

**COMPETITION COMMISSION OF PAKISTAN**

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**ENQUIRY REPORT**

*(Under Section 37 of the Competition Act, 2010)*

**IN THE MATTER OF ALLEGED ABUSE OF DOMINANCE BY BAHRIA TOWN PRIVATE LIMITED WITH  
REGARDS OF REFUSAL/GRANT OF RIGHT OF WAY FOR CABLE, INTERNET AND TELEPHONY SERVICES  
IN  
PHASE 1-6 OF BAHRIA TOWN, RAWALPINDI**

**Muhammad Arshad Javed | Zulfiqar Ali**

**Dated: 17 June 2016**

## BACKGROUND

1. On 12 January 2016, the Competition Commission of Pakistan (the ‘**Commission**’) received an email from, Mr. Najib Qureshi, a resident of Bahria Town, Rawalpindi complaining that they were deprived of any alternate cable internet service provider and were forced to subscribe PTCL’s (a public limited telecommunication company) Cable Internet and Telephone Services (**CIT Services**). According to the email, no other options or substitute service providers were available. While the resident of Bahria Town were demanding CIT Services by Nayatel, Bahria Town management were not issuing No Objection Certificate (**NOC**) to Nayatel to operate in phases 1-6 of Bahria Town.
2. Pursuant to the email, the **Cartel & Trade Abuse (C&TA) Department** of the Commission initiated a preliminary probe into the contents of email and to assess allegations leveled in the email.
3. On 1<sup>st</sup> March 2016, the C&TA Department wrote to the CEO of **Bahria Town (Pvt) Limited (Bahria Town)**, sharing the email and sought their comments on the same. The management of **Bahria Town** was also required to provide copies of agreement(s), if any, under which the existing operators are providing CIT Services in the Bahria Town Phases 1-6 to enable the Commission to assess the validity of the claims made in the email.
4. On 3<sup>rd</sup> March 2016, a letter was sent to **Nayatel (Pvt) Limited (Nayatel)** to ascertain the factual position if they have attempted to or intended to expand their network(s) into Bahria Town phases 1-6 and whether they have been refused to lay down their network(s) as has been stated in the email.
5. On 9<sup>th</sup> March 2016, Nayatel responded, stating that they intend to install their CIT Services infrastructure in phases 1-6, and have been negotiating with Bahria Town management for quite some time. In 2013, they were granted permission to install and operate their network in Safari villas 1 & 2 of Bahria Town. In this regard, on 25<sup>th</sup> October 2014, Bahria Town asked Nayatel to quote a revenue share percentage that Nayatel would be paying to Bahria Town for grant of right of way (**ROW**) for CIT Services. In response, Nayatel offered to match the revenue share percentage that Pakistan Telecommunication Company Limited (**PTCL**) was paying. On 13 November 2014, Bahria town turned down the offer of Nayatel. In July 2015, Nayatel was granted permission to deploy their CIT Services in the new phases 7 & 8 of Bahria Town. However, Nayatel was not granted permission to deploy its CIT Services in phases 1-6; which according to Nayatel are the most developed and populated sectors at present.

6. On 14<sup>th</sup> March 2016, Bahria Town management in its letter to the C&TA Department reinforced the fact that Nayatel is already operating in Safari Villas 1 & 2 of Bahria Town, and has been granted permission to install its network(s) in phases 7 & 8 as well. Regarding phases 1-6, Bahria Town stated that there are only 6,800 plots in those phases and in the last year they have spent PRK 70 million on new footpaths and no ROW was available since PTCL had already taken the space with their CIT infrastructure. And along with the other services *such as* gas, electricity, sewerage and water in the 5 feet Kacha portion, there is no room available for Nayatel to deploy its CIT infrastructure.
7. On 22<sup>nd</sup> March 2016, the Bahria Town management's response was shared with Nayatel seeking their comments.
8. On 29<sup>th</sup> March 2016, Bahria Town was required to provide their agreements with both PTCL and Nayatel pertaining to CIT Services deployment in Bahria Town.
9. On 16<sup>th</sup> April 2016, Bahria Town responded to the C&TA Department by providing a copy of the agreement with Nayatel for Safari Villas 1 & 2 of Bahria Town along with a copy of Memorandum of Understanding (the 'MoU') signed between PTCL and Bahria Town. The MoU, however, provides no information pertaining to revenue sharing arrangements between Bahria Town and PTCL except lying of G-PON (Gigabit Passive Optical Networks) services in phases 1-6 and FTTH (Fiber- to-the-Home) services in phases 7 and 8 by PTCL only.
10. On 18<sup>th</sup> April 2016, Nayatel responded to the C&TA's [Reminder] letter dated 11<sup>th</sup> April 2016; stating that in 2011 Nayatel was offered to submit its proposal for installation of its network in phases 7 & 8. However, Nayatel responded that if they were allowed to install their network in phases 1-6, which are fully developed, they will also invest in the underdeveloped phases 7 & 8 of Bahria Town. However their request to install network in phases 1-6 was declined. Further, Nayatel stated that they have had already deployed their FTTH network(s) in a fully developed and populated areas of Safari Villas 1 & 2, wherein ROW to install FTTH network(s) were more scarce in comparison to phases 1-6. They had used latest engineering techniques and best practices for installation of their network and have fully re-instated footpaths and other structures to the satisfaction of Bahria Town management. Not a single resident complaint against Nayatel's deployment was registered due to damage to footpaths, driveways and environment. If Bahria Town management grants them permission to install their FTTH network in phases 1-6, they would adopt same best practices and will ensure that the work is done as per international standards and up to satisfaction of Bahria Town management.

