



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF
SHOW CAUSE NOTICES ISSUED TO WATEEN TELECOM (PVT.) LIMITED**

& DEFENCE HOUSING AUTHORITY

(File No. 09/Reg/Comp/CAP/CCP/2010)

Dates of hearing: 22nd December 2010
30th December 2010
13th January 2011

Present: Ms. Rahat Kaunain Hassan
Chairperson

Ms. Vadiyya Khalil
Member (M&A)

Present for Defence Housing Authority: Mr. Asim Hafeez, Advocate
Mr. Muhammad Aslam Khan Niazi, Additional Director
Telecom

Present for Wateen Telecom Limited: Mr. Habib Ahmed Bhatti, Advocate
Ms. Naila Aziz, Advocate
Mr. Muhammad Khalid Bashir, Manager Special Projects
Mr. Ikhtlaq Ahmed Bhatti, Advocate
Mr. Malik Qaiser Anwar, Advocate

ORDER

1. This Order shall dispose of the proceedings pursuant to Show Cause Notices No. 63 & 64 of 2010 both dated November 26, 2010 (hereinafter jointly referred to as “SCN”) issued to Wateen Telecom (Pvt.) Limited (“Wateen”) and Defence Housing Authority (“DHA”), for *prima facie* violation of Section 4 of the Competition Act, 2010 (the ‘Act’).
2. The principle issue in this case is whether Wateen and DHA have entered into an agreement for the provision of telecommunication and media services in the area controlled by DHA in Lahore, which has the object or effect of preventing, restricting or reducing competition within the relevant market, thereby violating Section 4(1) read with Section 4(2) (b) of the Act.

UNDERTAKINGS

3. Wateen Telecom (Pvt.) Limited is a company, incorporated under the Companies Ordinance 1984, engaged in the business of providing telecommunication and media services and is an undertaking in terms of clause (q) of sub-section (1) of Section 2 of the Act.
4. Defense Housing Authority established by virtue of Chief Executive Order No. 26 of 2002 is a statutory housing authority empowered to do all the acts that are necessary for planning and development of and for providing and regulating housing facilities in the area notified by the authority and is an undertaking in terms of clause (q) of sub-section (1) of Section 2 of the Act.

FACTUAL BACKGROUND

5. The Commission received various informal complaints from the residents of DHA, Lahore, expressing concerns that due to an exclusivity agreement between DHA and Wateen, Wateen is the only landline voice services provider in Phase 5 of DHA. It had further been alleged in the complaints that services provided by Wateen are of poor quality and unreliable and consumers do not have the option of switching to a different provider due to the agreement.

6. The Commission requested DHA to provide copies of agreements entered between DHA and Wateen for the provision of landline based voice and data services to the residents of DHA. DHA sent the Commission copies of three agreements namely; the Strategic Services Agreement, the Joint Venture Agreement and the Supplemental to Joint Venture Agreement.

7. On review of these agreements, it was discovered that DHA and Wateen entered into the Strategic Services Agreement on May 24, 2006 (the “**Strategic Services Agreement**”) whereby DHA agreed to grant irrevocably certain rights and privileges to Wateen, conditional upon which Wateen agreed to provide telecommunication services under WLL License No. LL-25-2004 granted to DHA by Pakistan Telecommunication Authority (PTA) on September 9, 2004 (the “**DHA WLL License**”) and under Wateen’s own telecommunication licenses. Both parties to the Strategic Services Agreement agreed to share the revenue generated from the provision of such telecommunication services. The scope of the Strategic Services Agreement states that for a term of 30 years, Wateen will exclusively provide all telecommunication and media services (excluding television production) in all of the present and future sectors, phases and expansions owned and under the control of DHA.

8. Wateen and DHA also entered into a Joint Venture Agreement on January 1, 2008 (the “**JVA**”) and a Supplemental to the Joint Venture Agreement on April 28, 2008 (the “**Supplemental JVA**”) which is to be read and deemed to be part of the JVA for all intents and purposes and construed as a continuation of the JVA. Pursuant to the JVA, Wateen is to provide telecommunication services under the DHA WLL License by using the radio frequency assigned and allotted to DHA through the telecommunication equipment and infrastructure procured and installed by Wateen. Therefore, the provision of the telecommunication and media services pursuant to the DHA WLL License are now governed by the terms of the JVA and the Supplemental JVA and not by the Strategic Services Agreement. The Supplemental JVA stipulated that the Hybrid Fibre Coaxial (“**HFC**”) network arrangement inter se DHA and Wateen will be dealt with and managed independently under the Strategic Services Agreement and the same will have no nexus or link with the JVA. It also provides that the HFC network services are being offered under separate Wateen WLL License and revenues generated from such HFC network services have no bearing and are not subject to the revenue sharing under the JVA and the Supplemental JVA.
9. The exclusive right granted to procure, provide, install, set up and establish telecommunication equipment/system and infrastructure in DHA appears to have the object of creating entry barriers for other service providers responsible for telecommunication and media service provision and restricting the choice of customers/residents in the DHA in violation of Section 4 of the Act.
10. Agreements falling within the ambit of Section 4 of the Act but which substantially contribute to; improved production or distribution, promote technical or economic progress, benefits of which outweigh the adverse effect of lessening competition and allow consumers a fair share of the resulting benefits, may seek exemption under Section 5 of the Act. However, neither DHA nor Wateen approached the Commission to apply for an exemption of the Agreement.

