BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
Show Cause Notice Issued To
M/S. PESHAWAR ELECTRIC SUPPLY COMPANY LTD
On Complaints Filed By
M/S. CYBER INTERNET SERVICES (PVT) LIMITED
M/S. NAYATEL (PVT) LIMITED

F. NO: 382/PESCO/C&TA/CCP/2020

Date(s) of Hearing:	10-06-2022, 21-06-2022 07-07-2022, 24-11-2022 08-12-2022
Commission:	Ms. Rahat Kaunain Hassan **Chairperson**
	Mr. Mujtaba Ahmad Lodhi **Member**
Present:	
M/s. Peshawar Electric Supply Company Limited	Sultan Mazhar Sher Advocate Supreme Court
	Mr. Irfan Reayat Chief Law Officer, PESCO
	Aslam Khan Gandapur Chief Operating Officer,
	Mr. Ishfaq Director Safety
	Mr. Atif Jawad Safety Department
M/s Nayatel (Pvt) Limited	Muhammad Ahmed Company Secretary
	Ms. Zainab Janjua, Advocate High Court *Ajuris*
M/s Cyber Internet Services (Pvt) Limited	Shahid Rafique Dogar, Assistant Manager (Legal & Regulatory Affairs)
	MNA Rehan, Advocate AQLAAL

ORDER

1. This order shall dispose of proceedings initiated by the Competition Commission of Pakistan (the **'Commission'**) *vide* Show Cause Notice No. 12 of 2022 dated 28 April 2022 (the **'SCN'**), issued to M/s Peshawar Electric Supply Company Limited ("**PESCO**" or "**Respondent**"), for *prima facie* contravention of Section 3 of the Competition Act, 2010 (the **'Act'**).

FACTUAL BACKGROUND

2. Brief facts of the case are that on 1 December 2020, the Commission received two formal complaints under Section 37(2) of the Act (the "**Complaints**") from both Cyber Internet Services (Private) Limited ("**Cybernet**") and Nayatel Private Ltd. ("**Nayatel**") (hereinafter both Nayatel and Cybernet shall collectively be referred to as "**Complainants**", where the context permits).

3. The Complainants alleged in the Complaints that the Respondent is in a dominant position in the relevant product market for '*right of way for aerial cables across electricity poles*' and has violated both Sections 3 and 4 of the Act by *inter alia*:

   i. applying dissimilar conditions, including setting enhanced rent prices for use of its poles on combo/triple service providers, which are different from the charges previously charged from the Complainants and normal TV cable operators, taking it from PKR 10 per pole to a demand of PKR 100 per pole;

   ii. implementing price discrimination by charging different prices for the same product, i.e., ROW service from the Complainants as compared to normal cable TV operators as stated above;

   iii. Constructive refusal to deal by placing onerous conditions on the Complainants in terms of demanding 10 times enhanced rent from that currently being paid and other unfair and discriminatory trading conditions;

iv. imposing restrictive trading conditions and supplementary obligations on the Complainants by requiring the Complainants to provide free internet services to PESCO offices and free 10-minute advertisements through its new 'renting policy for aerial optical fibre cables ("**AOFC**") through usage of PESCO electric poles' issued on 24 July 2020 (the "**Pole Renting Policy**").

4. The Complainants therefore prayed for the Commission to annul the Pole Renting Policy or direct the Respondent to remove the dissimilar/discriminatory conditions in the Pole Renting Policy and the anti-competitive provisions in the draft agreement in the Pole Renting Policy; not to repeat the infringing actions in the future; to impose a penalty; grant interim relief and any other relief as the Commission may deem appropriate.

5. An enquiry was thereby initiated by the Commission on 11 January 2021 and an Enquiry Committee was formed to assess the allegations leveled in the Complaints. It is relevant to add that, as briefly mentioned in paragraphs 5-7 of the Enquiry Report, the enquiry was initiated after having assessed the frivolity of the Complaints. During the course of the enquiry, the Enquiry Committee also conducted an on-site inspection of different sites in Peshawar where such poles were located, and aerial cables were passed/strung through. The Enquiry Committee also enquired vis-à-vis from other Distribution Companies (i.e., DISCOs) in this regard. It also required the Respondent to submit data regarding *inter alia* safety incidents/measures, number of businesses currently renting the PESCO poles, basis of charging different amounts under the Pole Renting Policy, whether there are other options available for laying down cables, a copy of any agreements entered into with combo/triple service providers and copies of latest invoices issued to the Complainants. It is pertinent to note that correspondence by the Enquiry Committee included correspondence at the senior management level, i.e., with the Chief Executive Officer of PESCO.

6. The Enquiry Committee finalized its findings and recommendations in the Enquiry Report dated 17 March 2022 wherein, *inter alia*:

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i. it identified the relevant market in paragraph 28 thereof to be the "*right of way through electric poles availed by different types of cable service providers in the geographic boundary of Peshawar*" ("**ROW**").

ii. In paragraph 35 thereof, it also stated that the Respondent is dominant in the relevant market as the electricity poles are solely owned/managed by it.

iii. It found that there was no violation of Section 3(3)(d) [supplementary obligations], (e) [dissimilar conditions] and (h) [refusal to deal] as well as Section 4 of the Act as alleged in the Complaints. However, it found *prima facie* violations of Section 3(3)(a), in terms of imposition of unfair trading conditions, and price discrimination in terms of Section 3(3)(b) under the Act.

For ease of reference, the relevant portions are reproduced hereunder:

> "*106. Based on Paras 39-48, the Respondent by imposing ancillary condition on top of charging a rent for use of the relevant service, has done so unilaterally as a result of its seemingly absolute control over the facility. The said imposition being unrelated to the nature of the contract, was neither necessary nor proportional in terms of securing the Respondent's commercial interest and is therefore ostensibly an unfair trading condition in terms of Clause (a) of subsection (3) when read with Section 3(2) and 3(1) of the Act.*
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> *107. On the basis of paras (49-63), the Respondent has discriminated between the combo triple service providers and cable providers by charging the former a different rent for a common transaction i.e. right to passage through its owned facility. The Respondent has provided various reasons for carrying out such price discrimination, however, it has been unable to substantiate the same. In the absence of such objective justification, the said behavior of the Respondent appears to be in prima facie contravention of Section 3(3)(b) read with Section 3(2) & (1) of the Act.*"

In light of the findings, the Enquiry Committee recommended that the Commission consider initiating proceedings against the Respondent under Section 30 of the Act.