11. After the preliminary probe noted above, the Commission on 22 April 2016 initiated an enquiry under Section 37(1) of the Act and appointed an enquiry committee comprising Mr. Arshad Javed (Deputy Director, Legal) and Mr. Zulfiqar Ali (JEO, Cartel & Trade Abuse) (hereinafter, the 'EOs') to initiate an enquiry whether Bahria Town management has *prima facie* violated Section 3 and other provisions of the Act.
12. On 25<sup>th</sup> May 2016, to ascertain the stance of Nayatel, EOs further wrote to Nayatel asking particularly: why Bahria Town has not allowed Nayatel to install its infrastructure in Bahria Town; what revenue share percentage was being paid by PTCL in Bahria Town; and whether FTTH, which according to Bahria Town management in their letter dated 12<sup>th</sup> December 2016 are being provided free of cost by PTCL, could possibly be a factor for not granting the NOC by Bahria Town management to Nayatel.
13. On 8<sup>th</sup> June 2016, Nayatel responded that PTCL was not paying any revenue share percentage to Bahria Town for ROW. Moreover, PTCL is not providing FTTH service but fiber to the street CIT Services. Lastly, in their letter they stated that the reason for refusal according to Bahria Town management is the non-availability of space in the service corridor. Nayatel did not agree with Bahria Town management and stated that it is not an objective justification and they reiterated that they have installed their FTTH CIT services in areas i.e., Safari Villas 1 & 2 with less space available. According to Nayatel, the ROW space can be engineered as there is only one telecom operator, PTCL, having installed its network in Bahria Town. In Islamabad and other cities, networks of up to 4 to 5 telecom operators besides electricity, water and gas network co-exist in same corridor.

## ISSUES

14. In the light of the above, following are the core issues to be addressed in the Enquiry Report:
  - a. *Whether Bahria Town holds a dominant position in the relevant market?*
  - b. *Whether Bahria Town has inter alia abused its dominant position in violation of Section 3 of the Competition Act 2010 (the Act) by refusing to provide ROW to Nayatel for provision of CIT services?*

## ASSESSMENT OF ABUSE OF DOMINANT POSITION

15. While evaluating an abuse of dominant position, the Commission conducts a detailed assessment of the relevant market and conduct of undertaking concerned. The Commission applies a step-wise approach to assess if an undertaking's conduct constitutes 'abuse of dominant position' in terms of Section 3 of the Act, which includes but is not limited to:

- i. Defining the undertaking(s) concerned;*
- ii. Defining the relevant market;*
- iii. Whether the undertaking(s) is dominant in the relevant market; and*
- iv. Whether the undertaking is abusing its dominant position.*

### UNDERTAKING(S)

16. 'Undertaking' as defined under Section 2(1)(q) of the Act means:

*any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in production, supply, distribution of goods or provision or control of services and shall include an association of undertakings.*

17. While assessing whether an entity is an undertaking for the application of Section 3, the key consideration is whether it is engaged in commercial or economic activity in the relevant market.

- a. Bahria Town is a private company engaged in real estate development and management projects in across Pakistan and is therefore an undertaking in terms of Section 2(1)(q) of the Act.
- b. PTCL is a company engaged in providing telephone and internet services nationwide and is therefore an undertaking in terms of Section 2(1)(q) of the Act.
- c. Nayatel is a private company based in Islamabad. The company is engaged in the business of FTTH services and is a sister concern of Micronet Broadband and is there an undertaking in terms of Section 2(1)(q) of the Act.

18. It is observed that Bahria Town (Private) Limited, PTCL, and Nayatel are engaged in commercial and economic activities in different phases of Bahria Town; hence all entities fall within the meanings of 'undertaking' and are subject to the provisions of the Act.

