



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF
SHOW CAUSE NOTICE ISSUED TO
PAKISTAN BAHRIA TOWN (PVT.) LIMITED**

(F. NO: 153/BAHRIA/C&TA/CCP/2016)

Date(s) of hearing: 18-08-2016
15-11-2016
22-11-2016
13-12-2016
18-08-2016

Commission: Dr. Shahzad Ansar
Member

Mr. Ikram Ul Haque Qureshi
Member

Present on behalf of:
M/s. Bahria Town (Pvt.) Limited

Mr. Amjad Ali, Manager (Services) North
Mr. Aftab Ahmed Butt, Advocate

M/s Nayatel (Pvt.) Limited

Sardar Ejaz Ishaq Khan, ASC

Mr. Muhammad Faisal Khan, Advocate

**Pakistan Telecommunications
Company Limited**

Mr. Ghulam Mustafa, GM Legal

Ch. Badar, Asst Manager, Legal,
Corporate & Commercial Affairs

Mr. Amir Shafique, GM (Regulatory Affairs)

Mr. Aziz-ur-Rehman, Sr. GM (Legal)

Hassan Kaunain Nafeez

Mr. Azid Nafeez, ASC
Mr. Gulalay Zeb, Associate



ORDER

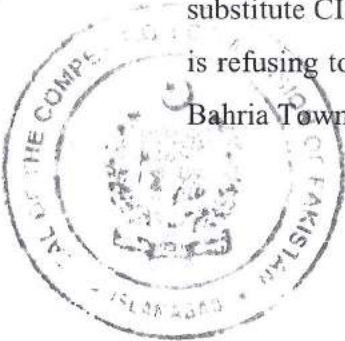
1. This Order shall dispose of proceedings initiated under Section 30 of the Competition Act 2010 (the 'Act') *vide* Show Cause Notice No. 24/2016 issued to M/s Bahria Town (Private) Limited (hereinafter, the 'Undertaking' or 'Bahria Town'). The primary issue, in this case, is whether Bahria Town has a dominant position in phases 1-6 of Bahria Town Rawalpindi and whether it has abused its dominant position in contravention of subsection 3(1) read with subsection 3(2), 3(3) (e), (g) & (h) of the Act by not granting M/s Nayatel (Private) Limited ('Nayatel') Right of Way (ROW) to lay down its Cable, Internet and Telephony services (CIT Services) in phases 1-6 to the resident's determinant and competition in the region.

THE UNDERTAKINGS

2. M/s Bahria Town is a private limited company engaged in the business of real-estate development and management in various cities of Pakistan and is an undertaking in terms of Section 2(1)(q) of the Act.
3. M/s Pakistan Telecommunication Company Limited (PTCL) is a company engaged in the business of providing CIT Services nationwide and is an undertaking in terms of Section 2(1)(q) of the Act.
4. M/s Nayatel is a company engaged in the business of providing Fibre-To-The-Home (FTTH) based CIT services and is an undertaking in terms of Section 2(1)(q) of the Act.
5. Bahria Town, PTCL and Nayatel may collectively be referred to as the "Undertakings".

THE BACKGROUND

6. On 12.01.2016, the Commission received an email from a resident of Bahria Town highlighting concerns that the residents of phases 1-6 were deprived of any alternate CIT service provider and they were forced to subscribe PTCL services. No other options or substitute CIT services providers were available because the management of Bahria Town is refusing to grant NOC (no objection certificate) to Nayatel to operate in phases 1-6 of Bahria Town.



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7. The Cartel & Trade Abuse (C&TA) department of the Commission initiated a probe to assess the veracity of alleged violation of the Act. The C&TA department shared the contents of the email with the management of Bahria Town to seek their comments. Also, the management was required to provide a copy(s) of the agreement(s), if any, with PTCL to determine the nature of the arrangement between them. Similarly, Nayatel was also asked to submit its comments if it has contacted the management of Bahria Town to lay down its CIT infrastructure/ network in phases 1-6.
8. In response, Bahria Town wrote to the C&TA department that Nayatel is operating in Safari Villas 1 & 2 of Bahria Town. Also, it has been granted permission to install its CIT infrastructure/ network in phase 7 & 8. Concerning phases 1-6, the management of Bahria Town stated that there are 6,800 plots and during the last year they had spent PKR 70 million on new footpaths. Besides, PTCL had already taken the space with its CIT infrastructure and there is no more space available to accommodate Nayatel.
9. Nayatel stated that it intends to install its CIT infrastructure/ network in phases 1-6. It has been negotiating with the management of Bahria Town for quite some time and was asked by the management of Bahria Town to quote a *revenue share percentage* for the grant of ROW. In response, Nayatel submitted it has offered to match the percentage that PTCL was paying in phases 1-6.
10. According to Nayatel, its offer was turned down and it was told by the management of Bahria Town that there is no more space available in the utility corridors of phases 1-6 to deploy any other CIT infrastructure/ network. Nayatel also submitted that the management of Bahria Town offered them to submit a proposal for the installation of CIT network in phases 7 & 8. However, if it were allowed to operate in phases 1-6, which are fully developed phases of Bahria Town, it would also invest in remaining phases 7 & 8.
11. Furthermore, Nayatel submitted that it is operating its FTTH network in the densely populated areas of Safari Villas 1 & 2 of Bahria Town, wherein the ROW is scarcer in comparison to phases 1-6. It accomplished the project by employing latest engineering techniques and the best practices for installation used for such networks. Post installation, it had reinstated all footpaths and other structures of Safari Villas to the satisfaction of the management of Bahria Town. Not a single complaint against Nayatel was registered due

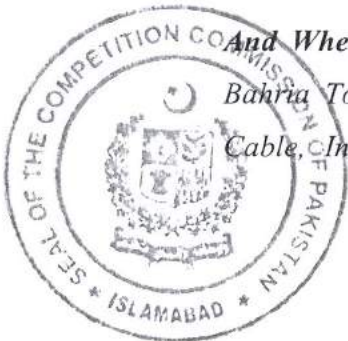


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to any damage to footpaths, driveways, and environment. If Bahria Town management grants it permission to install its infrastructure/ network in phases 1-6, it shall adopt the same best practices and will ensure that the work is done as per international best standards and up to the satisfaction of Bahria Town management.

