

ENQUIRY REPORT

(Under Section 37(2) of the Competition Act, 2010)

In the matter of complaint filed by Nayatel (Pvt) Limited against National Police Foundation and Tri-Star Cable TV Network

Factual Background:-

1. This Enquiry Report is prepared pursuant to a formal complaint lodged with the Competition Commission of Pakistan (hereinafter the “**Commission**”) under Section 37(2) of the Competition Act, 2010 (hereinafter referred to as the “**Act**”) by M/S Nayatel (Private) Limited (hereinafter referred to as the “**NTL**”) dated October 14, 2011 against M/S. National Police Foundation (hereinafter referred to as ‘**NPF**’) and M/S Tri-Star Cable TV Network (hereinafter referred to as ‘**TCTN**’). In the complaint it has been alleged that NPF and TCTN have violated the provisions of Section 4 of the Act by entering into a prohibited agreement. The complainant has also provided the Commission evidence and supporting documents through its legal council “AQLAAL Advocates” in support of its allegations.
2. In addition to the complaint of NTL the Commission have also received various informal complaints from the residents of NPF sector E-11 (3/4) expressing concerns that due to an exclusive agreement between NPF and TCTN, TCTN is the only cable TV & data transmission services provider in (sector E-11 ¾) i.e. NPF Housing Scheme. It had further been alleged in the resident’s complaints that services provided by TCTN are of poor quality and unreliable. By allowing only one cable operator while denying others, NPF has created monopoly in this sector thus depriving the residents from alternate choices of cable TV connections. Ultimately residents are left with no option but to get the services from TCTN.
3. Residents of sector E-11 approached the NTL who has a modern and reliable quality Cable TV Network, but NPF did not grant them the permission to install the fiber to the home (FTTH) network in the sector E-11. There were several other complaints against the services of TCTN in which customers from different areas submitted their comments against the service quality and management of the TCTN. One comment made on the website regarding service at TCTN is as follows:

03-Oct-2011

Tri-Star | Posted by: Danyaal 2 months, 16 day(s) ago ★★★★★

“They have the most third class service. Dishonest people. Cable quality is third class. The most third class cable service in Islamabad. Very bad cable quality and even worse customer support. Not recommended at ALL.”¹”

¹ <http://www.businesslisting.pk/Capital-Territory/Islamabad/Tristar-b81604>

4. In view of the foregoing, the Commission decided to initiate a formal enquiry under section 37(2) of the Act in the matter of alleged prohibited agreement between NPF and TCTN. The competent authority appointed an Enquiry Committee comprising Ms. Shaista Bano Director (Cartels) and Mr. Muhammad Fahad JEO (C &TA) under powers granted to in Section 28(2) of the Act

Undertakings:

5. According to Section 2(1)(q) of the Act, an undertaking is defined as:

Undertaking” means any natural or legal person, governmental including a regulatory authority, body corporate, partnership, association; trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision of services and shall include an association of Undertakings.”

- a. M/s. Nayatel (Pvt) Limited –:** The NTL network offers ultra broadband Internet, modern telephony and digital video services to business and home users. Nayatel is using the latest technology for its network while utilizing state of the art fiber optic cable, known as fiber to the home FTTH , to deliver superior quality ultra high speed internet, top quality video/TV and /telephony communication to its customers.² NTL is an undertaking in terms of Section 2(1) (q) of the Act.
- b. M/s. National Police Foundation -** The NPF was established in March, 1975 as a Trust under the Charitable Endowments Act 1890 for the benefit of Police Personnel and their Families.³ Hence, NPF is an undertaking in terms of Section 2(1) (q) of the Act.
- c. M/s. Tri Star Cable TV Network-** TCTN is one of the Cable Television Network providing services since 2000 in different sectors of Islamabad Capital Territory under the name and style of Tri Star⁴. Hence, TCTN is an undertaking in terms of Section 2(1) (q) of the Act.