11. In view of the foregoing, it appeared to the Inquiry Committee that DHA and Wateen have entered into an agreement *prima facie* prohibited under Section 4 of the Act having the object or effect of preventing, restricting or reducing competition within the relevant market.

12. DHA and Wateen were both issued SCN's on November 22, 2010 by the Commission directing to submit a written reply within fourteen days, and to appear before the Commission on December 22, 2010 to avail the opportunity of being heard. Relevant portions of the SCN are as follows:

Whereas, the Competition Commission of Pakistan ("the Commission") received an e-mail from a resident of Defense Housing Authority Phase 5. In the email concerns have been expressed that Wateen Telecom is the only telecommunication and media services provider in DHA Lahore Phase 5, leaving consumers with no choice in the area of telecommunication and media service provision, which has the effect of restricting and reducing competition in the relevant market. .

Whereas, the Commission initiated a preliminary probe in the matter and found that there is an exclusive agreement between DHA and Wateen Telecom effective from 1st January 2008, which gives Wateen Telecom the sole and exclusive right to procure, provide, install, set up and establish telecommunication equipment/system and infrastructure within the area of the Undertaking and beyond as permitted under the DHA WLL license. Telecommunication and media services provided by Wateen Telecom include Long Distance and International (LDI), Wireless Local Loop (WLL), Optical Fibre Cable (OFC), Telecom Infrastructure, Hybrid Fibre and Cable (HFC) services.

Whereas, in terms of the Agreement the relevant geographic market appears to be the geographical demarcation of land owned duly by the

Undertaking including all of the present and future sectors, phases and expansions under the Undertaking's control defined as the "DHA region" in the exclusive agreement. The 'product' comprises of a bundle of services including telephone, internet and multimedia services. Competitors offering the same bundle of services will be assumed to be a direct substitute in terms of the relevant product market for example PTCL.

***Whereas,** upon further examination of the contents of the agreement, certain clauses and provisions appear to be potentially anti competitive as per the Act, which are listed as follows;*

- a. According to Clause (3) that defines the scope of the agreement "For the period of the agreement, the Undertaking undertakes to provide all media and telecommunication services in the DHA region with Wateen Telecom only...Provided that DHA shall not enter into any similar agreement(s) and/or arrangement(s) with any third party in any form for any services covered in this agreement."*
- b. "To allow Wateen to commit and invest to provide services under the agreement, DHA will provide the last right of refusal for the provisioning of all other telecommunication and media activities in the DHA region."*
- c. According to Clause (16) relating to the term of the agreement "The agreement shall be valid and effective for a term of 30 years and renewable at terms mutually agreed."*

***Whereas,** in view of the foregoing, it appears to the Commission that the Undertaking by entering into an exclusive agreement for such a long time period with Wateen Telecom has prima facie engaged in practices which has the object or effect of preventing, restricting or reducing competition within the relevant market in violation of sub-section (1) of*

Section 4 and in particular clause (b) of the sub-section (2) of Section 4 of the Act;

ORAL AND WRITTEN SUBMISSIONS OF THE PARTIES

13. On December 15, 2010 the Commission received a letter from DHA requesting for the SCN to be withdrawn as DHA was willing to amend the Strategic Services Agreement such that it complies with the principles of competition. DHA stated that they were willing to undo the exclusivity clause and provide fair and equal opportunities to all licensed telecommunication service providers eligible to provide services in DHA. DHA further sought guidance from the Commission on the matter, as the exclusivity clause had become a serious cause of concern for DHA management who had received various complaints regarding non availability of telecommunication services from residents of newly emerging phases of DHA.

14. On December 22, 2010 hearing was held to give both parties an opportunity of being heard. During the hearing the parties submitted that exclusivity does not cover all telecommunication and media services and that it only pertains to right of way in fixed line services. The representatives of Wateen submitted that the DHA WLL License was obtained by DHA from PTA and the LDI (Long Distance International) license was obtained by Wateen separately from PTA. The Bench requested a copy of both licenses for further examination. The representatives of Wateen added that exclusivity can be justified due to the high investment costs incurred. The Bench requested the representatives of Wateen to bring forth documents supporting their claim in the form of feasibility reports and projections of recovery.

15. The second hearing was conducted on December 30, 2010. The representatives of Wateen submitted a letter quoting the value of losses incurred in the year 2008 and 2009 and the value of total investment since project inception signed by their Finance Department to justify not applying for an exemption. Both parties were directed to submit their written replies by January 10, 2010 before the next hearing. The written submissions made by Wateen are summarized as follows:

The Strategic Services Agreement was enacted in March 2006, prior to the Competition Act; hence the agreement is not prohibited under section 4 of the Act. Section 4 is prospective in nature as it prohibits undertaking(s) or association(s) from entering into an agreement and does not cover already executed agreements, thus it can not have retrospective effect. The SCN is in direct contravention of the fundamental rights guaranteed under Article 12 and Article 18 of the Constitution of the Islamic Republic of Pakistan.