Pursuant to the above, the SCN was issued to the Respondent, which is reproduced in its relevant part as follows:

> *"6. **WHEREAS**, in terms of the Enquiry Report in general and paragraphs 19 to 28 in particular, the relevant market in terms of clause (k) of subsection (1) of Section 2 of the Act appears to be Right of Way (ROW) through electric poles availed by different types of cable services providers in the geographic boundary of Peshawar; and*
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> *8. **WHEREAS,** in terms of the Enquiry Report in general and paragraphs 33 to 35 in particular, the Undertaking holds dominant position in the market of ROW by means of an aerial passage through its electric poles, in terms of Section 2(1)(e) of the Act; and*
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> *9. **WHEREAS,** in terms of the Enquiry Report in general and paragraphs 39 to 48 in particular, it appears that, the Undertaking unilaterally imposed ancillary conditions i.e., 10 minutes free advertising for PESCO and free internet facility to PESCO on top of charging a rent for use of the relevant services as a result of leverage it enjoys in the relevant market on account of its dominance, which, prima facie, constitutes a violation of Section 3(1) read with Sections 3(2) and 3(3)(a) of the Act; and*
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> *10. **WHEREAS,** in terms of the Enquiry Report in general and paragraphs 49 to 63 in particular, it appears that, the Undertaking discriminated between AOFC service providers vis-à-vis other cable service providers by charging them different rent for a similar transaction i.e. right to passage through its owned facility, without any objective justification, which, prima facie, constitutes violation of Section 3(1) read with Sections 3(2), and 3(3)(b) of the Act..."*

Main Submissions of the Respondent

8. Multiple opportunities of hearing were provided to the Complainants and the Respondent to present their respective case. The Respondent also submitted its reply to the SCN during the first hearing held on 10 June 2022 and its written arguments during

the hearing held on 8 December 2022. Broadly, in light of its oral and written submissions, the Respondent contends that:

i. The relevant market has not been correctly defined. Even otherwise, there exist close substitutes for the provision of ROW services and laying of cables, such as use of Peshawar Development Authority ("**PDA**") poles, poles of Pakistan Telecommunication Company Limited ("**PTCL**"), underground cable network, etc. which have not been fully considered.

ii. The Board (of Directors) of PESCO has now annulled the Pole Renting Policy and is not providing ROW to any undertaking offering such cable/internet services, particularly, in light of safety concerns/issues. In this regard, the Respondent's submission is primarily that as it has annulled the Pole Renting Policy, this resolves the issue as the Complainants had prayed for the same.

iii. PESCO is under no obligation to provide the same considering its mandate and main objective is to provide electricity distribution services.

iv. There is no valid agreement in place between PESCO and the Complainants.

v. The Complainants do not fall under the category of normal 'TV cable operators' on account of providing fibre optic cable internet services, hence, there is no price discrimination.

Additional Submissions of the Complainants during the SCN proceedings

9. Broadly, Nayatel, in addition to its submissions made in its complaint, has contended during the hearing proceedings and through its written arguments, the following:

i. At the outset, it was emphasized that the Bench must take note of the conduct and change in the stances of the Respondent. During the enquiry, the Respondent had neither denied the provision of ROW nor objected to the assessment of the relevant market nor had made any submission vis-à-vis the market aspect. The Respondent's focus was primarily on the cost and rent being enhanced as justifiable. Subsequently, during the very initial stage of the SCN

proceedings, the Respondent backtracked from its stance during the enquiry proceedings by stating that the Respondent is 'grateful to the Commission' for having brought to the notice of the current Board such practices/issues, which were without any lawful policy or authority in place. It was submitted that the Bench was informed through the Respondent's Counsel that the present Board has declared the alleged Pole Renting Policy to be null and void and provided a copy of the Board resolution in this regard.

Also, it was highlighted that now the Respondent's defense is primarily that it has annulled the Pole Renting Policy, and this resolves the issue as the Complainants had prayed for the same. Nayatel's Counsel drew the attention of the Bench to the prayer and termed the selective reliance of the Respondent's Counsel on the prayer as a tool to digress from the real issue. It was further submitted and emphasized that the annulment of the Pole Renting Policy due to safety grounds was only a mere pretext, which has not been satisfied either in the enquiry proceedings nor through further evidence submitted by the Respondent.

ii. That the Commission can take cognizance of recent facts/changes in circumstances during the course of the SCN proceedings in light of settled case law. In this regard, the complete annulment of the Pole Renting Policy and complete refusal to provide any ROW to any business in the relevant market amounts to outright refusal to deal in violation of Section 3(3)(h) of the Act.

iii. That PESCO is bound to abide by Section 27A of the Pakistan Telecommunication (Re-organization) Act, 1996 (the "**PTA Act**") and the Public and Private Right of Way Policy Directive (the "**Policy Directive**"), hence, the Respondent must facilitate the Complainants and other businesses in providing ROW.

iv. That the Enquiry Committee has erred in the analysis of possible contraventions of Section 3(3)(d) and 3(3)(e) of the Act.

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10. The Counsel on behalf of Cybernet stated on record that it would adopt the arguments pressed on behalf of Nayatel. He, however, added to elaborate that the constitutional and legal framework grants the Federal Government the power to make policies, particularly with regard to electricity management issues. Such policies are binding on the Respondent. Particularly, Section 27A of the PTA Act provides the inalienable and undisputable statutory ROW for the purpose of establishing or maintaining a telecommunication system subject to the conditions provided in the Policy Directive, which was issued by the Federal Government under Section 8 thereof. Thus, the Respondent's decision to either remove the cables or disallow the Complainants to deploy the same is not only illegal and unlawful in breach of the provisions of the PTA Act and the Policy Directive but also constitutes a refusal to deal in breach of Section 3(3)(h) of the Act and/or otherwise an abuse of dominant position.

