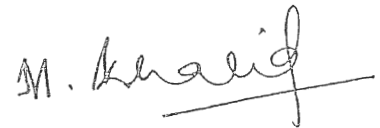


TF//HQ/MD/2016
28 June 2016

SUBJECT: LEGAL OPINION ON PUBLIC SECTOR COMPANIES

The Board of Governors of Telecom Foundation in its 76th meeting of 18 May 2016 had Resolved to obtain Legal Opinion to ascertain whether TF is a Government Organization/Public Sector Company. Accordingly, legal opinion from Hassan Kaunain Nafees, legal Practitioners & Advisors was obtained which is enclosed for information and comprehension of TF Board members. The legal opinion envisages that TF is neither an instrumentality nor an agency of the Government nor a statutory body. This vindicates the view point expressed in the BoGs meeting by TF management and some other members of the Board. The legal opinion also confirms that Pak Datacom Limited is not a Public Sector Company on the grounds stated above and thus falls beyond the purview of the Public Sector Companies Rules.

In the light of above, it is recommended that the above legal opinion should be taken into consideration by the TF Board of Governors in the next meeting to conclude the matter in the true spirit of the law/rules.



Maj. Gen. (R) M. Khalid Rao
Managing Director TF

To: All TF Board of Governors members:

- ✓ 1. Secretary IT/Chairman BoGs.
2. Addl. Secy. IT/Member.
3. EVP (Finance) PTCL/Member
4. Ex-SEVP PTCL/Member
5. JS CA&DD (dealing with Social Welfare subject)/Member
6. GM (Finance)/Secretary TF/Secretary BoGs

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9 June 2016

Mr. Riaz Ahmed Khan
General Manager (Admin)
TF Complex, Mauve Area
G-9/4, Islamabad

Subject: Legal Opinion

Dear Sir,

This is with reference to the recent meeting held at our office between the Telecom Foundation (the “Foundation”) representatives and our Senior Partners, Ms. Rahat Kaunain Hassan and Mr. Azid Nafees in respect of the captioned matter. Further to the meeting, vide your letter dated May 27, 2016 you have sought our legal advice on the queries stated below:

I. Queries

1. *Is Telecom Foundation a Governmental organisation or any instrumentality or agency of the Government or statutory body in contemplation of Rule 2 (g) of the Public Sector Companies (Corporate Governance) Rules, 2013 framed by the Securities and Exchange Commission of Pakistan?*
2. *Is Pak Datacom Limited being a subsidiary of Telecom Foundation, a Public Sector Company in terms of the afore-stated Rule 2 (g)?*
3. *Do the Public Sector Companies (Appointment of Chief Executive) Guidelines, 2015 have to be followed while appointing Chief Executive of Pak Datacom?*

II. Brief Background

- Telecom Foundation (the “**Foundation**”) is a charitable organisation that was established in 1991 under the Charitable Endowments Act, 1890 (the “**Endowments Act**”). The establishment of the Foundation was envisaged by the Board of Directors of the then Pakistan Telecommunication Corporation, which had applied for the vesting of amount of PKR 500,000 in the ‘Treasurer of Charitable Endowments for Pakistan’ (the “**Treasurer**”) as trust for a charitable purpose.

- Thereafter, pursuant to Sections 4 and 5 of the Endowments Act, upon application of the Board of Directors, the Federal Government ordered that the aforesaid amount shall vest in the Treasurer and further ordered that the Federal Government is pleased to settle the Scheme for the administration of the Foundation, vide S.R.O. 1194(1)/91 and S.R.O. 1195(1)/91 dated 27 November 1991, respectively.
- The Board of Governors shall be responsible for the administration of the Foundation. The Board of Governors consists of seven members with Secretary, Ministry of Information Technology and Telecommunication as its Chairman. Such amendment to the Board of Governors was brought about through S.R.O. (1)/2008.
- We are informed that the Foundation receives no funding from the Federal or Provincial Government. Funds generated by the Telecom Foundation by its own investments/efforts are spent on welfare activities and to achieve its objectives.
- The Foundation, at present has controlling shares in three companies namely Pak Datacom Limited (the "Pak Datacom"), TF Pipes Limited and Pakistan Communication Industries [PCI (Pvt) Ltd]. However, our advice has only been solicited with respect to Pak Datacom. Pak DataCom is a listed company that was established in 1992 and registered under the Companies Ordinance, 1984 to set up a countrywide network for data communication. The Foundation holds 55% of the share capital in Pak Datacom while the remaining 45% shareholding is with the general public. The Managing Director of the Foundation is also the Chairman of the Board of Directors of Pak Datacom.

