 29.06.2021 shows that another comprehensive joint monitoring survey was carried out between 10.06.2021 and 19.06.2021 to ascertain the presence of cross-border interference. This survey also reaffirmed FAB's earlier monitoring reports. In short, the surveys carried out by FAB between 08.06.2021 and 10.06.2021 and between 10.06.2021 and 19.06.2021 was not for a period to the satisfaction of ZONG, which wanted the survey to be carried out over a period of one year. Be that as it may, it is not for this Court to be ascertaining the exact nature and extent of the interference. Therefore, it is not appropriate for this Court to opine whether the 6.6 MHz in the 1800 MHz Band is adequate compensation for the interference. These would be matters best left for the regulator/PTA to decide.

82. The 44th meeting of FAB's Board was held on 21.10.2019. The minutes of the said meeting show that on expiry of ZONG's licence, the Additional Spectrum of 6.6 MHz in the 1800 MHz Band shall stand

withdrawn, and shall be auctioned in accordance with the provisions of the 1996 Act and the Telecommunications Policy of 2015 as well as the Policy Directive of the Federal Government prevailing at the relevant time. For the purposes of clarity, the decision taken in the said meeting is as follows:-

“M/s CMPak to be offered 2 x 7.6 MHz of their original licensed spectrum in 900 MHz band (882.5 – 890.1 / 927.5 – 935.1 MHz) in light of para viii of Policy Directive of the Federal Government No. 2-4/2018-DT Dated 09th May 2019 and Para (4 (v)(d) of the Minutes of the Meeting of 42nd FAB issued vide No. FAB/U-I/2016 Dated 23rd February 2016 as M/s CMPak has confirmed their intentions to PTA to retain the said spectrum despite presence of some cross border interference from India in area of Punjab and Sindh (Karachi and Hyderabad)”

83. It was further decided in FAB’s 44th Board meeting that *“the temporary frequency spectrum of 2 x 6.6 MHz (1755.7-1762.3 / 1850.7-1857.3) additionally assigned by the Board, in its 42nd Meeting till the expiry of their license (22nd October 2019) to M/s CMPak shall stand withdrawn on the expiry of the license and the same shall be auctioned as per provisions of Pakistan Telecommunication Re-Organization Act 1996 and in line with the Telecom Policy 2015 and Policy Directive of the Government at the relevant time.”*

84. The utilization of the Additional Spectrum by ZONG beyond 22.10.2019 *albeit* under an ad-interim injunctive order dated 21.10.2019 passed by this Court in writ petition No.3626/2019 justified PTA in issuing show cause notice dated 11.03.2020 to ZONG, which too was permitted by this Court vide order dated 27.01.2020. After ZONG’s challenge to the said show cause notice through appeal (first appeal against order No.76/2020) before this Court was unsuccessful, it filed a reply to the said notice on 10.08.2020. The proceedings pursuant to the said notice culminated in the enforcement order dated 14.12.2020 passed by PTA, whereby the utilization of the Additional Spectrum from 23.10.2019 onwards by ZONG was declared as *“unauthorized and illegal;”* ZONG was directed to vacate the Additional Spectrum at the earliest but not later than seven days; and ZONG was made liable to make payments for the period of the unauthorized use of the Additional Spectrum at the rate specified therein, including late payment of

additional fee. The said order is under challenge in appeal (first appeal against order No.133/2020).

85. Section 31 of the 1996 Act make the *“unauthorized use of the radio frequency spectrum, where [authorization] from the Board is required”* an offence punishable with imprisonment which may extend to three years or with fine which may extend to ten million rupees, or with both. In the case at hand, there is admittedly no authorization from FAB in ZONG’s favour to utilize the Additional Spectrum beyond 23.10.2019. ZONG’s claim to the Additional Spectrum as compensation for the cross-border interference in its 900 MHz Band cannot be equated with an authorization from FAB.