12. In response to the C&TA department's enquiry pertaining to *revenue sharing percentage*, Bahria Town shared its Memorandum of Understanding executed with PTCL on 30.04.2003 (MOU). However, the MOU does not mention any *revenue sharing percentage* by PTCL except the advanced deposit of demand notes for 6,000 new telephone connections in different tranches by Bahria Town and lying down its G-PON (Gigabit Passive Optical Networks) based CIT services in phases 1-6.
13. After a thorough probe, the Enquiry Committee *vide* its Enquiry Report dated 17.06.2016 (the '**Enquiry Report**') concluded that the management of Bahria Town has exclusive control and dominant position in granting the ROW in Bahria Town. Its conduct appears to have violated subsection 3(1) read with (3)(e), (g), and (h) of the Act by applying dissimilar conditions on Nayatel, excluding Nayatel to provide its CIT services in phases 1-6 of Bahria Town and eventually refusing to deal with Nayatel by not permitting it to lay down its infrastructure/ network for providing the residents with choice/ alternate CIT services. Given the significance of innovative FTTH based CIT services and resident access/ right to choose/ substitute between the services and service providers, the Enquiry Report proposed to initiate proceedings against Bahria Town under Section 30 of the Act. Also, the Enquiry Report recommended that PTCL and Nayatel may also be heard as necessary parties during the proceedings.
14. Based on the finding of the Enquiry Report, the Commission issued the SCN to Bahria Town on 02.08.2016, thereby directing it to submit a written reply within fourteen (14) days and to appear before the Commission on 18.08.2016 to avail the opportunity of being heard under Section 30(2)(b) of the Act. The relevant parts of the SCN are as reproduced herein under:

And Whereas, an email was sent to the Commission by a resident of Bahria Town, Rawalpindi alleging that they were forced subscribe to Cable, Internet and Telephone Services (CIT Services) provided by



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Pakistan Telecommunication Limited ('PTCL') and are deprived of any alternate CIT Services as Bahria Town was not issuing its no objection certificate to Nayatel (Private) Limited (Nayatel) to operate in Phase 1-6 of Bahria Town, Rawalpindi;

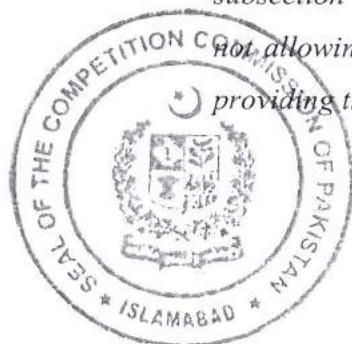
And Whereas, after an initial probe to ascertain preliminary facts, an enquiry was initiated by the Commission on 22 April 2016 under Section 37(1) of the Act to determine whether the Undertaking was in violation of the Act;

And Whereas, the enquiry was completed vide report dated 17 June 2016 (the "Enquiry Report"), a copy of which is enclosed herewith as 'Annex-I', which may be read along with this show cause notice;

And Whereas, in terms of the Enquiry Report in general and paragraphs 19 to 24 in particular, the market for right of way for provision of CIT Services in Bahria Town Rawalpindi Phase 1-6 has been identified as the relevant market under Section 2(1)(k) of the Act;

And Whereas, in terms of the Enquiry Report in general and paragraphs 25 to 27 in particular, it appears that the Undertaking, prima facie, has been found to hold dominant position in the relevant market in terms of Section 2(1)(e) of the Act by virtue to being the exclusive authority to grant the right of way for the provisions of CIT Services;

And Whereas, in terms of the Enquiry Report in general and paragraphs 28 to 34 in particular, the Undertaking has prima facie abused its dominant position in contravention of sub-section 3(1) read with subsection 3(2) and subsection 3(e)(g) & (h) of Section 3 of the Act by not allowing Nayatel the right of way to lay down in infrastructure and providing the residents with CIT services in Phase 1-6 in Bahria Town;



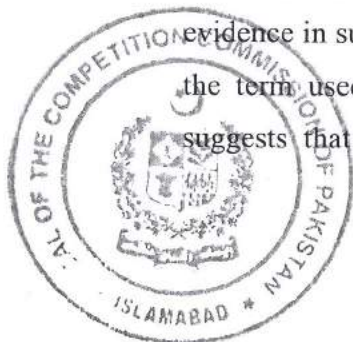
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SUBMISSIONS

15. The Parties' written and verbal submissions during the hearings held on 18.08.2016, 15.11.2016, 22.11.2016, 13.12.2016 and 19.12.2016 are summarized herein under:

Bahria Town

16. Bahria Town's counsel argued that it may be treated in accordance with Article 4 and 10-A of the Constitution of Pakistan 1973 (the '**Constitution**') and the procedure envisaged under Section 30(2)(b) of the Act. According to the counsel, the Commission has granted the right of hearing to Nayatel, who is one of the competitors along with PTCL. The hearing in rebuttal by Nayatel can only be considered if the Commission considers quashing the Enquiry Report first. Nayatel cannot be tagged as an undertaking, which has been excluded from operating within Bahria Town as it is effectively competing in other geographical regions of Rawalpindi and Islamabad.
17. Referring to Section 37 of the Act, the counsel submitted that Section 37(1) of the Act is fit for certain restraints of trade that are unreasonable *per se*. The instant proceedings were initiated pursuant to a complaint under Section 37(2) of the Act. The counsel argued that under Section 37(2) legislature has intended that besides an undertaking(s), only a registered consumers association can file a complaint. Neither an individual consumer has *locus standi* to file a complaint nor is the Commission competent to adjudicate upon such complaint. Rather, individual grievances are to be addressed under the Provincial consumer laws. Furthermore, Section 37(2) requires the Commission to form an opinion if the fact presented before it are sufficient to initiate an enquiry. In case the facts are insufficient, the Commission must resort to outsourcing its enquiry under Section 37(3) as per the direction of the Islamabad High Court given in 2016 CLD 1688. Moreover, the determination of relevant market by the Enquiry Officers was beyond the powers delegated to them by the Commission.
18. The counsel submitted that during the initial probe, the Enquiry Officers did not get any 'affidavit in evidence' from the Complainant or require from him any *prima facie* evidence in support of his claim. Furthermore, the Enquiry Officers omitted to notice that the term used in the preamble of the Act is 'consumers' and not 'consumer' which suggests that only matter related the larger number of the public could become the



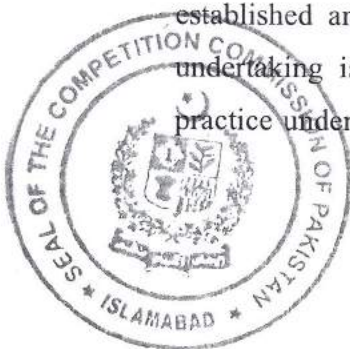
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subject-matter of enquiry under the Act. So the Enquiry Officers were under obligation to enquire into whether the CIT services offered by PTCL are being offered, *inter alia*, at exuberant prices, oppressive rates, or poor quality as has been alleged by the resident.