III. Brief Response

At the outset, we must state that keeping in view the facts shared in our response to the first query is in the affirmative, only then Queries (2) and (3) become relevant to deliberate and respond. Upon review and due consideration of the relevant laws, rules and case law, our seriatim brief response to the queries raised above is as follows:

1. **No.** It is our considered view that the Foundation is not a Governmental organisation. However, we may clarify that the application of the Public Sector Companies (Corporate Governance) Rules, 2013 (the "Public Sector Companies Rules") is to companies, directly or indirectly controlled by the Government or any instrumentality or agency of the Government or a statutory body. The term 'Governmental organisation' is itself not used under

the said Rules. Accordingly, the litmus test for the purposes of the query raised (re the Foundation being a Governmental organisation) would be the direct/indirect control exercised by the Government on the subject entity. The mere fact of Governmental representation on the Board or contribution in the form of initial seed money for the creation of a charitable trust in our view would not make it fall within the purview of an instrumentality or any agency of the Government. This view finds support from the fact that in Pakistan the superior courts have not held a Trust as a Governmental organisation even where it has been found to be totally dependent on the aid of the Government. Even otherwise in determining 'control' of the Government, the same is not restricted to the financial control of the Government over a body but includes the executive and/or administrative control as well, which again is absent in the present case.

2. **No.** Despite the majority shareholding of the Foundation in Pak Datacom, since the Foundation is not an instrumentality or agency of the Government or a statutory body, Pak Datacom would not fall within the purview of the Public Sector Companies Rules.
3. **No.** In view of our response to Query 1 above, Pak Datacom is not a Public Sector Company. Accordingly, Public Sector Companies (Appointment of Chief Executive) Guidelines, 2015 would have no application to Pak Datacom.

IV. Detailed Response

Please find our deliberations in response to Query 1 and our response to the remaining queries in seriatim.

1. Your first query relates to the character of the Foundation, i.e. whether or not it is a governmental organisation. We understand that the expression '*any instrumentality or agency of the Government or a statutory body*' used in your query has been picked up from Rule 2 (1)(g) of the Public Sector Companies Rules. It may be noted that the Public Sector Companies Rules were framed by the Securities and Exchange Commission of Pakistan (the "SECP") in exercise of the powers conferred by Section 506 of the Companies Ordinance, 1984 read with clause (b) of Section 43 of the SECP Act, 1997; and applies to all Public Sector Companies as defined in Rule 2 (1)(g). For ease of reference, Rule 2 (1)(g) in its entirety has been reproduced below and reads as follows:

"2. Definitions.—(1) In these rules, unless there is anything repugnant in the subject or context:

(g) "Public Sector Company" means a company, whether public or private, which is directly or indirectly controlled, beneficially owned or not less than fifty percent of the voting securities or voting power of which are held by the Government or any instrumentality or agency of the Government or a statutory body, or in respect of which the Government or any instrumentality or agency of the Government or a statutory body, has otherwise power to elect, nominate or appoint majority of its directors, and includes a public sector association not for profit, licensed under section 42 of the Ordinance."

A plain reading of the above definition suggests that the basic and fundamental test for determining whether or not a company is a Public Sector Company is to establish the extent and control of the Government.

However, our focus for the first part of this query will remain on whether or not the Foundation qualifies as an 'instrumentality or agency of the Government or a statutory body'; while the latter part will relate to determining the extent of control of the Government on the Foundation in terms of its establishment, structure and operation.