It is misconceived that Wateen is the only telecom and media service provider in DHA Lahore Phase 5. Exclusivity only pertains to “right of way” in relation to all existing and future sectors. Any resident of DHA can get, procure services of internet from PTCL, Wi-tribe and Wordcall and satellite channels are being offered by Sun through its antenna devices.

The DHA WLL license was about to be cancelled by PTA, Wateen made high investments and facilitated DHA in keeping their license and in consideration of this DHA gave Wateen exclusive right of way for a term of thirty years. In this connection Wateen subject to the terms of the agreement, agreed to share its annual net revenue arising out of the HFC network with DHA.

The granting of exclusivity does not give Wateen monopoly, as if everyone was asked to come and start digging to lay down infrastructure it would be hazardous for residents.

It is an established phenomenon even at the government level, where investors are given certain concessions and privileges in order to protect their investment, therefore, Wateen is not in violation of any laws of the country. Wateen also shares its net revenue with DHA and it must also be noted that the other existing service providers in the first four phases of DHA were given protection under the agreement and their services were not blocked by Wateen as they continue to provide services.

The exclusivity granted to Wateen is restricted to the DHA region only and does not apply to the rest of Pakistan; accordingly any service providers can deploy their cables anywhere except for the DHA region for the next twenty five years.

Wateen has incurred huge losses in relation to its HFC and Wimax projects and the losses are to be recovered in the period envisaged in the agreement. The networks deployed in DHA are of high quality, if other service providers are allowed to deploy infrastructure in the DHA region it will be a waste of funds and duplication costs will arise and consumers will suffer. Wateen has also established a dedicated customer service centre in DHA Phase 5 to cater to the complaints of residents in DHA in case they face any issues.

When Wateen entered into the agreement there was no bar or restriction on entering into such agreements at the relevant time, therefore, the Strategic Agreement was duly executed by the parties inter alia keeping in view the business requirements of Wateen and also with the objective of making some profit for the benefit of its share holders and providing high end services to consumers.

In light of the submissions, the Commission is requested to withdraw the SCN as Wateen has not committed any violation of the Act. Alternatively, the Commission is requested to grant necessary exemption for a period of 25 years under the Act.

16. On January 10, 2011 DHA submitted their correspondence with Wateen from 2009 to 2010. It became evident from the letters exchanged between both parties that DHA had been requesting Wateen to lay down infrastructure in Phase 5, 6, 7 and 8 repeatedly. In November 2009, DHA sent Wateen a Legal Notice claiming that under the agreement, Wateen is legally bound to provide three services in phase 5 and phases developed thereafter. Their actions of not being able to do so constitute a breach of the contract and they were called upon to make available telecom services to residents of Phase 6 and Phase 8 within three months. On June 16, 2010 Wateen sent a letter to DHA informing them that since Wateen is not currently deploying infrastructure in Phases 6, 7(excluding Raya Golf Course) and 8, therefore Wateen shall on a temporary basis forgo exclusivity in the said phases on the following conditions; a) a third party has shown willingness in writing to DHA to lay down the infrastructure in the said Phase to provide their services, b) the said third party also shares their proposal with Wateen, and c) Wateen leads the negotiations pertaining to the said Phases in order to determine the shared revenue to be allocated amongst Wateen, DHA and the third party.

17. On July 21, 2010 DHA sent Wateen another legal notice. Wateen sent a reply to the legal notice on August 26, 2010 stating that they were willing to forgo the conditions in the previous letter as deployment of infrastructure in the said Phases was not financially feasible for Wateen. Instead, they stated that they would only forgo exclusivity if in the future or at any time Wateen decides to lay down infrastructure in the said phases, Wateen will be able to do so, on the basis of the terms provided in the Strategic Services Agreement without fulfilling any further formality. Further, if in a situation that Wateen decides to lay down infrastructure the provision of exclusivity will stand restored.

18. The third hearing was conducted on January 13, 2011. The representatives of Wateen reiterated their stance that the Act does not have retrospective intent and presented the Bench with relevant case law in support of their claim. In view of Section 9 of the Act, Wateen highlighted arguments in favor of exemption while retaining exclusivity. They claimed a) their services are offered at competitive rates; b) the network is of superior quality; c) the investment made was very high and it will take a long time for Wateen to recover the cost and so far their financial statements are depicting losses; d) the life of the cable is thirty years and that is why the time period for exclusivity constitutes thirty years; and e) it would pose significant environmental hazards for other parties to come and lay the cable or cut it to provide services. DHA refuted these claims and left it to the Bench to suggest a course of action for both parties that would safe guard the interests of consumers and competition. The Bench directed Wateen to submit appropriate documentation to support their claims for further examination.

ISSUES

19. Primarily the issues that need to be addressed in this case are:
 - i) Whether the Act applies to the Strategic Services Agreement entered into in 2006 and whether such application amounts to giving the Act retrospective effect?
 - ii) Whether the Strategic Services Agreement contains provisions that prevent, restrict or reduce competition within the relevant market in violation of Section 4?
 - iii) Whether Wateen qualifies for an exemption under Section 5 read with Section 9 of the Act?