Relevant Market:-

6. The definition of Relevant Market under section 2(1)(k) of the act is being reproduced below

Relevant market” means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or

² www.nayatel.com

³ www.tuugo.pk/companies/tristar

⁴ www.rozee.pk/company_detail

substitutable by the consumers by reason of the products' characteristic, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of the Competition are appreciably different in those areas.⁵

7. According to this definition the relevant market is comprised of a (a) Product Market and a (b) Geographic Market.
8. The product market in the present case consists of multichannel cable TV and data transmission services. The substitutes available to consumers for a cable TV connection are a (i) terrestrial connection via a TV antenna or a (ii) Dish Satellite connection.

In a terrestrial connection:

- Viewers do not have the option to view over the air cable networks such as discovery or universal hd.
- The number of channels is very limited when compared with dish or cable TV.
- Accessibility of signals can be difficult in some areas

With a satellite or dish connection:

The initial cost of setting up an infrastructure is very high as there is a lot of equipment involved

With a Cable TV connection:

- The initial cost involves just the subscription and set top box, so it is a lot cheaper and hassle free compared with satellite TV
- Equipment is leased so there is no need to buy expensive equipment as with satellite TV
- The number of channels is not limited as in the case of terrestrial connection
- There is the option of on demand HDTV movies and program, some free some pay per view
- There is no signal drop in areas where Antenna signal is bad

Thus the dynamics associated with a cable TV service set it up as a unique and distinct product in every sense of the word.

9. Relevant geographic market in the present case consists of sector E-11(3/4) of Islamabad territory which is owned by NPF for the purpose of developing a Housing Scheme. As per clause 13 of the agreement between NPF and TCTN, TCTN enjoys exclusive rights in respect of laying down of Optical Fiber and

⁵ [www.cc.gov.pk/competition Act 2010/section 2 \(1\)\(k\)](http://www.cc.gov.pk/competition%20Act%202010/section%20(1)(k))

provision of multi-channel cable TV and data transmission services to the residents of NPF Sector E-11 housing scheme, Islamabad. With this agreement in effect barriers to entry are created and no other cable operators are allowed to provide there services in the area. Under the scenario free competition is restricted in the area making its situation distinguished from the surrounding geographic areas/sectors. Therefore the geographic market in the context of this enquiry is Sector E-11 of NPF.

Complaint by NTL: The contentions raised in the complaint by Nayatel are summarized below:

10. NPF and TCTN entered into an agreement dated 27-11-2008 for laying down of optical fiber and provision of multi channel cable TV and data transmission services in National Police Foundation sector E-11 housing scheme , Islamabad (hereinafter, the “**Agreement**”).
11. This Agreement contains the exclusivity clause i.e. clause 13, in which it appears that the effect of creating entry barriers for other service providers willing to provide telecommunication and media service and restricting the choice of the customers/residents of NPF housing scheme, sector E-11, Islamabad.
(Copy of Agreement is attached herewith as **Annex-A**).
12. NTL is a service provider duly licensed by the Pakistan Electric Media Regulatory Authority (hereinafter referred to as the “**PEMRA**”) to provide services in competition with TCTN and other Cable TV service providers in Islamabad. However, due to exclusivity clause, NTL is unable to provide services to the residents of sector E-11 of Islamabad.
(Copy of the license granted to Nayatel by PEMRA is attached as **Annex-B**).
13. NTL is using the latest technology for its network while utilizing state of the art fiber optic cable, popularly known as fiber to the home (FTTH), to deliver superior quality ultra high speed Internet, top quality video / TV and / telephony communication to its customers. The scope of services of NTL and charges thereof is appended in the table below:⁶

Telephone		Internet*		Cable TV	
Packages	Charges	Packages	Charges	Packages	Charges
Nayatel to Nayatel	0.25%	Home 15 GB	Rs. 1,199/-	Analog & Digital Channels and In House Cable Channels	Rs. 400/-

⁶ (Copies of brochures are attached as Annex-C)

Nayatel to Fixed Phone and WLL (Local) and (Nationwide)	0.75% & 1.9%	Home 18 GB Unlimited Downloads	Rs. 1,399/-	Set Top Box (STB)	Rs. 4,500/- **
Nayatel to Cellular (Local) and (Nationwide)	2.4% & 2.5%	Home 18 GB Plus Unlimited Downloads	Rs. 1,699/-		
Monthly Line Rent	Zero	Home 20 GB Unlimited Downloads	Rs. 1,999/-		

*Internet speed connect anywhere with the speed of light; having different speed during day and night time in Home Packages.