11. Both Complainants have also emphasized that the Respondent's objection to the definition of the relevant market was not taken initially during the enquiry stage and PDA poles were also not recommended by the Respondent as being substitutes. Moreover, the substitutes allegedly available for laying out cables or providing the cable internet services as contested by the Respondent i.e., through satellite, wireless, PDA streetlights, PTCL poles or underground, etc., are not commercially or technically or even otherwise feasible, hence, cannot be regarded as close substitutes of the ROW.

Application for Interim Relief

12. The Complainants had prayed for interim relief in the Complaints, however, as at the time there was no final *prima facie* findings by the Enquiry Committee, the Commission deemed it appropriate to consider the grant of interim relief after the finalization of the Enquiry Report. In this regard, after issuance of the SCN, Nayatel had filed another application for interim relief under Section 32 of the Act praying that the Respondent be restrained from cutting down Nayatel's cables in pursuance of the impugned notices dated 13 and 20 June 2022 issued by the Respondent in this respect. Hearing was fixed for the matter on 21 June 2022.

However, subsequently, the Commission was informed by both the Counsels for the Respondent and Nayatel that the Honourable Peshawar High Court, Peshawar, had granted a stay order against the Respondent via its Order dated 21 June 2022 in *Writ*

Petition No. 2271-P/2022, on the morning of the said hearing before the Bench. Hence, the subject interim application was disposed of accordingly.

14. Subsequently, on the next date of hearing on the matter, i.e., 7 July 2022, the Counsel on behalf of Cybernet had also raised the issue of grant of interim relief. In this connection, it was highlighted that the aforementioned Order of the Honourable Peshawar High Court, Peshawar still remained intact and the Counsel on behalf of the Respondent also affirmed that the Respondent would not take any adverse action against the Complainants in light of the said stay order.

Other Proceedings referred to by the Undertaking Concerned

15. After issuance of the Pole Renting Policy, Nayatel filed a complaint under Section 27(6) of the PTA Act read with the provisions of the Policy Directive before the Secretary, Ministry of Information Technology and Telecommunication ("**MoIT**") against the new rates prescribed under the Pole Renting Policy. The said dispute was decided by the Secretary, MoIT on 3 May 2021, where he concluded that the Pole Renting Policy may be revised in light of the Policy Directive and the business concerns of telecom service providers should be addressed "*subject to completion of all due processes of safety measures and protection of revenue*". Nayatel, being aggrieved of the same on account of not clarifying the issue had filed for review of the said decision via letter dated 15 July 2021.

On 22 November 2021, the Secretary, MoIT issued another decision stating *inter alia* that Nayatel's reliance on Clause 16(3) of the Policy Directive, i.e., that the rental rates shall be those as provided for in the Water and Power Development Authority ("**WAPDA**") notification (PKR 10/pole), was not in conformity with law and that the same was only meant for cable TV operators using WAPDA's electricity poles. However, the said Order also highlighted that PESCO is under an obligation to give equal treatment and cannot discriminate against the applicant in any manner and that the fee should be reasonable and determined in line with Clause 7 of the Policy Directive. PESCO was also directed to provide ROW to Nayatel.

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The aforementioned Order of the MoIT has now been challenged by Nayatel before the Honourable Islamabad High Court in *Nayatel (Private) Ltd versus Federation of Pakistan and PESCO WP No. 2692/2022.*

16. The Bench was also informed by the Respondent's Counsel that National Electric Power Regulatory Authority ("**NEPRA**") has taken action against it via Order dated 8 January 2021, *inter alia* imposing a penalty of PKR 13 million due to the fatal accident of 14 individuals. In this regard, the Commission directed the Respondent to provide a complete record and details as to whether such accidents had arisen on account of Complainants' representatives/employees or had any nexus with the subject proceedings, which the Respondent was not able to do so. The January 2021 NEPRA Order was challenged by PESCO through review application filed on 2 February 2021 before NEPRA. However, NEPRA upheld its January 2021 Order in the Review Decision dated 11 August 2021. Being aggrieved of the same, PESCO has challenged the same before the Honourable Islamabad High Court in *PESCO versus NEPRA WP No. 3570/2021*.

DELIBERATION ON ISSUES

17. In light of the written submissions, arguments and evidence presented by the undertakings concerned, and the contents of the SCN and the Enquiry Report, the following main issues arise in determining whether the Respondent has violated the provisions of Section 3 of the Act:

I. *Whether the Relevant Market has been correctly defined in the Enquiry Report?*

II. *Whether the Respondent has committed price discrimination in violation of Section 3(3)(b) of the Act by charging different prices for the same service from the Complainants as compared to the price charged from normal TV cable operators?*

III. *Whether the Respondent has imposed unfair trading conditions on the Complainants by unilaterally imposing ancillary conditions i.e., 10 minutes free advertising for PESCO and free internet facility to PESCO on top of charging*

a rent for use of the relevant service as a result of leverage of enjoying a dominant position in the relevant market, hence, in violation of Section 3(3)(a) of the Act and/or whether such impugned conditions amount to supplementary obligations in violation of Section 3(3)(d) of the Act as against the finding of the Enquiry Committee?

IV. *Whether the Respondent has contravened Section 3(3)(e) of the Act, i.e., applying dissimilar conditions to equivalent transactions, placing the Complainants at a competitive disadvantage as against the finding of the Enquiry Committee?*

V. *Whether the annulment of the Pole Renting Policy and refusal to provide ROW to all undertakings concerned amounts to refusal to deal in violation of Section 3(3)(h) of the Act? Or is otherwise an abuse of dominant position in terms of Section 3 of the Act.*

A. Issue I – Definition of 'Relevant Market'

18. The Respondent has challenged the definition of the relevant market stating i) that its main business is that of electricity, hence, the Respondent is active in a separate market altogether and ii) there are substitutes for the ROW.