The Foundation was created as a Trust for a 'charitable purpose', in accordance with the provisions of the Endowments Act. There is no dispute regarding the Foundation not being a statutory body, because it is not a creation of the statute. It is a body that was created and came into existence in accordance with the provisions of the statute, namely the Endowments Act.¹

We find it instructive to refer to the observation of the Supreme Court of India in *Sukhdev Singh v Bhagatram Sardar Singh Raghuvanshi* AIR 1975 SC 1331, wherein it clearly pointed out as to what constitutes a statutory body, in the following words:

"A company incorporated under the Companies Act is not created by the Companies Act but comes into existence in accordance with the provisions of that Act. It is not a statutory body, because it is not created by the statute. It is a body created in accordance with the statute."

¹ 'Statutory Body' is defined in the Judicial Dictionary, 13th Edition by K J Aiyar, to mean:

"Statutory.

Body. Before an institution can be a statutory body, it must be created by or under a statute and owe its existence to a statute. This must be the primary thing which has to be established. Here, distinction must be made between an institution which is not created by or under a statute but is governed by certain statutory provisions for the proper maintenance and administration of the institution..."

With respect to the terms “instrumentality” and “agency” of the Government, it needs to be appreciated that where terms are not defined, as per the settled principle the ordinary dictionary meaning has to be taken into account. Accordingly, we draw your attention to the following definitions provided in Black’s Law Dictionary, Eighth Edition:

“agency, 1. Fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions.”

“instrumentality, 1. A thing used to achieve an end or purpose. 2. A means or agency through which a function of another entity is accomplished, such as a branch of a governing body.”

From the above we may infer that the Foundation is neither acting ‘on behalf’ of the Government as an agency nor can it be termed an instrumentality i.e. a ‘branch’ through which functions of the Government are being carried out. Rather, it was created solely with a charitable purpose and objective.

Our understanding is further endorsed by a judgment of the Supreme Court of Pakistan namely *Sajjad Hussain Bukhari v Treasurer of Charitable Endowment for Pakistan, Head Office, Islamabad and others* 2005 SCMR 65, wherein Tassaduq Hussain Jilani, J observed that the ‘Trust for Voluntary Organisation’ which was also established under the Endowments Act was:

“not a Governmental organisation performing any functions of the Federal Government or Provincial Government but is a charitable organisation established under the Act to promote the aims and objectives of the scheme... The role of the Federal Government or the Provincial Government in terms of the Act and the scheme is merely that of a guide and of extending cooperation so that the aims and objects remain in focus. The Trust, therefore, being not a “person” performing the functions in connection with the affairs of the Federation of Province...”

Similarly, in our view the Foundation is also promoting the aims and objectives of its Scheme rather than furthering the objectives and performing the functions in connection with the affairs of the Government. Hence, the role of the Government, if any *viz-a-vis* the Foundation is limited to “extending cooperation” and/or facilitation alone.

As for the factors taken into account by the Courts in Pakistan for purposes of determining or establishing control, it includes ascertainment of the fact whether the control of the organisation vests in a substantial manner in the hands of the Government and the bulk of the funds is provided by the State. It needs to be appreciated that upon review of the relevant case law it transpires that the 'function test' i.e. performing functions in relation to the affairs of the Government (whether as its instrumentality or an agency) would invariably take into account the control of the Government in the subject entity.

As noted in *Abdul Wahab and others v HBL and others* 2013 SCMR 1383 it was held that for purposes of resorting to the 'function test', two important factors are the most relevant i.e. "the extent of financial interest of the State/Federation in an institution and the dominance in the controlling affairs thereof".

Also, in *Anoosha Shaigan v Lahore University of Management Sciences through Chancellor and others* PLD 2007 Lahore 568, the Lahore High Court with reference to the word 'control' appearing in Article 199(5) of the Constitution (re body under the control of the Federal Government) relied upon various judgments, which importantly includes *Maqsood Ahmed Toor and 4 others v Federation of Pakistan through Secretary to the Government of Pakistan, Ministry of Housing and Works, Islamabad and others* 2000 SCMR 928, wherein the Honourable Court observed:

"The Federation etc. should have a complete domination to do and undo whatever it decides in running the affairs of such a body and should have the exclusive, complete and final authority to take the vital policy decisions. Such control must be absolute, unfettered, unbridled and exclusive, besides, the State must also have the financial control of the organisation; the power of hiring and firing the employees thereof appointing and removing the management body meant for running the routine affairs of the Organisation"

We regard it material to mention that, as already stated above, the trust property is to vest in the Treasurer, who is appointed by either the Federal or Provincial Government under Section 3(1) of the Endowments Act. It is of significance to note here that the Treasurer is not required or deemed required to administer the trust property. Rather, the Treasurer merely holds the documents of title to the property as a trustee.