19. The Enquiry Officers have initially treated this matter under Section 4 of the Act, but the Enquiry Report refers to violation of various provisions of Section 3 of the Act. Section 3 is a “deeming provision”, the application of which requires the satisfaction of the certain preconditions. The criteria laid down in PLD 2007 Lahore 1 and PLD 1975 SC 397, is that “*the court in regard to deeming provision is entitled to ascertain the purposes and scope of the same i.e. as to how and between whom, is the deeming provision attractive or made applicable.*” For the deeming provisions to be applicable, all the conditions laid down in the relevant provision must be fulfilled.

20. In its reply to the SCN dated 21.09.2016, the management of Bahria Town submitted that it does not have a dominant position in the relevant market. Moreover, the Enquiry Officers have not identified the relevant market properly. A determination of the ‘relevant market’ is the prerogative of the Commission and not the Enquiry Officers. The geographic market can be determined either on the basis of territory which is Rawalpindi or Islamabad or the entire set of projects being operated and managed by Bahria Town. It does not have more than 40% shares of the relevant market; therefore, it cannot abuse its dominant position. Bahria Town’s obligation to grant ROW for the provisions of CIT Services need to be examined in comparison with other entities engaged providing the same services in the twin cities of Rawalpindi and Islamabad, which are inclusive of DHA (Defense Housing Authority), CDA (Capital Development Authority) and RDA (Rawalpindi Development Authority), and other cooperative housing societies. While determining the relevant geographic market the condition of ‘homogeneity of competition’ has not been met, rather the same has just summarily been declared phases 1-6 of Bahria Town.

21. The counsel further contended that the essentials to ‘refusal to deal’ that need to be established are not met. It is imperative to establish that the conduct of a dominant undertaking is without ‘objective business justifications’ to make it an exclusionary practice under Section 3 of the Act. Furthermore, it is pertinent to determine the ‘intent’



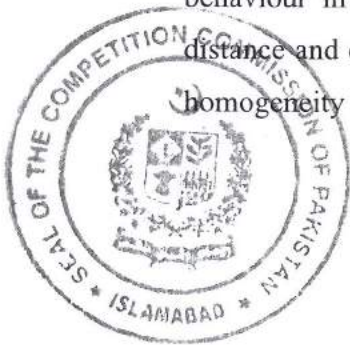
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of the dominant undertaking to condemn an alleged 'refusal to deal'. A competition authority cannot be used to justify an intervention and to improve the bargaining position of the party when in effect; no competition issue exists because there is no competitor of PTCL in the relevant market. It is an established principle that it is not the competitor that is to be protected, but the competition in the relevant market. With respect to alleged violation of 'applying dissimilar conditions to equivalent transactions', Bahria Town submitted that Enquiry Report did not point out and/or determine how the parties or transactions can be treated as 'equivalent'. Market factors may allow different parties to be treated differently, which cannot be treated as discrimination.

22. Bahria Town is constitutionally protected to enjoy and dispose of its property and cannot be deprived of this right under the pretext of an ordinary legislation. Contracts entered into with free consent between the parties are the only way forward and coercion in any manner to enter into a contract without the free consent of one of the parties to contract is an abuse of the process of law. Finally, the counsel submitted that since the enquiry was initiated under Section 37(2), but the SCN issued by the registrar of the Commission was under Section 37(1) of the Act, which is without lawful authority.

PTCL

23. Much as Bahria Town's argument, PTCL also submitted that the relevant geographic market identified in the Enquiry Report is flawed as it consists of twin cities of Rawalpindi and Islamabad. While delineating the relevant geographic market the Enquiry Officers must take into account that the conditions of competition are 'sufficiently homogenous' and capable of 'being distinguished from neighbouring market'. In addition, the geographic markets need to be demarcated together with the product market. Nonetheless, PTCL concurs with the findings of the Enquiry Reports in relation to relevant product market i.e., the grant of ROW for CIT Services. It further submitted that CIT services are being granted in the twin cities of Rawalpindi and Islamabad, which constitutes a single market by virtue of similar conditions of competition for granting a ROW, as there are no significant economic barriers and there is similar consumer behaviour in the twin cities. Factors such as similarity of price, availability of land, distance and commuting faculties, proximity and connectively, infrastructure endorse the homogeneity between the twin cities.



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24. The presence of other authorities *such as* RDA, CDA, and DHA signifies that Bahria Town is not the sole provider of grant of ROW for CIT Services within the twin cities. Therefore, Bahria Town is not a dominant undertaking in the relevant market. Neither does the question of abuse of dominant position arise, nor does it have the power to hinder effective competition.
25. Citing the Indian judgement in the matter of *Oberoi Cars Private Limited, New Dehli v Imperial Housing Ventures Private Limited, Gurgaon (2016 Indlaw CCI 48)* (hereinafter, *Oberoi Cars Case*), PTCL's counsel submitted that 'in its order relating to a company engaged in the business of real estate development, the Commission did not restrict the relevant geographic market to only the sectors where the company had allotted apartments to the complainant. Rather, the relevant geographic market was taken to be the cities of Noida and Greater Noida, as it observed that the conditions prevailing were homogeneous and distinct from those prevailing in adjacent areas. Citing *Gajinder Singh Kohli v Genius Propbuild Private Limited (2016 Indlaw CCI 35)* (hereinafter, *Gajinder Singh Case*), the counsel contended that *'there were other real estate developers operating and competing in the relevant market and accordingly the company was held not to possess the market power to act independently of its prevailing competitive forces'*.
26. Referring to paragraph 37 of the Enquiry Report, PTCL's counsel submitted that the Enquiry Report has suggested *"PTCL and Nayatel may also be heard (as a necessary party) during the proceedings"*. However, the Enquiry Officers have omitted to gather information from PTCL during the conduct of the enquiry. Further, Enquiry Officers have directed to the Commission to hear PTCL as a necessary party, which they did not have authority to do. Once proceedings are initiated, the Commission can itself perform fact-finding functions as an enquiry officer.
27. PTCL's counsel submitted that the Superior Courts have held that an enquiry under Section 37 of the Act can only be initiated once the Commission has sufficient facts. Hence, by relying on the one-sided stance of Nayatel, the Commission did not have sufficient facts to initiate the enquiry. And since PTCL has already laid its infrastructure in phases 1-6 of Bahria Town, it has proprietary rights over the utility corridors of Bahria