## RELEVANT MARKET

19. To assess whether or not an undertaking holds a dominant position, the Commission first delineates the relevant market. The definition of relevant market comprises of two dimensions: *the relevant product market*, and *relevant geographic market*, which are defined under Section 2(1)(k) of the Act as:

*[...] a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the product's characteristics, prices and intended uses.*

*[...] a geographic market comprises the area in which undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas.*

20. In view of the above, a relevant product market comprises all those goods and/or services which are regarded as interchangeable or substitutable by the consumers by reasons of the products' characteristics, the prices, and the intended use, among other things. While a relevant geographic market comprises the area(s) in which the undertaking(s) concerned are involved in the supply of products and/or providing services and in which the conditions of competition are sufficiently homogeneous.
21. It is apparent that the relevant product market in the matter at hand consists of the market for the grant of ROW to provide CIT Services. ROW is a very important consideration in the provision of CIT services, given that the latter is not possible without the former. With the proliferation of private housing development and cooperative societies and demand for quality CIT services by the public, provision of ROW for CIT Services is a growing market in the economy.
22. It is noted that in the CIT Services market, the main difficulties a potential entrant may face are the costs of deploying network(s), contracts with content providers, and the need to achieve a critical mass of clients. Additional restrictions or barrier to entry may be imposed by the public bodies or the private property management and developer to prevent and restrict competition by not allowing ROW/collocation. While CIT Services investors need to obtain ROW permit on a timely basis, any undue delay or restrictive practice on the part of public body or private entity managing public property can increase the investor's cost of deployment of such network(s).

Technologically, ROWs are closely interrelated with both civil works for infrastructure construction and technical engineering for network planning, operation and maintenance. Thus in telecommunication, ROW can be described as the right for telecommunications operators to pass their infrastructures across public and/or private areas.

23. It is pertinent to mention that the property rights arising from a utility corridor are referred to as ROW, whether owned and/or managed by a public body or by a private entity managing a public residential or commercial area. In the similar vein, public utilities can be described as private or publically owned/managed lines, facilities or systems, which directly or indirectly serve the public by providing necessary basic services. Therefore, a 'ROW' when carved out for public utility purposes can be defined as the land and facilities that are managed and maintained as 'public ROW' for providing essential services *such as* the mobility for people and products, water supply, waste treatment, and energy and communication systems.
24. At the same time, the grant of ROW is always localized, with each municipality, independent private development and society taking its own decisions. This necessitates the carving out of geographical markets overlap each independent development. Keeping in view the prevailing conditions of competition and sufficiency/homogeneity factors the relevant geographic market in the matter at hand consists of phases 1-6 of Bahria Town, Rawalpindi.

#### **DOMINANT POSITION**

25. According to Section 2(1)(e) of the Act, dominant position of one or more undertaking(s) in relevant market shall be deemed to exist if:

*[...] such undertaking or undertakings have the ability to behave to an appreciable extent independently from competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.*

26. To assess if an undertaking has substantial market power or dominant position in a relevant market, the Commission considers qualitative indicators of market power which include, among other things, an undertaking's ability to profitably sustain prices above competitive levels, restrict output, degrade quality below competitive levels, apply dissimilar conditions to equivalent transactions, placing competitors at a competitive disadvantage, boycotting/excluding any undertaking from the production, distribution or sale of any goods, providing services to public, or refusal to deal with at competitive terms.

27. Since phases 1-6 are exclusively managed by Bahria Town, no CIT Service provider can enter into the market without prior approval of Bahria Town management. Apparently, Bahria Town management does not need to share its decision making with any other entity and enjoys sole/arbitrary discretion as to how the area will be developed as well as to whom they may or may not provide service corridors/ROW and other utility services in various phases of Bahria Town. Thus Bahria Town management has dominant position in the relevant market.

#### **ABUSE OF DOMINANCE**

28. According to Section 3(2) of the Act an abuse of dominant position:

*[...] shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.*

29. One or several undertakings with substantial market power may have the ability and incentives to harm competition in different ways, for instance, by weakening existing competition, raising barrier to entry or slowing down innovation. Abusive practices may be categorized into: exploitative abuses or exclusionary abuses. Exploitative abuses are most directly concerned with the consumer harm since they encompass all conducts by dominant undertaking which results in direct loss of consumer welfare (for example, through excessive pricing, unfair discrimination, poor quality of products or services). Exclusionary abuses refer to practices by dominant undertakings that harm competition by impairing their competitors' ability to compete effectively in the market, and cover behaviours impairing the market structure which indirectly harms consumers. There is no rigid demarcation between the two categories as the same behaviour may exhibit both exploitative/exclusionary characteristics.