19. In this regard, the representatives of the Respondent had also made a presentation on the various methods of installing broadband/cable connections. However, we note that the said submissions made in this regard on behalf of the Respondent and the presentation itself were incomplete where no costing or feasibility study was provided to show whether such options would be viable or cost-effective in Pakistan, particularly in the locality of Peshawar.

20. We are of the considered view that the relevant market definition for the purposes of competition law is an open definition and revolves around the concerned product/service being offered, taking into consideration both demand-side and supply-side factors. In the instant proceedings, the issue at hand does not concern the supply/distribution of electricity but the public right of way to be/or being provided by

PESCO. In this regard, the Commission finds support from its previous Orders in the matter of *Show Cause Notice issued to Pakistan Bahria Town (Pvt.) Ltd. Dated 27 January 2017 (upheld by the Competition Appellate Tribunal via Order dated 10 May 2017 in Appeal No. 3/2017)* and in the matter of *Show Cause Notice issued to Defense Housing Authority for Alleged Violation of Section 3 of the Act Dated 3 June 2021*, where the relevant markets defined therein pertained to a right of way for cable, internet and telephony services by housing authorities.

21. As far as substitution is concerned, we find merit in the analysis provided in the Enquiry Report to the extent of underground cabling and the submissions made by the Complainants in this regard. It is a settled principle of competition law that substitutability concerns the alternatives a customer and a supplier have, from a technical and economic perspective, in serving a specific customer demand by switching to the consumption or supply of alternative products or services (or to and from alternative areas)[1].

22. The Enquiry Committee has adequately assessed the financial impact and technical issues of using an underground network, (which is primarily subject to obtaining approvals from PDA) and the use of PTCL owned poles in paragraphs 23 to 26 of the Enquiry Report. The Enquiry Report states that developing and digging underground passages requires heavy investment cost and prior approvals from the relevant authorities and there also exist practical impediments for laying down underground cables such as lack of access to corridors/green belts on roads, streets, etc. This is also evidenced from the Khyber Pakhtunkhwa (KPK) Highway Authority letter dated 15 April 2021 addressed to Cybernet concerning permission for optical fiber laying on the Charsadda Road, Peshawar attached as Annex VIII to the Enquiry Report, wherein the concerned engineer has stated that the locality is thickly populated, congested and is limited or fully covered/carpeted, hence, in such a situation any excavation work cannot be allowed. It has also been suggested by the concerned Authority to pass the cable aerially, which would not cause any inconvenience to commuters.

[1] See generally, the EU Commission 2021 Evaluation of the Commission notice on the definition of relevant market for the purposes of the Community competition law; retrieved from: https://competition-policy.ec.europa.eu/public-consultations/2020-market-definition-notice_en#evaluation-results

23. Interestingly, the Respondent itself has stated in its reply via letter dated 3 February 2021 to the questions put forward by the Enquiry Committee (attached as Annex VI of the Enquiry Report) that "*new deployment* [of cables] *can be done by two different methods, underground and aerial, underground is simple and more secure but very costly which needs huge capex whereas aerial stringing is very complex and dangerous but very cheap in terms of cost...The fibre cable operators have already invested on underground facility by paying millions of rupees to Peshawar development authority PDA as capex/onetime cost for per meter underground deployment and will also pay per meter line rent per month over and above it.*"

24. As for PTCL poles, as stated in the Enquiry Report and by the Complainants, the same are customized to PTCL's own requirements, i.e., installed at the end of PTCL's underground network of cables and supports copper wires. The PTCL poles can also not be used for the purpose of hanging fibre optic cables. Moreover, the poles are generally of low height and are more scattered. As per the Complainants, providing satellite and wireless broadband services also requires heavy investment and are even more costly than underground cable networking. Wireless broadband services are mostly used for cellular devices and internet and the same is not reliable due to quality issues and limited bandwidth.

25. Regarding the use of streetlights/poles of PDA, it is pertinent to note from the correspondence cited above and the findings of the Enquiry Report that the focus had only been in the context of the underground facility/network, which is subject to approval of PDA, and use of PTCL poles. There had been no prior mention by the Respondent or the taking into consideration by the Enquiry Committee, with reference to the relevant market, the use of streetlights for provision of ROW.

26. Nevertheless, as the use of streetlights has now been contended by the Respondent to be a substitute of the ROW, for sake of completeness, having examined the issue, we are of the view that the streetlight poles may not be a suitable substitute for the purpose of deployment of AOFC due to being scattered and positioned in different areas and not being available in all (particularly street lights are generally located in the middle of roads or intersections, whereas, electricity poles are near homes). Such streetlight

poles may perhaps not be designed to hold/support such cables in terms of weight and height. Moreover, such poles are not uniform in nature, hence, may require different cable hanging techniques as well as greater safety concerns in view of its structure.

27. In light of the above, we are in agreement with the definition of the relevant market as determined in the Enquiry Report as the "*ROW through electric poles availed by different types of cable service providers in the geographic boundary of Peshawar.*" In this connection, it is pertinent to note that as the definition of relevant market remains unchanged, the dominance of the Respondent as determined in the Enquiry Report is not at issue, nor has it been contested in this regard. Admittedly, during the hearing, it was submitted that PESCO provides distribution services to approximately 4 million consumers in the entire province of KPK including approximately 7 lac consumers in Peshawar alone. The electricity distribution facilities therefore cover an area of approximately 78,088 sq. km, which further strengthens the aspect of dominance of the Respondent in the relevant market of ROW as it owns/manages a significant number of electric poles, and no other (adequate) substitutes are available in the relevant market.