DISCUSSION

i) The Retrospective Application of the Act

20. Wateen submitted that the Strategic Services Agreement was executed before the enactment of the Act and that Section 4 of the Act is prospective in nature and cannot have retrospective effect. Wateen also stated that Section 4 of the Act prohibits undertakings or association to enter into a prohibited agreement and does not cover agreements already executed or concluded.
21. The Commission in the order passed in the matter of *All Pakistan Cement Manufacturer Association and its Members*, dated August 27, 2009 (the “**APCMA Order**”) addressed the issue of applicability of the Act on the agreements executed before its promulgation. In the aforementioned order the Commission discussed at length the scope of word ‘enter’ and ‘enter into’ and effect of a continuing and subsisting agreement under the Act. The relevant parts of the above mentioned order are reproduced below:

“At this point, it may be useful to examine the scope and ambit of the word ‘enter’ and the term ‘enter into’. It has been held that the connotation of the word ‘enter’ is sufficiently wide to cover even cases where the entry is continued or retained (Kowtha Suryanarayan Rao V Bank of Hindustan Ltd (1953) 23 Comp Case 168 (Mad)). In its ordinary sense the word ‘enter’ has been defined as to “become a member of; enroll; come on stage” (the Penguin English Dictionary at page 246). The term ‘enter into’ has been defined as ‘to engage in’; ‘be part of’; ‘take part in’; become a party to’; to participate in’; take an active role or interest in.....”

It is interesting to note that when the term ‘enter’ is used in isolation, it may connote a relatively restrictive interpretation. However, when this is coupled with the term ‘into’, the scope is considerably enhanced to include situations of participation in a pre-existing event. In fact the term ‘into’ has been defined as ‘continuing to the midst of (the Penguin English Dictionary at page 384). Accordingly, the term as used in the said section must necessarily include the continuance of an agreement as well.

By concluding that the term 'enter into' excludes agreements that were in fact executed prior to the promulgation of the Ordinance, would obviously defeat the very purpose for which the Ordinance was promulgated. In the very least, the term was included to enhance the scope of the Section rather than to restrict it.

22. In respect of the applicability of the Act on continuing and subsisting agreements the Commission further held that:

“With respect to the argument, with regard to the retrospective operation of the Ordinance, it may be stated that in our view there is no dispute with respect to the retrospectivity of the law itself; instead, the question at issue is the applicability of the Ordinance to the case at hand.

Since the Agreement was executed in 2003, no doubt exists in stating that it was executed at the time when the 1970 Ordinance was in force. However, in our considered view, if subsequent to the promulgation of the Ordinance, the Undertaking continues the breach in any way, as in the present case it is detailed above, the breach shall be one that is continuing and subsisting, renewed on every single day, a continuing cause of action. Hence the question of retrospective application does not arise.

In this regard, the observation made by Supreme Court of Pakistan in Khan Asfandyar Wali V Federation of Pakistan reported at PLD 2001 SC 607 at page 903, is relevant, wherein retrospectivity of the National Accountability Bureau Ordinance 1999, in respect of its applicability to a default committed prior to the promulgation of the Ordinance was examined and the Honourable Court held as under:--

In examining whether the Undertaking has continued the breach after the promulgation of the Ordinance, the dates of execution or expiration of the Agreement are not at issue. In fact, if the effects of the understanding between the Member Undertakings can still be felt, even for one day after the promulgation of the Ordinance, it may be presumed that the Agreement has continued, and the provisions of the Ordinance may therefore be invoked.

“The mere fact that at the time of entering into an Agreement no punishment was prescribed for default in payment of loan or bank dues, as the case may be, cannot possibly mean that the duty of the defaulter to re-pay the loan/dues also expired. The duty still remains. It continues till the loan/dues also re-paid as required under the Agreement. Therefore, non-payment of loan/dues in terms of the Agreement within the contemplation of section 5(r) is

a continuing breach of duty or obligation, which itself is continuing if duty to re-pay the loan/dues as aforesaid continues from day to day and the non-performance of that duty/default from that point of view must be held to be a continuing default in the repayment of loan. Therefore, if it is continuing, there is a fresh starting point of limitation every day as the wrong continues. Viewed from this angle, there is no limitation and no question of retrospectivity involved as long as the duty remains undischarged.”

Therefore, viewing the situation in light of the above, the nature of the breach under any section of the Ordinance, and in this case particularly under Section 4 of the Ordinance, is not the breach which is committed once and for all. It is a continuous breach. Thus, on every occasion the breach occurs and recurs, it constitutes an act or omission, which continues and is therefore a fresh act.

23. In light of the above, it is clear that even if an agreement, which in this case is the Strategic Services Agreement, has been executed before the enactment of the Act but continues after the Act came into effect, would fall under the purview of Section 4 of the Act.
24. Wateen also submitted that the issuance of the SCN to Wateen was in direct contravention of the protection provided against retrospective punishment under Article 12 of the Constitution of the Islamic Republic of Pakistan. In support of its submission it relied upon *Muhammad Waseem v. Sessions Judge, Islamabad (2004 YLR 2867)* where it was held that the petitioner could not be punished for dishonoring a cheque which he issued before the offence was created as Article 12 of the Constitution places an express bar upon retrospective punishment and protects the citizens of the country against the same.
25. What needs to be appreciated here, that Section 4 of the Act applies to prohibited agreements that are of a continuing nature and not to past and closed transactions as was in the case relied upon by Wateen. As the Strategic Services Agreement continued after the enactment of the Act, it was of a continuing nature and therefore, the Act was applied prospectively as intended and not retrospectively. Therefore, the application of the Act and/or any penalty that may be imposed for

violation of Section 4 of the Act will not be retrospective, i.e. from the date the Strategic Services Agreement was executed but from the date the Act came into effect. Hence, the question of retrospective application of the law does not arise and is not relevant.