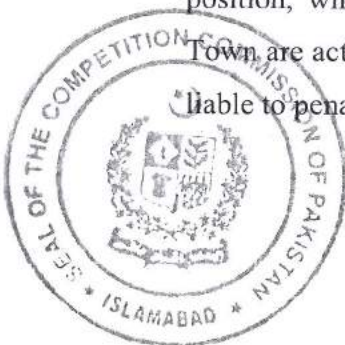


Town and it would have been in a better position to explain the availability of ROW underneath the footpaths. Furthermore, when Nayatel responded by stating that PTCL was not paying any *revenue share percentage* to Bahria Town for ROW, the Enquiry Officers did not seek to verify such information with PTCL. The Enquiry Officer merely relied on Nayatel's submissions in which it assured the Enquiry Officers that it would be able to successfully lay down its CIT infrastructure/ network without any harm being caused to any other service. If the Enquiry Officers had sought PTCL comments, it would have been in a better position to explain the availability of ROW.

28. The counsel further submitted that PTCL has no intent to exclude Nayatel from the relevant market as it has been granted No Objection Certificate (NOC) to operate in Bahria Town phase 7 & 8, Defence Villas, and DHA-1 Sector F. Since PTCL has already laid its infrastructure in phases 1-6, Bahria Town's decision not to allow Nayatel to operate in these phases is based on reasonable justifications and on its own incapacity to provide ROW to Nayatel. Furthermore, PTCL laid its G-PON (Gigabit Passive Optical Network) based CIT infrastructure/ network in phases 1-6 in 2003 and currently is installing FTTH services in phase 7 & 8. PTCL has made a huge investment on these projects and is entitled to reap its benefits. It would be unfair to PTCL if a competing service provider is allowed it would affect profit accruing PTCL's efforts and investment.
29. Finally, citing Section 28(2) of the Act, PTCL's counsel argued that the Commission is empowered to "*delegate all or any of its functions and powers to any of its Members or officers as it deems fit*" however the exercise of such discretion should not be so wide that it becomes impossible to discern its limits. The main objective of an enquiry is 'fact-finding'. Neither the scope of enquiry should go beyond such purpose nor should the powers delegated be indefinite so as to confer on the Enquiry Officers adjudicating powers to determine relevant market.

Nayatel

30. Nayatel's counsel submitted that PTCL has defended Bahria Town's abuse of dominant position, which is clear evidence of a *concerted practice* whereby PTCL and Bahria Town are acting in concert to erect barriers to entry, making both PTCL and Bahria Town liable to penalties under the Act.



31. The key issue in the matter at hand is, whether refusal to grant ROW to a competitor of an existing service provider is tantamount to abuse of dominant position, is well settled in the Order in the matter of Show Cause Notice to **Wateen Telecom (Private) Limited and Defence Housing Authority (2010)** [hereinafter, *Wateen Order*], wherein the Commission has held that *“the grant of right of way to dig soil and lay infrastructure in the DHA Region exclusively to Wateen will prevent other telecom operators to provide services in the DHA region through the HFC network. This will have the effect of reducing, restricting and prevent competition in the relevant market”*. The counsel also submitted that though the infringement in question was that of Section 4, the net effect is identical to the exclusive agreement therein, which was meant to exclude other entrants in the DHA’s geographical area.

32. Furthermore, the barrier to entry in the relevant market has been up for 13-year by now. Bahria Town has given inconsistent explanations over this period which are:

- a. *vide* letter dated 25.10.2014, Bahria Town asked Nayatel to quote revenue share;
- b. *vide* letter dated 12.12.2014, Bahria Town declined market entry claiming that PTCL’s services were provided free of cost to subscribers and that there were no further requirement of any other operator for the same type of services in the relevant market; and
- c. *vide* letter dated 14.03.2016, Bahria Town has replied to the Commission that PTCL has already taken space for CIT infrastructure and there was not much room available for Nayatel.

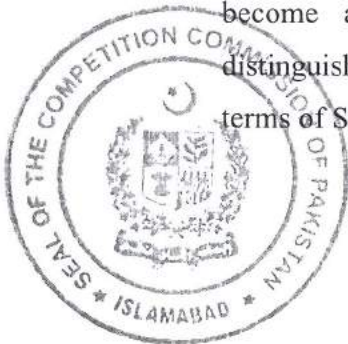
33. In relation to the adequacy of space available for an additional ROW in phases 1-6 of Bahria Town, Nayatel’s counsel proposed:

- a. ~~first~~ requiring a senior officer of Bahria Town under Section 33 of the Act to give an affidavit of there being no physical space left for ROW;



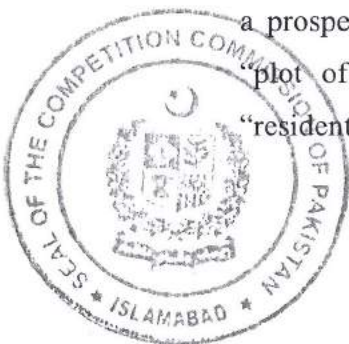
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- b. *second*, if Bahria Town swears the affidavit, Nayatel would move that the Commission seek expert neutral opinion, say a civil engineer with experience of laying utility ducts and telco cables in housing projects for a survey report to the Commission; and
- c. *third*, examining both Bahria' Town's officer and the neutral expert opinion on oath (Bahria Town's officer's testimony and expert's report and testimony to be validly tendered in evidence would require examination-in-chief with the right to cross-examine).
34. If there is no physical space available, Bahria Town's stance wilful stand vindicated. In case, there is physical space available, Bahria Town's stance will amount to will misrepresentation and a violation of Section 3 of the Act.
35. In respect of relevant product market, Nayatel submitted that it concurs with PTCL i.e., the ROW for CIT Services. The SCN is issued to Bahria Town and the alleged abuse of dominant position pertains to Bahria Town and not to PTCL. Bahria Town cannot influence the conditions of competition in the ROW market in CDA, RDA, and DHA. Nayatel relies on the relevant principles laid down by the Commission in **Engro Vopak Terminal Order (2010)** (hereinafter, *Engro Order*), wherein the Commission held that:
- a. defining the relevant market is not an end itself. It is an analytical tool for the ultimate objective of identifying dominance and resultant ability to, *inter alia*, limit the consumers' choice by raising barriers to entry. For the purposes of the Act, the expression "dominant position" extends to the ability of Bahria Town to raise barriers to entry.
- b. given the fact that Bahria Town holds dominant position in the granting ROW in the geographic bounds of Bahria Town, the conditions of competition have become appreciably different in Bahria Town, which therefore can be distinguished from neighbouring geographic areas of DHA, CDA and RDA in terms of Section 2(1)(k) of the Act.