B. Issue II – Price Discrimination

28. Without prejudice to the fact that the Respondent has now annulled the Pole Renting Policy (in June 2022), which has been dealt with in detail below. We note that previously, the Pole Renting Policy provided that fibre optic cable providers like the Complainants shall pay a monthly rent of PKR 100 per pole/structure. This was different from the rate charged to normal TV cable operators at PKR 10/pole. Prior to the issuance of the Pole Renting Policy, the Complainants had also been paying the same amount of PKR 10/pole. The Respondent has broadly contended that, apart from the fact that it has now annulled the Pole Renting Policy, the concerned notification issued by WAPDA (annexed at Annex IV of the Enquiry Report) was issued back in 2004 for normal TV cable operators to *inter alia* give them incentive to improve services as well as provide some form of financial cover and the Complainants cannot possibly fall under the same category.

29. In this regard, the Enquiry Committee found in paragraphs 50 to 63 of the Enquiry Report that essentially two different rates were being charged for using the ROW to

pass cables through PESCO poles without any legitimate, objective justification, hence, *prima facie* a violation of Section 3(3)(b) of the Act.

30. We find merit in the Enquiry Report findings in this regard. It is not for us to indulge in the debate of whether or not the Complainants and/or the Respondent are bound by the said WAPDA notification or whether the Complainants can be categorized as a 'Cable TV Operator' according to the said notification.

31. In our view, this is not the issue/concern in the instant matter. The fact is that, regardless of the categorization of the cable operator and the end service they provide to the end consumer, these cable operators are also renting a pole from the Respondent who is providing a public right of way for this purpose in order to put up their cables. Admittedly, the Respondents themselves are dominant in this regard as highlighted in paragraph 27 of Part A of this Order above. When inquired into the objective justifications, the Respondent had initially stated that:

i. the deployment of AOFC on the Respondent's poles required additional allocation of resources to assess the extent of usage and to secure the infrastructure;

ii. there were safety concerns as it was alleged that Complainants' employees or workers were not well-trained and posed potential risks for the Respondent and that they do not report any incident that occurs and manage it on their own outside the compensation framework; and

iii. that it requires shutting down of electric feeders, which cause huge losses (refer to paragraph 53 of the Enquiry Report).

32. Without prejudice to our observations on the safety issues, which have been discussed in greater detail below, two things are very clear: the Respondent did not provide any substantive evidence as to fatalities/accidents being attributed to the Complainants, neither during the enquiry proceedings nor during the hearings. In fact, to the contrary, the Enquiry Report reveals in paragraph 59 that the accidents/incidents had decreased from the year 2017-2018 till the year 2020-2021. Secondly, as submitted by the

Complainants, the other DISCOs are already providing ROW on similar rates to fibre optic cable operators and, as such, no denial on safety grounds has been reported or witnessed. Also, the other DISCOs allow access subject to compliance with requisite safety rules/regulations/guidelines.

33. Therefore, the Respondent has failed to satisfy the Bench with any legitimate objective justifications or evidence, which support to a sufficient degree, the imposition of an enhanced/excessive fee, i.e., PKR 100 per pole on the Complainants. We also note that 'normal cable TV operators' would also reasonably require some 'allocation of resource' prior to their cables being put up as the infrastructure would need to be secured and appropriate precautions would also need to be in place regardless. Thus, for argument's sake, the above concerns would ideally be valid across the board without needing to consider whether the cable was being installed by the Complainants or by other cable operators.

34. The PKR 100/pole rent charge coupled with other provisions in the previous Pole Renting Policy under clause 8 thereof in relation to a two-year renewable contract with a fee increment of 5% and a renewal fee of PKR 50,000/- indicates that the discriminatory conduct of the Respondent is solely for the reason of the dominant position it holds rather than for any objective reasons and can be deemed to be exploitative and harmful for undertakings deploying AOFC.

35. As for the denial of the Respondent of having entered into any such arrangement/agreement without any lawful authority or in the absence of the Board's knowledge; the same does not appear to be tenable. Particularly, the correspondence exchanged between the Enquiry Committee and the Respondent's representatives was always addressed to the Chief Executive Officer and involved engaging with senior most officials.

36. Importantly, we must add that it is not for the Commission to determine or dictate charges/fees. However, regard must be given to the objective and intent of the Policy Directive as per Clause 3 thereof. Particularly, the Government of Pakistan aims to promote modern telecommunication services and increase broadband penetration, which is a critical foundation of digital revolution and economic growth. In this

connection, Clause 7 of the Policy Directive broadly states that the fee imposed by a public authority for a public right of way shall be on a no profit no loss basis, should not be a means of commercial benefit and there shall be no discrimination against any licensee in terms of the fee charged. Therefore, although the Respondent is free to determine a fee as it deems necessary for the public ROW concerned, the same should be reasonable, not excessive, and applicable for all as well as not be an undue burden on undertakings willing to provide services to end consumers, which would in turn promote consumer welfare.

37. In the given circumstances the Respondent, being in a dominant position and that too in the public sector, is expected to act responsibly and not contrary to the above governing requirements of the Policy Directive. It has a special responsibility in this regard to discharge while also remaining subject to the provisions of the Act. In light of the above, the Respondent is hereby found to have acted in violation of Section 3 read with sub-section (3)(b) of the Act. Such conduct also creates barriers to entry for the Complainants and other similar businesses and does not serve public/consumer interest in any manner.

C. Issue III – Unfair Trading Conditions/Supplementary Obligations

38. It has been alleged that the Respondent unilaterally imposed ancillary conditions on the Complainants that amount to unfair trading conditions in *prima facie* violation of Section 3(3)(a) of the Act, i.e., that the 'fibre optic cable operator'/internet service provider ("**ISP**") must provide a 10 minutes advertisement to PESCO free of cost daily during 10 am to 10 pm and that the said fibre optic cable operator must provide internet connection facility to all PESCO offices where the facility is required in the service area free of cost. The Enquiry Committee also found that there was no *prima facie* violation of Section 3(3)(d) in this respect. Nayatel has contested the findings of the Enquiry Committee in relation to Section 3(3)(d) of the Act stating, *inter alia*, that it is not the intent of the legislature to make Section 3(3)(d) a subset of Section 3(3)(c) by associating supplementary obligation with tie-ins, and the two amount to distinct contraventions of Section 3 of the Act. However, we note that the Enquiry Committee has found the conditions imposed on the Complainants to be 'unfair trading conditions' in terms of Section 3(3)(a) of the Act.