ii) Provisions of the Strategic Services Agreement that prevent, restrict or reduce competition within the relevant market

26. The application of Section 4 in most cases requires identifying the relevant market which comprises of the relevant product market and geographic market. For the purposes of defining relevant market we refer to the definition of the relevant market under clause (k) sub-section (1) of Section 2 of the Act reproduced below:

“relevant market” means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products’ characteristic, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas;

27. The relevant geographic market in this case is the geographical demarcation of land owned duly by DHA including all of the present and future sectors, phases and expansions under DHA control defined as the “DHA region” in the Strategic Services Agreement.

28. According to the SCN, with respect to the relevant product market the product comprises of a bundle of services collectively referred to as telecommunication and media services including telephone, internet and multimedia services.

Competitors offering the same bundle of services will be assumed to be a direct substitute in terms of the relevant product market for example PTCL. However, during the course of the hearings conducted, it has transpired that there are two broad categories within the product that is covered by the Strategic Services Agreement- telecommunication and media services provided on fixed line basis through HFC network and telecommunication and media services provided through wireless technology. Telecommunication and media services as a whole, as listed in Appendix III of the Strategic Services Agreement include Voice/Telephony Services, Internet and E-Commerce Services, Video (TV) and Multimedia Services and Mobile Services. Due to the inherent nature of wireless technology, competitors can not be restricted from providing internet, mobile, telephony and Video (TV) through wireless technology in the DHA region. Therefore, competition concerns do not arise in the area for wireless services, however, for fixed line services provided through HFC network, there are competition concerns as the exclusivity clause has the effect of restricting potential telecom service providers from entering the DHA region. Hence, within the relevant product market where competition concerns exist needs to be viewed as further narrowed down to telecommunication services provided on fixed line basis through HFC network. Competitors offering the same bundle of services on fixed line basis through HFC network will be assumed to be a direct substitute in terms of the product market.

29. *Prima facie*, Clauses 3 and 16 of the Strategic Services Agreement are potentially anti-competitive as per the provisions of the Act. The relevant parts of the provisions mentioned above have been reproduced below for convenience:

“3. Scope of the Agreement

For the period of the Agreement, DHA undertakes to provide all telecommunication and media (excluding television production) services, in the DHA Region under the terms of this Agreement with Wateen only...Provided, however, that DHA shall not enter into any similar agreement(s) and/or arrangement(s) with any third party in any form for any services covered in this Agreement...

To allow Wateen to commit and invest to provide services under this Agreement, DHA will provide the last right of refusal for the provision of all other telecommunication and media activities in DHA Region.”

“16. Term

(a) The Agreement shall be valid and effective for a term of 30 years and renewable at terms to be mutually agreed.”

30. It is clear from a reading of the provisions mentioned above that all telecommunication and media services in the DHA Region will be provided by Wateen for a period of 30 years, which is the term of the Strategic Services Agreement. DHA is restricted from entering into any kind of agreement with any third party for the provision of any services covered by the Strategic Services Agreement. In effect, Wateen has the exclusive right to provide telecommunication and media services in the DHA Region for a period of 30 years.

31. In order to better understand the question at hand, it is essential to determine the services that are covered by the term telecommunication and media services. The Strategic Services Agreement has not defined this term but the intent of the Strategic Services Agreement becomes clear from a perusal of Clause 4 read with Appendix I and III. Clause 4 has been divided into two parts, the first dealing with the lease and transfer of the DHA License and the Radio Frequency Spectrum and the other with rights that have been explained under Appendix I of the Strategic Services Agreement to be provided by DHA to Wateen. The relevant parts of Clause 4 read as follows:

“4.1.1 DHA has represented to Wateen that it has duly obtained the DHA License from PTA and has irrevocably agreed to allow Wateen to use the radio frequency spectrum allocated to DHA under the DHA License (the “Radio Frequency Spectrum”) on lease along with all the rights under the DHA License for the provisioning of Wateen Products and Services in the DHA Region

in terms of this Agreement for the terms of this Agreement subject to renewal of the DHA License...DHA shall be responsible for obtaining all and any necessary permissions and approvals from the relevant competent authorities including but not limited to PTA and FAB...

4.1.2 In case DHA is not allowed or fails to procure relevant approvals in relation to the leasing of rights to Wateen under the DHA License together with the Radio Frequency Spectrum, then DHA shall irrevocably transfer the said DHA License together with the Radio Frequency Spectrum to Wateen subject to the terms and conditions set forth herein and further subject too prior approval of PTA as per the terms and conditions of the DHA License...

4.2 Wateen Rights

DHA shall further provide to Wateen the Wateen Rights as better explained in Appendix I... ”

32. The relevant parts of Appendix I are reproduced below for reference:

“(a) DHA RoW & DHA Assets

DHA hereby irrevocably and unconditionally provides the DHA Right of Way for the laying of Wateen’s OFC & HFC and WLL network in the DHA Region for a period of 30 years, at the end of which period, DHA Right of Way shall be provided to Wateen at terms to be agreed between the Parties...