*Internet Corporate Packages have different rates charge to the customer on the basis of volume and speed being consumed.

**All Hardware charges are inclusive of 16% GST. Installation of STB is free for limited time only.

The setup costs of these services are as follows:

- a. **Installation:** Corporate (Connect, Premium, Data Connectivity's, this includes the 200ft double fiber drop cable): Rs. 6,000/- Home (Home Packages, which includes the 100ft double fiber drop cable): Rs.3, 000/-
- b. **Hardware:** Optical Network Terminal (ONT) (2 Ethernet Port, 2POTS, 1 RF Video, with uninterrupted power supply (UPS)): Rs.24, 000
- c. **Fiber Cable TV one time setup cost:**
 - Installation cost: Rs. 2000
 - Hardware (V-ONT): Rs. 7000
 - **Router**
 - Wireless Firewall Router: Rs.2, 500/-
 - Wireless Business Class Router: Rs.6, 100/-

14. NTL cannot share (or utilize) the network of TCTN as FTTH is entirely a different, costly and robust technology as compared to copper coaxial network which has been used by the Tri Star Cable TV Network. However, due to exclusive agreement between NPF and TCTN, NTL is unable to provide services to the residents of sector E-11 of Islamabad.

Submissions by NPF:-

15. NPF was asked to clarify its position in respect to granting exclusive rights to TCTN vide letter dated May 02, 2011. NPF's written submission in response to a letter by the Enquiry Committee is being reproduced below.

As mentioned in clause 13 of the agreement exclusive rights were given to TCTN for 10 years with effect from 27th September 2008. A notice was served to TCTN upon non-compliance specifically with respect to clauses, 3 and 7 of the notice. According to the terms of the Agreement if any dispute were to arise between parties it shall be settled in accordance with the Arbitration Act 1940. TCTN filed a petition in the civil court and obtained stay order. The issue has not been resolved to date as the matter is pending in the court for final decision.

16. NPF also shared copies of court proceedings including a petition filed by TCTN against NPF and NTL in the Civil Court, the highlights of which are as follows:
- a. At the time of execution of the said agreement TCTN was assured by NPF that no other party but TCTN would have the right to provide Cable Network services to the residents of sector E-11 /3 and E-11 /4 of NPF, Islamabad.
 - b. That thereafter, NPF violated this agreement by allowing some other cable operators to provide the facility of Cable TV to the residents of sector E-11. The proceedings before the civil court are in respect of this matter. NTL complaint to Commission and proceedings before Commission are independent of that matter.
 - c. As a result NPF withdrew their termination letter and requested TCTN to resume provision of Cable TV services to the residents of the sector E-11, Islamabad. Furthermore NPF assured TCTN of compliance with contractual obligations by not allowing any other person / company/ party to provide the said services in the concerned sector.
 - d. NPF is fully aware that the agreement which was executed between the parties would not expire until September 2018 and that until that period TCTN has exclusive rights to provide Cable TV Network and data transmission services to the residents of NPF, sector E-11, Islamabad.
17. 'Status Quo' orders dated 22-09-2011 was passed by the civil court in the favor of TCTN against the NPF and NTL which still holds the field. This court order that is self explanatory does not bar any other legal proceedings from taking place while this order is in force. Therefore this order does not bar the Commission from initiating proceeding in the matter at hand under Section 30 of the Act. (Copy of the order dated 22-09-2011 is attached as "**Annex- D**").

TOR:-

18. Whether the exclusive agreement entered into by and between NPF & TCTN is a prohibited agreement and is in violation of Section 4 of the Act, by having an object or effect of preventing, restricting or reducing competition in the relevant market?