39. At the outset, notwithstanding the Respondent's argument that it has now discontinued the Pole Renting Policy and without going into the debate concerning Section 3(3)(d) and 3(3)(c) of the Act, the term 'unfair trading conditions' is indeed wide in scope and deals with either or both exclusionary and exploitative forms of abuse of dominance. In this regard, the Korea Fair Trade Commission has issued guidelines describing instances of what may amount to 'unfair trade practices', which can include unfairly coercing customers by forcing an entity to sell services against their will and unfairly taking advantage of one's superior bargaining position to impair free decision making of a transacting party[2].

40. In this connection, the Respondent is dominant in the relevant market and the sole provider of the public ROW service to the Complainants and other such undertakings that fall under the previous Pole Renting Policy. In such circumstances, it is apparent that the Respondent is in a superior bargaining position and has sufficient market power to impose unilateral conditions on the Complainants, who would be compelled to comply considering that the ROW is necessary for the Complainants to carry out their business and provide their services to end consumers as highlighted above under Part A of this Order. The aforementioned conditions appear onerous and not freely negotiated upon by the parties concerned. The same may also be an added barrier for undertakings to compete effectively and efficiently in the market for provision of internet, cable and telephony services and, in terms of monetary value, would be an added cost.

41. In this regard, we find support from the case of *Case T-139/98 Amministrazione Autonoma dei Monopoli di Stato (AAMS) versus the European Commission [2001]*, wherein the European Commission had considered various clauses of a standard distribution agreement between AAMS and certain cigarette manufacturers in relation to the distribution of cigarettes in the Italian territory. Although the clauses concerned were related to *inter alia* quantity and brand restrictions, the General Court upheld the European Commission's decision that *inter alia* the text of the said agreements had

[2] https://www.ftc.go.kr/eng/contents.do?key=505

been drawn up unilaterally by AAMS and that the foreign firms had not had any opportunity to either negotiate the same or to propose amendments that took account of their point of view or their specific interests. These firms were also extremely dependent on AAMS and were compelled to accept the clauses in full. Hence, it was found that AAMS had abused its dominant position.

42. The Competition Commission of India has also observed in the case of *Ravinder Singh Bawa and Oil and Natural Gas Corporation Limited Case No. 13 of 2022*, although no finding of violation was made out against the Oil and Natural Gas Corporation Limited, that "*...it* [CCI] *is not without jurisdiction in matters that arise out of contractual arrangements, wherein an entity with significant market power creates and imposes unilateral clauses on the other which impedes the affected party's freedom of trade and subjects it to onerous obligations without any corresponding concomitant duty on the part of the dominant entity, to act in fairness and without any discrimination.*"

43. Notwithstanding the assertions of Nayatel, it should suffice that the Enquiry Committee has treated such conduct to be a violation of Section 3(3)(a) of the Act, which has a very wide scope, therefore, for the purposes of this Order, we do not deem it necessary to indulge in the debate as to whether for the same conduct, there could have been a violation of Section 3(3)(d) of the Act. We are in agreement to the extent that contravention in terms of Section 3(3)(a) of the Act has been made out and committed by the Respondent.

D. Issue IV – Dissimilar Conditions to Equivalent Transactions

44. Nayatel has contested the finding of the Enquiry Committee in this regard where, in paragraphs 72 to 83 of the Enquiry Report, the Enquiry Committee has found that there is no *prima facie* contravention of Section 3(3)(e) of the Act. In this connection, Nayatel submits that the Enquiry Committee has reached the erroneous conclusion that there is a difference in technologies used for coaxial cable and an optic fibre cable and that the services being offered by Nayatel are of the same nature and characteristic as that being offered by the ordinary cable operators. Moreover, the regulatory regime is also the same for Nayatel and the cable operators where they must obtain the requisite license from the Pakistan Electronic Media Regulatory Authority ("**PEMRA**").

45. For the sake of brevity and for the purpose of the instant matter, without going into technicalities, we find merit in the finding of the Enquiry Committee as the scope of Section 3(3)(e) of the Act would apply to competition in the market in which the Complainants and other such undertakings compete. Although Nayatel and cable TV operators may provide basic cable TV packages, however, it cannot be denied that Nayatel also provides other services in addition to basic cable TV including video-on-demand, more channel options, internet services and telephone. This is also evidenced from the *supra DHA and Bahria Town* Orders of the Commission where the services are generally described collectively as cable, internet and telephony services (CIT). Therefore, the relevant market may be inherently different from that of normal TV cable operators given that their services are generally limited to basic cable TV. The installation charges and fees may also be considerably different as well as the targeted consumers as compared to normal/basic cable TV operators. Yet, the Respondents have not pressed any legitimate business justification for charging ten times high excessive fee.

46. In this regard, it is important to clarify that these differences, which may exist between other cable operators and the Complainants, were not the issue/concern with respect to charging the excessive/discriminatory prices as discussed in Part B above. The fact remains that different rates were being charged for the same ROW, which would allow a cable to be passed through/hung, regardless of the type of cable, with an increased financial burden being placed on the Complainants without any legitimate, objective reasoning. Therefore, it is all the more discriminatory that for the same service being provided by the Respondent, i.e., the ROW, different prices have been set by the Respondent, one being ten times higher than the other.

47. We thus conclude that, having already addressed that there is price discrimination by the Respondent and that there is an imposition of unfair trading conditions under Section 3(3)(a) and (b) of the Act, a violation of Section 3(3)(e) also does not remain relevant.