...Wateen shall have the exclusive right to dig soil in the DHA Region to lay infrastructure for any services as provided under Appendix III attached hereto... Notwithstanding anything contained hereof, no other party does have or shall have the right to lay infrastructure for any services as provided under Appendix III attached hereto on or after signing of this Agreement. If DHA is forced or is legally bound to allow any third party(s) similar rights, Wateen shall lead the negotiations for settling the terms and conditions under which such right may be awarded to such third party(s) and apply the DHA Revenue Share for such income allocation.”

33. The provisions of the Strategic Services Agreement reproduced above, show that the telecommunication and media services covered by the Strategic Services Agreement can be divided into two parts. Firstly, the services to be provided by

Wateen pursuant to the DHA WLL License that is to be leased/ transferred in the name of Wateen. The other services are those listed under Appendix III of the Strategic Services Agreement which Wateen will provide pursuant to the rights acquired in respect of the DHA Right of Way and the exclusive right to dig soil in the DHA Region to lay infrastructure and the LDI and WLL licenses held by Wateen. The services listed under Appendix III include Voice/Telephony Services, Internet & E-commerce Services, Video (TV) and Multimedia Services, Security, surveillance and traffic monitoring, managed services and solutions and mobile services.

34. Wateen through its written reply to the SCN and at the hearings held by the Commission has submitted that the exclusivity, as per the provisions of the Strategic Services Agreement, primarily pertains to the right of way in relation to the DHA Region. It also stated that service providers already operating in the DHA Region were provided protection under the terms of the Strategic Services Agreement and were not restricted from providing services to the resident of the DHA Region. Furthermore, Wateen has submitted that other service providers are providing their services to the residents of the DHA Region.
35. On the other hand DHA has submitted that the provisions of the Strategic Services Agreement create an exclusionary vertical agreement which creates a restrictive/exclusionary trade regime in DHA with regard to telecommunication services and deny equal opportunity to other service providers.
36. Upon examination of the provisions of the Strategic Services Agreement and the arguments presented by DHA and Wateen, the Commission is of the view that exclusivity pursuant to the Strategic Services Agreement does not only relate to Right of Way as alleged by Wateen but also relates to the, i) services to be provided under the DHA WLL License, ii) the right to dig soil and lay infrastructure in the DHA Region and iii) provide services detailed under Appendix III which Wateen provides under its own LDI license obtained from

- PTA. Further, the grant of right to dig soil and lay infrastructure in the DHA Region exclusively to Wateen will prevent other telecom providers to provide services in the DHA region through the HFC network. This will have the effect of reducing, restricting and preventing competition in the relevant market as envisaged in Section 4 of the Act.
37. Wateen had submitted a judgment, *Webcom (Pvt.) Limited v. Capital Development Authority and others*, in support of its claim relating to Right of Way in which the Islamabad High Court had held that Section 27-A of the Pakistan Telecommunication (Re-organization) Act, 1996 (the “PTA Act”) does not entitle a company to whom PTA has issued a license, to dig the land or road owned by the Capital Development Authority as of right. Also, that as per the definition of “Right of Way” under the PTA Act, the right does not extend to dig the land owned by a private person or a public authority.
38. Section 27-A of the PTA Act provides that every licensee shall have the right to share any Public or Private Right of Way for the purpose of the installation or maintenance of its telecommunication equipment or for the purpose of establishing or maintaining its telecommunication system. In order for a licensee to enjoy the rights granted under Section 27-A, a request to the owner of such Right of Way is required to be made for approval of the mode of execution of the works it proposes to undertake. As held by Islamabad High Court in the above mentioned judgment, this right is not granted as of right to the licensee but is subject to the approval of the owner of the land in question. In the present case, the owner of the land is DHA, therefore, any licensee wishing to use DHA’s Right of Way may do so upon approval being granted to it. The effect of the Strategic Services Agreement is that it grants exclusive Right of Way to Wateen, which appears to be contrary to the purpose of Section 27-A i.e. sharing of Public or Private Right of Way. Furthermore, it is important to note that the Strategic Services Agreement does not only grant Wateen exclusivity pertaining to Right of Way but also in respect of digging soil in the DHA Region to lay infrastructure

for provision of telecommunication and media services. In respect of exclusivity granted to Wateen pursuant to the DHA WLL License, it is important to note that PTA has granted such license on non-exclusive basis. In light of the legal maxim “*nemo dat quod non habet*” which means one cannot grant what one does not have, DHA is not able to grant exclusive rights to use the DHA WLL License to Wateen, as DHA itself does not have exclusive rights. As noted above, and submitted by Wateen, the exclusive arrangement in respect of DHA WLL License does not have the effect of restricting other service providers to provide services through their WLL licenses due to the inherent feature of the wireless technology.