In *Sajjad Hussain Bukhari, Supra*, the charitable trust was even dependent on the aids of *inter alia* the Government of Pakistan (in the instant matter, the Foundation does not even receive any funding from either the Federal or

Provincial Governments); despite this, the trust was not recognised as a Governmental organisation on this premise.

The Government representation on the Board of the Foundation is through the Chairman who is the Secretary, Ministry of IT, Vice Chairman who is the Additional Secretary, Ministry of IT and a Member who is Joint Secretary, Capital Administration and Development Division (dealing with Social Welfare subject). In total, only 3 out of 7 Members of the Board of Governors are representatives of the Government.

Furthermore, we also consider it relevant to point out that the Government only makes appointments to the Board of Governors and is not involved in the administration of the Foundation/trust. The Chairman of the Foundation/Trust is merely responsible for ensuring that the policies and decisions of the Board of Governors are implemented and to keep apprised the members of the Board regarding the activities of the Foundation (Paragraph 6, S.R.O 1195(1)/1). We are informed that except appointment of the Managing Director by the Board of Governors, all powers of hiring and firing of the staff and managerial cadre vest in the Managing Director as per delegation by the Board.

In similar facts, the Indian Supreme Court in the case of *Sabhajit Tewary v Union of India and others* AIR 1975 SC 1329, in relation to the Council of Scientific and Industrial Research observed as follows:

“The fact that the Prime Minister is the President or that the Government appoints nominees to the Governing Body or that the Government may terminate membership will not establish anything more than the fact that the Government takes special care that the promotion, guidance and co-operation of scientific and industrial research.”

Hence, the restricted role of the Government may merely be construed as that of taking ‘special care’ and/or as mentioned earlier that of ‘cooperation’/facilitation and nothing further.

This view is supported and strengthened by the position taken by the Ministry of Information and Technology itself in Writ Petition No. 1930 of 2009 before the courts (copy of which is provided to us). The said Ministry has taken a distinct stance to the effect that the Foundation is *“neither a Government Organisation nor is performing functions in connection with the affairs of Federation. The Federal Government neither has any controlling share nor has any interest therein.”* It also further submitted that the Foundation *“is governed by an independent Board of Governors”*.

It is for the above reasons that our response to the first query is in the negative.

2. We may now address the second query, which pertains to whether or not Pak Datacom is a Public Sector Company, by virtue of being a subsidiary of the Foundation. As explained above, the term Public Sector Companies has been defined under Rule 2 (1)(g) of the Public Sector Companies Rules and essentially examines the extent of control of the Government when deciding whether or not a company constitutes a Public Sector Company.

It is defined to mean “*a company, whether public or private, which is directly or indirectly controlled, beneficially owned or not less than fifty percent of the voting securities or voting power of which are held by the Government or any instrumentality or agency of the Government or a statutory body*”.

The Foundation holds 55% shares in Pak Datacom and therefore has controlling power. However, since we have already established that the Foundation is neither an instrumentality nor an agency of the Government nor a statutory body, consequently Pak Datacom is not a Public Sector Company and thus falls beyond the purview of the Public Sector Companies Rules.

However, we understand that being a listed company, Pak Datacom is subject to the Code of Corporate Governance for Listed Companies, 2012.

3. With reference to your query regarding the applicability of the Public Sector Companies (Appointment of Chief Executive) Guidelines, 2015 to Pak Datacom, please note that response to Queries 1 and 2 above are reiterated. Since Pak Datacom cannot be viewed as a Public Sector Company, all relevant laws affecting and regulating Public Sector Companies would remain inapplicable to it.

Trust the above is of assistance.



HASSAN KAUNAIN NAFEEES