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E. Issue V – Refusal to Deal & Abuse of Dominance

48. The Enquiry Committee had found in paragraphs 84 to 93 of the Enquiry Report that there was no *prima facie* violation of Section 3(3)(h) of the Act, broadly because, at the time, the Respondent was still allowing the ROW; albeit by demanding a higher rent for the same through the previous Pole Renting Policy. Now, as the Respondent has time and again stated that it has annulled the previous Pole Renting Policy and has decided to no longer provide/allow any ROW service to any undertaking, regardless of category of services, the Complainants contend that this amounts to outright refusal to deal in violation of Section 3(3)(h) of the Act of which the Commission can take cognizance of.

49. The Commission has deliberated at length upon the application of certain factors, in combination of which a violation under Section 3(3)(h) of the Act can be made out in the matter of *Pakistan Steel Mill Dated 22 March 2010* and *Karachi Stock Exchange (Guarantee) Ltd Dated 29 May 2009*. For purposes of clarity, review of the American and European jurisprudence in this regard indicates that, with respect to traditional 'refusal to deal' cases, there is generally an aspect of a vertical or horizontal relationship present vis-à-vis the product or service market. Moreover, American jurisprudence in this regard considers 'refusal to deal' cases strictly; broadly due to the general school of thought that businesses have a right to protect their investments and it may lead to greater economic growth in terms of creating an incentive for other businesses to invest and innovate[3]. We have also seen a similar pattern emerge in the European cases, i.e., competition in related markets (vertical or horizontal). Against this backdrop, the Complainants have not satisfied as to how a case of 'refusal to deal' is made out under Section 3(3)(h) of the Act in the instant matter.

50. Notwithstanding the above, we are of the view, at present, the Commission is confronted with a case of first instance where the Respondent does not directly compete with the Complainants in the same market or has some form of relationship in a related/neighboring market, vertically or otherwise. The fact remains that the Respondent holds a dominant position in providing an essential public ROW (the

[3] Scott, P. *Unilateral Refusals to Supple and the Essential Facilities Doctrine under New Zealand's Competition Law* (2018) 49 VUWLR

relevant market) that enables the Complainants to compete effectively in their respective market(s) and provide their services to end consumers.

51. It follows that apart from the specific contraventions identified, deemed and enumerated under Section 3 of the Act as an abuse of dominance; the law does not restrict considering other situations from other possible abusive situations. We must not forget that Section 3(3) is not exhaustive and only enumerative, and Section 3 prohibits any abuse by an undertaking that is in a dominant position.

52. In fact, the European Commission has referred to numerous judgements issued by the European Court of Justice ("**ECJ**") in this respect that "*an abuse of a dominant position is prohibited under Article 102 of the Treaty 'regardless of the means and procedure by which it is achieved', and 'irrespective of any fault'*", "*the list of abusive practices contained in Article 102 of the Treaty is not an exhaustive list of the methods of abusing a dominant position prohibited by Article 102 of the Treaty*" and "*the fact that a dominant undertaking's abusive conduct has adverse effects on a market distinct from the dominated one does not detract from the applicability of Article 102 of the Treaty*" (see generally: the European Commission's decision in *Case AT. 39523 – Slovak Telekom [2014]*, and the cases cited therein. The same was upheld by the ECJ in *Case C-165/19 P Slovak Telekom versus European Commission [2021]*).

53. We also find support from the applicable telecommunication regulatory regime, particularly in terms of Section 27A of the PTA Act read with the provisions of the Policy Directive, so far as the same has not been contested by a higher forum, which imposes a legal obligation on the Respondent to provide the ROW. For ease of reference, the relevant portion is reproduced below:

> "*27A right of Way (1) For the purpose of the installation or maintenance of its telecommunication equipment or for the purpose of establishing or maintaining its telecommunication system, every licensee shall, subject to the conditions provided in the section and the policy directive issued by the Federal Government under section 8, have the right to share any Public Right of Way or Private Right of Way.*"

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In this regard, the Policy Directive was issued under Section 8 of the PTA Act in relation to the "Public and Private Right of Way". Without prejudice to the generality of the Policy Directive, it is important to recapitulate the following:

> *"5. Every Licensee, subject to section 27 of the Act, 1996 and conditions of the license issued by the PTA, has the right to acquire and share... any public or private right of way..."*
>
> *16(3) The Licensees can use the poles of government and privately owned electricity distribution and supply companies (DISCOs) for aerial installation of optical fiber cables..."*

54. In this respect, although the Respondent and the Complainants are subject to their own sector-specific regulatory regimes, the objective of providing the ROW remains in line with the objectives of the Act as, in so far, it promotes economic efficiency and enables the Complainants to compete and provide services to consumers in the market for cable, internet and telephony services. Hence, the Commission can also consider the factors related to the pre-existing public ROW obligation when assessing the conduct of the Respondent under Section 3 of the Act. In this regard, the ECJ held in *Case C-280/08 P, Deutsche Telekom v Commission, ECR I-09555* that ""*...the legislation relating to the telecommunications sector defines the legal framework applicable to it, and in so doing, contributes to the determination of the competitive conditions under which an undertaking... carries on its business in the relevant markets, it is... a relevant factor in the application of Article 82 EC to the conduct of that undertaking, whether for the purposes of defining relevant markets, assessing the abusive nature of such conduct or setting the amount of the fines.*" It is relevant to add that Article 82 (now Article 102 of the Treaty on the Functioning of the European Union) as mentioned by the ECJ corresponds to our Section 3 under the Act and broadly encapsulates the same provisions and principles.

55. In this respect, as demonstrated and held in Parts A, B and C of this Order above, the Respondent is dominant in the relevant market and the ROW is only feasible through its own poles. Restricting or denying access to the ROW without providing any

legitimate objective justification may also lead to the foreclosure of future players altogether as such entities may not generate enough revenue to invest or be deterred by the significant cost associated with setting their own infrastructure along with facing other practical impediments. Moreover, the market reality is, as evidenced from the record, that the fibre optic cable operators are providing services in a densely populated area, making it practically not feasible to consider any other option. The provision of ROW is also attached to public policy objectives, where it would lead to the expansion of broadband connectivity available to the general public.

