

ORDER

In the matter of show cause notice issued to PESCO on complaints filed by Nayatel & Cybernet



Competition Commission of Pakistan

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BACKGROUND

The Complainants alleged 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;

- ⇒ 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
- ⇒ 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;
- ⇒ 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;
- ⇒ 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 ("AOF") through usage of PESCO electric poles' issued on 24 July 2020 (the "Pole Renting Policy").



DATE OF ORDER

13 December 2022



BENCH MEMBERS

Ms. Rahat Kunain Hassan
Mr. Mujtaba Ahmad Lodhi



SECTOR/MARKET

Electric Poles & Cables



NATURE & SECTION VIOLATION

Abuse of dominance in violation of **Section 3** of Competition Act, 2010



PARTIES

Complainant:
1. Cyber Internet Services (Private) Limited ("Cybernet")
2. Nayatel Private Ltd. ("Nayatel")

Respondent:
1. Peshawar Electric Supply Company (PESCO)

FINDINGS OF ENQUIRY REPORT

Enquiry Report finalised on: 17 March 2022

- ⇒ 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 Complaint.
- ⇒ However, Enquiry Committee 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.
- ⇒ In light of the findings, Enquiry Committee recommended the Commission to consider initiating proceedings against respondent under Section 30 of the Act.



In consideration of the Enquiry Committee's findings and recommendations, the Commission issued a show cause notice to the Respondent and held hearings in the matter.

SCN ISSUANCE DATE:
28 April 2022

ISSUES FRAMED BY THE BENCH

- ⇒ Whether the Relevant Market has been correctly defined in the Enquiry Report?
- ⇒ Whether PESCO 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?
- ⇒ Whether PESCO 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?
- ⇒ Whether PESCO 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?
- ⇒ 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.



FINDINGS OF THE BENCH

- ⇒ PESCO was dominant in the market for “Right of Way (ROW) through electric poles availed by different types of cable service providers in the geographic boundary of Peshawar.”
- ⇒ It was also found that there were no financially viable or otherwise adequate alternatives for the Complainants to put up their cables in order to provide their respective services to end consumers.
- ⇒ Enhanced fee from PKR 10 per pole to PKR 100 per pole for the Complainants as compared to basic TV cable operators without any legitimate objective justifications have been held as discriminatory in contravention of Section 3(3)(b) of the Act.
- ⇒ It was found that the PKR 100/pole rent charge coupled with other provisions in the previous Pole Renting Policy issued by PESCO indicated 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 Aerial Optical Fiber Cable (AOFC).
- ⇒ PESCO had abused its superior bargaining position and imposed further unfair trading conditions in contravention of Section 3(3)(a) of the Act on the Complainants, i.e., that the Complainants must provide 10-minute advertisements and free internet connection facilities to all PESCO offices.
- ⇒ Referring to the Korea Fair Trade Commission guidelines in this regard, it was observed that ‘unfair trade practices’ may also 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.
- ⇒ The Bench did not find any violation under Section 3(3)(e), i.e., that the Respondent imposed dissimilar conditions to equivalent transaction as it was observed that 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.



- ➡ After the annulment of the Pole Renting Policy and refusal to provide ROW, there were no other substitutable means available for the Complainants to provide cable, internet, and telephony services to end consumers, thus, PESCO was found to have abused its dominant position in contravention of Section 3 of the Act.
- ➡ The Bench found that 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.

- ➡ The conduct of the Respondent was also found discriminatory as admittedly, decommissioning notices related to the removal of cables were only sent to the Complainants. The Respondent had also admitted that no other action has been taken against normal cable TV operators.

CONCLUSION, REMEDIES & PENALTY



Owing to ensure compliance and to encourage corrective behaviour, the Bench exercise restraint and has directed the Respondent to restore access to the ROW and/or provide the ROW to Nayatel and Cybernet, on fair, reasonable and non-discriminatory terms no later than twenty-one (21) days from the date of receipt of the Order.

Failing which, 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.



TO DOWNLOAD THE ORDER



RECOMMENDATIONS AND DIRECTIONS

The Bench has recommended that all private and government stakeholders, including the Respondent, 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.

NEWS COVERAGE