39. With respect to the submission of Wateen that the existing services providers continue to provide telecommunication services through their infrastructure, the Commission notes that as per DHA’s submissions and the proceedings of the hearings, it is clear that these service providers only operate in Phases 1 to 4 of the DHA Region.
40. Wateen has also submitted that the residents of DHA have access to other service providers and Wateen is not the only company providing services within the DHA Region. DHA submitted a chart in support of its submission, which has been reproduced below:

Internet	Phase 1-4		Phase 5		Phase 6	
	PTCL	EVO CDMA	PTCL	EVO	PTCL	EVO
		DSL				
	Worldcall	WLL	Worldcall	WLL	Worldcall	WLL
		HFC				
	Wateen	HFC	Wi tribe	WiMAX	Wi tribe	WiMAX
	Wi tribe	WiMAX	Qubee	WiMAX	Wateen	Partial
Qubee	WiMAX	Wateen	HFC			

Telephone	Phase 1-4		Phase 5		Phase 6	
	PTCL	Landline	PTCL	WLL	PTCL	WLL
		WLL				
	Worldcall	WLL	Worldcall	WLL	Worldcall	WLL
	Wateen	HFC	Wateen	HFC	Wateen	WiMAX
		WLL				
All Mobiles		All Mobiles		All mobiles		

TV	Phase 1-4		Phase 5		Phase 6	
	PTCL		Wateen		Sun TV	
	Worldcall		Sun TV		Dish	
	Wateen		Dish			
	Sun TV					

41. A perusal of the chart above shows that in Phases 1-4, in which other service providers were operating before the execution of the Strategic Services Agreement and which have been protected by the Strategic Services Agreement, other operators are providing internet and telephone services through laying of cables e.g. Wordcall providing internet through HFC and PTCL providing landline services. However, in Phases 5 and 6, service providers other than Wateen are providing internet and telephone services through the use of wireless technology while Wateen is providing the same through HFC network.
42. Therefore, the assertion of Wateen that the residents of DHA Region have access to the services of other service providers is only applicable to residents of Phases 1 to 4 of the DHA Region and to wireless local loop services. The Commission finds that due to the Strategic Services Agreement, no other service providers other than Wateen have the option to provide telecommunication services through the use of HFC network in Phase 5 onwards.

43. Another issue to be discussed is the “right of last refusal” which is also referred to as a matching right, that is granted to Wateen by Clause 3. This right amounts to the creation of a significant entry barrier that could deter future potential entrants and as a result limit the number of competitors in the relevant geographic market. While the right of first refusal gives one party to a contract the first right to make an offer for the provision of a service or the first right to refuse to provide a service, the last right of refusal gives a party to a contract the right to match the terms the other party to the contract is willing to accept from a third party. This provides Wateen the right to match the last best bona fide third party offer for provision of any telecommunication and media services in the DHA Region. Wateen is given more protection under this right than it would have if the first right of refusal had been provided to it.
44. It is concluded that Clauses 3 and 4 read with Appendix I and III of the Strategic Services Agreement have the effect of preventing, restricting and reducing competition through the division of the telecommunication and media services market in the DHA Region, which are provided through HFC network. Therefore, the provisions of the Strategic Services Agreement relating to exclusivity in respect of provision of telecommunication and media services through HFC network is in violation of Section 4 of the Act unless the Commission is satisfied pursuant to Section 9 that an exemption should be granted in respect of the Strategic Services Agreement under Section 5 of the Act.

iii) Wateen Telecom’s justifications for exemption in light of Section 9

45. Section 9 of the Act lays down the criteria for individual and block exemptions. If an undertaking meets the criteria stipulated in section 9 it may apply for an exemption under section 5 of the Act. As per Section 9, the Commission may grant exemption in respect of an agreement, if the agreement contributes to:

- a) Improving production and distribution;
 - b) Promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits; or
 - c) benefits of that clearly outweigh the adverse effect of absence or lessening of competition.
46. Wateen was directed to submit relevant material in light of section 9 of the Act in order for them to justify retaining exclusivity for a time period of thirty years. Wateen's oral and written submissions in this respect were analyzed, and are discussed in turn in this section.
47. Wateen claimed that if DHA were to allow other service providers to keep on digging and excavating the soil for the deployment of fibre then this will be extremely hazardous for all the residents of DHA and further funds will be wasted for the same exercise. Wateen has incurred high investment costs and in consideration of that exclusivity must be retained. The Commission does not propagate duplication of resources; other service providers would only be willing to lay down infrastructure if the project is financially feasible and bankable. If this is not the case, as Wateen claims, then based on the assumption that economic agents behave rationally, other service providers would be deterred from repeating the exercise of deploying infrastructure unless they have a competitive advantage in doing so. Further, it is evident from the correspondence exchanged between DHA and Wateen, that there is partial or no infrastructure in Phases 5, 6, 7 and 8 hence the argument of duplication does not apply.
48. Wateen was directed by the Commission to submit feasibility reports and projections of future recovery of costs to legitimize exclusivity for the duration of thirty years. With respect to this, they submitted a 15 year business plan and their financial statements for the year ended 2008 and 2009, along with their basis for joint venture accounting.