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- c. the relevant product market i.e. ROW for CIT Services is itself subject to varying conditions of competition, depending on the relevant geographic market. Therefore, the reference to DHA, CDA, and RDA is a logical fallacy intended to mislead as each housing authority exercises absolute dominance simultaneously over the ROW product market in the geographic area owned and possessed by them. ROW in DHA, ROW in CDA, ROW in RDA and ROW in Bahria Town are not substitutable products *inter se* for this reason.
- d. referring to the 1997 Notice on Market Definition by the European Commission, Nayatel's counsel contended that the 'hypothetical monopolist test' is employed by competition regulators to determine the 'relevant market'. According to the counsel, it is a logical fallacy to assume that only neighbouring geography is relevant – each geographic neighbourhood becomes distinct once conditions of entry are in the control of a distinct legal entity. In the matter at hand, Bahria Town is a supplier of the relevant product ROW for CIT services resulting in the "Bahria ROW market", the "DHA ROW market" or the "RDA ROW market" in their geographical manifestations.
- e. For the purposes of Section 2(1)(k) of the Act, the 'conditions of competition' for the ROW geographic market are homogeneous in Bahria Town but are not homogeneous with the ROW markets in DHA, CDA, and RDA. Taking into account the key ingredient in terms of "Demand Substitution", the ROW demand for Bahria is not substitutable with the ROW demand in CDA, RDA, or DHA.
- f. furthermore, PTCL's reliance on the *Oberoi Cars Case*, wherein the product market was identified as "residential flats" is misconceived as in its judgment the Competition Commission of India (CCI) held at para 38 that "...[I]t may be noted that a plot of land or a commercial space cannot be considered as substitutable with a residential unit by the consumers because of the difference in its characteristics of the product, different in price and intended use," which means a prospective buyer could buy residential flats from multiple developers and a plot of land" were different which could not be taken as substitutes for "residential flats". Similarly, CCI in *Gajinder Singh Case*, wherein the



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respondents were property developers and complaints related to abuse of dominance in the product market pertaining to “provision of services for development and sale of residential apartments/flats” in greater Noida region. Because these services could not be distinguished from neighbouring geographic areas, CCI held that it would have been inclined to a much narrower geographic area if plots of land were the relevant product for the complaint before the Commission.

36. With regards to PTCL pleading as a necessary party, Nayatel’s counsel argued that no prejudice is being caused to PTCL and since the SCN is against for abuse of dominant position in Bahria Town and not to PTCL, it can make its submissions as it deems necessary. Citing paragraph 14 of the Commission’s order in the matter of Pakistan State Oil Company Limited (2016) [hereinafter, *PSO Order*], the counsel contended that even non-participation of an interested party is not fatal to the SCN proceedings as long as each party can make its submission at the SCN hearings. Therefore, PTCL’s argument pertaining to the inadequacy of the Enquiry Report and validity of the SCN are not justified as per the practice of the Commission.
37. Moreover, Nayatel’s counsel submitted that PTCL’s submission in respect of ‘no intent to exclude’ is baseless because the matter at hand involves entry into phases 1-6 and not 7 & 8 of Bahria Town. Since PTCL has averred Bahria Town’s inability to provide space to another service provider; it is a question of fact, which can be determined by the Commission as duly noted in the preceding paragraphs in general and reproduced in paragraph 33 in particular.
38. Finally, the counsel reiterated that PTCL has been in the relevant market for more than 13-year. While exclusivity for non-essential facilities may be tolerated for some period as is reasonably required to recoup the risky investments, provided that such exclusivity is based on transparent terms. The counsel also submitted that the ROW is an essential facility and the protectionist-led approach is not sustainable. The onus is on Bahria Town and PTCL to show that the 13-year period lapse was not enough to recoup PTCL’s investment. An indefinite restraint on competition cannot be allowed. Apart from bald assertions, PTCL has not provided any facts or figures to the Commission to substantiate



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that the 13-year was not enough to recoup its investment. To elucidate, the laying down a CIT infrastructure/ networks is not such a capital intensive investment. Referring to Wateen Order, the counsel submitted that the Commission had rejected Wateen/DHA agreement on the basis that business plan which was for 15-year, while the exclusivity granted was for 30-year.

ISSUES

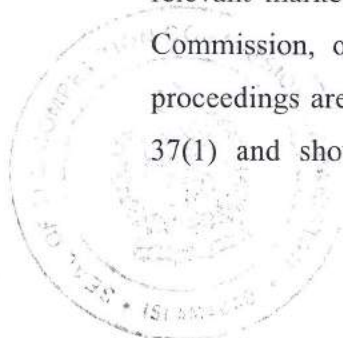
39. Based on the submissions, the main issue in the matter at hand are:

- I. *Whether Bahria Town and PTCL have been dealt with in accordance with the procedure laid down in the Act?*
- II. *Whether the relevant market as is defined in the paragraphs 19-24 of the Enquiry Report is correct?*
- III. *Whether Bahria Town has a dominant position in the relevant market?*
- IV. *Whether Bahria Town's conduct amounts to an abuse of dominant position under subsections 3(3)(e), (g) and (h) read with Section 3(1) of the Act, preventing, restricting, reducing or distorting competition in the relevant market?*

ANALYSIS

Issue-I

40. At the outset, the Commission notes that after an initial probe by the C&TA department, the enquiry in the matter at hand was formally authorized and initiated under Section 37(1) of the Act, which thereby empowers the Commission to initiate an enquiry, on its own, into the matters relevant to the purposes of the Act. The definition of 'undertaking' under Section 2(1)(q) includes "any natural or legal person". Any individual or an entity can reach out the Commission and highlight concerns affecting competition in the relevant market in any manner such as email or letter via the Complaint Cell of the Commission, or by filing a complaint under Section 37(2) of the Act. The instant proceedings are based on an enquiry authorized by the Commission pursuant to Section 37(1) and show cause notice was issued under Section 30(2)(b) of the Act. The



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Commission finds no merit in the arguments and contentions of the counsel of Bahria Town as reproduced in paragraphs 16, 17, 18 and 19 above.