30. As noted above, Bahria Town has dominant position in the relevant market. It has granted exclusive service corridors/ROW to PTCL in phases 1-6 for providing G-PON based CIT services to the residents, wherefrom the Commission has received email alleging non-availability of alternate CIT Services, allegedly poor quality of PTCL's services, in addition to imposition of discriminatory conditions on Nayatel, placing the operator at competitive disadvantage, and refusal to deal by not granting access to service corridor/ROW on competitive terms and conditions or treating it at par with PTCL. The conduct of Bahria Town has resulted in restricting the proliferation of CIT Sector and restriction of competition and abuse of dominant position and hence, consumer harm in the relevant market.



31. The residents of phases 1-6 have alleged that because of the current regime for provisions of CIT Services, they are dependent upon the network(s) of PTCL. The ownership and control over G-PON infrastructure, service corridor/ROW and the underlying pipes/ducts granted by Bahria Town, have given PTCL exclusivity in providing CIT Services to the residents, which in turn is abused by Bahria Town management by not addressing the issue of allegedly degraded quality of CIT Services by PTCL and denying/delaying access to other CIT operators to the required infrastructure. The residents are deprived of any alternate and innovative CIT Services such as FTTH (a relatively new and fast growing method of providing vastly higher bandwidth than traditional copper infrastructure, and thereby enabling more robust video, internet and voice services to consumers) which may be provided by the competing undertakings.
32. It appears that by denying access to ROW to Nayatel in order to install its CIT Service in phases 1-6 is directly resulting in consumer harm by forcing residents to subscribe PTCL G-PON services only. For these reasons, Bahria Town has *prima facie* abused its dominant position by preventing and restricting competition in the market of CIT Services. Such practices constitute violations of, *inter alia*, sub-section (e), (g) and (h) of Section 3 of the Act by applying dissimilar conditions on Nayatel and placing it at a competitive disadvantage; excluding Nayatel from distribution of its FTTH based CIT Service and refusing to deal with Nayatel in the relevant market, consequently closing the market for other CIT Service providers and depriving consumer from choice and innovative services.
33. On the flip side, (as noted above in paragraph 10), Nayatel in its comments has stated that the grounds for not allowing ROW in laying its FTTH network in phases 1-6 (also mentioned in Bahria Town's letter dated 14<sup>th</sup> March 2016 to the Commission) are non-availability of space in the existing service corridors or ducts for fiber under the footpath and 5 ft Kacha/un-built area for a new operator. According to Nayatel, it has already laid down its network in densely populated Safari Villas 1 & 2 of Bahria Town and has intelligently accommodated their network without damaging any existing infrastructure and inconvenience to residents. Moreover, they can offer similar engineering practices in phases 1-6 to install their network and infrastructure. According to Nayatel, the ROW space can also be engineered as there is only one CIT operator, PTCL. In Islamabad and other cities, networks of 4 to 5 telecom operators besides electricity, water, sewerage, and gas networks coexist in the same service corridors.
34. In its response to C&TA Department's letter dated 14<sup>th</sup> March 2016, Bahria Town management has informed in plenary terms that it had completed the required infrastructure in Phases 1-6 area including roads and footpaths. New footpaths have been provided during the last one year at the cost of PKR 70.0 million and now they have no ROW available to entertain any other service

provider. They cannot afford to allow any service provider to dig the footpaths again when ICT infrastructure has already been laid by PTCL in the entire area. However, Bahria Town reasoning does not constitute an objective justification vis-à-vis repairing and maintenance guarantees offered by Nayatel to lay its infrastructure as mentioned in paragraphs 10 and 30 above. PTCL continues to enjoy monopoly in the provisions of CIT services in the relevant market as is delineated above irrespective of its quality of services, among other things. The residents of Bahria Town remain dependent upon PTCL's G-PON CIT services and arbitrary decision making of Bahria Town management with respect to resident's rights in the market of CIT Services.

## CONCLUSIONS

35. Bahria Town has *prima facie* abused its dominant position and apparently violated subsection (3) (e), (g) & (h) of Section 3 the Act by applying dissimilar conditions on Nayatel, excluding Nayatel to provide its CIT Services in phases 1-6 of Bahria Town and not allowing it to lay down its infrastructure and providing the residents with alternate CIT Service in phases 1-6 in Bahria Town, which is adversely effecting competition in the relevant market.
36. Given the significance of innovative FTTH based CIT Services and residents' access and freedom to choose between the services and service providers, it is proposed that proceedings may be initiated against Bahria Town (as Respondent) under Section 30 of the Act for violation of Section 3 of the Act.
37. PTCL and Nayatel may also be heard (as necessary party) during the proceedings.

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Enquiry Officer

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