Exclusivity Granting Agreement between the Parties:

19. The agreement took effect on 27 September, 2008 under the title **“Laying down of Optical Fiber and provision of multi-channel Cable TV and data transmission services in National Police Foundation sector E-11 Housing Scheme”**. Relevant extracts from the exclusive Agreement between the two parties i.e. NPF & TCTN are being reproduced below:

“1st party would have exclusive rights for National Police Foundation for 10 years which will be extendible with mutual consent with terms and conditions to be agreed.”

Clauses (3-7 & 9) of the Agreement appear to be relevant after thorough examination and are reproduced as under:

(3) 1st party will be responsible for laying of under ground optical fiber network and necessary equipment and its maintenance in Sector E-11 scheme.

(4) 2nd party will facilitate the 1st party for laying of its network and equipment.

(5) 1st party will not damage infrastructure of the E-11 scheme during the laying of cable or providing connection and will make good any loss resulting from any damage.

(6) Network and all the equipment will remain 1st party's property.

(7) 1st party will be responsible for the transmission maintenance of the services.

(9) 1st party will charge monthly fee to the subscriber as laid down by the PEMRA.

Whereas TCTN and NPF have been defined in the agreement as “1st Party” and “2nd Party” respectively.

Analysis:-

20. Any agreements entered into by undertakings with respect to the production, supply or distribution of services that have the object or effect of preventing or restricting competition in the relevant market are prohibited under section 4 of the Act unless exempted under section 5. The relevant portions of section 4 are being reproduced below

4. Prohibited Agreements: - (1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have their object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.⁷

(2) Such agreements include, but are not limited to-

(a) Fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service;

(d) Limiting technical development or investment with regard to the production, distribution or sale of the any goods or provision of any service.

21. The agreement contains an exclusivity clause, i.e. clause 13 that grants laying down of Optical Fiber and provision of multi-channel Cable TV services exclusively to TCTN in the relevant market. This clause has been introduced in the Agreement with the sole object of creating entry barriers for other service providers responsible for telecommunication and media service provision thereby restricting the choice of the customers/ residents of NPF housing scheme, sector E-11, Islamabad. Creating such an entry barrier has the effect of reducing, restricting and preventing competition in the relevant market as envisaged in Section 4 of the Act.
22. By virtue of clause 13 of the Agreement, *prima facie* the consumers (residents) are restricted to fulfill their cable TV requirements from only one service provider despite availability of a host of others. This not only denies consumers benefits resulting from a free market environment but also denies suppliers the opportunity to gain market by offering better services at competitive rates. Such restrictive trading conditions *prima facie* constitute violation of section 4 of the Act.
23. Moreover, residents of sector E-11 have no access to a modern and reliable quality Cable TV Network because of the agreement between TCTN and NPF. There have been complaints against the quality of service offered by Tri-star from residents of other areas as well. One of the objects of competition is to encourage innovation in order to make the best known technology available to consumers at the lowest possible price. By virtue of the Agreement TCTN does not have much incentive to upgrade or invest in its services at least for the period that it is protected from competition. This limiting of technical development or investment with regard to the provision of services in the relevant market is a *prima facie* violation of section 4 of the act. (*Paragraph No. 3*)

Conclusion/Recommendations

⁷ [www.cc.gov.pk/Competition Act 2010/section 4 \(1\) & \(2\) a, b & d.](http://www.cc.gov.pk/Competition Act 2010/section 4 (1) & (2) a, b & d.)

24. The agreement between TCTN and NPF that is effective for ten (10) years and, *prima facie*, denies a level playing field by creating barriers to entry, denying a free market environment and disincentivizing innovation has the object or effect of preventing, restricting or reducing competition within the relevant market. Such practices are considered, *prima facie*, violation of sub-section (1) of Section 4 and in particular clause (a) & (d) of the sub-section (2) of Section 4 of the Act.
25. By examining the complaint and supporting documents provided by the complainant, it appears that undertakings NPF and TCTN are *prima facie* involved in anti competitive practices that deny consumers free choice in attaining value for money. This type of restrictive trading conditions if unchecked would have the effect of encouraging such behavior in other relevant markets. In view of the foregoing, it is therefore proposed that proceedings under Section 30 of the Act may be initiated against NPF and TCTN.

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Dated: 20-02-2012