41. The counsels of Bahria Town and PTCL have stressed considerably upon the validity of the Enquiry Report and the status of Nayatel as a necessary party to the proceedings. The Commission deems it appropriate to address the issues raised by the counsels at some length. In this regard, it is pertinent to mention that everything has to be examined in the context. Needless to reiterate, Bahria Town's counsel has argued that they should be dealt with in accordance with Article 4 and Article 10-A of the Constitution and Section 30(2)(b) of the Act. The counsel of PTCL has further stated that the Enquiry Report has been concluded without taking any input from PTCL and Nayatel is not a proper and necessary party to the proceedings. In essence, both Bahria Town and PTCL have made identical arguments in this regard. These issues are addressed in the following paragraphs:

I. pursuant to Section 28(2) of the Act, in order to determine the factual matter pertaining to the alleged contraventions of the Act, the Commission can delegate any of its powers and functions to any of its Members or officers as it deems fit. Once an enquiry is authorized and an enquiry committee is constituted, such committee is independent on how to conduct the enquiry to determine the factual position in relation to the alleged violation and/or any contravention of the Act. The Enquiry Officers can seek any information from the complainant and respondent or take the view of any other undertakings as well, and it may or may not dispense with the same as it finds appropriate in the circumstances of the case. Keeping in view the requirement of fairness as well as the interest of the parties who were affected by the alleged contravention of the Act, the Enquiry Committee deemed it appropriate to probe Nayatel, which the Commission finds is directly affected by the conduct of Bahria Town. Furthermore, recommendations contained in the Enquiry Committee to solicit the views of PTCL during the proceedings and to provide it with the opportunity of being heard was duly availed by PTCL during the hearing stage. Therefore, the Commission is of the considered opinion that the arguments of Bahria Town and PTCL's counsel, in particular, their objections with regard to the prerogative of



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the Commission to delegate its powers and function to the Enquiry Committee are baseless and irrelevant and does not withstand a legal and/or logical scrutiny.

- II. in relation to the common argument raised by PTCL and Bahria Town – to exclude Nayatel as a necessary party in the proceedings, the Commission finds that the Enquiry Report has made a recommendation to hear both PTCL and Nayatel as necessary parties during the proceedings. Though a recommendation made in the Enquiry Report is not binding on the Commission while deciding to issue a show cause notice, the Commission is, nevertheless, empowered to call any person to the proceedings. It is pertinent to highlight that in the matter at hand, both PTCL and Nayatel have been admitted to the proceeding after receipt of intervener applications under Regulation 27 of the Competition (General Enforcement) Regulations 2007 received on 21.09.2016 and 04.10.2016 respectively. Hence, both PTCL and Nayatel have acquired the status of being a proper and necessary party as interveners in accordance with the procedure laid down in the Act and regulations made thereunder. In addition, it is noted that the law provides for the issuance of show cause notices to parties that appear to be in contravention of the provisions of the Act. At the outset, it was the conduct of Bahria Town that in the view of the Commission merited issuance of SCN to Bahria Town only. In light of the foregoing, the Commission is of the considered opinion that these contention of Bahria Town and PTCL are baseless.

42. In view of the above, the Commission finds it appropriate that there has been no substantive or procedural anomaly during the enquiry stage and during the proceeding. All concerned parties were given the ample opportunity of being heard and to present their views both in writing as well as during the conduct of the hearing.

Issue-II

43. The application of Section 3 requires defining and delineation of the relevant market. Section 2(1)(k) of the Act provides:

“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 of all



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those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products' characteristics, price 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 condition of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, the conditions of competition are appreciably different in those areas;

44. Bahria Town and PTCL have jointly contended that the relevant geographic market for grant of ROW comprises the twin cities of Rawalpindi and Islamabad. Its obligation to grant ROW should be holistically examined in comparison with DHA, CDA, and RDA as well as other cooperative housing societies. The criterion of 'homogeneity of competition' should be reconsidered. In addition to this, PTCL has submitted that to determine the relevant geographic market the Commission must take into consideration factors *such as* similarity of price, availability of land, distance, commuting facilities, proximity and connectivity and infrastructure which will then determine the homogeneity of competition in the twin cities.
45. According to the Enquiry Report, the relevant product market consists of the market for the grant of ROW to provide CIT services to the residents of phases 1-6 of Bahria Town. Paragraph 24 of the Enquiry Report envisages that the grant of ROW is always localized, whether it is a municipality or an independent housing society who is able to take its own decisions irrespective of the neighbouring markets. This fact necessitates narrowing down the geographic market with respect to the competitive constraint in the relevant market. Keeping in view the prevailing conditions of competition and sufficiency/homogeneity, the relevant geographic market in the matter at hand consists of phases 1-6 of Bahria Town. The Enquiry Report suggests that determination of the relevant geographic market is the identification of region based on the market of CIT services affected by it.



46. At the outset, it is pertinent to mention that the primary objective of defining and delineating the relevant market for the purposes of Section 3 is to identify the competitive

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constraints that undertaking(s) might face by identifying actual or potential competitors and preventing them from behaving independently of effective competitive pressure. The Act is applicable to the whole of Pakistan or any part of it. The Commission is of the considered opinion that in view of the competitive dynamics of a particular area, it can narrow down the relevant market in the circumstances of the case. For this purpose, the Commission enquires into the most immediate disciplinary forces imposed on the consumers in terms of demand-side substitutability and on the suppliers of a particular good or services [emphasis added].

47. In the matter of **Jamshoro Joint Venture Limited and LPG Association of Pakistan (2009)** (hereinafter, **LPG Order**), the Commission has observed that the geographic market consists of all those areas where the conditions of the competition are homogeneous. Two geographic areas have homogenous conditions of competition if the availability and pricing of the product in the two regions is such that consumers of region one can buy or subscribe to the product or services from the region two, and vice versa, without incurring significant difference in prices.