56. Regarding the safety submissions by the Respondent as the reason (albeit at a later stage) for discontinuing the Pole Renting Policy, we find this reasoning not to be consistent with the facts on record. As stated in paragraph 32 of Part B of this Order above, the Enquiry Report also states in paragraphs 54 to 59 that there has been a decreasing trend in the number of fatalities or accidents from 2017-2018 till 2020-21. Moreover, other DISCOs have been providing similar ROW to the Complainants without stating any issue or safety violations.

57. The Respondent also submitted that NEPRA has taken action against them for safety reasons. We perused the NEPRA decision in this regard as well as its petition before the Honorable Islamabad High Court challenging the same, however, as highlighted in the factual background above, the Respondent could not directly attribute such safety issues to the conduct of the Complainants or any of its representatives. Interestingly, it is pertinent to note that the main contention in the Respondent's pleadings related to the safety concerns was that *inter alia* later construction activities such as new houses and/or buildings interfered with the clearance standards of the distribution facilities and PESCO faces hurdles in hiring sufficient and/or properly trained staff in this regard.

58. Also, we find the conduct of the Respondent discriminatory as admittedly, decommissioning notices related to the removal of cables were only sent to the Complainants. The Respondent has also admitted that no other action has been taken against normal cable TV operators. Importantly and admittedly, it cannot be identified by the Respondent as to which cable deployed on the pole belongs to which cable operator.

59. It must be appreciated that the instant matter pertains to the provision of broadband technologies and fibre network deployment, which in many countries is carried out through a public ROW in collaboration with all relevant stakeholders. It is a fact that access to broadband technology has significant beneficial economic and social impacts and is in line with the objectives of the Government of Pakistan to promote digital inclusion. In fact, the Draft National Broadband Policy 2021 aims at addressing the need for affordable access to broadband for all and the impediments in the digital infrastructure rollout, such as the implementation of the Policy Directive, license framework review and efficient spectrum management. According to the OECD Report on 'Public Rights of Way for Fibre Deployment to the Home[4]', it is the focus of policy makers and communication regulators on how to reduce costs for access to high-speed broadband connections. The OECD has highlighted many factors leading to slow deployment of fibre connections associated with network construction, particularly, for rights of way and ducts or poles, as well as the associated legal and regulatory difficulties in obtaining permits for access to streets, roads, and other public land. In this connection, the OECD highlights that "*the opening of communication markets to competition has led to a considerable increase in demand by new entrants for access to public rights of way and ducts. For new entrants to compete effectively in local markets and to facilitate facilities competition, access to rights of way and ducts is crucial.*"

60. Against the above backdrop, it is alarming that a public body like the Respondent be allowed to easily choose to 'opt out' facilitating and providing such an important public utility/facility in terms of the ROW. There is no denying the fact that, considering the totality of the peculiar facts and circumstances of this case, such conduct/decision is abusive and is tantamount to abuse of a dominant position in violation of Section 3 of the Act. It is reiterated that such conduct of Respondent creates a barrier to entry in the market for cable, internet, and telephone services, restricting competition and causing substantial harm to consumers. The Respondent cannot act oblivious of the ground reality, both as a public company and holding a dominant position in the relevant market; whereby it has a special obligation to set fair standards and not to be abusive.

[4] OECD (2008-07-15), "Public Rights of Way for Fibre Deployment to the Home", OECD Digital Economy Papers, No. 145, OECD Publishing, Paris. http://dx.doi.org/10.1787/230502835656

We are of the considered view that if such conduct is left unchecked, it can perpetrate undesirable standards and practices that would hurt businesses as well as end consumers.

61. We wish to caution and add on the state of the poles as shown in the pictures attached to the on-site inspection report of the Enquiry Committee (annexed as Annex V of the Enquiry Report) and the concerns of the Respondent shared with the Enquiry Committee in this respect that the in-house training of the Complainants' workers was not up to the safety standard(s) imposed by PESCO (which as per our understanding given during the hearing, is in line with NEPRA's safety requirements), need to be enforced as per law.

62. We recommend that the Respondent, along with all relevant stakeholders including the Complainants and concerned Government regulatory authorities as well as the concerned Ministries collectively create a uniform policy for the deployment of broadband technology and ROW that may address any/all space/safety issues, including considering any shared infrastructure possibilities to fulfill the overall public policy objectives. The Complainants and all undertakings concerned are under an obligation to ensure strict implementation of any/all safety regulations while deploying their respective cables in this regard and ensure that the same are deployed under intimation to the Respondent.

63. Although, the annulment of the Pole Renting Policy by the Respondent and the denial of ROW may not be a 'classic refusal to deal' under Section 3(3)(h) of the Act on part of the Respondent, i.e., solely based on a monopolistic intent of keeping the facility/poles for its own commercial benefit or to strengthen its own dominant position, nevertheless, a clear contravention of Section 3 of the Act in our considered view stands established through the Respondent's discriminatory and unfair conduct concerning the Complainants. Notwithstanding the same, owing to the peculiarity of the case, to ensure compliance and to encourage corrective behavior, we are exercising restraint and hereby directing the Respondent to restore access to the ROW and/or provide the ROW to the Complainants on fair, reasonable and non-discriminatory terms at the earliest but no later than twenty-one (21) days from the date of receipt of this Order and not to repeat the prohibited act.

64. Failing to implement the aforesaid direction of the Commission or ensuring compliance in terms of this Order; the Respondent shall be liable to pay a fixed penalty of PKR 75 million and an additional penalty of PKR 0.5 million for every day after the first of such violations or the subject abuse had occurred.

65. Order Accordingly.

Ms. Rahat Kaunain Hassan
(Chairperson)

Mr. Mujtaba Ahmad Lodhi
(Member)

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ISLAMABAD THE 13 DAY OF DECEMBER 2022