49. The business plan submitted is restricted to a time period of fifteen years, while the time period for exclusivity in the agreement amounts to thirty years. The plan submitted does not provide sufficient information pertaining to estimates of start up costs, operating costs and the basis for the calculation of the pay back period from which an informed conclusion can be derived. The business plan does provide the income statement, the cash flow projection and the balance sheet but it does not provide an explanation/analysis of the three statements. In addition to this, feasibility reports and break even forecasts would have been useful in substantiating Wateen's claims but since they were not submitted, the Commission can only rely on the information provided.
50. Another justification submitted by Wateen regarding the thirty year time period is that the life of the cable is thirty years. The time period for exclusivity should not be proportional to the life of the cable, as this implies that after thirty years when the infrastructure is obsolete then only will renegotiations take place. Hence, the time that lapses between negotiations and deployment of the new infrastructure, consumers will suffer as they would in effect be forced to use the obsolete infrastructure laid down by Wateen. Further, since under the Strategic Services Agreement Wateen has the last right of refusal or matching right, future negotiations are likely to take place with Wateen only. The Commission is of the view that competitive bidding should take place such that all service providers are given a fair chance to provide services and as a result promote economic efficiency in the market.
51. Furthermore it has been asserted by Wateen that it offers competitive rates to the consumer and therefore they should be allowed to retain exclusivity.

Rate Comparison (Service Wise) on Fibre Technology

	Wateen	Nayatel	Worldcall	PTCL	Wi-tribe	Qubee
Cable TV	150-350	400	325-800	449+250*	N/A	N/A
Telephony	90-150	N/A	N/A	174	N/A	N/A
Internet						
512 Kbps	599	N/A	N/A	N/A	750	750
1 Mbps	1099	N/A	N/A	N/A	1350	1000
512 Kbps	1299	N/A	N/A	N/A	1200	1000
1Mbps(Unlimited)	1399	1199-1700	1000	1199	N/A	1500
2Mbps(Unlimited)	1999	N/A	1500	N/A	N/A	N/A
4Mbps(Unlimited)	3899	N/A	2000	1999	N/A	N/A
Installation Charges	N/A	2000+7000	750	500	500	500

*Rs. 250 representing rental charges for setup box to run TV series for a period of 2 years.

52. In accordance with the table above Wateen is offering the lowest rates in the Telephony and Cable TV market in DHA. They face no competition in the telephony market except PTCL. In the Cable TV market there is competition and Wateen is offering the lowest rates. However, it is pertinent to mention that merely offering the lowest rates can not be the sole determinant of competitiveness; factors such as availability of choice, quality of service and after sales service, among others should also be taken into account. As mentioned in Para 5 above, several residents of the relevant market expressed their discontentment and concern with the quality of services, in respect of which Wateen was also confronted during the hearing. In this regard, their assertion was that the networks deployed within the DHA region are the best networks of their kind through which superior quality services are being provided to the residents of DHA. This assertion of Wateen was strongly rebutted by DHA. Also, the comparison above has been made between existing service providers and Wateen which can not provide a true picture of the comparison of the rates, had there been fair competition. For the provision of internet services the competitor offering the lowest rates varies. The table does not distinguish between monthly, quarterly or

yearly rates as some service providers have designed special promotional packages whereby if a customer pays on quarterly basis, he will be charged less for the same service. Some of the rates provided in the table do not correspond with those advertised on the service providers' respective websites. Hence, Wateen's claim of providing the most competitive rates can not serve as valid grounds for retaining exclusivity.

53. In light of the discussions above, the Commission finds that Clauses 3 and 4 read with Appendix I and III of the Strategic Services Agreement are in violation of Section 4 (1) read with Section 4 (2) (b) and are declared to be of no legal effect. As for DHA, we are restricting the quantum of penalty to Rs. 10 million only, this takes into account their cooperation and willingness to seek Commission's guidance in the matter. As mentioned, this nominal penalty is being imposed in light of DHA's approach of having admitted their fault and the willingness to take all appropriate measures to modify any violative provisions of the Strategic Services Agreement. However, it needs to be appreciated that a higher onus is to be placed on DHA owing to its status and the mandate that it is expected to pursue. Similarly, we are restricting the quantum of penalty to Rs. 5 million only for Wateen, as the Commission deems it appropriate to take into account the submission that Wateen has made huge investments when laying infrastructure in the DHA region and the fact that at that time the law was not in place. Yet, the fact that after the enactment there was ample opportunity to rectify the Strategic Services Agreement cannot be ignored. Both parties are directed to deposit the penalty within forty five days of this Order. In this regard, we would also like to clarify that the option for other service providers to use Wateen's HFC network cannot be imposed upon any other service providers interested in providing similar service within the relevant market. However, there is no bar on such service providers to seek Wateen's collaboration, directly. DHA is cautioned not to create any entry barriers through imposition of unreasonable terms and conditions or charges for such service providers and restrict its role to grant of ordinary necessary approvals with respect to Right of Way. Furthermore, DHA is

directed to provide Right of Way without any discrimination to all service providers.

54. The penalties have been kept low keeping in mind the nascent stage of the law, nature and duration of the violation and keeping in view the peculiar facts, including those stated in para's 16 to 18, of the case. However, continuing the breach would entail serious consequences and the parties shall be liable to pay maximum penalty of Rs. 1 million for every day of the continuing violation. The parties are directed that the renegotiated agreement/arrangement between the parties (if any) be submitted for review of the Commission within 30 days of finalization of such agreement/arrangement, to ensure that the same is compliant with the provisions of the Competition Act, 2010.
55. Ordered accordingly.

(RAHAT KAUNAIN HASSAN)
CHAIRPERSON

(VADIYYA S. KHALIL)
MEMBER

Islamabad the March 22nd, 2011