48. Factually speaking, PTCL has been operating as the sole provider of CIT services for over the last 13-year in phases 1-6 of Bahria Town, which suggests that PTCL has been granted *de facto* exclusivity to operate in the relevant market. The fact that Bahria Town has denied granting ROW to Nayatel to lay down its CIT infrastructure/ network on various grounds over a period of time suggest that its management has exclusivity to grant ROW in the utility corridors. It is, therefore, that the conditions of competition are sufficiently homogeneous in phases 1-6 of Bahria Town as well as appreciably different than the neighbouring areas where multiple CIT service providers are co-located. This observation of the Commission is fortified by the fact that residents of phases 1-6 of Bahria Town cannot switch to CIT service providers in the neighbouring areas such as DHA, CDA, and RDA or even Nayatel's or PTCL's services provided in Safari Villas 1 & 2 of or phases 7 & 8 of Bahria Town. In considering the likely reaction of the residents of phases 1-6 who are availing CIT services offered by PTCL, they have no choice but to subscribe to PTCL in response to a relative change in prices or quality and other competitive variables. Therefore, the Commission is of the considered opinion that the



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relevant geographic market in the matter at hand consists of phases 1-6 of Bahria Town and has been correctly identified in the Enquiry Report.

Issue-III

49. According to Section 2(1)(e) of the Act:

“dominant position” of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave an appreciable extent independently of competitors, customers, consumers, suppliers and the position of an undertaking shall be presumed to be dominant if its shares of the relevant market exceeds forty percent.

50. The definition of ‘dominant position’ of an undertaking as is envisaged under Section 2(1)(e) of the Act stipulates to identify the relevant market with reference to the relevant product market and relevant geographic market to assess the dominant position of undertaking(s). In the preceding paragraphs, the Commission has observed that the relevant product market, in this case, is the ‘grant of ROW for the provision of CIT services’ and relevant geographic market consists of phases 1-6 of Bahria Town.

51. In the KSE Order and LPG Order, the Commission has observed that the concept of dominant position envisaged under Section 2(1)(e) has two limbs:

- I. the first relates to a ‘presumption of fact’ which is a “deeming clause”. The dominance of an undertaking can be deemed to exist if the facts imply that the undertaking has the ability to behave, to an appreciable extent, independent of the competitors, customers, and supplier, etc. This entails taking into account the practices or behaviour of undertaking(s) in the relevant market. If the facts reveal that such undertaking can act, to an appreciable extent, independent of its competitors, customers, consumers, and suppliers, it would be safe to assume that the undertaking(s) has a dominant position in the relevant market. Therefore, the dominance or market power of an undertaking does not flow solely from lesser or greater market share than the threshold stipulated in the Act. The test requires



analyzing the market dynamics in view of the market structure and direct or indirect competitive constraints inside and outside the relevant market *such as* a buyer's ability to switch to a competitor, entry and exit barriers, investment and licensing regimes, among other things.

II. the second relates to a 'presumption of law' which provides that if an undertaking's market share exceeds 40 percent, it shall be presumed to have a "dominant position". The presumption of 40 percent suggests who has to prove what, which can always shift back-and-forth. *Sensu stricto*, where an undertaking's market share exceeds 40 percent, it shall be presumed to have a "dominant position" in the relevant market.

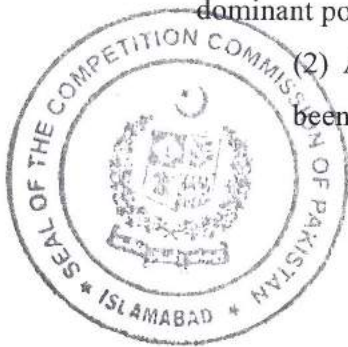
52. As noted above, the management of Bahria Town has exclusive rights to administer Bahria Town including a grant to ROW for the provision of CIT services and therefore it has 100% market share in the relevant market. Besides, the conduct of Bahria Town, *inter alia*, refusal to grant ROW for the provisions of CIT services to PTCL's competitors suggests that it has the ability to behave to an appreciable extent, or to any extent whatsoever, independently of the customers or suppliers, including the resident of Bahria Town and alternate service provider in the relevant market. Therefore, the Commission concurs with the determination of dominant position adopted in the Enquiry Report both in terms of the qualitative and quantitative test. Bahria Town can behave appreciably independent of its competitors, customers, consumers, and suppliers.

Issue-IV

53. Sections 3(3)(e), (g) and (h) read with Section 3(1) of the Act refer to exclusionary practices by dominant undertaking(s), which are prohibited under subsections (1) and 2 of Section 3 of the Act. For reference, these provisions are reproduced herein below:

3. **Abuse of Dominant Position.**—(1) No person shall abuse dominant position.

(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of



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practices which prevent, restrict, reduce or distort competition in the relevant market.

(3) The expression “practices” referred in subsection (2) shall include, but are not limited to—

(e) applying dissimilar conditions to equivalent transactions on other parties, placing them at competitive disadvantage;

(g) boycotting or excluding any other undertaking from the production, distribution or sale of any goods or the provisions of any service; or

(h) refusal to deal.

54. It is noted above that Bahria Town’s counsel has submitted that Section 3 is a “deeming provision”. While interpreting a “deeming provision” in a statute, a court or an adjudicating body is bound to ascertain for what purpose and object the provision has been enacted by the legislature. In this regard, reference is made to the KSE Order, wherein the Commission while elaborating the concept of abuse of dominance and its object relied on the case of the Court of Justice of the European in Case 85/76, Hoffmann-La Roche [1979] ECR, and discerned the concept as follows:

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

55. It has been alleged that management of Bahria Town is preventing or restricting competition in the relevant market in a systematic manner i.e. by applying dissimilar conditions in related to two seemingly equivalent transactions by requiring revenue sharing percentage, exclusionary practices in terms of excluding Nayatel from the



relevant market by not allowing it to lay down its infrastructure in the relevant market, and ultimately refusing to deal on account of repair of its footpaths and unavailability of space in the utility corridors, which according to Bahria Town has already been occupied by PTCL.