86. Section 21(4)(a) of the 1996 Act provides that every licence granted under the said Act may *inter alia* contain conditions requiring the licensee to adhere to the provisions of the 1996 Act and the rules and regulations made thereunder. Clause 8.1 of Appendix-B to the Telecom Rules, 2000 requires every licensee to observe the provisions of the licence, the 1996 Act and the Rules and Regulations. Clause 3.1.3 of ZONG’s licence provides that *“the Licensee shall comply with all orders, determinations, directives and decisions of the Authority.”* It is a matter of record that there are scores of letters addressed by PTA directing ZONG to vacate the Additional Spectrum by 22.10.2019. These directions were issued on the basis of FAB’s 42nd Board meeting dated 19.02.2016 read with instructions contained in paragraph (viii) of the Federal Government’s Policy Directive. ZONG, instead of complying with such directions, embroiled FAB and PTA in lengthy litigation. In this way ZONG violated the provisions of the 1996 Act as well as the terms of its licence.

87. I have been given no reason to fault PTA’s finding that *“radio frequency spectrum is a scarce resource, which cannot be used/utilized without authorization.”* FAB, in its 46th Board meeting held on 20.03.2020, approved the auction of the Spectrum in 1800 MHz Band. It was also decided that once the litigation with ZONG is over, the 6.6 MHz in the 1800 MHz Band / Additional Spectrum will be available for auction. By reason of the injunctive orders issued by this Court at the

instance of ZONG, the process of auctioning of 6.6 MHz in the 1800 MHz Band has been thwarted since the past five years. This has clearly resulted in a loss to the public exchequer.

88. ZONG's assertion in its letters to PTA including letter dated 21.06.2019 that the Additional Spectrum of 6.6 MHz in the 1800 MHz Band had become an integral part of its network and therefore the same should be made a part of its licence post-renewal without any further charge has no legal foundation since ZONG was well aware at all material times since 11.03.2016 that the said Additional Spectrum was going to be available to it only until the expiry of its licence in October, 2019 and not any further. One of the decisions taken by FAB in its 42nd Board meeting was that *"ZONG will not deploy any non-tuneable equipment in the DCS (1800 MHz) Band and should retune their temporary additional assignments in future if so required."* This decision was also conveyed to ZONG by FAB through its letter dated 11.03.2016. As ZONG is a prudent commercial person of business, it ought not to have made the Additional Spectrum an integral part of its network. ZONG had a period of 3½ years to adopt new strategies and retune its equipment to the spectrum which PTA could offer.

89. ZONG's entire case for the continuation of the Additional Spectrum beyond the expiry of its licence is that the cross-border interference in its 900 MHz Band was still continuing. Assuming that the cross-border interference is cured, ZONG's stated position is that it would nonetheless strive to retain the Additional Spectrum because the equipment that it had installed was not re-tuneable. However, ZONG in its letter dated 30.05.2016 to FAB has taken a rather curious position. It asserted that it had deployed the majority of its equipment in 1800 MHz Band by using the Additional Spectrum, and that the said equipment could be retuned within the 1800 MHz Band only up to certain limits, but could not be retuned back to the 900 MHz Band *"even in case the external interference in this Band is reduced with passage of time."* This letter shows that even if FAB and PTA were successful in curing the cross-border interference, ZONG had no intention of giving up the Additional Spectrum. This is clearly indicative of ZONG's intention to

hold onto the Additional Spectrum in its entirety even if the cross-border interference is reduced or cured.

90. Clause 1.2.2 of ZONG's licence dated 23.10.2004 required that the application for the renewal has to be made at least 45 months prior to the expiration of the licence. As mentioned above, on 20.01.2016, ZONG applied to PTA for the renewal of its licence. Clause 1.2.3 of the licence obligates PTA to decide the application for the renewal within a period of three months of receipt. It was within this period that FAB, in its 42nd Board meeting held on 19.02.2016, decided *inter alia* that the Additional Spectrum could be used by ZONG only till the expiry of its licence on 22.10.2019. FAB, through its letter dated 11.03.2016, and PTA, through its letter dated 03.05.2016, made it clear to ZONG 3½ years prior to the expiry of its licence that the renewal of its licence would be for the uninterfered portion of the 900 MHz Band, if available. It was also made clear to ZONG that if it wants to keep its original 2G assignment of 900 MHz and 1800 MHz, then it would not claim compensation in terms of Additional Spectrum.