56. The following paragraphs discuss as to whether Bahria Town has abused its dominant position by:

- I. applying or asking Nayatel to quote revenue sharing percentage that is dissimilar than what it is charging from PTCL and thus placing Nayatel at a competitive disadvantage in violation of Section 3(1) read with subsection 3(3)(e) of the Act;
- II. creating conditions which exclude Nayatel from competing in the relevant market in violation of Section 3(1) read with subsection 3(3)(g) of the Act; and
- III. refusing to deal with Nayatel to lay down its CIT infrastructure/ network in the relevant market in violation of Section 3(1) read with subsection 3(3)(h) of the Act.

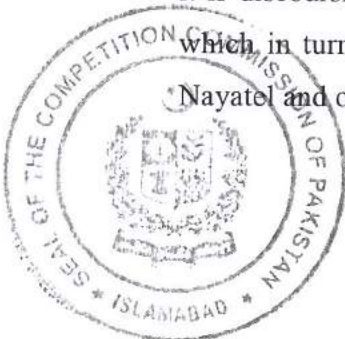
57. In relation to violation of the questions (I) & (II), it is observed that when a dominant undertaking that owns and/or controls and/or itself uses and/or has the ability to grant the right to use an essential facility i.e. a facility or an infrastructure without access to which other undertakings cannot provide competing services to the end-consumers, refuses competitors to access such facility or grants access to competitors only on terms less favourable than those which it gives to others, it places the undertaking at a competitive disadvantage, which are exclusionary practices and strictly prohibited under Section 3(1) read with Sections 3(3)(e) and 3(3)(h) of the Act.

58. In relation to question (III), In the matter of Pakistan Steel Mills (2008) the Commission described 'refusal to deal' or refusal to supply as a behaviour in which a dominant undertaking refuses to sell, supply, or grant access to another firm, or is willing to sell only at a price that is considered "too high", or is willing to sell, supply or grant access only under such conditions that are unacceptable. In **Engro Order**, the Commission has



observed that refusal to deal is not only to be viewed as outright refusal to deal business. Strangulation of the customer by a dominant supplier to do business on unrealistic terms is also tantamount to a refusal to deal and has been termed as constructive refusal to deal which covers the instances of excessive pricing, imposing unfair trading conditions, treating a customer in a discriminatory manner and margin squeeze, etc. [...]. Moreover, a refusal to deal with customers who are not competitors can produce anticompetitive effects where the refusal is, in reality, a threat or punishment or inducement designed to make a customer to adopt a particular course of action. A dominant firm would rely on its privileged position as a bargaining tool to induce customers to accept certain trading conditions of its choice, which are exclusionary practices and strictly prohibited under Section 3(1) read with Sections 3(3)(g) of the Act.

59. Taking all into account, the Commission is of the considered opinion that when Bahria Town asked Nayatel to quote revenue share percentage, the utility corridors must have space available to lay another duct to accommodate Nayatel's FTTH infrastructure. However, since Nayatel offered to match the percentage that is being paid by PTCL, Bahria Town refused Nayatel on the ground that it has repaired its footpath and all the space available has been taken by PTCL, which indeed was allotted back in 2003. In line with the earlier stance of Bahria Town to grant ROW on the basis of revenue sharing percentage, it appears that there is enough space to accommodate one or more CIT service providers in the relevant market. However, the conduct of the management of Bahria Town is preventing new entrants, including Nayatel, to invest in the relevant market and provide the resident with substitute/alternate service provider(s).
60. In view of the above, the Commission is of the considered opinion that the proprietary rights arising from a utility corridor serving public purposes, whether owned and/or managed by the municipality or a private body, are essentially public utility corridors. The conduct of the management of Bahria Town is adversely affecting competition in the provision of CIT services within relevant market i.e. phases 1-6 of Bahria Town. Bahria Town has also failed to provide any rational commercial or objective justification in terms of efficiency gains for its exclusionary and anti-competitive conduct. Furthermore, it is discouraging investors to the consumer's detriment and proliferation of CIT services which in turn is affecting the national economy as well as competition *inter se* PTCL, Nayatel and other service providers, which is actionable under the Act.



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DECISION

Based on the above, the Bench finds and holds Bahria Town to have abused its dominant position in the relevant market and imposes of PKR 2,000,000/- (Two million rupees only). It is pertinent to mention that the Bench has refrained from imposing higher penalties which ordinarily would have been appropriate considering the impact of exclusionary practices in contravention of Section 3 of the Act by Bahria Town.

61. In addition to the above, keeping in view the proportionally and balance of interests of Bahria Town, PTCL, and Nayatel, the Commission hereby directs:

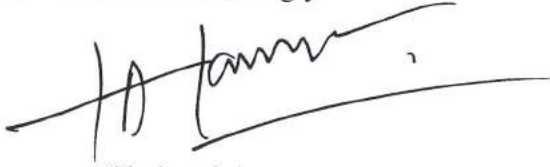
- I. Bahria Town and Nayatel shall jointly appoint a reputed consultant/ surveyor (the 'Surveyor') registered with the Pakistan Engineering Council (PEC) to conduct an on-ground survey in Bahria Town phases 1-6, in the presence of relevant officials/ engineers of Bahria Town and Nayatel and prepare a report to verify whether there is enough physical space, including in footpaths to lay down new CIT infrastructure/ networks therein, and the Surveyor shall submit its findings (hereinafter, the Survey Report) within 15-day of this Order with the office of the Registrar of the Commission;
- II. In case the Survey Report suggests there is enough space to lay down CIT infrastructure/ networks, Bahria Town shall grant NOC to Nayatel and/or any other competitors to lay down CIT infrastructure/ networks as is required to install/operate FTTH based services within 30 days of this Order;
- III. Bahria Town shall grant ROW on reasonable, fair and competitive terms and price to lay down its CIT infrastructure.
- IV. Bahria Town and Nayatel shall submit a joint compliance report within 30-days of this Order with the Registrar of the Commission; and
- V. Nayatel shall ensure that while laying down and installing its CIT infrastructure it shall use the best technology and reinstate footpaths and all infrastructures to the satisfaction of Bahria Town. Bahria Town and Nayatel shall submit a joint second compliance report within 15-days of the completion of the project.



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62. In the case of non-compliance of above direction in a timely manner, Bahria Town shall be proceeded against under the Act.

63. Ordered accordingly.



Shahzad Ansar
Member



Ikram Ul Haque Qureshi
Member



ISLAMABAD THE 27th JANUARY 2017