91. Although ZONG, in its letter dated 30.05.2016, had stated that the majority of its network where its 900 MHz Band was suffering from interference had been dimensioned on 1800 MHz Band which was not re-tunable back to 900 MHz Band, it remained silent for 2½ years and thereafter vide letter dated 11.12.2018 took the position that it would like to renew its existing allocation with the Additional Spectrum. FAB and PTA did not waver from their stance that the Additional Spectrum was only available to ZONG until the expiry of its licence. Neither PTA nor FAB had denied to ZONG its right for the renewal of its licence for the licenced frequency spectrum of 13.6 MHz in total, i.e. 7.6 MHz in the 900 MHz Band and 6 MHz in the 1800 MHz Band, but not including the Additional Spectrum which is due to be auctioned. Since the said decision was communicated to ZONG through FAB's letter dated 11.03.2016 and PTA's letter dated 03.05.2016, and since ZONG did not challenge the said decision upon being informed about it, it would be deemed to have acquiesced to it. Therefore, I find no substance in ZONG's stance that PTA and FAB are under an obligation to continue

the *status quo* regarding ZONG's licence, i.e. to renew ZONG's licence for the initially granted spectrum of 7.6 MHz in the 900 MHz Band and 6 MHz in the 1800 MHz Band as well as the Additional Spectrum.

92. During the course of the arguments on behalf of FAB and PTA, it was alleged that although the Additional Spectrum was allocated only for the areas affected by cross-border interference in Sindh and Punjab, ZONG had continued to use such spectrum beyond its authorized use. Vide letter dated 17.08.2015, FAB complained to PTA that ZONG had been utilizing the Additional Spectrum in different areas across Pakistan where no cross-border interference exists. FAB also sent the monitoring reports regarding such use of the Additional Spectrum by ZONG to PTA. Apparently in the past, FAB had complained about such use of the said spectrum from time to time. The position taken by FAB was that the use of the Additional Spectrum in areas where there was no cross-border interference was illegal. FAB, vide letter dated 12.05.2017, informed PTA that joint technical monitoring surveys had been conducted in Rawalpindi/Islamabad, Lahore and Multan to check and confirm whether ZONG was using the Additional Spectrum in the said cities. FAB took the position that during such surveys, it was confirmed that ZONG was utilizing the 1800 MHz compensatory Band up to 5 MHz in the said cities. Furthermore, FAB stated that during such surveys, ZONG shut down the use of the Additional Spectrum but the very next day re-started the same. Again vide letter dated 21.05.2018, FAB informed PTA that during the technical monitoring survey carried out in Islamabad and Lahore, it was found that ZONG was using the Additional Spectrum in the said cities where there had been no complaint regarding cross-border interference.

93. The matter regarding the unauthorized use of the additional compensatory spectrum came under discussion in FAB's 41st meeting held on 14.10.2015. The minutes of the said meeting show that the Executive Director, FAB had highlighted that ZONG is using the Additional Spectrum in the 1800 MHz Band in areas with no cross-border interference. He also submitted a summary of the latest

monitoring survey which was presented to PTA. The said minutes also show that a three-member Committee had been constituted to submit recommendations for consideration by FAB. There is nothing on the record to show that PTA took any measures on FAB's complaint to stop ZONG from such use of the Additional Spectrum. It will now be for the responsible officers in PTA to come up with an explanation before the relevant authorities as to why no action was taken on FAB's said complaint.

94. In view of the above, writ petitions No.3626/2019 and 3458/2020 as well as the first appeal against order No.133/2020 are dismissed with costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 21/08/2024

(JUDGE)

*Qamar Khan**

APPROVED FOR REPORTING